

LEGISLATIVE COUNCIL BRIEF

Copyright Ordinance
(Chapter 528)

COPYRIGHT (AMENDMENT) BILL 2022

INTRODUCTION

At the meeting of the Executive Council on 17 May 2022, the Council ADVISED and the Chief Executive ORDERED that the Copyright (Amendment) Bill 2022 (“the 2022 Bill”) at Annex A should be introduced into the Legislative Council (“LegCo”).

A

JUSTIFICATIONS

Need for Updating the Copyright Regime

2. The “Outline of the 14th Five-Year Plan for National Economic and Social Development of the People’s Republic of China and the Long-Range Objectives Through the Year 2035” (“National 14th Five-Year Plan”) promulgated in March 2021 raises, for the first time, the support of the Central People’s Government for Hong Kong to develop into a regional intellectual property (“IP”) trading centre. To achieve this goal, we have to ensure that our IP regime keeps abreast with times and international norms, as well as meets Hong Kong’s social and economic needs. The copyright system is an important part of the IP regime. On the one hand, it effectively protects private property right arising from original works. On the other hand, it allows the public to make reasonable use of copyright works. This is crucial to encouraging creativity, technological development, as well as the dissemination and advancement of knowledge, underpinning the development of a knowledge-based economy.

3. We need to update our copyright regime in light of rapid advances in technology, which have been reshaping our society in the information age. In fact, many overseas economies which aspire to drive economic growth through innovation and creativity have taken proactive efforts to keep their copyright

regimes robust and up-to-date in order to support their development needs.¹ Indeed, the Government has since 2006 conducted three rounds of major consultations on strengthening copyright protection in the digital environment, and introduced two amendment bills, in 2011 and 2014 respectively, into the LegCo. However, the corresponding legislative processes could not be completed before expiry of the respective LegCo terms. As a result, Hong Kong's copyright regime has not been updated in a timely manner and is lagging seriously behind international developments. To safeguard IP rights and Hong Kong's business environment, as well as to fully leverage the advantage of the support for Hong Kong to develop into a regional IP trading centre in the National 14th Five-Year Plan, there is an imminent need to revive the copyright review and the legislative amendment exercise.

Public Consultation on Updating Hong Kong's Copyright Regime

B

4. We conducted a three-month public consultation on updating Hong Kong's copyright regime and strengthening copyright protection in the digital environment (consultation document at **Annex B**) from 24 November 2021 to 23 February 2022. We proposed in the consultation to use the Copyright (Amendment) Bill 2014 ("the 2014 Bill") as the basis of amending the Copyright Ordinance ("CO"), as the relevant legislative proposals are the result of years of deliberations of the Government, LegCo, copyright owners, online service providers ("OSPs") and copyright users, representing the consensus and balance of interests of different stakeholders. The legislative proposals in the 2014 Bill, which remain relevant to our economic and social needs today and enable us to address the most imminent and fundamental copyright protection needs as soon as possible, include –

- (a) to introduce an exclusive technology-neutral communication right for copyright owners in light of technological developments;
- (b) to introduce criminal sanctions against infringements relating to the new communication right;
- (c) to revise and expand the scope of copyright exceptions to allow use of copyright works in certain common Internet activities; facilitate online learning and operation of libraries, museums and archives; and allow media shifting of sound recordings, etc.;
- (d) to introduce "safe harbour" provisions to provide incentives for OSPs to cooperate with copyright owners in combating online piracy and to provide reasonable protection for their acts; and

¹ For instance, many overseas jurisdictions have long introduced a communication right to enhance copyright protection in the digital environment. Such jurisdictions include the European Union (2001), Australia (2001), the United Kingdom (2003), Singapore (2005), New Zealand (2008) and Canada (2012).

- (e) to introduce two additional statutory factors for the court to consider when assessing whether to award additional damages to copyright owners in civil cases involving copyright infringements.

5. The consultation document also sets out the Government's position to maintain the status quo with regard to the following four copyright issues, namely (a) exhaustive approach to exceptions; (b) contract override; (c) illicit streaming devices ("ISDs"); and (d) judicial site blocking, thereby obviating the need to amend the CO in this exercise.

Responses to the Public Consultation

6. We received a total of 62 written submissions during the three-month consultation period, including –

- (a) 21 from copyright owners' organisations, such as the Hong Kong Copyright Forum, licensing bodies, and various local and international organisations representing different creative industries (including music, music recordings, films and videos, publishing, multimedia services, etc.);
- (b) 4 from IP practitioners' groups (including the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Institute of Trade Mark Practitioners, and the Asian Patent Attorneys Association Hong Kong Group);
- (c) 5 from OSPs;
- (d) 19 from copyright users or individuals; and
- (e) the rest from other professional bodies, chambers of commerce, non-governmental organisations, etc.

C

A summary of the views collected is at **Annex C**.

7. First and foremost, the majority of respondents agree that there is an imminent need for Hong Kong to update our copyright regime and generally support using the 2014 Bill as the basis for amending the CO. They call for an early passage of the amendment bill to keep Hong Kong's copyright regime abreast with times and in line with international developments. Some respondents have different views on individual legislative proposals, including the scope of coverage of the proposed communication right, the proposed safe harbour provisions and the revised and new copyright exceptions. Regarding the four copyright issues set out in the consultation document, most respondents support the Government's position to maintain the existing exhaustive approach to

exceptions and continue allowing contracts to override exceptions. While many copyright owners urge the Government to introduce specific provisions in the CO to deal with ISDs and establish a judicial site blocking mechanism, other stakeholders either support or have no particular views on the Government's position to maintain the status quo.

KEY PROPOSALS OF THE 2022 BILL

8. Taking into account the views received during the public consultation, the 2022 Bill contains mainly the legislative proposals of the 2014 Bill covering the following five key areas, with suitable adjustments to address the views of the copyright owners on the scope of coverage of the proposed communication right.

Communication Right

9. At present, the CO gives copyright owners certain exclusive rights, including the right to make a copyright work available to the public on the Internet, to broadcast a work or to include a work in a cable programme service. Considering that new modes of electronic transmission would emerge with advances in technology, and to ensure that the protection afforded to copyright owners would cover any mode of electronic transmission, the 2022 Bill proposes to introduce into our copyright regime a new technology-neutral exclusive communication right for copyright owners to communicate their works to the public through any mode of electronic transmission (including streaming). The introduction of a technology-neutral communication right will bring our copyright regime on par with international developments and in line with the practices of many overseas jurisdictions.

10. In response to the public consultation, many copyright owners consider that the scope of coverage of the proposed new section 28A(4) to (6)² in the 2014 Bill, which stipulates that certain acts do not constitute “communication to the public”, is too broad, and will render the amendment bill unable to effectively combat online infringing activities. They suggest that the Government should delete or amend the relevant provisions.

² Section 28A(4) to (6) proposed by the 2014 Bill is as follows –

- “(4) *The mere provision of facilities by any person for enabling or facilitating the communication of a work to the public does not of itself constitute an act of communicating the work to the public.*
- (5) *A person does not communicate a work to the public if the person does not determine the content of the communication.*
- (6) *For the purposes of subsection (5), a person does not determine the content of a communication only because the person takes one or more steps for the purpose of –*
 - (a) gaining access to what is made available by someone else in the communication; or*
 - (b) receiving the electronic transmission of which the communication consists.”*

11. We consider that the proposed new section 28A(4) to (6) have balanced and protected the interests of different stakeholders. They aim to clarify that the mere provision of facilities for the carriage of signals by parties (such as OSPs) and the daily and reasonable online behaviours of the general public (such as the mere forwarding of a hyperlink or access to materials communicated by others) would not be subject to legal liabilities for unauthorised “communication to the public”. We consider there is a need to retain the proposed new section 28A(4) to (6), but have made appropriate adjustments and clarifications to the provisions to better bring out our legislative intent.

Criminal Liability

12. To tie in with the proposal to introduce a technology-neutral communication right, the 2022 Bill proposes to introduce criminal sanctions against those who make unauthorised communication of copyright works to the public (a) 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 (b) to such an extent as to affect prejudicially the copyright owners. The offence elements and sanctions of the proposed offence mirror those of the existing offence available in the CO against the distribution of infringing copies of works.³ The provisions concerned will also include clarifications of the threshold of criminal liability in relation to the existing prejudicial distribution and the proposed prejudicial communication offences, by stipulating that the court will examine all the circumstances of a case and highlighting economic prejudice as an important factor for the court to assess possible criminal liability. The majority of copyright owners welcome the introduction of the relevant criminal liability while most of the other respondents have not expressed any particular views on this proposal.

³ Section 118(1)(g) of the existing CO stipulates that –

“A person commits an offence if he, without the licence of the copyright owner of a copyright work –

.....

(g) distributes an infringing copy of the work (otherwise than for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works) to such an extent as to affect prejudicially the copyright owner.”

Mirroring the principles of the above offence, the proposed section 118(8B) of the 2022 Bill stipulates that –

“A person commits an offence if the person infringes copyright in a work by –

.....

(b) communicating the work to the public (otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward) to such an extent as to affect prejudicially the copyright owner.”

Revised and New Copyright Exceptions

13. Copyright is an intangible property right that promotes creativity by providing authors and lawful owners with economic incentives. But its protection is not without limitations. Fair access to and uses of copyright works by others are also important, not only for freedom of expression in its own right but also for dissemination and advancement of knowledge which also promotes creativity. The existing CO contains over 60 sections specifying a number of permitted acts which may be done in relation to copyright works without attracting civil or criminal liability notwithstanding the subsistence of copyright (such as for the purposes of research, private study, education, criticism, review and reporting current events).⁴ To tie in with the introduction of the communication right, the 2022 Bill proposes to revise and expand the scope of permitted acts as appropriate to maintain the balance between copyright protection and reasonable use of copyright works.

New copyright exceptions for the education sector, libraries, museums, archives, temporary reproduction of copyright works by OSPs, and media shifting

14. In response to the digital environment, the 2022 Bill proposes to introduce the following new copyright exceptions with appropriate preconditions

—

- (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;
- (b) to allow OSPs to cache data,⁵ which technically involves copying and is a restricted act in the CO. Such caching is transient or incidental in nature and technically required for the process of data transmission to function efficiently; and
- (c) to allow media shifting of sound recordings (i.e. the making of an additional copy of a sound recording from one media or format into another, usually for the purpose of listening to the work in a more convenient manner)⁶ for private and domestic use.

⁴ In addition, our existing copyright regime accepts any rule of law that restricts the enforcement of copyright on the ground of public interest (section 192 of the CO).

⁵ 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.

⁶ Media shifting is technically an act of copying and is restricted by copyright. A typical example is the copying of sound recordings from an audio compact disc to the embedded memory of a portable MP3, i.e. from compact disc digital audio format to MP3 format.

New fair dealing exceptions

15. Many copyright users believe that the scope of permitted acts should include a wide range of common activities on the Internet which might make use of copyright works, such as mash-ups, altered pictures/videos, doujinshi, image/video capture, streaming of video game playing, homemade videos, posting of earnest performance of copyright works, rewriting lyrics for songs, etc. On the other hand, copyright owners believe that the current copyright regime with licensing as the centrepiece together with various statutory exceptions is operating well to deal with these matters and causing no problems in practice in Hong Kong and elsewhere. To balance different interests, the 2022 Bill proposes to introduce new fair dealing exceptions to cover –

- (a) use for the purposes of parody, satire, caricature and pastiche,⁷ which are common means for the public to express views or comment on current events, and such use is usually critical and transformative in nature and should unlikely compete with or substitute the original works;
- (b) use for the purpose of commenting on current events; and
- (c) use of a quotation the extent of which is no more than is required by the specific purpose for which it is used, so as to facilitate expression of opinions or discussions in the online and traditional environment.

16. The new fair dealing exceptions proposed above would cover, in appropriate cases, a wide range of day-to-day Internet activities for the purposes of parody, satire, caricature, pastiche, commenting on current events or quotation. This should go a long way towards addressing the major concerns of users who make use of existing copyright works for the above purposes in the digital environment.

17. We received different views during the public consultation regarding the scope of the copyright exceptions. Copyright users suggest that the

⁷ The Concise Oxford English Dictionary (12th Edition, 2011) defines the terms 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 criticise 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.

The above proposed scope of the new copyright exceptions consists of well recognised literary or artistic practices. Similar scopes of copyright exceptions are also available in other overseas copyright regimes, such as Australia, Canada and the United Kingdom.

Government should introduce new exceptions to cover acts such as earnest imitation of copyright works or “secondary creations”, while copyright owners call for the scope of the copyright exceptions to be tightened. Our view is that it is perhaps inevitable that copyright owners and users hold different views towards the scope of the copyright exceptions. The Government’s position is that the revised and new copyright exceptions proposed in the 2022 Bill have achieved the greatest balance between the legitimate interests of all parties.

Safe Harbour

18. To provide incentives for OSPs to cooperate with the copyright owners in combating online piracy, and to provide sufficient protection for their acts, the 2022 Bill proposes 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 Practice⁸ which sets out practical guidelines and procedures for OSPs to follow after notification.⁹

19. In response to the public consultation, some copyright owners consider the scope of the proposed safe harbour too broad and suggest that OSPs should take a more proactive role in combating online infringing activities. On the contrary, some OSPs consider that the prescribed conditions specified in the proposed safe harbour provisions would impose a significant burden on them. Both the copyright owners and OSPs have also provided various comments on the Code of Practice. On the other hand, some copyright users are concerned that the takedown mechanism under the safe harbour may be abused, impacting the freedom of expression.

20. Our position is that the proposed safe harbour provisions have already incorporated various safeguards¹⁰ to address the concerns of different stakeholders. Similar safe harbour provisions are also prescribed in the copyright legislation of a number of overseas jurisdictions (such as Australia, Singapore, the

⁸ The draft Code of Practice was formulated after taking into account views received in two rounds of consultations in 2011 and 2012 respectively.

⁹ For example, the Code of Practice sets out a “Notice and Notice” system which requires OSPs to notify their subscribers or users that their accounts have been identified in connection with an alleged copyright infringement; and a “Notice and Takedown” system where OSPs are required to remove materials or disable access to materials (stored or made available for search on the service platforms by subscribers) that are found to be infringing.

¹⁰ For instance, upon receipt of a counter notice filed by a subscriber, an OSP is required to take reasonable steps to reinstate the removed material unless it has been notified in writing by the complainant that proceedings have been commenced in Hong Kong seeking a court order (such as an injunction) in connection with any infringing activity that relates to the material. In addition, both the complainant and subscriber are required to provide sufficient and specific information to substantiate their notice of alleged infringement and counter notice. A complainant or subscriber making a false statement will be subject to civil and criminal liabilities.

United Kingdom and the United States) to incentivise OSPs to take reasonable measures to limit infringing activities on their service platforms. Indeed, the proposed safe harbour regime represents the result of years of deliberation of copyright owners, users and OSPs, balancing the interest of different stakeholders. We propose that the relevant safe harbour mechanism should be established first, but we will continue to engage the trade and take into account the views of different stakeholders in enhancing the Code of Practice and the operational details of the safe harbour regime. We will also continue to monitor the latest international developments on this issue, with a view to reviewing and enhancing our safe harbour regime from time to time.

Additional Damages in Civil Cases

21. 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. As a general rule, damages are compensatory in nature and 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 existing CO 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 challenges in the digital environment (especially in providing evidence), the 2022 Bill proposes to introduce two additional factors in the CO for consideration by the court when determining whether to award additional 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. Most respondents have not expressed any particular views on this proposal.

Technical Amendments

22. Apart from the above key legislative proposals, the 2022 Bill will also make the following technical amendments to the CO –

- (a) to align the scope of non-government-owned libraries, museums and archives which could be designated by the Secretary for Commerce and Economic Development (“SCED”) for exclusion from a criminal offence in relation to possession of an infringing copy of a copyright work.

¹¹ Section 108(2) of the CO 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.”

In addition to those owned by charitable institutions or trusts of a public character which are exempted from tax under section 88 of the Inland Revenue Ordinance (Cap. 112), other non-government-owned libraries, museums and archives which are owned by statutory bodies that are exempt from tax under any other enactments or their subsidiaries could also be designated by SCED for the same exclusion. For example, museums owned by M Plus Museum Limited and the Hong Kong Palace Museum Limited, both of which are wholly-owned subsidiaries of the West Kowloon Cultural District Authority, which in turn is a statutory body exempted from tax in accordance with the West Kowloon Cultural District Authority Ordinance (Cap. 601), would be qualified for designation by SCED for such purpose;

- (b) to align the enforcement powers given to investigating officers of the Customs and Excise Department (“C&ED”) and procedures for forfeiture of seized articles for various offences in the CO;¹²
- (c) to repeal certain provisions of the Copyright (Amendment) Ordinance 2007 concerning rental rights of comic books which are outdated;¹³ and
- (d) to make corresponding changes to certain provisions in the CO concerning exceptions for persons with a print disability, which were added or amended by the Copyright (Amendment) Ordinance 2020¹⁴, in order to bring them in line with other amendments made in the 2022 Bill.

¹² Currently, the enforcement powers of investigating officers and various procedures regarding the forfeiture of articles seized by officers provided by the CO in relation to offences under Part 2 of the CO are not the same as offences in relation to the circumvention of effective technological measures under Part 4 of the CO. This has posed difficulties and complications in the enforcement work of C&ED. The proposed amendments would enable C&ED to handle items seized under Part 4 of the CO more effectively.

¹³ Section 25(1)(e) and (f) of the CO relating to rental rights for comic books were introduced into the CO by means of the Copyright (Amendment) Ordinance 2007. To ensure that comic book rental shops had the legal means to carry on their business after the introduction of the new rental rights, the Government decided that section 25(1)(e) and (f) should not commence operation until a reasonable number of copyright comic books available in the rental market had been covered by rental licensing schemes. At a meeting held between the Administration and representatives from the local comics industry in April 2019, the industry opined that section 25(1)(e) and (f) of the CO were outdated and no longer required.

¹⁴ The enactment of the Copyright (Amendment) Ordinance 2020 renders Hong Kong fully compliant with the standards of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (“Marrakesh Treaty”).

OTHER ISSUES COVERED IN THE PUBLIC CONSULTATION

Illicit Streaming Devices and Judicial Site Blocking

23. In response to the public consultation, many copyright owners urge the Government to introduce specific provisions in the CO to deal with the problem of ISDs and provide for a judicial site blocking mechanism. While we note the copyright owners' concerns about the problem of ISDs and online infringement activities, our views on the two issues are as follows –

- (a) Regarding the problem of ISDs, the existing CO already contains a number of provisions to deal with online copyright infringement activities, which could be applied to combat ISDs in appropriate cases. Furthermore, when the communication right is incorporated into our statutory framework, coupled with the elaboration of the meaning of “authorisation” of copyright infringement as proposed in the 2022 Bill, our domestic law will be enhanced for holding persons involved in ISD cases accountable for the relevant civil and/or criminal liabilities, depending on the circumstances and evidence of individual cases. At present, most overseas jurisdictions do not have specific provisions concerning ISDs in their copyright legislation, and to our knowledge, among the common law jurisdictions, only Singapore and Malaysia have enacted ISD specific provisions¹⁵ so far, but the effectiveness of such statutory provisions has yet to be observed. As such, we consider it inappropriate to introduce ISD specific provisions in the CO to combat ISDs.
- (b) As for judicial site blocking, section 21L of the High Court Ordinance (Cap. 4) already provides copyright owners with a ready avenue to seek injunctions against online copyright infringements under which an OSP may in appropriate cases be ordered to block the access to one or more online location(s) from which infringing activities originate. In fact, overseas experience shows that blocking orders against OSPs granted under the court's general powers to order an injunctive relief could equally serve the purpose. Furthermore, given the many debates and controversies on the potential impact of site blocking injunctions, notably on freedom to seek, receive and impart information, we consider it not necessary to introduce a judicial site blocking mechanism specifically for copyright infringements.

¹⁵ Singapore's new Copyright Act and Malaysia's Copyright (Amendment) Act 2022, which set out specific provisions concerning ISDs, took effect in November 2021 and March 2022 respectively.

Other Copyright Issues

24. Some respondents point out that the ever-evolving technological development and changing social and economic needs around the world have led to the emergence of new copyright issues, and that many overseas jurisdictions have continuously reviewed their copyright regimes in recent years. We fully acknowledge that more work needs to be done in the future in addressing various new copyright issues.¹⁶ Upon passage of the 2022 Bill, we will embark on a new round of copyright review exercise to study the issues raised by different stakeholders, but are yet to be addressed in this legislative amendment exercise.

THE BILL

25. The main provisions of the 2022 Bill are –

- (a) **Clause 10(3)** amends section 22 of the CO to provide for an exclusive right of the owner of the copyright in a work to communicate the work to the public;
- (b) **Clause 10(4)** adds a new subsection (2A) to section 22 of the CO to set out a non-exhaustive list of factors for determining whether a person has authorised another to do any of the acts restricted by the copyright in a work;
- (c) **Clause 14** adds a new section 28A to the CO to elaborate on the newly established restricted act of communication [see clause 10(3)], with clarifications on the scope of what constitutes “communication to the public”;
- (d) **Clause 19** substitutes new provisions for section 39 of the CO to extend the scope of the acts that may be done without infringing copyright so as to cover the use of a quotation from a copyright work and the use of a copyright work for the purpose of commenting on current events, subject to the specified conditions, and set out a non-exhaustive list of factors for determining whether the dealing with a copyright work is fair;
- (e) **Clause 20** adds a new section 39A to the CO to allow the use of a copyright work for the purpose of parody, satire, caricature and pastiche and set out a non-exhaustive list of factors for determining whether the

¹⁶ Issues that have been raised include, for example, extension of copyright term of protection, introduction of specific copyright exceptions for text and data mining, issues related to artificial intelligence and copyright, use of “orphan works” (i.e. copyright works where its owner cannot be identified), review of the jurisdiction of the Copyright Tribunal, updating the Copyright (Libraries) Regulations, etc.

dealing with a copyright work is fair;

- (f) **Clauses 30 to 31** amend sections 44 and 45 of the CO to allow the communication of specified works to authorised recipients for educational purposes and specify the conditions for the exceptions;
- (g) **Clauses 33 and 37 to 41** amend sections 46 and 51 to 53 of the CO and add new sections 51A and 52A to the CO to allow libraries, museums and archives to make copies of copyright work for preservation or replacement purposes and to communicate, play or show copyright work to users within their premises, subject to specified conditions;
- (h) **Clause 47** adds a new section 65A to the CO to allow temporary reproduction of copyright materials by OSPs, subject to specified conditions;
- (i) **Clause 54** adds a new section 76A to the CO to allow media shifting of sound recordings for private and domestic use, subject to specified conditions;
- (j) **Clause 56** adds a new Division IIIA (containing new sections 88A to 88J) in Part II of the CO to establish a “safe harbour” for OSPs, including the following provisions –
 - (i) The new section 88B sets out the conditions for limiting OSPs’ pecuniary liability in relation to copyright infringements occurring on their service platforms;
 - (ii) The new section 88C provides for the procedures for giving a notice to an OSP in respect of an alleged infringement of copyright;
 - (iii) The new section 88D provides for possible actions that an OSP may take after the OSP becomes aware of the occurrence of an infringement on the OSPs’ service platform;
 - (iv) The new section 88E specifies the format and substance of a counter notice contesting the infringement allegation;
 - (v) The new section 88F imposes criminal liability on a person who recklessly makes a false statement in a notice;
 - (vi) The new section 88G provides for civil liability for making false statements in a notice;
 - (vii) The new section 88H exempts OSPs from liability for removing or disabling access to the material or activity to which an alleged infringement relates;
 - (viii) The new section 88I provides a rebuttable presumption in favour of OSPs on evidence of compliance with the specified conditions;
 - (ix) The new section 88J empowers SCED to publish a code of

practice in the Gazette;

- (k) **Clause 61** amends section 108 of the CO to add two more factors to which the Court may have regard when considering any additional damages in an action for infringement of copyright;
- (l) **Clause 63** amends section 118 of the CO to, among other things, highlight the pertinent factor for determining the “prejudicial” effect of a case concerning unauthorised distribution or communication and create a new offence of unauthorised communication of a copyright work that is made in the course of trade or business conducted for profit; or to such an extent as to affect prejudicially the copyright owners;
- (m) **Clauses 66 to 71** amend sections 122, 126, 128, 131, 132 and 133 of the CO to provide for investigation, seizure, disposal and other powers for certain offences in relation to the circumvention of effective technological measures that protect copyright works from infringement under section 273C; and
- (n) **Clauses 112 to 114** repeal certain uncommenced provisions, or references to section 25(1)(e) and (f) of the CO in certain uncommenced provisions, in the Copyright (Amendment) Ordinance 2007 relating to rental rights in comic books as they are out-of-date and no longer required.

LEGISLATIVE TIMETABLE

26. The legislative timetable will be as follows –

Publication in the Gazette	27 May 2022
First Reading and commencement of Second Reading debate	8 June 2022
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

27. The proposal has economic, financial, civil service and sustainability implications as set out in **Annex D**. The proposal has no environmental, family, gender and productivity implications. It is in conformity with the Basic Law, including the provisions concerning human rights. It will not affect the current binding effect of the CO.

PUBLIC CONSULTATION

28. The legislative proposals contained in the 2014 Bill were drawn up after three rounds of major consultations since 2006. From November 2021 to February 2022, we conducted a further public consultation on updating Hong Kong's copyright regime using the 2014 Bill as the basis of legislation. During the consultation period, we collected views from the general public and stakeholders through different channels, including briefing sessions targeted at copyright owners, OSPs and IP practitioners' groups respectively, as well as an online public forum to gauge views of the general public. We attended various discussion meetings organised by different stakeholders to gather the views of the trade and different interested parties. We also briefed the LegCo Panel on Commerce and Industry on 19 April 2022 regarding the consultation outcomes and our proposed way forward on amending the CO to update the copyright regime. Members generally agreed that there is a genuine need to update the CO to catch up with the international trend and supported the Government's proposal to amend the CO. We will continue to engage various stakeholders throughout the legislative process.

PUBLICITY

29. A press release will be issued on 27 May 2022. A spokesperson will be available to answer media enquiries.

BACKGROUND

30. Hong Kong has all along been committed to enhancing our copyright regime in order to support our development needs. Since its enactment in 1997, we have completed several legislative amendment exercises to update the CO to address different needs of society.¹⁷ The Government has since 2006 conducted three rounds of major consultations and introduced two amendment bills, in 2011 and 2014 respectively, into the LegCo with a view to reforming our copyright regime and strengthening copyright protection in the digital environment. While the respective LegCo Bills Committees supported the passage of the amendment bills on both occasions, the corresponding legislative processes could not be completed before the expiry of the respective LegCo terms, due in no small measure to the polarised interests of the copyright owners and users in certain copyright issues. In particular, despite the extensive scrutiny

¹⁷ The CO was amended in 2000, 2003, 2004, 2007, 2009 and 2020 to address a number of issues, including business end-user liability, parallel imports, circumvention of technological measures, rights management information used for protection of copyright works, new permitted acts and fair dealing exceptions, and compliance with standards of international treaties such as the Marrakesh Treaty.

and support by the LegCo Bills Committee, the 2014 Bill met with filibustering by some LegCo Members, resulting in adjournment of the proceedings and failure of the passage of the Bill in 2016.

ENQUIRIES

31. Enquiries on this brief may be addressed to Ms Joanna Cheung, Principal Assistant Secretary for Commerce and Economic Development (Commerce and Industry) at telephone number 2810 2862.

Commerce and Economic Development Bureau
25 May 2022

Copyright (Amendment) Bill 2022

Contents

Clause		Page
Part 1		
Preliminary		
1.	Short title and commencement.....	1
2.	Enactments amended.....	2
Part 2		
Amendments to Copyright Ordinance		
3.	Section 2 amended (copyright and copyright works).....	3
4.	Section 7 amended (films)	3
5.	Section 8 amended (broadcasts).....	3
6.	Section 9 amended (cable programmes)	4
7.	Section 17 amended (duration of copyright in literary, dramatic, musical or artistic works)	4
8.	Section 18 amended (duration of copyright in sound recordings)	5
9.	Section 19 amended (duration of copyright in films).....	5
10.	Section 22 amended (the acts restricted by copyright in a work).....	6

Clause		Page
11.	Section 25 amended (infringement by rental of work to the public).....	7
12.	Section 26 repealed (infringement by making available of copies to the public)	7
13.	Section 28 repealed (infringement by broadcasting or inclusion in a cable programme service).....	7
14.	Section 28A added	7
	28A. Infringement by communicating to public	8
15.	Section 29 amended (infringement by making adaptation or act done in relation to adaptation)	9
16.	Section 31 amended (secondary infringement: possessing or dealing with infringing copy).....	9
17.	Section 32 amended (secondary infringement: providing means for making infringing copies)	10
18.	Section 35 amended (meaning of <i>infringing copy</i>)	10
19.	Section 39 substituted	11
	39. Criticism, review, quotation, and reporting and commenting on current events	11
20.	Section 39A added	13
	39A. Parody, satire, caricature and pastiche	13
21.	Section 40 amended (incidental inclusion of copyright material).....	14

Clause	Page
22. Section 40A amended (definitions for sections 40A to 40F)	14
23. Section 40B amended (making a single accessible copy for a person with a print disability)	15
24. Section 40C amended (making multiple accessible copies by specified bodies for persons with a print disability).....	15
25. Section 40CA amended (export or supply of accessible copies by specified bodies to authorized entities).....	16
26. Section 40CB amended (import or obtainment of accessible copies by specified bodies from authorized entities)	17
27. Section 40D amended (intermediate copies).....	17
28. Section 41A amended (fair dealing for purposes of giving or receiving instruction)	18
29. Section 41 amended (things done for purposes of instruction or examination)	20
30. Section 44 amended (recording by educational establishments of broadcasts and cable programmes).....	21
31. Section 45 amended (reprographic copying made by educational establishments or pupils of passages from published works).....	23
32. Cross-heading before section 46 substituted	26
33. Section 46 amended (libraries and archives: introductory)	26

Clause	Page
34. Section 47 amended (copying by librarians: articles in periodicals).....	27
35. Section 48 amended (copying by librarians: parts of published works).....	28
36. Section 50 amended (copying by librarians: supply of copies to other libraries).....	29
37. Section 51 amended (copying by librarians or archivists: replacement copies of works).....	29
38. Section 51A added	30
51A. Communication by librarians, curators or archivists: copies of works	31
39. Section 52 amended (copying by librarians or archivists: certain unpublished works)	31
40. Section 52A added	33
52A. Playing or showing by librarians, curators or archivists: sound recordings or films	33
41. Section 53 amended (copying by librarians or archivists: articles of cultural or historical importance)	34
42. Section 54A amended (fair dealing for purposes of public administration)	34
43. Section 55 amended (statutory inquiries).....	35

Clause	Page
44. Section 56 amended (material open to public inspection or on official register).....	35
45. Section 57 amended (material communicated to the Government in the course of public business)	36
46. Section 65 amended (certain acts permitted where works made available to the public)	37
47. Section 65A added	38
65A. Temporary reproduction by service providers	38
48. Section 67 amended (use of notes or recordings of spoken words in certain cases)	39
49. Section 68 amended (public reading or recitation).....	40
50. Section 69 amended (abstracts of scientific or technical articles).....	40
51. Section 70 amended (recordings of folksongs)	41
52. Section 71 amended (representation of certain artistic works on public display).....	41
53. Section 72 amended (advertisement of sale of artistic work).....	41
54. Section 76A added	42
76A. Copying sound recordings for private and domestic use.....	42
55. Section 83 amended (provision of sub-titled copies of broadcast or cable programme)	43

Clause	Page
56. Part II, Division IIIA added	43
Division IIIA—Limitations on Liability of Service Providers relating to Online Materials	
88A. Definitions.....	44
88B. Limitations on liability of service providers	45
88C. Notice of alleged infringement.....	48
88D. Notice given by service provider	51
88E. Counter notice.....	51
88F. Offence for making false statements	54
88G. Civil liability for making false statements	54
88H. Exemption of service providers from liability for removal of material etc.	54
88I. Evidence of compliance with conditions	58
88J. Code of practice	58
57. Section 89 amended (right to be identified as author or director).....	59
58. Section 91 amended (exceptions to right)	62
59. Section 92 amended (right to object to derogatory treatment of work).....	62
60. Section 96 amended (false attribution of work)	64

Clause	Page
61. Section 108 amended (provisions as to damages in infringement action).....	64
62. Section 116 amended (presumptions relevant to sound recordings, films and computer programs).....	65
63. Section 118 amended (offences in relation to making or dealing with infringing articles, etc.)	65
64. Section 119 amended (penalties for offences under section 118).....	69
65. Section 121 amended (affidavit evidence).....	69
66. Section 122 amended (powers of investigating officers)	70
67. Section 126 amended (disclosure of information, etc.).....	71
68. Section 128 amended (inspection of articles, release of samples, etc.).....	71
69. Section 131 amended (seized articles, etc. liable to forfeiture).....	72
70. Section 132 amended (disposal of articles, etc. where a person is charged)	73
71. Section 133 amended (determination of application for forfeiture).....	73
72. Section 154 amended (licensing schemes to which sections 155 to 160 apply)	74

Clause	Page
73. Section 161 amended (licences to which sections 162 to 166 apply)	74
74. Section 198 amended (minor definitions)	75
75. Section 199 amended (index of defined expressions)	75
76. Section 200 amended (rights conferred on performers and persons having fixation rights).....	75
77. Section 202 amended (consent required for fixation, etc. of unfixed performance).....	76
78. Section 203 amended (consent required for copying of fixation).....	76
79. Section 205 amended (consent required for making available of copies to public).....	76
80. Section 206 amended (infringement of performer's rights by use of fixation made without consent)	78
81. Section 207A amended (infringement of performers' rights by renting copies to the public without consent).....	78
82. Section 210 amended (infringement of fixation rights by use of fixation made without consent).....	78
83. Section 214 amended (duration of rights)	79
84. Section 221 amended (provisions as to damages in infringement action).....	79
85. Section 229 amended (meaning of <i>infringing fixation</i>).....	80

Clause	Page
86. Section 238 amended (expressions having same meaning as in copyright provisions)	81
87. Section 239 amended (index of defined expressions)	81
88. Section 241 substituted	81
241. Criticism, review, quotation, and reporting and commenting on current events	81
89. Section 241A added	83
241A. Parody, satire, caricature and pastiche	83
90. Section 242 amended (incidental inclusion of performance or fixation).....	84
91. Section 242A amended (fair dealing for purposes of giving or receiving instruction)	84
92. Section 243 amended (things done for purposes of instruction or examination)	86
93. Section 245 amended (recording of broadcasts and cable programmes by educational establishments).....	87
94. Sections 245A and 245B added	89
245A. Copying or communication by educational establishments: published sound recordings or films	89

Clause	Page
245B. Communication, playing or showing by librarians, curators or archivists: sound recordings or films	91
95. Section 246 amended (copying by librarians or archivists: articles of cultural or historical importance)	91
96. Section 246A amended (fair dealing for purposes of public administration)	92
97. Section 252 amended (certain copying permitted when performances made available to the public).....	93
98. Section 252A added	93
252A. Temporary reproduction by service providers	93
99. Section 253 amended (use of fixations of spoken words in certain cases).....	94
100. Section 254 amended (fixations of folksongs).....	95
101. Section 272A amended (moral rights conferred on certain performers).....	95
102. Section 272B amended (right to be identified as performer)	96
103. Section 272D amended (exceptions to right under section 272B).....	97
104. Section 272E amended (right to object to derogatory treatment)	97

Clause	Page
105. Section 273 amended (interpretation of sections 273 to 273H).....	98
106. Section 273A amended (rights and remedies in respect of circumvention of effective technological measures).....	98
107. Section 273B amended (rights and remedies in respect of devices and services designed to circumvent effective technological measures).....	99
108. Section 273D amended (exceptions to section 273A).....	99
109. Section 274 amended (rights and remedies in respect of unlawful acts to interfere with rights management information)	99
110. Schedule 2 amended (copyright: transitional provisions and savings)	100
111. “報道” substituted for “報導”	100

Part 3

Amendments to Copyright (Amendment) Ordinance 2007

112. Section 6 amended (infringement by rental of work to the public)	102
113. Section 47 amended (minor definitions)	102
114. Section 75 amended (Schedule 7 added).....	102

A BILL

To

Amend the Copyright Ordinance to provide for the rights to communicate a work or performance to the public by a copyright owner or performer; to provide for limiting an online service provider's liability; to provide for acts that may be done without infringing copyright or performers' rights; to provide for additional factors in considering whether additional damages should be awarded in an action for infringement; to provide for investigation, seizure, disposal and other powers for certain offences in relation to the circumvention of effective technological measures that protect copyright works from infringement; and to make related and miscellaneous amendments to the Ordinance and the Copyright (Amendment) Ordinance 2007.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Copyright (Amendment) Ordinance 2022.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette.

2. Enactments amended

- (1) The Copyright Ordinance (Cap. 528) is amended as set out in Part 2.
 - (2) The Copyright (Amendment) Ordinance 2007 (15 of 2007) is amended as set out in Part 3.
-

Part 2**Amendments to Copyright Ordinance****3. Section 2 amended (copyright and copyright works)**

Section 2(3), Chinese text—

Repeal

“本部中關於享有版權保護所須具備的資格的規定均已獲符合”

Substitute

“已符合本部中關於享有版權保護所須具備的資格的規定”。

4. Section 7 amended (films)

After section 7(4)—

Add

“(5) Nothing in this section affects any copyright subsisting in a film sound-track as a sound recording.”.

5. Section 8 amended (broadcasts)

Section 8(1)—

Repeal

“making available to the public of copies of works or fixations of performances”

Substitute

“making works or fixations of performances available to the public”.

6. Section 9 amended (cable programmes)

- (1) Section 9(2)(b)—

Repeal

“making available to the public of copies of works or fixations of performances”

Substitute

“making works or fixations of performances available to the public”.

- (2) Section 9(2)(g), Chinese text—

Repeal

“以下條件就該某一電訊系統而獲符合”

Substitute

“該某一電訊系統符合以下條件”.

7. Section 17 amended (duration of copyright in literary, dramatic, musical or artistic works)

- (1) Section 17(5), English text, after “(3)”—

Add a comma.

- (2) Section 17(5)(a), after “work”—

Add

“, either or both of the following”.

- (3) Section 17(5)(a)(i)—

Repeal

“or”.

- (4) Section 17(5)(a)—

Repeal subparagraph (ii)**Substitute**

“(ii) communication to the public; and”.

- (5) Section 17(5)(b), after “artistic work”—

Add

“, any of the following”.

- (6) Section 17(5)(b)(ii)—

Repeal

“or”.

- (7) Section 17(5)(b)—

Repeal subparagraph (iii)**Substitute**

“(iii) communication to the public.”.

- (8) Section 17(5)—

Repeal paragraph (c).**8. Section 18 amended (duration of copyright in sound recordings)**

Section 18(3)—

Repeal

“, broadcast or included in a cable programme service”

Substitute

“or communicated to the public”.

9. Section 19 amended (duration of copyright in films)

- (1) Section 19(6), English text, after “(4)”—

Add a comma.

- (2) Section 19(6), after “includes”—

Add

“either or both of the following”.

- (3) Section 19(6)—
Repeal paragraph (b).

- (4) Section 19(6)—
Repeal paragraph (c)
Substitute

“(c) communicating to the public.”.

10. Section 22 amended (the acts restricted by copyright in a work)

- (1) Section 22(1)—
Repeal paragraph (d).

- (2) Section 22(1)—
Repeal paragraph (f).

- (3) Before section 22(1)(g)—
Add

“(fa) to communicate the work to the public (see section 28A);”.

- (4) After section 22(2)—
Add

“(2A) For the purposes of subsection (2), in determining whether a person has authorized another person to do any of the acts restricted by the copyright in a work, the court may take into account all the circumstances of the case and, in particular—

- (a) the extent of that person’s power (if any) to control or prevent the infringement;
- (b) the nature of the relationship (if any) between that person and that other person; and

- (c) whether that person has taken any reasonable steps to limit or stop the infringement.”.

11. Section 25 amended (infringement by rental of work to the public)

- (1) Section 25(1)(d)—
Repeal the semicolon
Substitute a full stop.

- (2) Section 25(3)(a)—
Repeal
“public, broadcasting or inclusion in a cable programme service”
Substitute
“public or communicating to the public”.

12. Section 26 repealed (infringement by making available of copies to the public)

Section 26—
Repeal the section.

13. Section 28 repealed (infringement by broadcasting or inclusion in a cable programme service)

Section 28—
Repeal the section.

14. Section 28A added

Before section 29—
Add

“28A. Infringement by communicating to public

- (1) The communication of a work of any description to the public is an act restricted by the copyright in the work.
- (2) References in this Part to the communication of a work to the public are references to the electronic communication of the work to the public, including—
 - (a) the broadcasting of the work;
 - (b) the inclusion of the work in a cable programme service; and
 - (c) the making available of the work to the public.
- (3) References in this Part to making a work available to the public are references to making the work available, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the work from a place and at a time individually chosen by them (such as by making works available through the Internet).
- (4) A person is to be regarded as having communicated a work to the public if the person has determined the content of the communication.
- (5) For the purposes of subsection (4), a person does not determine the content of a communication only because the person takes one or more steps for the purpose of—
 - (a) gaining access to what is made available by someone else in the communication; or
 - (b) receiving the electronic transmission of which the communication consists.

Example—

A person does not determine the content of a communication (in the form of a webpage) to the person only because the person clicks on a link to gain access to the webpage.

- (6) The mere provision of facilities by any person for enabling or facilitating the communication of a work to the public does not of itself constitute an act of communicating the work to the public.

Note—

The provision of facilities that are primarily designed, produced or adapted to enable or facilitate direct access to a work protected by copyright without the permission of the copyright owner is not a mere provision of facilities referred to in this subsection.

- (7) To avoid doubt, the mere fact that an act done by a person is not a communication of a work to the public under subsection (1) does not affect any liability (whether civil or criminal) the person may otherwise have for that act under—
 - (a) this Ordinance;
 - (b) any other Ordinance; or
 - (c) any rule of law.”.

15. Section 29 amended (infringement by making adaptation or act done in relation to adaptation)

Section 29(2)—

Repeal

“sections 23 to 28”

Substitute

“section 23, 24, 25, 27 or 28A”.

16. Section 31 amended (secondary infringement: possessing or dealing with infringing copy)

- (1) Section 31, heading—

Repeal

“possessing or”.

(2) After section 31(2)—

Add

“(3) For the purposes 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) the purpose of the distribution;
- (b) the nature of the work, including its commercial value (if any);
- (c) the amount and substantiality of the portion copied (in relation to the work as a whole) that was distributed;
- (d) the mode of the distribution; and
- (e) the economic prejudice (if any) caused to the owner of the copyright as a consequence of the distribution, including the effect of the distribution on the potential market for, or value of, the work.”.

17. Section 32 amended (secondary infringement: providing means for making infringing copies)

Section 32(2)—

Repeal

“broadcasting or inclusion in a cable programme service”

Substitute

“communicating to the public”.

18. Section 35 amended (meaning of *infringing copy*)

(1) Section 35(7)(i)—

Repeal

“reprographic copying”

Substitute

“copies made”.

(2) Section 35(7)(j), after “librarian”—

Add

“, curator”.

(3) Section 35(7)(m)—

Repeal

“or”.

(4) After section 35(7)(m)—

Add

“(ma) section 76A(2) (copies made for private and domestic use);”.

19. Section 39 substituted

Section 39—

Repeal the section

Substitute

“39. Criticism, review, quotation, and reporting and commenting on current events

- (1) Fair dealing with a work (*the work*) for the purpose of criticism or review of the work or another work, or of a performance of a work, does not infringe any copyright in the work or, for a published edition of the work, in the typographical arrangement of the published edition, if—
 - (a) the work has been released or communicated to the public; and

- (b) (subject to subsection (6)) the dealing is accompanied by a sufficient acknowledgement.
- (2) 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.
- (3) Fair dealing with a work for the purpose of reporting or commenting on current events does not infringe any copyright in the work or, for a published edition of the work, in the typographical arrangement of the published edition, if (subject to subsection (6)) the dealing is accompanied by a sufficient acknowledgement.
- (4) In determining whether any dealing with a work is fair dealing under subsection (1), (2)(b) or (3), the court must 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.
- (5) For the purposes of subsections (1)(a) and (2)(a)—
 - (a) a work has been released to the public if it has been provided to the public by any means (other than by communication to the public), including—
 - (i) the issue of copies of the work to the public;
 - (ii) the rental of copies of the work to the public; and
 - (iii) the performance, exhibition, playing or showing of the work in public; and
 - (b) in determining whether a work has been released or communicated to the public, no account is to be taken of any unauthorized act.
- (6) For the purposes of subsections (1)(b), (2)(d) and (3), it is not necessary to accompany the relevant dealing with a sufficient acknowledgement if it is not reasonably practicable to do so.”.

20. Section 39A added

Before section 40—

Add**“39A. Parody, satire, caricature and pastiche**

- (1) Fair dealing with a work for the purpose of parody, satire, caricature or pastiche does not infringe any copyright in the work.
- (2) In determining whether any dealing with a work is fair dealing under subsection (1), the court must 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.”.

21. Section 40 amended (incidental inclusion of copyright material)

- (1) Section 40(2)—

Repeal

“or making available”.

- (2) Section 40(2)—

Repeal

“showing, broadcasting or inclusion in a cable programme service”

Substitute

“showing or communicating to the public”.

22. Section 40A amended (definitions for sections 40A to 40F)

Section 40A(1), definition of *supply*—

Repeal paragraph (a)

Substitute

“(a) communicate the copy; and”.

23. Section 40B amended (making a single accessible copy for a person with a print disability)

- (1) Section 40B(5), Chinese text—

Repeal

“被用以進行”

Substitute

“用作”.

- (2) Section 40B—

Repeal subsection (6)

Substitute

“(6) For the purposes of subsection (5), an accessible copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed, by any person other than the person by whom the copy is made or to whom the copy is supplied under subsection (1), for the purpose of or in the course of any trade or business; or
- (b) sold or let for hire, or offered or exposed for sale or hire.”.

24. Section 40C amended (making multiple accessible copies by specified bodies for persons with a print disability)

- (1) Section 40C(7), Chinese text—

Repeal

“被用以進行”

Substitute

“用作”.

- (2) Section 40C—

Repeal subsection (8)**Substitute**

“(8) For the purposes of subsection (7), an accessible copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed, by any person other than the specified body by which the copy is made or the person to whom the copy is supplied under subsection (1A) or (1C) (as the case may be), for the purpose of or in the course of any trade or business; or
- (b) sold or let for hire, or offered or exposed for sale or hire.”.

25. Section 40CA amended (export or supply of accessible copies by specified bodies to authorized entities)

(1) Section 40CA(11), Chinese text—

Repeal

“被用以進行”

Substitute

“用作”.

(2) Section 40CA—

Repeal subsection (12)**Substitute**

“(12) For the purposes of subsection (11), an accessible copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed, by any person other than the specified body by which the copy is made or the authorized entity to which the copy is exported or supplied under subsection (2) or

(5) (as the case may be), for the purpose of or in the course of any trade or business; or

- (b) sold or let for hire, or offered or exposed for sale or hire.”.

26. Section 40CB amended (import or obtainment of accessible copies by specified bodies from authorized entities)

(1) Section 40CB(7), Chinese text—

Repeal

“被用以進行”

Substitute

“用作”.

(2) Section 40CB—

Repeal subsection (8)**Substitute**

“(8) For the purposes of subsection (7), an accessible copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed, by any person other than the specified body by which the copy is imported, obtained, possessed or made under subsection (2) or the person to whom the copy is supplied under subsection (1), for the purpose of or in the course of any trade or business; or
- (b) sold or let for hire, or offered or exposed for sale or hire.”.

27. Section 40D amended (intermediate copies)

(1) Section 40D(7), Chinese text—

Repeal

“被用以進行”

Substitute

“用作”。

(2) Section 40D—

Repeal subsection (8)

Substitute

“(8) For the purposes of subsection (7), an intermediate copy is dealt with if it is—

- (a) exhibited in public or distributed, by any person other than the specified body entitled to possess the copy under subsection (1) or the specified body to which the copy is lent or transferred under subsection (3), for the purpose of or in the course of any trade or business; or
- (b) sold or let for hire, or offered or exposed for sale or hire.”.

28. Section 41A amended (fair dealing for purposes of giving or receiving instruction)

(1) Section 41A(4)(a), Chinese text—

Repeal

everything before “，則”

Substitute

“(a) 如該紀錄並無包含一項聲明，以確認作者，或確認被記錄的作品所載的其他創作努力”。

(2) Section 41A(4)(b), Chinese text—

Repeal

everything before “，則”

Substitute

“(b) 如該紀錄包含一項聲明，以確認作者，或確認被記錄的作品所載的其他創作努力”。

(3) Section 41A(5)—

Repeal

“making available of copies”

Substitute

“communication”。

(4) Section 41A(5)(a)(i)—

Repeal

“copies of the work through the network so that the copies of the work are made available only to persons who need to use the copies of”

Substitute

“work through the network so that the work is communicated only to persons who need to use”。

(5) Section 41A(5)(a)(ii)—

Repeal

“copies of the work are”

Substitute

“work is”。

(6) Section 41A(5)(b)(i)—

Repeal

“copies of the work through the network so that the copies of the work are made available only to persons who need to use the copies of”

Substitute

“work through the network so that the work is communicated only to persons who need to use”。

- (7) Section 41A(5)(b)(ii)—

Repeal

“copies of the work are”

Substitute

“work is”.

- (8) Section 41A(6)—

Repeal

“reprographic”.

- (9) Section 41A(7), Chinese text—

Repeal

“被用以進行”

Substitute

“用作”.

- (10) Section 41A—

Repeal subsection (8)**Substitute**

“(8) For the purposes of subsection (7), a copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed (otherwise than for the purposes mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or
- (b) sold or let for hire, or offered or exposed for sale or hire.”.

29. Section 41 amended (things done for purposes of instruction or examination)

- (1) Section 41(5)—

Repeal

everything after “purposes.”.

- (2) Section 41(5), Chinese text—

Repeal

“有人進行該複製品的”

Substitute

“該複製品用作”.

- (3) After section 41(5)—

Add

“(6) For the purposes of subsection (5), a copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed (otherwise than for the purposes of instruction or examination) for the purpose of or in the course of any trade or business;
- (b) sold or let for hire, or offered or exposed for sale or hire; or
- (c) communicated to the public, unless that communication is not an infringement of copyright under subsection (3).”.

30. Section 44 amended (recording by educational establishments of broadcasts and cable programmes)

- (1) Section 44, heading—

Repeal

“Recording by educational establishments of broadcasts and cable programmes”

Substitute

“Recording, copying or communication by educational establishments: broadcasts or cable programmes”.

- (2) After section 44(1)—

Add

“(1A) A person authorized by an educational establishment may, without infringing copyright, communicate to an authorized recipient a recording, or a copy of a recording, of a broadcast or cable programme that has been made in accordance with subsection (1) if—

- (a) the person makes the communication for the educational purposes of the establishment; and
- (b) the establishment takes 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.”.

- (3) Section 44—

Repeal subsection (2)**Substitute**

“(2) Recording, copying or communicating to authorized recipients is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the recording, copying or communication in question and the person making the recording, copies or communication in question knew or ought to have been aware of that fact.”.

- (4) Section 44(3)—

Repeal

everything after “purposes.”.

- (5) Section 44(3), Chinese text—

Repeal

“有人進行該複製品的”

Substitute

“該複製品用作”.

- (6) After section 44(3)—

Add

“(4) For the purposes of subsection (3), a recording or copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;
- (b) sold or let for hire, or offered or exposed for sale or hire; or
- (c) communicated to the public, unless that communication is not an infringement of copyright under subsection (1A).

- (5) In this section—

authorized recipient (獲授權收訊人), in relation to a communication made by a person authorized by an educational establishment, means a teacher or pupil of the establishment who has been authorized by or on behalf of the establishment to receive the communication.”.

31. Section 45 amended (reprographic copying made by educational establishments or pupils of passages from published works)

- (1) Section 45, heading—

Repeal

“Reprographic copying made by educational establishments or pupils of passages from published works”

Substitute

“Copying or communication by educational establishments or pupils: passages or extracts from published works”.

- (2) Section 45(1)—

Repeal

“Reprographic copies”

Substitute

“Copies”.

- (3) Section 45(1), after “musical works”—

Add

“, or extracts from published sound recordings or films,”.

- (4) Section 45(1)—

Repeal

“or in the typographical arrangement”

Substitute

“in the typographical arrangement, or in the sound recording or film (as the case may be)”.

- (5) After section 45(1)—

Add

- “(1A) A person authorized by an educational establishment may, without infringing copyright, communicate to an authorized recipient a copy of an artistic work, a passage from a published literary, dramatic or musical work, or an extract from a published sound recording or film, that has been made in accordance with subsection (1) if—

- (a) the person makes the communication for the educational purposes of the establishment; and
- (b) the establishment takes 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.”.

- (6) Section 45—

Repeal subsection (2)**Substitute**

- “(2) Copying or communicating to authorized recipients is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the copying or communication in question and the person making the copies or communication in question knew or ought to have been aware of that fact.”.

- (7) Section 45(3)—

Repeal

everything after “purposes.”.

- (8) Section 45(3), Chinese text—

Repeal

“有人進行該複製品的”

Substitute

“該複製品用作”.

- (9) After section 45(3)—

Add

- “(4) For the purposes of subsection (3), a copy is dealt with if it is—
- (a) possessed, exhibited in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;
 - (b) sold or let for hire, or offered or exposed for sale or hire; or
 - (c) communicated to the public, unless that communication is not an infringement of copyright under subsection (1A).
- (5) In this section—
- authorized recipient* (獲授權收訊人), in relation to a communication made by a person authorized by an educational establishment, means a teacher or pupil of the establishment who has been authorized by or on behalf of the establishment to receive the communication.”

32. Cross-heading before section 46 substituted

Cross-heading before section 46—

Repeal the cross-heading

Substitute

“**Libraries, museums and archives**”.

33. Section 46 amended (libraries and archives: introductory)

- (1) Section 46, heading, after “**Libraries**”—
- Add**
- “, museums”.
- (2) Section 46(1)(b), after “libraries”—

Add

“, museums”.

- (3) Section 46(1)—

Repeal

“(copying by librarians and archivists)”

Substitute

“(copying and communication by librarians, curators and archivists)”.

- (4) Section 46(2)(b)—

Repeal

“library or archive” (wherever appearing)

Substitute

“library, museum or archive”.

- (5) Section 46(3)(a), after “librarian”—

Add

“, curator”.

- (6) Section 46(3)(b), after “libraries”—

Add

“, museums”.

- (7) Section 46(5), after “librarian”—

Add

“, curator”.

34. Section 47 amended (copying by librarians: articles in periodicals)

Section 47(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. Section 48 amended (copying by librarians: parts of published works)

(1) Section 48(1)—

Repeal

“from a published edition a copy of part of a literary, dramatic or musical work (other than an article in a periodical)”

Substitute

“a copy of part of a published literary, dramatic, musical or artistic work (other than an article in a periodical), or of part of a published sound recording or film,”.

(2) Section 48(1)—

Repeal

“or in the typographical arrangement”

Substitute

“, in the typographical arrangement, or in the sound recording or film (as the case may be)”.

(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”.

36. Section 50 amended (copying by librarians: supply of copies to other libraries)

(1) Section 50(1)(b)—

Repeal

“published edition of a literary, dramatic or musical work”

Substitute

“published literary, dramatic, musical or artistic work”.

(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”.

37. Section 51 amended (copying by librarians or archivists: replacement copies of works)

(1) Section 51, heading—

Repeal

“Copying by librarians or archivists: replacement copies of works”

Substitute

“Copying by librarians, curators or archivists: preservation or replacement copies of works”.

(2) Section 51(1)—

Repeal

“The librarian or archivist of a specified library or archive”

Substitute

“Subject to subsection (1A), the librarian, curator or archivist of a specified library, museum or archive”.

- (3) Section 51(1), after “the library”—

Add

“, museum”.

- (4) Section 51(1)(b)—

Repeal

“library or archive”

Substitute

“library, museum or archive”.

- (5) Section 51(1)—

Repeal

“dramatic or musical work”

Substitute

“dramatic, musical or artistic work”.

- (6) After section 51(1)—

Add

“(1A) The total number of copies made from an item in the permanent collection of a specified library, museum or archive and placed in the permanent collection of that library, museum or archive must not exceed 3 at any one time, and only one of those copies may be accessible to the public at that library, museum or archive.”.

38. Section 51A added

After section 51—

Add

“51A. Communication by librarians, curators or archivists: copies of works

- (1) If the conditions specified in subsection (2) are complied with, the librarian, curator or archivist of a specified library, museum or archive may, without infringing copyright, communicate a copy of an item in the permanent collection of the library, museum or archive made under section 51 to the users or staff of the library, museum or archive, by making it available online to be accessed through the use of a computer terminal installed within the premises of the library, museum or archive.
- (2) The conditions are—
 - (a) that only 1 user may access the copy at any one time; and
 - (b) that the library, museum or archive takes appropriate measures to prevent users from making further copies or communicating the copy to others.
- (3) Communicating to users or staff of a specified library, museum or archive is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the communication in question and the person making the communication in question knew or ought to have been aware of that fact.”.

39. Section 52 amended (copying by librarians or archivists: certain unpublished works)

- (1) Section 52, heading, after “**librarians**”—

Add

“, **curators**”.

- (2) Section 52(1)—

Repeal

“librarian or archivist of a specified library or archive”

Substitute

“librarian, curator or archivist of a specified library, museum or archive”.

- (3) Section 52(1)(a)—

Repeal

“dramatic or musical work”

Substitute

“dramatic, musical or artistic work”.

- (4) Section 52(1), after “the library”—

Add

“, museum”.

- (5) 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”.

- (6) Section 52(2)(a), after “library”—

Add

“, museum”.

- (7) Section 52(2), after “librarian”—

Add

“, curator”.

- (8) Section 52(3)(a), after “librarian”—

Add

“, curator”.

- (9) Section 52(3)(c), after “library”—

Add

“, museum”.

40. Section 52A added

After section 52—

Add

**“52A. Playing or showing by librarians, curators or archivists:
sound recordings or films**

- (1) If the 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 of the library, museum or archive to an audience consisting of members of the public within the premises of the library, museum or archive, without infringing the copyright in the sound recording or film or any work included in the sound recording or film.
- (2) The condition is that if the audience is required to pay for the playing or showing of the sound recording or film, the payment required is no more than a reasonable contribution towards the maintenance of the library, museum or archive.
- (3) The playing or showing of a sound recording or film is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the playing or showing in question and the person playing or showing the sound recording or film in question knew or ought to have been aware of that fact.”.

41. Section 53 amended (copying by librarians or archivists: articles of cultural or historical importance)

- (1) Section 53, heading, after “
- librarians**
- ”—

Add“, **curators**”.

- (2) Section 53—

Repeal

“librarian or archivist of a specified library or archive”

Substitute

“librarian, curator or archivist of a specified library, museum or archive”.

- (3) Section 53—

Repeal

“the specified library”

Substitute

“the library, museum”.

42. Section 54A amended (fair dealing for purposes of public administration)

- (1) Section 54A(3), Chinese text—

Repeal

“被用以進行”

Substitute

“用作”.

- (2) Section 54A—

Repeal subsection (4)**Substitute**

- “(4) For the purposes of subsection (3), a copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed (otherwise than for the purposes mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or

- (b) sold or let for hire, or offered or exposed for sale or hire.”.

43. Section 55 amended (statutory inquiries)

Section 55(3)—

Repeal

“the issue or making available to the public of copies of the report of a statutory inquiry containing the work or material from it”

Substitute

“communicating to the public the report of a statutory inquiry containing the work or material from it or by issuing copies of the report to the public”.

44. Section 56 amended (material open to public inspection or on official register)

- (1) Section 56(1)—

Repeal

“the issuing or making available of copies to the public”

Substitute

“communicating the material to the public or issuing copies of the material to the public”.

- (2) Section 56(2)—

Repeal

“the copying or issuing or making available to the public of copies of the material”

Substitute

“copying the material, communicating the material to the public or issuing copies of the material to the public”.

- (3) Section 56(3)—

Repeal

“the copying or issuing or making available to the public of copies of the material”

Substitute

“copying the material, communicating the material to the public or issuing copies of the material to the public”.

45. Section 57 amended (material communicated to the Government in the course of public business)

- (1) Section 57, heading—

Repeal

“communicated”

Substitute

“provided”.

- (2) Section 57(1)—

Repeal

“communicated”

Substitute

“provided”.

- (3) Section 57(2)—

Repeal

“communicated”

Substitute

“provided”.

- (4) Section 57(2)—

Repeal

“or issue or make available copies of the work to the public”

Substitute

“communicate the work to the public or issue copies of the work to the public”.

- (5) Section 57(3)—

Repeal

“or issue or make available copies of a work to the public,”

Substitute

“communicate a work to the public or issue copies of a work to the public”.

46. Section 65 amended (certain acts permitted where works made available to the public)

- (1) Section 65, heading—

Repeal

“made available”

Substitute

“communicated”.

- (2) Section 65—

Repeal

“a copy of the work is made available”

Substitute

“the work is communicated”.

47. Section 65A added

Before cross-heading “**Miscellaneous: Literary, dramatic, musical and artistic works**”—

Add

“65A. Temporary reproduction by service providers

- (1) The copyright in a work is not infringed by the making and storage of a copy of the work by a service provider if—
- (a) the sole purpose of the making and storage is to enable more efficient transmission of the work by the provider through a network;
 - (b) the making and storage forms an automatic and essential part of a technological process, and that process neither modifies the work, nor interferes with the lawful use of technology to obtain data on the use of the work;
 - (c) the storage is temporary;
 - (d) the provider updates the database in which the copy is stored in accordance with reasonable industry practice;
 - (e) the provider complies with conditions (if any) on access to the work; and
 - (f) the provider acts promptly to remove the copy or disable access to the copy in the event that either of the following facts comes to the provider’s actual knowledge—
 - (i) the work has been removed from the original source from which the copy was made;
 - (ii) access to the work at the original source from which the copy was made has been disabled.

(2) In this section—

hosting (寄存) means providing space on a network server or any electronic retrieval system for storage of information or material at the direction of a user;

information location tools (資料搜尋工具) means tools such as directories, indexes, references, pointers, or hypertext links that link or refer users to an online location;

online service (聯線服務) includes—

- (a) the transmission, routing, or provision of connections for digital online communications, between or among points specified by a user, of information or 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;

routing (路由選擇) means directing or choosing the means or routes for the transmission of data;

service provider (服務提供者) means a person who, by means of electronic equipment or a network, or both, provides, or operates facilities for, any online services.”.

48. Section 67 amended (use of notes or recordings of spoken words in certain cases)

(1) Section 67(1)—

Repeal paragraph (b)

Substitute

“(b) communicating the whole or part of the work to the public.”.

- (2) Section 67(1), Chinese text—

Repeal

“如第(2)款所述條件獲符合”

Substitute

“在符合第(2)款所述條件的情況下”.

49. Section 68 amended (public reading or recitation)

- (1) Section 68(2)—

Repeal

“broadcasting or inclusion in a cable programme service”

Substitute

“communication to the public”.

- (2) Section 68(2)—

Repeal

“recording, broadcast or cable programme”

Substitute

“recording or communication”.

50. Section 69 amended (abstracts of scientific or technical articles)

Section 69(1)—

Repeal

“or issue or make available copies of it”

Substitute

“, communicate the abstract to the public or issue copies of the abstract”.

51. Section 70 amended (recordings of folksongs)

- (1) Section 70(1), Chinese text—

Repeal

“如第(2)款所列條件獲符合”

Substitute

“在符合第(2)款所述條件的情況下”.

- (2) Section 70(3), Chinese text—

Repeal

“如根據第(4)(a)款訂明的條件獲符合，則”

Substitute

“在符合根據第(4)(a)款訂明的條件的情況下，”.

52. Section 71 amended (representation of certain artistic works on public display)

Section 71(3)—

Repeal

“issue or making available to the public of copies, or the broadcasting or inclusion in a cable programme service”

Substitute

“communication to the public, or the issue to the public of copies”.

53. Section 72 amended (advertisement of sale of artistic work)

- (1) Section 72(1)—

Repeal

“or to issue or make available copies”

Substitute

“communicate it to the public or issue copies of it”.

- (2) Section 72(2)—

Repeal

everything after “purposes.”.

- (3) Section 72(2), Chinese text—

Repeal

“有人進行該複製品的”

Substitute

“該複製品用作”.

- (4) After section 72(2)—

Add

“(3) For the purposes of subsection (2), a copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed (otherwise than for the purpose mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or
- (b) sold or let for hire, or offered or exposed for sale or hire.”.

54. Section 76A added

Before cross-heading “**Miscellaneous: Broadcasts and cable programmes**”—

Add**“76A. Copying sound recordings for private and domestic use**

- (1) Copyright in a sound recording or in any literary, dramatic or musical work included in a sound recording is not infringed by the making of a copy of the sound recording (*private copy*) if—

- (a) the copy of the sound recording from which the private copy is made (*original copy*) is not an infringing copy;
- (b) the private copy is made by the lawful owner of the original copy (*owner*) solely for the private and domestic use by the owner or a member of the household in which the owner lives;
- (c) not more than one private copy of the original copy is made and stored in each device lawfully owned by the owner; and
- (d) the owner retains the ownership of both the original copy and the private copy.

- (2) A private copy that, but for subsection (1), would be an infringing copy is to be treated as an infringing copy if—

- (a) it is used otherwise than for the purpose mentioned in subsection (1)(b); or
- (b) the condition mentioned in subsection (1)(c) or (d) is broken.”.

55. Section 83 amended (provision of sub-titled copies of broadcast or cable programme)

Section 83(1)—

Repeal

“and issue and make available copies”

Substitute

“, communicate the broadcasts or cable programmes to the public or issue copies of the broadcasts or cable programmes”.

56. Part II, Division IIIA added

Part II, after Division III—

Add

“Division IIIA—Limitations on Liability of Service Providers relating to Online Materials

88A. Definitions

In this Division—

code of practice (《實務守則》) means the code of practice published by the Secretary for Commerce and Economic Development under section 88J;

complainant (投訴人), in relation to a notice of alleged infringement given to a service provider, means the person who gives the notice;

counter notice (異議通知) means a notice given to a service provider under section 88E(1) in relation to an alleged copyright infringement;

notice of alleged infringement (指稱侵權通知) means a notice given to a service provider under section 88C(1) in relation to an alleged copyright infringement;

online service (聯線服務) has the meaning given by section 65A(2) but does not include any service provided through an intranet;

personal data (個人資料) has the meaning given by section 2(1) of the Personal Data (Privacy) Ordinance (Cap. 486);

service platform (服務平台), in relation to a service provider, means a system or network controlled or operated by or for the provider that is accessible to users of the online services provided by the provider;

service provider (服務提供者) has the meaning given by section 65A(2);

standard technical measure (標準技術措施) means any technical measure generally accepted by the industry that—

- (a) is used to identify or protect copyright works;
- (b) has been developed through an open, voluntary process by a broad consensus of copyright owners and service providers;
- (c) is available to any person on reasonable and non-discriminatory terms; and
- (d) does not impose substantial costs on service providers or substantial burdens on the systems or networks controlled or operated by or for service providers.

88B. Limitations on liability of service providers

- (1) If the conditions specified in subsection (2) are complied with, a service provider is not liable for damages or any other pecuniary remedy for infringement of the copyright in a work that occurs on the provider's service platform merely because the provider provides, or operates facilities for, online services.
- (2) The conditions are—
 - (a) that the service provider has taken reasonable steps to limit or stop the infringement as soon as practicable after the provider—
 - (i) received a notice of alleged infringement in relation to the infringement;
 - (ii) became aware that the infringement has occurred; or

- (iii) became aware of the facts or circumstances that would lead inevitably to the conclusion that the infringement had occurred;
 - (b) that the service provider has not received and is not receiving any financial benefit directly attributable to the infringement;
 - (c) that the service provider accommodates and does not interfere with the standard technical measures that are used by copyright owners to identify or protect their copyright works; and
 - (d) that the service provider designates an agent to receive notices of alleged infringements, by supplying through the provider's service, including on the provider's website at a location accessible to the public, the agent's name and contact details.
- (3) For the purposes of subsection (2)(a), a service provider is to be treated as having taken reasonable steps to limit or stop the infringement in question if the provider complies with all the provisions in the code of practice respecting the course of action that a service provider may adopt in limiting or stopping an alleged infringement.
- (4) For the purposes of subsection (2)(b)—
- (a) in determining whether a service provider has received or is receiving a financial benefit directly attributable to the infringement in question, the court may take into account all the circumstances of the case and, in particular—
 - (i) the industry practice in relation to the charging for the online services provided by other service providers that are similar to the online service to which the infringement relates;

- (ii) whether the fee for the online service provided by the provider is for, and the value of the online service provided by the provider lies in, providing access to infringing material; and
 - (iii) whether the financial benefit received by the provider for providing the online service to which the infringement relates is greater than the benefit that would usually result from charging for the online service in accordance with accepted industry practices; and
- (b) without limiting paragraph (a), financial benefits directly attributable to the infringement do not include one-off set up fees and flat periodic payments that are charged by the service provider in respect of all users on a non-discriminatory basis.
- (5) To avoid doubt—
- (a) nothing in this Division requires a service provider to—
 - (i) monitor the provider's service or actively seek facts that indicate infringing activity, except to the extent consistent with a standard technical measure complying with subsection (2)(c); or
 - (ii) gain access to, remove, or disable access to material in cases where such actions are prohibited by law,
 in order to qualify for the limitations on liability established by this section; and
 - (b) the failure of a service provider to qualify for the limitations on liability established by this section has no adverse bearing on the consideration of any

defence that may be available to the provider in proceedings for infringement of copyright.

- (6) This section does not apply to proceedings for infringement of copyright commenced before the day on which this section comes into operation.

88C. Notice of alleged infringement

- (1) If it is alleged that an infringement of the copyright in a work has occurred or is occurring on a service provider's service platform, a notice in respect of the alleged infringement may be given to the provider under this section.
- (2) The notice of alleged infringement—
 - (a) must be in writing;
 - (b) (if the service provider specifies the form of the notice under subsection (5)) must be in the form specified by the provider;
 - (c) must be signed or otherwise authenticated by the owner of the allegedly infringed copyright or that owner's authorized representative; and
 - (d) must be provided to the designated agent of the service provider by the means specified by the provider under subsection (6).
- (3) In addition, the notice of alleged infringement—
 - (a) must contain the complainant's name and address for service in Hong Kong and any other information that is reasonably sufficient for contacting the complainant;
 - (b) must substantially identify the copyright work that is alleged to have been infringed;
 - (c) must identify—

- (i) the material, or the link or reference to the material, that is alleged to be infringing or to be the subject of the infringing activity; or
 - (ii) the activity, or the link or reference to the activity, that is alleged to be infringing;
- (d) must contain information sufficient to enable the service provider to locate the material, activity, link or reference mentioned in paragraph (c);
- (e) must contain a description of how the material or activity mentioned in paragraph (c) infringes the rights of the copyright owner of the copyright work;
- (f) must contain a statement to the effect that the complainant believes in good faith that use of the material, or conduct of the activity, in the manner complained of is not authorized by law, and has not been authorized by the copyright owner or the authorized representative of the copyright owner;
- (g) must contain a statement to the effect that the complainant requests the service provider to—
 - (i) send a copy of the notice to the provider's subscriber whose account for online services has been used or involved in the alleged infringement; and
 - (ii) if applicable, remove the material to which the alleged infringement relates, or disable access to the material or activity to which the alleged infringement relates; and
- (h) must contain a declaration to the effect that—
 - (i) the information contained in the notice is true and accurate to the best of the complainant's knowledge and belief;

- (ii) the complainant is the copyright owner or is authorized to act on behalf of the copyright owner; and
 - (iii) the complainant understands that the complainant may incur criminal or civil liability for making false statements in the notice.
- (4) If a notice of alleged infringement given to a service provider does not comply with subsection (2) or (3)—
 - (a) the notice is of no effect for the purposes of section 88B(2)(a)(i); and
 - (b) in determining whether the provider was aware of any of the matters mentioned in section 88B(2)(a)(ii) or (iii), no account is to be taken of the notice.
- (5) For the purposes of subsection (2)(b), a service provider may specify the form of a notice of alleged infringement in so far as it is not inconsistent with the provisions in subsection (3).
- (6) For the purposes of subsection (2)(d), a service provider must specify, through the provider's service (which may include on the provider's website), the means (which may include electronic means) by which a notice of alleged infringement is to be provided to the designated agent of the provider.
- (7) On receiving a notice of alleged infringement from a complainant, a service provider may—
 - (a) send a copy of the notice to the provider's subscriber whose account for online services has been used or involved in the alleged infringement;

- (b) notify the subscriber that the subscriber may contact the complainant directly;
- (c) remove the material to which the alleged infringement relates, or disable access to the material or activity to which the alleged infringement relates; and
- (d) (if the provider removes the material to which the alleged infringement relates, or disables access to the material or activity to which the alleged infringement relates) notify the subscriber of the removal or disabling.

88D. Notice given by service provider

If a service provider becomes aware that an infringement of the copyright in a work has occurred on the provider's service platform or becomes aware of the facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred, the provider may—

- (a) remove the material to which the infringement relates, or disable access to the material or activity to which the infringement relates; and
- (b) by written notice given to the provider's subscriber whose account for online services has been used or involved in the infringement, notify the subscriber of the removal or disabling.

88E. Counter notice

- (1) Within a reasonable time after receiving a copy of a notice of alleged infringement sent by the service provider under section 88C(7)(a) in respect of the matter mentioned in section 88C(7)(d) or a notice given by the provider under

section 88D(b), the provider's subscriber may give a counter notice to the provider—

- (a) disputing or denying the infringement alleged by the complainant or provider; and
 - (b) requesting the provider to take reasonable steps to reinstate the material, or cease disabling access to the material or activity, within a reasonable time after receiving the counter notice.
- (2) The counter notice—
- (a) must be in writing;
 - (b) (if the service provider specifies the form of the counter notice under subsection (5)) must be in the form specified by the provider;
 - (c) must be signed or otherwise authenticated by the subscriber; and
 - (d) must be provided to the designated agent of the service provider by the means specified by the provider under subsection (6).
- (3) In addition, the counter notice—
- (a) must contain the subscriber's name and address for service in Hong Kong and any other information that is reasonably sufficient for contacting the subscriber;
 - (b) must identify—
 - (i) the material that has been removed or to which access has been disabled, and the location at which the material appeared before it was removed or access to it was disabled; or

- (ii) the activity to which access has been disabled, and the location at which the activity appeared before access to it was disabled;
 - (c) must contain a statement to the effect that the subscriber believes in good faith that the material was removed, or access to the material or activity was disabled, as a result of a mistake or misidentification;
 - (d) must contain the grounds for the subscriber's belief mentioned in paragraph (c);
 - (e) (if the subscriber is an individual) must state whether the subscriber opts for or against the service provider's disclosure of the subscriber's personal data contained in the counter notice to the complainant; and
 - (f) must contain a declaration to the effect that—
 - (i) the information contained in the counter notice is true and accurate to the best of the subscriber's knowledge and belief; and
 - (ii) the subscriber understands that the subscriber may incur criminal or civil liability for making false statements in the counter notice.
- (4) A counter notice that does not comply with subsection (2) or (3) is of no effect for the purposes of subsection (1)(b).
- (5) For the purposes of subsection (2)(b), a service provider may specify the form of a counter notice in so far as it is not inconsistent with the provisions in subsection (3).
- (6) For the purposes of subsection (2)(d), a service provider must specify, through the provider's service (which may include on the provider's website), the means (which may

include electronic means) by which a counter notice is to be provided to the designated agent of the provider.

88F. Offence for making false statements

- (1) A person commits an offence if the person—
 - (a) makes any statement in a notice of alleged infringement or counter notice that the person knows to be false in a material respect; or
 - (b) recklessly makes any statement in a notice of alleged infringement or counter notice that is false in a material respect.
- (2) A person who commits an offence under subsection (1) is liable on conviction to a fine at level 2 and to imprisonment for 2 years.

88G. Civil liability for making false statements

- (1) A person who makes any statement in a notice of alleged infringement or counter notice that the person knows to be false, or does not believe to be true, in a material respect, is liable in damages to any person who suffers loss or damage as a result of the making of the statement.
- (2) In this section—

loss or damage (損失或損害), in relation to a statement, means loss or damage that is actual and reasonably foreseeable as likely to result from the making of the statement.

88H. Exemption of service providers from liability for removal of material etc.

- (1) Subject to subsection (2), if a service provider has, in good faith, removed any material, or disabled access to any material or activity, pursuant to a notice of alleged infringement, the provider is not liable to any person for

any claim made in respect of the removal or disabling, whether or not the relevant material or activity is ultimately determined to be infringing.

- (2) Subsection (1) does not apply to material residing at the direction of a subscriber of the service provider on the provider's service platform and that is removed, or to material or activity residing at the direction of a subscriber of the provider on the provider's service platform and to which access is disabled, unless—
 - (a) the provider takes reasonable steps to notify the subscriber that the provider has removed the material or disabled access to the material or activity;
 - (b) the provider takes reasonable steps to send a copy of the notice of alleged infringement to the subscriber; and
 - (c) if the subscriber gives a counter notice to the provider—
 - (i) the provider promptly sends a copy of the counter notice to the complainant;
 - (ii) (if the subscriber is an individual) the provider acts in accordance with the subscriber's option stated in the counter notice under section 88E(3)(e); and
 - (iii) subject to subsection (7), the provider takes reasonable steps to reinstate the material, or cease disabling access to the material or activity, within a reasonable time after receiving the counter notice.

- (3) Subject to subsection (4), if a service provider has, in good faith, removed any material, or disabled access to any material or activity, after the provider—
- became aware that the material or activity relates to an infringement of copyright; or
 - became aware of the facts or circumstances that would lead inevitably to the conclusion that the infringement had occurred,
- the provider is not liable to any person for any claim made in respect of the removal or disabling, whether or not the relevant material or activity is ultimately determined to be infringing.
- (4) Subsection (3) does not apply to material residing at the direction of a subscriber of the service provider on the provider's service platform and that is removed, or to material or activity residing at the direction of a subscriber of the provider on the provider's service platform and to which access is disabled, unless—
- the provider takes reasonable steps to notify the subscriber that the provider has removed the material or disabled access to the material or activity;
 - the provider takes reasonable steps to provide the subscriber with—
 - information reasonably sufficient to enable the subscriber to identify the material or activity; and
 - the provider's reasons for the removal or disabling; and
 - subject to subsection (7), if the subscriber gives a counter notice to the provider, the provider takes

- reasonable steps to reinstate the material, or cease disabling access to the material or activity, within a reasonable time after receiving the counter notice.
- (5) Subject to subsections (6) and (7), if a service provider has, in good faith, reinstated any material, or ceased disabling access to any material or activity, pursuant to a counter notice, the provider is not liable to any person for any claim made in respect of the reinstatement or cessation, whether or not the relevant material or activity is ultimately determined to be infringing.
- (6) Subsection (5) does not apply in a case where the material was removed, or access to the material or activity was disabled, pursuant to a notice of alleged infringement, unless—
- the service provider promptly sends a copy of the counter notice to the complainant; and
 - (if the subscriber is an individual) the provider acts in accordance with the subscriber's option stated in the counter notice under section 88E(3)(e).
- (7) Subsections (2)(c)(iii), (4)(c) and (5) do not apply if—
- proceedings have been commenced in Hong Kong seeking a court order in connection with any infringing activity that relates to the material or activity mentioned in those subsections; and
 - the designated agent of the service provider has been notified in writing, by the person who brings the proceedings, of the proceedings—
 - in the case of subsection (2)(c)(iii) or (5), within a reasonable time after the provider sent a copy of the counter notice to the complainant; or

- (ii) in the case of subsection (4)(c), within a reasonable time after the provider received the counter notice.

88I. Evidence of compliance with conditions

In an action relating to the liability of a service provider, if the provider adduces evidence tending to show that the provider has complied with—

- (a) a condition described in section 88B(2); or
 - (b) a condition specified in the code of practice,
- the court must presume, in the absence of evidence to the contrary, that the provider has complied with that condition.

88J. Code of practice

- (1) The Secretary for Commerce and Economic Development may publish in the Gazette a code of practice for providing practical guidance to service providers in respect of this Division.
- (2) Without limiting subsection (1), the Secretary may in the code of practice specify—
 - (a) the procedures for giving a notice of alleged infringement or counter notice, including—
 - (i) the forms of, and the information to be contained in, the notice;
 - (ii) the manner of sending the notice; and
 - (iii) the manner of verification of statements in the notice; and
 - (b) the course of action that a service provider may adopt on receiving a notice of alleged infringement or counter notice.

- (3) In any proceedings, if the court is satisfied that a provision of the code of practice is relevant to determining a matter that is in issue in the proceedings—
 - (a) the code of practice is admissible in evidence in the proceedings; and
 - (b) proof that a person contravened or did not contravene the provision may be relied on as tending to establish or negate that matter.
- (4) The Secretary may amend the code of practice in a manner consistent with the Secretary's power to publish the code, and a reference to the code in this Division is to be construed as including a reference to the code as so amended.
- (5) Neither the code of practice, nor any amendment made to it, is subsidiary legislation.”.

57. Section 89 amended (right to be identified as author or director)

- (1) Section 89(2)(a)—

Repeal

“, broadcast or included in a cable programme service”

Substitute

“or communicated to the public”.

- (2) Section 89(2)—

Repeal paragraph (b)**Substitute**

“(b) a film or sound recording including the work is made available to the public, or copies of such a film or sound recording are issued to the public,”.

- (3) Section 89(3)(a)—

Repeal

“, broadcast or included in a cable programme service”

Substitute

“or communicated to the public”.

- (4) Section 89(3)—

Repeal paragraph (b)**Substitute**

“(b) a sound recording of the work is made available to the public, or copies of such a sound recording are issued to the public; or”.

- (5) Section 89(3)—

Repeal paragraph (c)**Substitute**

“(c) a film of which the sound-track includes the work is shown in public or made available to the public, or copies of such a film are issued to the public.”.

- (6) Section 89(4)(a)—

Repeal

“broadcast or included in a cable programme service”

Substitute

“communicated to the public”.

- (7) Section 89(4)—

Repeal paragraph (b)**Substitute**

“(b) a film including a visual image of the work is shown in public or made available to the public, or copies of such a film are issued to the public; or”.

- (8) Section 89(4)(c)—

Repeal

“copies of a graphic work representing it, or of a photograph of it, are issued or made available to the public”

Substitute

“a graphic work representing it or a photograph of it is made available to the public, or copies of such a graphic work or photograph are issued to the public”.

- (9) Section 89(6)—

Repeal

“, broadcast or included in a cable programme service”

Substitute

“or communicated to the public.”.

- (10) Section 89(6)—

Repeal

“or made available”.

- (11) Section 89(7)(a)—

Repeal

“or making available”.

- (12) After section 89(7)(a)—

Add

“(ab) in the case of making a film or sound recording available to the public, to be identified in or on the film or sound recording or, if that is not appropriate, in some other manner likely to bring the author’s or director’s identity to the notice of a person acquiring the film or sound recording.”.

- (13) Section 89(7)(c)—

Repeal

“, broadcast or cable programme”

Substitute

“or communication”.

58. Section 91 amended (exceptions to right)

Section 91(4)—

Repeal paragraph (a)**Substitute**

“(a) section 39 (criticism, review, quotation, and reporting and commenting on current events);

(ab) section 39A (parody, satire, caricature and pastiche);”.

59. Section 92 amended (right to object to derogatory treatment of work)

(1) Section 92(3)(a)—

Repeal

“, broadcasts or includes in a cable programme service”

Substitute

“or communicates to the public”.

(2) Section 92(3)—

Repeal paragraph (b)**Substitute**

“(b) makes available to the public a film or sound recording of, or including, a derogatory treatment of the work, or issues copies of such a film or sound recording to the public.”.

(3) Section 92(4)(a)—

Repeal

“broadcasts or includes in a cable programme service”

Substitute

“communicates to the public”.

(4) Section 92(4)(b)—

Repeal

“or issues or makes available to the public copies of such a film”

Substitute

“, makes such a film available to the public or issues copies of such a film to the public”.

(5) Section 92(4)(c)—

Repeal

“issues or makes available to the public copies of a graphic work representing, or of a photograph of, a derogatory treatment of the work”

Substitute

“makes available to the public a graphic work representing, or a photograph of, a derogatory treatment of the work, or issues copies of such a graphic work or photograph to the public”.

(6) Section 92(6)(a)—

Repeal

“, broadcasts or includes in a cable programme service”

Substitute

“or communicates to the public”.

(7) Section 92(6)(b)—

Repeal

“or makes available”.

60. Section 96 amended (false attribution of work)

- (1) Section 96(2)(a)—

Repeal

“or makes available”.

- (2) Section 96(3)(a)—

Repeal

“, broadcasts it or includes it in a cable programme service”

Substitute

“or communicates it to the public”.

- (3) Section 96(3)(b)—

Repeal

“, broadcasts it or includes it in a cable programme service”

Substitute

“or communicates it to the public”.

61. Section 108 amended (provisions as to damages in infringement action)

- (1) Section 108(2)(b)—

Repeal

“and”.

- (2) Section 108(2)(c)—

Repeal

“records,”

Substitute

“records;”.

- (3) After section 108(2)(c)—

Add

- “(d) any unreasonable conduct of the defendant after the act constituting the infringement occurred, including any act done or attempt made by the defendant to destroy, conceal or disguise evidence of the infringement after having been informed of the infringement by the plaintiff; and
- (e) the likelihood of widespread circulation of infringing copies as a result of the infringement.”.

62. Section 116 amended (presumptions relevant to sound recordings, films and computer programs)

Section 116(5)—

Repeal

“, broadcast or included in a cable programme service”
(wherever appearing)

Substitute

“or communicated to the public”.

63. Section 118 amended (offences in relation to making or dealing with infringing articles, etc.)

- (1) After section 118(2)—

Add

- “(2AA) For the purposes of subsection (1)(g), in determining whether any distribution of an infringing copy of the work is made to such an extent as to affect prejudicially the copyright owner, the court—
- (a) may take into account all the circumstances of the case; and

- (b) in particular, may take into account whether economic prejudice is caused to the copyright owner as a consequence of the distribution, having regard to whether the infringing copy so distributed amounts to a substitution for the work.”.

- (2) Section 118(2D)(a), Chinese text—

Repeal

“公眾人士中任何人”

Substitute

“任何公眾人士”.

- (3) Section 118(2D)(b), Chinese text—

Repeal

“公眾人士中的任何人”

Substitute

“任何公眾人士”.

- (4) Section 118(2E)—

Repeal

“the Hong Kong Film Archive for”

Substitute

“a designated library, museum or archive for”.

- (5) Section 118(2E)(a)—

Repeal

“the Hong Kong Film Archive”

Substitute

“the library, museum or archive”.

- (6) Section 118(2E)(b)—

Repeal

“the Hong Kong Film Archive”

Substitute

“the library, museum or archive”.

- (7) Section 118(2F)—

Repeal

“the Hong Kong Film Archive for”

Substitute

“a designated library, museum or archive for”.

- (8) Section 118(2F)(a)(i) and (ii)—

Repeal

“the Hong Kong Film Archive”

Substitute

“the library, museum or archive”.

- (9) After section 118(2F)—

Add

“(2FA) In subsections (2E) and (2F), references to a designated library, museum or archive are references to—

(a) a library, museum or archive owned by the Government; or

(b) a library, museum or archive designated by the Secretary for Commerce and Economic Development under subsection (2FB).

(2FB) For the purposes of subsection (2FA)(b), the Secretary for Commerce and Economic Development may, having regard to the advice of the Director of Leisure and Cultural Services, by notice published in the Gazette, designate any library, museum or archive that is—

- (a) owned by a charitable institution or trust of a public character that is exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112) (*Cap. 112*); or
- (b) owned by—
 - (i) a statutory body that is exempt from tax under an Ordinance other than Cap. 112; or
 - (ii) a subsidiary of such a statutory body.

(2FC) In subsection (2FB)(b)—

statutory body (法定團體) means a body established or constituted by or under the authority of an Ordinance;

subsidiary (附屬公司) has the meaning given by section 15 of the Companies Ordinance (Cap. 622).”.

(10) Before section 118(9)—

Add

“(8B) A person commits an offence if the person infringes copyright in a work by—

- (a) communicating the work to the public for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward; or
- (b) communicating the work to the public (otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward) to such an extent as to affect prejudicially the copyright owner.

(8C) For the purposes of subsection (8B)(b), in determining whether any communication of the work to the public is made to such an extent as to affect prejudicially the copyright owner, the court—

- (a) may take into account all the circumstances of the case; and
 - (b) in particular, may take into account whether economic prejudice is caused to the copyright owner as a consequence of the communication, having regard to whether the communication amounts to a substitution for the work.
- (8D) It is a defence for the person charged with an offence under subsection (8B) to prove that the person did not know and had no reason to believe that, by communicating the work in question in the circumstances described in subsection (8B)(a) or (b), the person was infringing the copyright in the work.”.

64. Section 119 amended (penalties for offences under section 118)

After section 119(2)—

Add

“(3) A person who commits an offence under section 118(8B) is liable on conviction on indictment to a fine at level 5 in respect of each copyright work and to imprisonment for 4 years.”.

65. Section 121 amended (affidavit evidence)

(1) After section 121(2C)—

Add

“(2CA) For the purposes of any proceedings instituted under section 118(8B), an affidavit that purports to have been made by or on behalf of the copyright owner of a copyright work and that—

- (a) states the name of the copyright owner; and

(b) states that the person named in the affidavit does not have the licence of the copyright owner to do an act referred to in that section in respect of the work,
is, subject to the conditions contained in subsection (4), to be admitted without further proof in the proceedings.”.

(2) Section 121(3), after “(2C)”—

Add

“, (2CA)”.

(3) Section 121(4), after “(2C)”—

Add

“, (2CA)”.

(4) Section 121(7), after “(2C)”—

Add

“, (2CA)”.

(5) Section 121(13)(a), after “(2C)”—

Add

“, (2CA)”.

66. Section 122 amended (powers of investigating officers)

(1) Section 122(1)(a)(C), after “Part”—

Add

“or section 273C”.

(2) Section 122(1)(b)(ii), after “Part”—

Add

“or section 273C”.

(3) Section 122(1)(b)(iii), after “Part”—

Add

“or section 273C”.

67. Section 126 amended (disclosure of information, etc.)

(1) Section 126(1)(a)—

Repeal

“or”.

(2) Section 126(1)(b)—

Repeal

“work,”

Substitute

“work; or”.

(3) After section 126(1)(b)—

Add

“(c) if an effective technological measure under section 273C(1) has been applied in relation to a copyright work—a relevant device as defined by section 273C(2),”.

68. Section 128 amended (inspection of articles, release of samples, etc.)

(1) Section 128(1)(a)—

Repeal

“or”.

(2) Section 128(1)(b)—

Repeal

“work,”

Substitute

“work; or”.

- (3) After section 128(1)(b)—

Add

“(c) if an effective technological measure under section 273C(1) has been applied in relation to a copyright work—a relevant device as defined by section 273C(2),”.

- (4) Section 128(1), English text, before “or is an article”—

Add a comma.

- (5) Section 128(1)—

Repeal the full stop

Substitute

“, or is a relevant device as defined by section 273C(2).”.

- (6) Section 128(2), before “or are articles”—

Add a comma.

- (7) Section 128(2), before “on condition”—

Add

“, or are relevant devices as defined by section 273C(2),”.

69. Section 131 amended (seized articles, etc. liable to forfeiture)

- (1) Section 131(1)—

Repeal

“or 120”

Substitute

“, 120 or 273C”.

- (2) Section 131(7)—

Repeal

“or 120”

Substitute

“, 120 or 273C”.

70. Section 132 amended (disposal of articles, etc. where a person is charged)

Section 132—

Repeal

“or 120”

Substitute

“, 120 or 273C”.

71. Section 133 amended (determination of application for forfeiture)

- (1) Section 133(5)—

Repeal

“or 120”

Substitute

“, 120 or 273C”.

- (2) Section 133(6)—

Repeal

“or 120”

Substitute

“, 120 or 273C”.

- (3) Section 133(13)—

Repeal the full stop

Substitute

“, or is not a relevant device as defined by section 273C(2).”.

72. Section 154 amended (licensing schemes to which sections 155 to 160 apply)

- (1) Section 154(b)—

Repeal

“(c), (d), (e) or (f)”

Substitute

“(c) or (d)”.

- (2) Section 154—

Repeal paragraph (d)**Substitute**

“(d) communicating the work to the public;”.

- (3) Section 154(e)—

Repeal

“or making available”.

73. Section 161 amended (licences to which sections 162 to 166 apply)

- (1) Section 161(b)—

Repeal

“(c), (d), (e) or (f)”

Substitute

“(c) or (d)”.

- (2) Section 161—

Repeal paragraph (d)**Substitute**

“(d) communicating the work to the public;”.

- (3) Section 161(e)—

Repeal

“or making available”.

74. Section 198 amended (minor definitions)

After section 198(3)—

Add

“(3A) A note in the text of this Part is for information only and has no legislative effect.”.

75. Section 199 amended (index of defined expressions)

- (1) Section 199, Table—

Repeal

“make available copies to the public section 26”.

- (2) Section 199, Table—

Repeal

“specified library or archive”

Substitute

“specified library, museum or archive”.

- (3) Section 199, Table—

Add in alphabetical order

“communication to the public section 28A(2)

curator (in sections 46 to 53) section 46(5)

make available to the public section 28A(3)”.

76. Section 200 amended (rights conferred on performers and persons having fixation rights)Section 200(2), definition of *fixation*—**Repeal paragraph (b)****Substitute**

“(b) made from a communication to the public that includes the performance; or”.

77. Section 202 amended (consent required for fixation, etc. of unfixed performance)

(1) Section 202(1)—

Repeal paragraph (b)

Substitute

“(b) communicates to the public live the whole or any substantial part of a qualifying performance; or”.

(2) Section 202(1)—

Repeal paragraph (c)

Substitute

“(c) makes a fixation of the whole or any substantial part of a qualifying performance directly from a communication to the public that includes the unfixed performance.”.

(3) Section 202—

Repeal subsection (4).

78. Section 203 amended (consent required for copying of fixation)

Section 203(3), after “electronic means”—

Add

“, and making a copy that is transient or is incidental to some other use of the fixation”.

79. Section 205 amended (consent required for making available of copies to public)

(1) Section 205, heading—

Repeal

“copies”

Substitute

“fixations”.

(2) Section 205(1)—

Repeal

“copies of”.

(3) Section 205(2)—

Repeal

“the making available to the public of copies of a fixation of a performance are to the making available of copies of the fixation”

Substitute

“making a fixation of a performance available to the public are references to making the fixation available”.

(4) Section 205(2)—

Repeal

“the making available of copies of works through the service commonly known as the INTERNET”

Substitute

“by making fixations available through the Internet”.

(5) Section 205—

Repeal subsection (3).

(6) Section 205—

Repeal subsection (4)

Substitute

“(4) The mere provision of facilities by any person for enabling or facilitating the making available of a fixation

of a performance to the public does not of itself constitute an act of making the fixation available to the public.”.

(7) Section 205(5)—

Repeal

“copies of”.

80. Section 206 amended (infringement of performer’s rights by use of fixation made without consent)

(1) Section 206(1)(b)—

Repeal

“broadcasts or includes in a cable programme service”

Substitute

“communicates to the public”.

(2) Section 206—

Repeal subsection (2).

81. Section 207A amended (infringement of performers’ rights by renting copies to the public without consent)

Section 207A(2)(b)(i)—

Repeal

“, broadcasting or inclusion in a cable programme service”

Substitute

“or communicating to the public”.

82. Section 210 amended (infringement of fixation rights by use of fixation made without consent)

(1) Section 210(1)(b)—

Repeal

“broadcasts or includes in a cable programme service”

Substitute

“communicates to the public”.

(2) Section 210—

Repeal subsection (2).

(3) Section 210(3)—

Repeal

“or (2)”.

83. Section 214 amended (duration of rights)

Section 214(3)—

Repeal

“, broadcast, included in a cable programme service or made available to the public”

Substitute

“or communicated to the public”.

84. Section 221 amended (provisions as to damages in infringement action)

(1) Section 221(2)(b)—

Repeal

“and”.

(2) Section 221(2)(c)—

Repeal

“records,”

Substitute

“records,”.

(3) After section 221(2)(c)—

Add

- “(d) any unreasonable conduct of the defendant after the act constituting the infringement occurred, including any act done or attempt made by the defendant to destroy, conceal or disguise evidence of the infringement after having been informed of the infringement by the plaintiff; and
- (e) the likelihood of widespread circulation of infringing copies as a result of the infringement.”.

85. Section 229 amended (meaning of *infringing fixation*)

- (1) Section 229(2)—

Repeal

“private purposes”

Substitute

“private and domestic use”.

- (2) Section 229(3)—

Repeal

“private purposes”

Substitute

“private and domestic use”.

- (3) After section 229(3)—

Add

“(3A) If a fixation lawfully made for private and domestic use under this Part is used for any other purpose, the fixation is to be treated as an infringing fixation.”.

- (4) After section 229(7)(d)—

Add

“(da) section 245A(4) (fixations made by educational establishments for educational purposes);”.

86. Section 238 amended (expressions having same meaning as in copyright provisions)

Section 238(1), after item “Commissioner;”—

Add

“communication to the public;”.

87. Section 239 amended (index of defined expressions)

Section 239, Table—

Add in alphabetical order

“communication to the public section 238(1) (and section 28A(2))”.

88. Section 241 substituted

Section 241—

Repeal the section**Substitute****“241. Criticism, review, quotation, and reporting and commenting on current events**

- (1) Fair dealing with a performance or fixation for the purpose of criticism or review of the performance or fixation or another performance or fixation, or of a work, does not infringe any of the rights conferred by this Part if the performance or fixation has been released or communicated to the public.
- (2) The rights conferred by this Part are not infringed by the use of a quotation from a performance or fixation (whether for the purpose of criticism, review or otherwise) if—

- (a) the performance or fixation has been released or communicated to the public;
 - (b) the use of the quotation is fair dealing with the performance or fixation; and
 - (c) the extent of the quotation is no more than is required by the specific purpose for which it is used.
- (3) Fair dealing with a performance or fixation for the purpose of reporting or commenting on current events does not infringe any of the rights conferred by this Part.
- (4) In determining whether any dealing with a performance or fixation is fair dealing under subsection (1), (2)(b) or (3), the court must 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 performance or fixation;
 - (c) the amount and substantiality of the portion dealt with in relation to the performance or fixation as a whole; and
 - (d) the effect of the dealing on the potential market for, or value of, the performance or fixation.
- (5) For the purposes of subsections (1) and (2)(a)—
- (a) a performance has been released to the public if it has been held in the public live, or provided to the public by any means (other than by communication to the public), including—
 - (i) the issue of a fixation of the performance to the public;

- (ii) the rental of a fixation of the performance to the public; and
 - (iii) the playing or showing of a fixation of the performance in public;
- (b) a fixation has been released to the public if it has been provided to the public by any means (other than by communication to the public), including—
- (i) the issue of the fixation to the public;
 - (ii) the rental of the fixation to the public; and
 - (iii) the playing or showing of the fixation in public; and
- (c) in determining whether a performance or fixation has been released or communicated to the public, no account is to be taken of any unauthorized act.
- (6) Expressions used in this section have the same meaning as in section 39.”.

89. Section 241A added

Before section 242—

Add**“241A. Parody, satire, caricature and pastiche**

- (1) Fair dealing with a performance or fixation for the purpose of parody, satire, caricature or pastiche does not infringe any of the rights conferred by this Part.
- (2) In determining whether any dealing with a performance or fixation is fair dealing under subsection (1), the court must 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 performance or fixation;
 - (c) the amount and substantiality of the portion dealt with in relation to the performance or fixation as a whole; and
 - (d) the effect of the dealing on the potential market for, or value of, the performance or fixation.
- (3) Expressions used in this section have the same meaning as in section 39A.”.

90. Section 242 amended (incidental inclusion of performance or fixation)

Section 242(2)—

Repeal

“showing, broadcasting or inclusion in a cable programme service”

Substitute

“showing or communicating to the public”.

91. Section 242A amended (fair dealing for purposes of giving or receiving instruction)

(1) Section 242A(3), Chinese text—

Repeal

“被用以進行”

Substitute

“用作”.

(2) Section 242A(4)—

Repeal

“making available of copies”

Substitute

“communication”.

(3) Section 242A(4)(a)(i)—

Repeal

“copies of the fixation through the network so that the copies of the fixation are made available only to persons who need to use the copies of”

Substitute

“fixation through the network so that the fixation is communicated only to persons who need to use”.

(4) Section 242A(4)(a)(ii)—

Repeal

“copies of the fixation are”

Substitute

“fixation is”.

(5) Section 242A(4)(b)(i)—

Repeal

“copies of the fixation through the network so that the copies of the fixation are made available only to persons who need to use the copies of”

Substitute

“fixation through the network so that the fixation is communicated only to persons who need to use”.

(6) Section 242A(4)(b)(ii)—

Repeal

“copies of the fixation are”

Substitute

“fixation is”.

- (7) After section 242A(4)—

Add

“(4A) For the purposes of subsection (3), a fixation is dealt with if it is—

- (a) possessed, shown or played in public or distributed (otherwise than for the purposes mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or
- (b) sold or let for hire, or offered or exposed for sale or hire.”.

92. Section 243 amended (things done for purposes of instruction or examination)

- (1) Section 243(3)—

Repeal

everything after “purposes.”.

- (2) Section 243(3), Chinese text—

Repeal

“有人進行如此製作的錄製品”

Substitute

“該錄製品用作”.

- (3) After section 243(3)—

Add

“(3A) For the purposes of subsection (3), a fixation is dealt with if it is—

- (a) possessed, shown or played in public or distributed (otherwise than for the purposes of instruction or examination) for the purpose of or in the course of any trade or business;
- (b) sold or let for hire, or offered or exposed for sale or hire; or
- (c) communicated to the public, unless that communication is not an infringement of the rights conferred by this Part under subsection (2)(b).”.

93. Section 245 amended (recording of broadcasts and cable programmes by educational establishments)

- (1) Section 245, heading—

Repeal

“Recording of broadcasts and cable programmes by educational establishments”

Substitute

“Recording, copying or communication by educational establishments: broadcasts or cable programmes”.

- (2) After section 245(1)—

Add

- “(1A) A person authorized by an educational establishment may, without infringing the rights conferred by this Part, communicate to an authorized recipient a recording, or a copy of a recording, of a broadcast or cable programme that has been made in accordance with subsection (1) if—
- (a) the person makes the communication for the educational purposes of the establishment; and

- (b) the establishment takes 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.”.

(3) Section 245—

Repeal subsection (2)**Substitute**

“(2) Recording, copying or communicating to authorized recipients is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the recording, copying or communication in question and the person making the recording, copies or communication in question knew or ought to have been aware of that fact.”.

(4) Section 245(3)—

Repeal

everything after “purposes.”.

(5) Section 245(3), Chinese text—

Repeal

“有人進行該紀錄或複製品的”

Substitute

“該紀錄或複製品用作”.

(6) After section 245(3)—

Add

“(3A) For the purposes of subsection (3), a recording or copy is dealt with if it is—

- (a) possessed, shown or played in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;
- (b) sold or let for hire, or offered or exposed for sale or hire; or
- (c) communicated to the public, unless that communication is not an infringement of the rights conferred by this Part under subsection (1A).”.

94. Sections 245A and 245B added

After section 245—

Add**“245A. Copying or communication by educational establishments: published sound recordings or films**

- (1) The making of a copy of part of a published sound recording or film by or on behalf of an educational establishment for the educational purposes of the establishment does not infringe any of the rights conferred by this Part in relation to any performance or fixation included in it.
- (2) A person authorized by an educational establishment may, without infringing the rights conferred by this Part, communicate to an authorized recipient a copy of part of a published sound recording or film that has been made in accordance with subsection (1) if—
 - (a) the person makes the communication for the educational purposes of the establishment; and
 - (b) the establishment takes 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.
- (3) Copying or communicating to authorized recipients is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the copying or communication in question and the person making the copies or communication in question knew or ought to have been aware of that fact.
- (4) Where a copy that would otherwise be an infringing fixation is made in accordance with this section but is subsequently dealt with, it is to be treated as an infringing fixation for the purposes of that dealing, and if that dealing infringes any right conferred by this Part, for all subsequent purposes.
- (5) For the purposes of subsection (4), a copy is dealt with if it is—
 - (a) possessed, shown or played in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;
 - (b) sold or let for hire, or offered or exposed for sale or hire; or
 - (c) communicated to the public, unless that communication is not an infringement of the rights conferred by this Part under subsection (2).
- (6) Expressions used in this section have the same meaning as in section 45.

245B. Communication, playing or showing by librarians, curators or archivists: sound recordings or films

- (1) The communication of a sound recording or film made by the librarian, curator or archivist of a specified library, museum or archive under section 51A to the users or staff of the library, museum or archive, by making it available online to be accessed through the use of a computer terminal installed within the premises of the library, museum or archive, does not infringe any of the rights conferred by this Part in relation to any performance or fixation included in it.
- (2) The playing or showing by the librarian, curator or archivist of a specified library, museum or archive under section 52A of a sound recording or film held in the permanent collection of the library, museum or archive to an audience consisting of members of the public within the premises of the library, museum or archive does not infringe any of the rights conferred by this Part in relation to any performance or fixation included in it.
- (3) The communication, playing or showing of a sound recording or film is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the communication, playing or showing in question and the person communicating, playing or showing the sound recording or film in question knew or ought to have been aware of that fact.
- (4) Expressions used in this section have the same meaning as in sections 51A and 52A.”.

95. Section 246 amended (copying by librarians or archivists: articles of cultural or historical importance)

- (1) Section 246, heading, after “**librarians**”—

Add

“, curators”.

- (2) Section 246(1)—

Repeal

“librarian or archivist of a specified library or archive”

Substitute

“librarian, curator or archivist of a specified library, museum or archive”.

- (3) Section 246(1), after “at the library”—

Add

“, museum”.

96. Section 246A amended (fair dealing for purposes of public administration)

- (1) Section 246A(3), Chinese text—

Repeal

“被用以進行”

Substitute

“用作”.

- (2) After section 246A(3)—

Add

“(3A) For the purposes of subsection (3), a fixation is dealt with if it is—

- (a) possessed, shown or played in public or distributed (otherwise than for the purposes mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or

- (b) sold or let for hire, or offered or exposed for sale or hire.”.

97. Section 252 amended (certain copying permitted when performances made available to the public)

- (1) Section 252, heading—

Repeal

“made available”

Substitute

“communicated”.

- (2) Section 252—

Repeal

“made available (within the meaning of section 205)”

Substitute

“communicated”.

98. Section 252A added

After section 252—

Add

“252A. Temporary reproduction by service providers

- (1) The rights conferred by this Part in a fixed performance are not infringed by the making and storage of a copy of a fixation by a service provider if—
- (a) the sole purpose of the making and storage is to enable more efficient transmission of the fixation by the provider through a network;
- (b) the making and storage forms an automatic and essential part of a technological process, and that

process neither modifies the fixation, nor interferes with the lawful use of technology to obtain data on the use of the fixation;

- (c) the storage is temporary;
- (d) the provider updates the database in which the copy is stored in accordance with reasonable industry practice;
- (e) the provider complies with conditions (if any) on access to the fixation; and
- (f) the provider acts promptly to remove the copy or disable access to the copy in the event that either of the following facts comes to the provider's actual knowledge—
 - (i) the fixation has been removed from the original source from which the copy was made;
 - (ii) access to the fixation at the original source from which the copy was made has been disabled.

- (2) Expressions used in this section have the same meaning as in section 65A.”.

99. Section 253 amended (use of fixations of spoken words in certain cases)

- (1) Section 253(1)—

Repeal paragraph (b)

Substitute

“(b) of communicating the whole or part of the reading or recitation to the public.”.

- (2) Section 253(1), Chinese text—

Repeal

“如第(2)款所述條件獲符合”

Substitute

“在符合第(2)款所述條件的情況下”.

100. Section 254 amended (fixations of folksongs)

- (1) Section 254(1), Chinese text—

Repeal

“如第(2)款所列條件獲符合”

Substitute

“在符合第(2)款所述條件的情況下”.

- (2) Section 254(3), Chinese text—

Repeal

“如訂明條件獲符合”

Substitute

“在符合訂明條件的情況下”.

101. Section 272A amended (moral rights conferred on certain performers)

- (1) Section 272A(4)—

Repeal the definition of *make available to the public live*.

- (2) Section 272A(5)—

Repeal

“cable programme service; and”

Substitute

“cable programme service;
communication to the public; and”.

- (3) Section 272A(9)—

Repeal

“, (3)”.

- (4) Section 272A(9)—

Repeal

“copies of” (wherever appearing).

102. Section 272B amended (right to be identified as performer)

- (1) Section 272B(1)(a)—

Repeal

“, made available to the public live, broadcast live or included live in a cable programme service”

Substitute

“or communicated to the public live”.

- (2) Section 272B(1)—

Repeal paragraph (b)

Substitute

“(b) the sound recording in which the performance is fixed is communicated to the public or copies of such a sound recording are issued to the public.”.

- (3) Section 272B(2)—

Repeal

“or making available”.

- (4) Section 272B(3)—

Repeal

“, broadcast or cable programme”

Substitute

“or communication”.

103. Section 272D amended (exceptions to right under section 272B)

Section 272D(4)—

Repeal paragraph (a)

Substitute

“(a) section 241 (criticism, review, quotation, and reporting and commenting on current events);

(ab) section 241A (parody, satire, caricature and pastiche);”.

104. Section 272E amended (right to object to derogatory treatment)

- (1) Section 272E(2)(a)—

Repeal

“, broadcasted, included in a cable programme service or made available to the public live”

Substitute

“or is communicated to the public live”.

- (2) Section 272E(2)(b)(i)—

Repeal

“, broadcasts or includes in a cable programme service”

Substitute

“or communicates to the public”.

- (3) Section 272E(2)(b)—

Repeal subparagraph (ii).

- (4) Section 272E(2)(c)(i)—

Repeal

“, broadcasts or includes in a cable programme service the sound recording; or”

Substitute

“or communicates to the public the sound recording.”

- (5) Section 272E(2)(c)—

Repeal subparagraph (ii).**105. Section 273 amended (interpretation of sections 273 to 273H)**

- (1) Section 273(1)(c)(i), after the semicolon—

Add

“or”.

- (2) Section 273(1)(c)—

Repeal subparagraph (ii)**Substitute**

“(ii) communicates the work to the public.”.

- (3) Section 273(1)(c)—

Repeal subparagraph (iii).**106. Section 273A amended (rights and remedies in respect of circumvention of effective technological measures)**

- (1) Section 273A(2)(c)(i), after the semicolon—

Add

“or”.

- (2) Section 273A(2)(c)—

Repeal subparagraph (ii)**Substitute**

“(ii) communicates the work to the public.”.

- (3) Section 273A(2)(c)—

Repeal subparagraph (iii).**107. Section 273B amended (rights and remedies in respect of devices and services designed to circumvent effective technological measures)**

- (1) Section 273B(3)(c)(i), after the semicolon—

Add

“or”.

- (2) Section 273B(3)(c)—

Repeal subparagraph (ii)**Substitute**

“(ii) communicates the work to the public.”.

- (3) Section 273B(3)(c)—

Repeal subparagraph (iii).**108. Section 273D amended (exceptions to section 273A)**

Section 273D(8)(b)—

Repeal

“librarian or archivist of a specified library or archive”

Substitute

“librarian, curator or archivist of a specified library, museum or archive”.

109. Section 274 amended (rights and remedies in respect of unlawful acts to interfere with rights management information)

- (1) Section 274(2)(b)—

Repeal

“makes available to the public, sells or lets for hire, imports into or exports from Hong Kong, broadcasts or includes in a cable programme service,”

Substitute

“communicates to the public, sells or lets for hire, or imports into or exports from Hong Kong,”.

(2) Section 274(3)—

Repeal

“making available”

Substitute

“communication”.

110. Schedule 2 amended (copyright: transitional provisions and savings)

Schedule 2, paragraph 17(b)—

Repeal

“broadcasting the work or including it in a cable programme service”

Substitute

“communicating the work to the public”.

111. “報道” substituted for “報導”

The following provisions, Chinese text—

- (a) section 54B(2);
- (b) section 54(2);
- (c) section 55(2);
- (d) section 67(1)(a);
- (e) section 81A(1);
- (f) section 91(5);
- (g) section 93(3);
- (h) section 246B(1)(a);

- (i) section 247(1);
- (j) section 248(1);
- (k) section 253(1)(a);
- (l) section 258A(1);
- (m) section 272D(2);
- (n) section 272G(1)—

Repeal

“報導” (wherever appearing)

Substitute

“報道”.

Part 3

Amendments to Copyright (Amendment) Ordinance 2007

112. Section 6 amended (infringement by rental of work to the public)

(1) Section 6(1), new section 25(1)—

Repeal paragraphs (e) and (f).

(2) Section 6—

Repeal subsections (2) and (4).

113. Section 47 amended (minor definitions)

Section 47(2), new definition of *rental right*—

Repeal paragraphs (e) and (f).

114. Section 75 amended (Schedule 7 added)

(1) Section 75, new Schedule 7, Part 3, Division 1, heading—

Repeal

“, (e) and (f)”.

(2) Section 75, new Schedule 7, section 3(1) and (2)—

Repeal

“, (e) and (f)”.

(3) Section 75, new Schedule 7, section 4(a)—

Repeal

“, (e) and (f)”.

(4) Section 75, new Schedule 7, section 5—

Repeal subsection (2).

Explanatory Memorandum

The object of this Bill is to amend the Copyright Ordinance (Cap. 528) (*Ordinance*) and the Copyright (Amendment) Ordinance 2007 (15 of 2007) (*Amendment Ordinance*) for the purposes set out in the long title.

2. The Bill is divided into 3 Parts. Part 1 contains preliminary provisions; Part 2 contains amendments to the Ordinance and Part 3 contains amendments to the Amendment Ordinance.
3. Clause 1 sets out the short title and provides for commencement.

Right of Communication to Public

4. New sections 22(1)(fa) and 28A are added to the Ordinance to provide for an exclusive right of the owner of the copyright in a work to communicate the work to the public (clauses 10(3) and 14). The communication of a work to the public is the act of communicating the work to the public by electronic communication, including—
 - (a) the broadcasting of the work;
 - (b) the inclusion of the work in a cable programme service; and
 - (c) the making available of the work to the public.
5. Consequential amendments are made to the Ordinance to delete or modify references to the acts that are subsumed in the expression “communication to the public” within the meaning of the new section 28A added by clause 14 (the acts are mentioned in paragraph 4), and other similar references (clauses 7, 8, 9, 10(1) and (2), 11(2), 12, 13, 17, 21, 48(1), 49, 52, 53(1), 55, 57(1), (3), (6), (9), (10), (11) and (13), 59(1), (3), (6) and (7), 60, 62, 72(2) and (3), 73(2) and (3), 75(1) and (3) and 110). A new section 198(3A) is added to the Ordinance to provide that a note in the text of Part II of the Ordinance (to which

the new section 28A belongs) is for information only and has no legislative effect (clause 74).

6. Amendments are made to sections 8(1), 9(2)(b), 41A(5), 55(3), 56(1), (2) and (3), 57(2) and (3), 65, 69(1), 89(2), (3), (4) and (7) and 92(3) and (4) of the Ordinance to delete the references to “copies of” contained in the expression “making available to the public of copies of works” and in similar expressions (clauses 5, 6(1), 28(3), (4), (5), (6) and (7), 43, 44, 45(4) and (5), 46, 50, 57(2), (4), (5), (7), (8) and (12) and 59(2), (4) and (5)). Given that a work may be made available to the public in different forms and no formal copy is required, the references to “copies” are unnecessary.
7. Similar amendments are made to Parts III, IIIA and IV of the Ordinance in relation to the rights of a performer to communicate a performance to the public, circumvention of effective technological measures and rights management information (clauses 76, 77, 79, 80, 81, 82, 83, 86, 87, 90, 91(2), (3), (4), (5) and (6), 97, 99(1), 101, 102, 104, 105, 106, 107 and 109).
8. A new subsection (8B) is added to section 118 of the Ordinance to impose criminal liability on a person who infringes copyright in a work by communicating the work to the public in the circumstances specified in that subsection (clause 63(10)). A new subsection (3) is added to section 119 of the Ordinance to provide for the penalty for contravention of the new section 118(8B) (clause 64).
9. A new subsection (2CA) is added to section 121 of the Ordinance to enable the deponent of an affidavit to state that the person named in the affidavit does not have the licence of the copyright owner of a work to communicate the work to the public (clause 65(1)).

Limitations on Liability of Online Service Providers

10. A new Division IIIA (sections 88A to 88J) is added to Part II of the Ordinance to provide for limitations on the liability of an online service provider relating to an alleged infringement of the copyright

in a work that occurs on the provider's service platform (clause 56).
In particular—

- (a) the new section 88A provides for the meaning of the expressions used in the new Division IIIA;
- (b) the new section 88B provides that, subject to the specified conditions, a service provider is not liable for damages or any other pecuniary remedy in respect of copyright infringement that occurs on the provider's service platform;
- (c) the new section 88C provides for the procedures for giving a notice to a service provider in respect of an alleged infringement of copyright, requesting the provider to—
 - (i) remove the material to which the alleged infringement relates; or
 - (ii) disable access to the material or activity to which the alleged infringement relates;
- (d) the new section 88D provides for the actions that a service provider may take after the provider—
 - (i) becomes aware that an infringement of copyright has occurred on the provider's service platform; or
 - (ii) becomes aware of the facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred;
- (e) the new section 88E provides for the procedures for giving a counter notice to dispute the alleged infringement;
- (f) the new section 88F imposes criminal liability on a person who knowingly or recklessly makes any false statement in a notice of alleged infringement or counter notice;

- (g) the new section 88G provides for the civil liability of a person who makes any false statement in a notice of alleged infringement or counter notice;
- (h) the new section 88H provides that, subject to the specified conditions, a service provider is not liable for any claim in respect of the provider removing the material to which an alleged infringement of copyright relates, disabling access to the material or activity to which an alleged infringement of copyright relates, reinstating the material, or ceasing disabling the access;
- (i) the new section 88I provides for a rebuttable presumption that a service provider has complied with the conditions specified in that section; and
- (j) the new section 88J empowers the Secretary for Commerce and Economic Development to publish a code of practice for providing practical guidance to service providers in respect of the new Division IIIA.

Permitted Acts

11. Section 39 of the Ordinance is substituted by new provisions—

- (a) to make clear that fair dealing with a work for the purpose of criticism or review does not infringe any copyright in the work if the work has been released or communicated to the public; and
- (b) to extend the scope of the acts that may be done without infringing the copyright in a work so as to—
 - (i) cover the use of a quotation from the work for the purpose of criticism, review or otherwise; and
 - (ii) cover fair dealing with the work for the purpose of reporting or commenting on current events (clause 19).

12. A new section 39A is added to the Ordinance to provide that fair dealing with a work for the purpose of parody, satire, caricature or pastiche does not infringe any copyright in the work (clause 20).
13. The definition of *supply* in section 40A(1) of the Ordinance is updated with substitution of a new paragraph (a) (clause 22).
14. A new subsection (1A) is added to section 44 of the Ordinance to provide that, subject to the specified conditions, a person authorized by an educational establishment may, without infringing copyright, communicate a recording, or a copy of a recording, of a broadcast or cable programme that has been made in accordance with section 44(1) of the Ordinance (clause 30(2)).
15. A new subsection (1A) is added to section 45 of the Ordinance to provide that, subject to the specified conditions, a person authorized by an educational establishment may, without infringing copyright, communicate a copy of an artistic work, a passage from a published literary, dramatic or musical work, or an extract from a published sound recording or film, that has been made in accordance with section 45(1) of the Ordinance (clause 31(5)).
16. Section 48(1) of the Ordinance is amended to extend the scope of works that the librarian of a specified library may, without infringing copyright, copy so as to cover artistic works, sound recordings and films (clause 35(1) and (2)).
17. Section 50(1)(b) of the Ordinance is amended to extend the scope of copies of works that the librarian of a specified library may, without infringing copyright, make and supply to another specified library so as to cover copies of artistic works (clause 36(1)).
18. A new section 51A is added to the Ordinance to provide that, subject to the specified conditions, the librarian, curator or archivist of a specified library, museum or archive may, without infringing copyright, communicate a copy of a specified item made under

- section 51 of the Ordinance to the users or staff of the library, museum or archive (clause 38).
19. A new section 52A is added to the Ordinance to provide that, subject to the specified conditions, the librarian, curator or archivist of a specified library, museum or archive may, without infringing copyright, play or show in public any sound recording or film held in the permanent collection of the library, museum or archive (clause 40).
20. Certain permitted acts under the Ordinance that are applicable to specified libraries and archives are extended to cover museums (clauses 37, 39, 41, 95 and 108).
21. A new section 65A is added to the Ordinance to provide that, subject to the specified conditions, an online service provider may, without infringing copyright, make and store a temporary copy of a work to enable more efficient transmission of the work through a network (clause 47).
22. A new section 76A is added to the Ordinance to provide that, subject to the specified conditions, the making of a copy of a sound recording for private and domestic use does not infringe copyright in the sound recording or any literary, dramatic or musical work included in the sound recording (clause 54).
23. Section 241 of the Ordinance is substituted by new provisions—
 - (a) to make clear that fair dealing with a performance or fixation for the purpose of criticism or review does not infringe the performers' rights in the performance or fixation if the performance or fixation has been released or communicated to the public; and
 - (b) to extend the scope of the acts that may be done without infringing the performers' rights in a performance or fixation so as to—

- (i) cover the use of a quotation from the performance or fixation for the purpose of criticism, review or otherwise; and
 - (ii) cover fair dealing with the performance or fixation for the purpose of reporting or commenting on current events (clause 88).
- 24. A new section 241A is added to the Ordinance to provide that fair dealing with a performance or fixation for the purpose of parody, satire, caricature or pastiche does not infringe the performers' rights in the performance or fixation (clause 89). The new permitted act is similar to that provided by the new section 39A added by clause 20.
- 25. A new subsection (1A) is added to section 245 of the Ordinance to provide for a new permitted act in respect of the communication of a recording, or a copy of a recording, of a broadcast or cable programme by a person authorized by an educational establishment (clause 93(2)). The new permitted act is similar to that provided by the new section 44(1A) added by clause 30(2).
- 26. A new section 245A is added to the Ordinance to provide for a new permitted act in respect of the copying and communication of a sound recording or film by or on behalf of an educational establishment (clause 94).
- 27. A new section 245B is added to the Ordinance to provide that, under the specified circumstances, the communication, playing or showing of a sound recording or film does not infringe the performers' rights in the performance or fixation included in it (clause 94).
- 28. A new section 252A is added to the Ordinance to provide for a new permitted act in respect of the making and storage of a temporary copy of a fixation by an online service provider to enable more efficient transmission of the fixation through a network (clause 98). The new permitted act is similar to that provided by the new section 65A added by clause 47.

Additional Damages

- 29. Sections 108(2) and 221(2) of the Ordinance are amended to add 2 factors to which the court may have regard in considering whether additional damages should be awarded in an action for infringement of copyright or infringement of the rights of a performer (clauses 61(3) and 84(3)).

Related Amendments

- 30. A new subsection (5) is added to section 7 of the Ordinance to make clear that the copyright in a film sound-track that does not accompany the film but falls within the meaning of *sound recording* in section 6(1) of the Ordinance is to be protected as a sound recording (clause 4).
- 31. A new subsection (2A) is added to section 22 of the Ordinance to set out a non-exhaustive list of factors for determining whether a person has authorized another to do any of the acts restricted by the copyright in a work (clause 10(4)).
- 32. New sections 31(3) and 118(2AA) are added to the Ordinance to set out a non-exhaustive list of factors for 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 in the work (clauses 16(2) and 63(1)).
- 33. Sections 40B(6), 40C(8), 40CA(12), 40CB(8), 40D(8), 41A(8) and 54A(4) of the Ordinance are amended, and new sections 41(6), 44(4), 45(4), 72(3), 242A(4A), 243(3A), 245(3A) and 246A(3A) are added to the Ordinance, to provide for the meaning of the expression "dealt with" in the relevant provisions of the Ordinance (clauses 23(2), 24(2), 25(2), 26(2), 27(2), 28(10), 29(3), 30(6), 31(9), 42(2), 53(4), 91(7), 92(3), 93(6) and 96(2)).
- 34. Subsections (2E) and (2F) of section 118 of the Ordinance are amended to extend the scope of exemption under those subsections

to designated libraries, museums and archives (clause 63(4), (5), (6), (7) and (8)). New subsections (2FA) and (2FB) are added to that section to provide that the designation of any library, museum or archive is to be made by the Secretary for Commerce and Economic Development (clause 63(9)).

Repeals relating to Rental Rights in Comic Books

35. Certain uncommenced provisions, and references to section 25(1)(e) and (f) of the Ordinance in certain uncommenced provisions, of the Amendment Ordinance are repealed as they are out-of-date and no longer required (clauses 112, 113 and 114).

Provision of Investigation, Seizure, Disposal and Other Powers for Circumvention Offences

36. Sections 122, 126, 128, 131, 132 and 133 of the Ordinance are amended to provide for investigation, seizure, disposal and other powers for certain offences in relation to the circumvention of effective technological measures that protect copyright works from infringement under section 273C of the Ordinance (clauses 66 to 71).

Minor Amendments

37. Minor textual adjustments are made to the Chinese text of sections 2(3), 9(2)(g), 40B(5), 40C(7), 40CA(11), 40CB(7), 40D(7), 41A(4)(a) and (b) and (7), 41(5), 44(3), 45(3), 47(1), 48(1), 50(1), 52(1), 54A(3), 67(1), 70(1) and (3), 72(2), 118(2D)(a) and (b), 242A(3), 243(3), 245(3), 246A(3), 253(1) and 254(1) and (3) of the Ordinance (clauses 3, 6(2), 23(1), 24(1), 25(1), 26(1), 27(1), 28(1), (2) and (9), 29(2), 30(5), 31(8), 34, 35(3), 36(2), 39(5), 42(1), 48(2), 51, 53(3), 63(2) and (3), 91(1), 92(2), 93(5), 96(1), 99(2) and 100).
38. References to “報導” in the Chinese text of sections 54B(2), 54(2), 55(2), 67(1)(a), 81A(1), 91(5), 93(3), 246B(1)(a), 247(1), 248(1),

253(1)(a), 258A(1), 272D(2) and 272G(1) of the Ordinance are substituted by “報道” (clause 111).



UPDATING HONG KONG'S COPYRIGHT REGIME

PUBLIC CONSULTATION PAPER



Commerce and Economic Development Bureau

Contents

Chapter 1	Introduction.....	2
Chapter 2	Key Legislative Proposals of the 2014 Bill	5
Chapter 3	Exhaustive Approach to Exceptions.....	12
Chapter 4	Contract Override.....	17
Chapter 5	Illicit Streaming Devices	21
Chapter 6	Judicial Site Blocking	26
Chapter 7	Possible New Issues for Further Studies	31
Chapter 8	Invitation of Views	33

Chapter 1 Introduction

1.1 The “Outline of the 14th Five-Year Plan for National Economic and Social Development of the People’s Republic of China and the Long-Range Objectives Through the Year 2035” (“National 14th Five-Year Plan”) promulgated in March 2021 raises, for the first time, the Central People’s Government’s support for Hong Kong to develop into a regional intellectual property (“IP”) trading centre. Leveraging the national support and building on the solid foundation we have established in the past decade on promoting IP trading, the Government is committed to further developing Hong Kong as a regional IP trading centre.

1.2 To achieve our goal, we have to ensure that our IP regime keeps abreast with times and international norms, as well as meets Hong Kong’s social and economic needs. The copyright system is an important part of the IP regime, as it protects original works in the literary and artistic fields as a private property right, underpinning the development of the creative economy. There is a need for us to update our copyright regime in the light of rapid advances in technology and development of the knowledge-based economy, which have been reshaping our society in the information age. In fact, many overseas economies which aspire to leverage innovation and creativity to drive economic growth have taken proactive efforts to keep their copyright regimes robust and up-to-date in order to support their development needs. Hong Kong cannot afford to lag behind.

1.3 Unlike trade marks, patents and registered designs which require registration, the copyright system has no registration requirement and relies on a statutory scheme setting out legal norms that balance different rights and interests to support development needs. Since its enactment in 1997, we have completed several legislative amendment exercises to update the Copyright Ordinance (Cap. 528) (“CO”) to address different needs of society.¹ In particular, we have launched a major review exercise to update our copyright law to strengthen copyright protection in the digital environment. To this end, we have since 2006 conducted three rounds of major consultations and introduced two amendment bills, in 2011² (“2011 Bill”) and 2014³ (“2014 Bill”) respectively, into the

¹ The CO was amended in 2000, 2003, 2004, 2007, 2009 and 2020 to address a number of issues, including business end-user liability, parallel imports, circumvention of technological measures, rights management information used for protection of copyright works, new permitted acts and fair dealing exceptions, and compliance with standards of international treaties such as the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

² The Copyright (Amendment) Bill 2011.

³ The Copyright (Amendment) Bill 2014.

Legislative Council (“LegCo”) with a view to reforming our copyright regime. While the respective LegCo Bills Committees supported the passage of the amendment bills on both occasions, the corresponding legislative processes could not be completed before the expiry of the respective LegCo terms, due in no small measure to the polarised interests of the copyright owners and users in certain copyright issues. In particular, despite the extensive scrutiny and support by the LegCo Bills Committee, the 2014 Bill met with filibustering by some Members, resulting in adjournment of the proceedings and failure of the passage of the bill in 2016.

1.4 To capitalise on the support for Hong Kong to develop into a regional IP trading centre in the National 14th Five-Year Plan, we believe it is high time to revive the copyright review exercise. The failure of the passage of the 2011 and 2014 Bills has put Hong Kong over a decade behind in keeping our copyright regime in line with international developments. At the same time, we recognise that over the years, certain overseas jurisdictions have introduced changes to their copyright regimes and the ever-evolving technological development around the world has led to the emergence of new copyright issues that would require our attention and further deliberation in our society. These include, for example, the extension of copyright term of protection; introduction of specific copyright exceptions for text and data mining; and issues related to artificial intelligence (“AI”) and copyright (see elaborations in Chapter 7 of this consultation document).

1.5 The need for catching up with a modern and business facilitating IP protection regime is obvious and imminent. We should also continue to embrace changes as required, but priority should be accorded to completing the long overdue legislative amendment exercise of the 2014 Bill in order to address the most imminent and fundamental copyright issues, on which broad consensus has already been reached based on balanced interests of different stakeholders. Our proposal in this consultation exercise is to take the 2014 Bill as our basis for engaging stakeholders and the wider community with a view to taking the legislative amendments forward.

1.6 The legislative proposals contained in the 2014 Bill are the result of years of deliberations of the Government, LegCo, copyright owners, online service providers (“OSPs”) and copyright users, representing the consensus and balance of interests of different stakeholders. On the one hand, these proposals will enhance protection for copyright in the digital environment and help combat large scale online piracy, the efforts of which we cannot afford to further delay. On the other hand, the proposed copyright exceptions will allow use of copyright works in many common Internet activities such as parody and safeguard users’ freedom of expression.

1.7 The 2014 Bill also represents a balanced package which remains relevant today in bringing our copyright regime more in line with the international norms

and maintaining a robust copyright regime conducive to the development of the creative industry, thereby contributing to the vibrancy of Hong Kong's economy. The clear legal framework contained therein will help remove uncertainties of our copyright regime, which is important in promoting freedom of creation and expression, enhancing the business environment and strengthening Hong Kong's position as a regional IP trading centre. Such changes will bring positive impact on all stakeholders, including copyright owners, users and OSPs.

1.8 Against the above background, this public consultation will set out the key legislative proposals and at the same time, address four issues which generated much interests from stakeholders during the deliberation of the 2014 Bill and remain relevant today, namely

- (a) **exhaustive approach to exceptions** (Chapter 3),
- (b) **contract override** (Chapter 4),
- (c) **illicit streaming devices** (Chapter 5), and
- (d) **judicial site blocking** (Chapter 6).

We welcome views on these issues and shall consider them carefully before finalising the new amendment Bill based on the key legislative proposals in the 2014 Bill for introduction into LegCo, with a view to striking a proper balance between the legitimate interests of copyright users and owners, and serving the best interest of Hong Kong.

Chapter 2 Key Legislative Proposals of the 2014 Bill

2.1 Copyright as a property right is recognised and protected under the Basic Law as well as the local law of Hong Kong.⁴ At the international level, Hong Kong has an obligation to protect copyright pursuant to several international copyright conventions which apply to Hong Kong.⁵ The existing CO provides for exclusive rights to copyright owners to do certain “acts restricted by copyright”, including the right to make a copyright work available to the public on the Internet, to broadcast a work, or to include a work in a cable programme service. Copyright in a work is infringed by any person who without the consent of the copyright owner does or authorises another to do any of the acts restricted by copyright which are not covered by any statutory copyright exceptions in Hong Kong. To balance the interests of copyright owners and users, the existing CO provides for a number of copyright exceptions or permitted acts for users to facilitate the use of copyright works under different circumstances that do not unreasonably prejudice the legitimate interest of copyright owners.

2011 Bill

2.2 The prevalence of high speed Internet connectivity, the emergence of new modes of content uses and transmissions give copyright owners a wider choice of avenues to disseminate their works but at the same time, pose new challenges in combating online infringements. To make the copyright protection regime more forward looking in keeping pace with technological developments, the Government started an exercise in 2006 to update Hong Kong’s copyright regime with respect to strengthening copyright protection in the digital environment. Following extensive consultations, the 2011 Bill was introduced into LegCo in June 2011 seeking, amongst others, to introduce a technology-neutral communication right to enhance copyright protection in the digital environment, foster cooperation between copyright owners and OSPs to combat large scale online copyright infringements, and facilitate new modes of uses of copyright works such as e-learning and media shifting. After thorough deliberation, the

⁴ Article 6 of the Basic Law provides that the Hong Kong Special Administrative Region “shall protect the right of private ownership of property in accordance with law”. Article 140 of the Basic Law specifically requires the Government to “protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation”.

⁵ These treaties include the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty.

LegCo Bills Committee supported passage of the 2011 Bill with suitable amendments and requested the Government to separately consult the public on the treatment of parody in our copyright regime. However, owing to other more pressing business LegCo had to transact, the Second Reading of the 2011 Bill had not been resumed before the end of the LegCo term concerned in July 2012. The 2011 Bill lapsed thereafter.

2014 Bill

2.3 In July 2013, the Government launched a public consultation on the treatment of parody. Taking into account the views received, the Government introduced the 2014 Bill into LegCo in June 2014, comprising the package of legislative amendments in the 2011 Bill and new provisions to provide for fair dealing exceptions for the purposes of parody, satire, caricature and pastiche, commenting on current events, quotation, as well as further clarification of the criminal liability for copyright infringements generally. The LegCo Bills Committee, after extensive scrutiny over 24 meetings, supported passage of the 2014 Bill, while the Government agreed to review further issues of interest raised by different stakeholders after the bill's passage. The Second Reading of the 2014 Bill resumed in December 2015, but it met with filibustering by some Members resulting in adjournment of the proceedings in April 2016. The 2014 Bill was unable to proceed and lapsed upon expiry of the LegCo term concerned in July 2016.

2.4 The 2014 Bill covers legislative proposals in the following five key areas to modernise the copyright regime in the digital environment, namely (a) communication right, (b) criminal liability, (c) revised and new copyright exceptions, (d) safe harbour, and (e) additional damages in civil cases.

(A) Communication Right

2.5 At present, the CO gives copyright owners certain exclusive rights, including the right to make a copyright work available to the public on the Internet, to broadcast a work or to include a work in a cable programme service. With advances in technology, new modes of electronic transmission such as streaming have emerged. To ensure that the protection afforded to copyright owners would cover any mode of electronic transmission, a new technology-neutral exclusive communication right for copyright owners to communicate their works to the public through any mode of electronic transmission is proposed to be introduced in our copyright regime. The introduction of a technology-neutral communication right will bring our copyright regime on par with international

developments and in line with the practices of many overseas jurisdictions.⁶

(B) Criminal Liability

2.6 To tie in with the proposal to introduce a technology-neutral communication right, criminal sanctions will also be introduced against those who make unauthorised communication of copyright works to the public (a) 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 (b) to such an extent as to affect prejudicially the copyright owners. The proposed criminal sanctions mirror the existing sanctions available in the CO against the distribution of infringing copies of works.⁷

2.7 To allay concerns about the possible impact on the free flow of information across the Internet and to provide greater legal certainty, the legislative proposal concerned will include clarifications of the threshold of criminal liability in relation to the existing prejudicial distribution and the proposed prejudicial communication offences, by stipulating in the CO that the court will examine all the circumstances of a case and highlighting the factor of economic prejudice, for which whether the infringement would amount to a substitution for the original copyright work is an important factor for the court to assess possible criminal liability.

⁶ Many overseas jurisdictions have long introduced a communication right to enhance copyright protection in the digital environment, including the European Union (2001), Australia (2001), the United Kingdom (2003), Singapore (2005), New Zealand (2008) and Canada (2012).

⁷ Section 118(1)(g) of the CO stipulates that:

“A person commits an offence if he, without the licence of the copyright owner of a copyright work –

.....

(g) distributes an infringing copy of the work (otherwise than for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works) to such an extent as to affect prejudicially the copyright owner.”
(referred to as the existing “prejudicial distribution offence”)

In a mirroring manner, the proposed section 118(8B) of the 2014 Bill reads:

“A person commits an offence if the person infringes copyright in a work by –

.....

(b) communicating the work to the public (otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward) to such an extent as to affect prejudicially the copyright owner.”
(referred to as the proposed “prejudicial communication offence”)

(C) Revised and New Copyright Exceptions

2.8 Copyright is an intangible property right that promotes creativity by providing authors and lawful owners with economic incentives. But its protection is not without limitations. Fair access to and uses of copyright works by others are also important, not only for freedom of expression in its own right but also for dissemination and advancement of knowledge which also promotes creativity. The existing CO contains over 60 sections specifying a number of permitted acts which may be done in relation to copyright works without attracting civil or criminal liability notwithstanding the subsistence of copyright (such as for the purposes of research, private study, education, criticism, review and reporting current events).⁸ To tie in with the introduction of the communication right, the scope of permitted acts will also be revised and expanded as appropriate to maintain the balance between copyright protection and reasonable use of copyright works.

New copyright exceptions for the education sector, libraries, museums, archives, temporary reproduction of copyright works by OSPs, and media shifting

2.9 In response to the digital environment, the following new copyright exceptions are proposed to be introduced with appropriate preconditions –

- (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;
- (b) to allow OSPs to cache data⁹, which technically involves copying and is a restricted act in the CO. Such caching is transient or incidental in nature and technically required for the process of data transmission to function efficiently; and
- (c) to allow media shifting of sound recordings for private and domestic use (i.e. the making of an additional copy of a sound recording from one media or format into another, usually for the purpose of listening to the work in a more convenient manner¹⁰), which technically is an act of copying and is restricted by copyright.

⁸ In addition, our copyright regime accepts any rule of law that restricts the enforcement of copyright on the ground of public interest (section 192 of the CO).

⁹ 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.

¹⁰ A typical example is the copying of sound recordings from an audio compact disc to the embedded memory of a portable MP3, i.e. from compact disc digital audio format to MP3 format.

New fair dealing exceptions

2.10 Many copyright users believe that the scope of permitted acts should include a wide range of common activities on the Internet which might make use of copyright works, such as mash-ups, altered pictures/videos, doujinshi, image/video capture, streaming of video game playing, homemade videos, posting of earnest performance of copyright works and rewriting lyrics for songs. On the other hand, copyright owners believe that the current copyright regime with licensing as the centerpiece together with various statutory exceptions is operating well to deal with these matters and causing no problems in practice in Hong Kong and elsewhere. To balance different interests, new fair dealing exceptions are proposed to be introduced to cover –

- (a) **use for the purposes of parody, satire, caricature and pastiche¹¹**, which are common means for the public to express views or comment on current events, and such use is usually critical and transformative in nature and should unlikely compete with or substitute the original works;
- (b) **use for the purpose of commenting on current events;** and
- (c) **use of a quotation the extent of which is no more than is required by the specific purpose for which it is used**, so as to facilitate expression of opinions or discussions in the online and traditional environment.

2.11 The new fair dealing exceptions proposed above 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. This should go a long way towards addressing the major

¹¹ The Concise Oxford English Dictionary (12th Edition, 2011) defines the terms 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 criticise 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.

The above proposed scope is clear and confined, consisting of well recognised literary or artistic practices which are accommodated as appropriate in other overseas copyright regimes, such as Australia, Canada and the United Kingdom.

concerns of many users who make use of existing copyright works for the above purposes in the digital environment.

(D) Safe Harbour

2.12 To provide incentives for OSPs to cooperate with the copyright owners in combating online piracy, and to provide sufficient protection for their acts, safe harbour provisions will be introduced to limit OSPs' liability for copyright infringements 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 would be underpinned by a voluntary Code of Practice¹² which sets out practical guidelines and procedures for OSPs to follow after notification.¹³

(E) Additional Damages in Civil Cases

2.13 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. As a general rule, damages are compensatory in nature and 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 existing CO 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.¹⁴ Given the digital challenges, two additional factors are proposed to be introduced in the CO for the court's assessment of damages, namely (a) the unreasonable conduct of an infringer after having been informed of

¹² The draft Code of Practice ([https://www.cedb.gov.hk/assets/resources/citb/\(Eng\)%20Draft%20Code%20of%20Practice%20\(March%202012\).pdf](https://www.cedb.gov.hk/assets/resources/citb/(Eng)%20Draft%20Code%20of%20Practice%20(March%202012).pdf)) was formulated after taking into account views received in two rounds of consultation in 2011 and 2012 respectively. We welcome further views or suggestions on the draft Code of Practice from the industry.

¹³ For example, the Code of Practice sets out a "Notice and Notice" system which requires OSPs to notify their subscribers or users that their accounts have been identified in connection with an alleged copyright infringement; and a "Notice and Takedown" system where OSPs are required to remove materials or disable access to materials (stored or made available for search on the service platforms by subscribers) that are found to be infringing.

¹⁴ Section 108(2) of the CO 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."

the infringement; and (b) the likelihood of widespread circulation of infringing copies as a result of the infringement.

2.14 The legislative proposals summarised above represent a consensus that has struck a proper balance between the conflicting interests of different stakeholders and has been supported by the LegCo Bills Committee in 2015. They will form the basis of the new amendment Bill to bring our copyright regime more in line with the international norms and conducive to the development of the creative industry.

Chapter 3 Exhaustive Approach to Exceptions

3.1 Copyright is a private property right which subsists in certain types of creative works such as original literary, dramatic, musical and artistic works. It gives copyright owners exclusive rights to do certain acts in relation to their works, such as copying the works, making available copies of the works to the public or broadcasting the works. To maintain a proper balance between the rights and interests of copyright owners and users, copyright regimes around the world also provide exceptions which allow users to make reasonable use of copyright works in certain circumstances without the owner's consent.

Exhaustive Approach

3.2 Similar to Hong Kong, most jurisdictions worldwide, including Australia, Canada, the European Union ("EU"), New Zealand and the United Kingdom ("UK") formulate their copyright exceptions based on a specified range of purposes and circumstances exhaustively set out in their respective regimes. In Hong Kong, over 60 exceptions are provided in Part II of the CO.¹⁵ They include *inter alia* exceptions relating to uses in education, libraries and archives; public administration such as LegCo and judicial proceedings; and uses that address the needs of persons with a print disability. Furthermore, there are several fair dealing exceptions which allow dealing with a work if it is done for certain prescribed purposes (namely research, private study, criticism, review and news reporting, giving or receiving instructions in educational establishments and urgent business in public administration) provided that the dealing is "fair", assessed by taking into account all circumstances of the case and, in particular, the following:

- (a) the purpose and nature of the dealing, including whether it is for a non-profit-making purpose and whether it 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.¹⁶

¹⁵ Apart from copyright works, the CO also provides protection to rights in performances. Most of the exceptions provided in Part II of the CO are correspondingly provided to rights in performances in Part III of the CO.

¹⁶ The four factors are currently not stated for the fair dealing exceptions under section 39 of the CO. The 2014 Bill proposed to set out these factors expressly in the CO.

Non-exhaustive Approach

3.3 A handful of overseas jurisdictions, including Israel, the Philippines, Singapore, South Korea and the United States (“US”), adopt a non-exhaustive approach in providing exceptions for copyright infringements.¹⁷ In addition to copyright exceptions of specific purposes and circumstances, these jurisdictions also provide exceptions for non-exhaustive purposes on the basis of whether a particular use of a work is fair, which is determined by the court with reference to a list of non-exhaustive factors that are largely similar to the factors provided for in our fair dealing exceptions set out in paragraph 3.2 above.

International Development

3.4 Over the past decade or so, a number of overseas jurisdictions have conducted reviews and consultations on copyright reform. The prospect of introducing a non-exhaustive exception approach was reviewed by a number of developed economies currently adopting an exhaustive exception approach, including Australia, Ireland, New Zealand and the UK. However, none of these jurisdictions have decided to introduce a non-exhaustive approach in their regimes so far. It remains the case that most common law jurisdictions still adopt an exhaustive exception approach in their copyright regimes. It is also worth noting that while the EU has initiated various legislative reviews in an effort to modernise its copyright framework, the non-exhaustive approach has never been featured in any of its review consultations or proposals.

Local Discussion

3.5 The question of whether a non-exhaustive copyright exception regime should be introduced in Hong Kong was included in the 2004 public consultation exercise on various copyright issues. Taking into account the polarised responses received and the need to give clear guidance to both copyright owners and users, the Government decided that a general non-exhaustive copyright exception regime should not be pursued. During the deliberation of the 2014 Bill at the LegCo Bills Committee, the issue of introducing a non-exhaustive exception approach in the copyright regime resurfaced at a very late stage, and a LegCo Member submitted a Committee Stage Amendment (“CSA”) to introduce a non-exhaustive

¹⁷ Singapore introduced a general open-ended fair dealing exception in its Copyright Act in 2004 that closely resembled the US’ non-exhaustive approach (known as “fair use” exception), but the pre-existing close-ended fair dealing provisions were also retained. Following a reform review, a new Copyright Act was passed by the Singaporean legislature in September 2021, in which the general open-ended fair dealing exception is restated as a “fair use” exception.

approach.¹⁸ The Government explained at the time that the introduction of a non-exhaustive approach would bring fundamental changes to our copyright regime. The Government agreed to consider the matter in a future copyright review.

Arguments Relating to Maintaining an Exhaustive Exception Approach

3.6 Arguments for maintaining an exhaustive approach include –

(a) *Provide legal certainty*

The exhaustive approach provides legal certainty as all exceptions are prescribed in the law. In contrast, adopting a non-exhaustive approach will give rise to legal uncertainty as the question of whether a particular use of a work comes within an exception under the non-exhaustive approach has to be determined by the court on a case by case basis. The legal uncertainty will likely generate a lot of litigation and cause confusion for both owners and users.

(b) *In line with international practices*

Most jurisdictions worldwide adopt an exhaustive approach, in which their copyright exceptions are based on a specified range of purposes and circumstances. There is little, if any, empirical evidence which supports the alleged economic benefits of introducing a non-exhaustive copyright exception regime. The non-exhaustive approach is not a prerequisite for innovation.

(c) *Avoid possible exploitation at the expense of copyright owners*

Some criticise the non-exhaustive approach to exceptions as too wide and vague, and some are concerned that users or third parties may exploit an exception under the non-exhaustive approach at the expense of copyright owners (i.e. leading to a substantial reduction in licensing income for copyright owners). These would all be avoided under the exhaustive approach.

(d) *Compatible with international agreements*

Unlike the exhaustive approach, some point out that the non-exhaustive approach may not be compatible with the three-step test under the Berne

¹⁸ Another CSA was also proposed to introduce a copyright exception for user-generated content (“UGC”) during the deliberation of the 2014 Bill at the LegCo Bills Committee. The concept of UGC is vague and lacks international norm in its definition. So far, only Canada adopts such exception in its legislation.

Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization which stipulates that exceptions should be confined to certain special cases.

(e) *Maintain the balance of rights between owners and users*

The existing copyright exceptions and the new ones included in legislative proposals of the 2014 Bill have struck an appropriate balance in a holistic manner between certainty and flexibility, as well as between private property rights and freedom of speech and expression.¹⁹

3.7 Arguments for not maintaining an exhaustive approach include –

(a) *More flexibility*

A non-exhaustive approach offers more flexibility in accommodating new circumstances of uses and distribution of copyright works brought about by new technologies in future without the need to amend the “permitted acts” provisions in the CO, thus may promote and stimulate innovation and technological growth, particularly in transformative markets, and bring economic benefits to society.

(b) *Better align with expectations and behaviours of users*

A non-exhaustive approach may better align with the reasonable expectations and common behaviours of users and the general public in the digital environment. User activities that are trivial and cause little or no economic harm to the copyright owners should not be regarded as copyright infringements.

(c) *Better protection for freedom of speech and expression*

An open and flexible exception regime may provide better protection for freedom of speech and expression.

3.8 We have carefully considered the above arguments. Given that most jurisdictions worldwide continue to formulate their copyright exceptions based on a specified range of purposes and circumstances exhaustively and the lack of adequate empirical evidence to support the alleged economic benefits of a non-exhaustive approach, it is the Government’s position to maintain the existing

¹⁹ It is observed that in some jurisdictions which implement the non-exhaustive approach, more stringent measures to protect copyright owners are also in place, such as extension of copyright terms, judicial site blocking, repeated infringer policies, statutory damages for copyright infringements, etc.

exhaustive approach as it will give more certainty to copyright owners and users in the exploitation of copyright works.

Question

3.9 Against the above analysis, we would like to invite views on the following issue:

- Hong Kong, similar to most jurisdictions worldwide, should continue to maintain the current exhaustive approach by setting out all copyright exceptions based on specific purposes or circumstances in the CO.

Chapter 4 Contract Override

4.1 To exploit the economic value of their creations, copyright owners may grant authorisation or licences to users through commercial contracts for the use of their works in accordance with the terms and conditions agreed by the parties. Such contracts are normally crafted to fit the specific commercial arrangements of individual parties. While statutory exceptions for certain specific uses of copyright works without the owner's consent are provided in copyright legislation, commercial contracts may, depending on the terms agreed by the parties concerned, exclude or restrict the application of these statutory exceptions. Such restrictions, often referred to as "contract override", only bind the individual parties to the contract and the benefits of the statutory copyright exceptions remain intact for other users of the copyright work.

Overseas Practices

4.2 There is no unified approach in overseas jurisdictions on the use of statutory restrictions on contract override. Similar to Hong Kong, Australia, Canada, New Zealand and the US generally have no restriction imposed in their copyright laws against the use of contract to override copyright exceptions.²⁰ In the EU and the UK, contract override is disallowed in certain specific exceptions, such as those concerning the use of computer programmes and databases, text and data mining, print disability, selected exceptions relating to educational use, etc. For Singapore, a new Copyright Act passed by its legislature in September 2021 contains provisions, amongst others, to restrict contract override for certain exceptions concerning the use of computer programmes, computational data analysis, judicial proceedings and legal professional advice, and the use of works by institutions such as galleries, libraries, archives and museums.²¹ At the other end of the spectrum, Ireland is the only common law jurisdiction that restricts contract override for all copyright exceptions.

Local Discussion

4.3 There is no express provision in the CO that restricts parties from using a contract to override copyright exceptions. Section 37(1) of the CO provides

²⁰ Australia and New Zealand generally do not prohibit contract override, except in relation to certain exceptions for computer programmes.

²¹ In addition, Singapore's new Copyright Act also provides a general safeguard that, for exceptions other than those listed, a term overriding an exception in a contract is only valid if the contract is individually negotiated and the term is fair and reasonable.

that statutory copyright exceptions relate only to the question of copyright infringement (a tortious liability). As such, these exceptions do not affect the contractual arrangements agreed between individual parties. During the deliberation of the 2014 Bill at the LegCo Bills Committee, some LegCo Members expressed concerns that the operation of the new fair dealing exceptions in the 2014 Bill might be excluded or limited by individual contractual agreements. Subsequently, a LegCo Member proposed a CSA to restrict the use of contract to override certain fair dealing exceptions.²² The Government expressed reservations on the proposal as the matter was complicated and there was no international consensus on the approach. The Government agreed at the time to consider the matter in a future copyright review.

Arguments Relating to Introducing Statutory Restrictions on Contract Override

4.4 Arguments for not introducing statutory restrictions on contract override include –

(a) *Freedom of contract*

Freedom of contract plays a vital role in Hong Kong's free market economy. Allowing copyright owners and users room to negotiate their own licence arrangements provides flexibility and legal certainty to both parties, and also facilitates the efficient and competitive exploitation of copyright works under new and innovative business models. Such freedom of contract in business operations should not be easily interfered with.

(b) *Privity of contract*

Contract terms that override copyright exceptions only bind users who are parties to the contracts with the relevant copyright owners. Potential users of copyright exceptions with no contractual relationship with the owners will continue to be entitled to benefit from the exceptions. There are many circumstances where it is unlikely that users of copyright exceptions would have any contractual arrangement with the owners of the works concerned, e.g. exceptions for LegCo and judicial proceedings and incidental inclusion of copyright material.

²² The CSA proposed to restrict contract override in relation to copyright exceptions concerning fair dealings for the purposes of research and private study; criticism, review, quotation, and reporting and commenting on current events; parody, satire, caricature and pastiche; and giving or receiving instruction.

(c) *Lack of empirical evidence*

There is no empirical evidence which supports that users of copyright works are prevented from using existing exceptions in the CO to their detriment due to relentless exploitation of restrictive contractual provisions by copyright owners. The potential benefits of introducing restriction on contract override may be largely academic.

(d) *Protection of users' interests under existing legal framework*

Freedom of contract is not unfettered. Hong Kong's legal regime provides appropriate protection and remedies under different circumstances where important public interest is at stake. For instance, a contract term might be unenforceable if it is found to be contrary to public policy under the law of contract. Other legislation including consumer protection legislation (e.g. the Unconscionable Contract Ordinance (Cap.458) ("UCO")²³) also plays a role in ousting objectionable contract terms.

(e) *No internationally consistent and unified approach*

As elaborated in paragraph 4.2 above, there is no consistent and unified approach among overseas jurisdictions on the use of statutory restrictions on contract override. Introducing a blanket prohibition against contract override for all copyright exceptions would be a fundamental change of the legal norms of the copyright regime in Hong Kong. On the other hand, selecting certain copyright exceptions to include restrictions on contract override might create a hierarchy of exceptions, which lacks empirical evidence to justify.

4.5 Arguments for introducing statutory restrictions on contract override include –

(a) *Maintain the balance of rights and interests between owners and users*

The copyright regime, with adequate protection provided to owners and reasonable exceptions allowed for users, aims to strike a fair balance between private property rights and public interests, and this reflects the policy objective and public consensus on the issues. Introducing statutory restrictions on contract override could help ensure that the

²³ The UCO prevents "unconscionable" contractual terms from being enforceable in appropriate circumstances and generally applies to consumer contracts in respect of the sale of goods or supply of services.

benefits of the exceptions will not be undermined by private arrangements and that the overall balance of rights and interests between owners and users could be maintained.

(b) *Address concerns arising from unequal bargaining power*

The need to ensure that users will be able to benefit from the copyright exceptions provided by law is more apparent where there is disparity in bargaining power, or the users are simply not given an opportunity to negotiate licence terms for the use of works, such as the use of standard form contracts (notably in website notices or terms and conditions in licence agreements of digital contents).

(c) *Provide legal certainty for users*

Statutory restrictions on contract override will provide legal certainty and clarity to users, consumers and businesses that the exceptions apply in all circumstances regardless of the terms of a contract or licence. Time and costs expended by the parties on construing and resolving possible ambiguities on the legal effect of contract override clauses could be avoided.

4.6 We have carefully considered the above arguments. Given that there is no empirical evidence to support that users are prevented from using existing copyright exceptions to their detriment by contract override, and the importance of upholding freedom of contract in business operations, it is the Government's position to maintain a non-interference approach to contractual arrangements agreed between copyright owners and users.

Question

4.7 Against the above analysis, we would like to invite views on the following issue:

- Hong Kong should not introduce provisions to the CO to restrict the use of contracts to exclude or limit the application of statutory copyright exception(s).

Chapter 5 Illicit Streaming Devices

5.1 Set-top boxes (also referred to as TV boxes/sticks, or media boxes/sticks) are devices for connection to TVs or other displays that enable users to locate and access audio-visual materials available on the Internet usually via either pre-loaded software applications (“Apps”) or a list of indexes or categories of Apps for self-downloading by users to the devices. Such devices are widely available to serve legitimate purposes for accessing authorised copyright contents. Parties involved in the design, manufacture, marketing and sale of set-top boxes include reputable brands of information and communication technologies equipment and media companies. These devices are now an indispensable part of the online copyright ecosystem. However, allegedly infringing or dubious online materials could also be communicated without the authorisation of copyright owners by streaming through the use of certain suspicious set-top boxes or Apps, which are often referred to as illicit streaming devices (“ISDs”).

Overseas Practices

5.2 There is no consistent approach at the international level to address the issue of ISDs. Most overseas jurisdictions do not have specific provisions concerning ISDs in their copyright legislation and apply the general principles of copyright law or common law to combat the ISD problem. In Australia, copyright owners could take actions in relation to technological protection measures and site blocking injunctions under its Copyright Act to deal with infringements involving ISDs. In the EU, actions against unauthorised communication or site blocking orders could be used to tackle ISDs.²⁴ In the US, ISDs are dealt with under secondary liability for infringements developed in case law, Copyright Law and/or offences under the Crimes and Criminal Procedure, and the Protecting Lawful Streaming Act enacted in December 2020 empowers the authority to bring felony charges against those who illegally stream copyrighted material willfully for commercial advantage or private financial gain. In the UK, authorities use offences under the Copyright Designs and Patents Act and the Fraud Act 2006, inchoate offences under the Serious Crime Act 2007 and the common

²⁴ The Court of Justice of the EU stated that the sale of pre-loaded grey boxes constitutes a (unauthorised) communication to a “new” public (i.e. an audience that is not envisaged by the creator of the content when they authorised the initial communication of the content); see *Stichting Brein v. Jack Frederik Willems* [2017] ECDR 14; *Svensson v. Retriever Sverige AB* [2014] All ER (EC) 609.

law offence of conspiracy to defraud²⁵ to combat ISDs. The UK government consulted the public on the need for legislative change in relation to the issue of ISDs in 2017. Opinions received were polarised and the UK government eventually decided not to pursue any legislative changes.

5.3 To our knowledge, Singapore is the only common law jurisdiction that imposes civil and criminal liabilities on people who engage in commercial dealings with ISDs in its new Copyright Act passed by its legislature in September 2021. Under the new Copyright Act of Singapore, copyright owners may sue anyone who knowingly engages in commercial dealings (e.g. sell, offer for sale, distribute for trade, etc.) with devices or services, which have the commercially significant purpose of facilitating access to copyright infringing works.²⁶

Local Discussion

5.4 Like most overseas jurisdictions, while the CO does not have specific provisions to deal with ISDs, it contains various provisions to deal with online copyright infringement activities that could be applied to combat ISDs.

5.5 For example, under the CO, where the use of copyright works²⁷ involves the circumvention of technological measures adopted by copyright owners to prevent unauthorised copying or access to their works, such act may attract civil liability for circumventing technological measures;²⁸ or civil and criminal liabilities for dealing in circumvention devices or providing circumvention

²⁵ The common law offence of conspiracy to defraud requires that two or more persons dishonestly conspire to commit a fraud against a victim. To drive a charge, the two key elements, i.e. the conspiracy involved dishonesty, and the victim's interests would be harmed if the conspiracy was undertaken, must be present.

²⁶ To our knowledge, under the civil law system, only Taiwan imposes civil and criminal liabilities in its Copyright Act on anyone who facilitates the public to access infringing copyright works through the Internet and receives benefit by providing computer programmes, or manufacturing, importing or selling equipment or devices preloaded with the computer programmes concerned.

²⁷ For example, gaining access to encrypted online contents through set-top boxes.

²⁸ Section 273A of the CO imposes civil liability on a person who knowingly does an act which circumvents a technological measure applied to a copyright work.

services for commercial purpose.²⁹ In this regard, the Customs and Excise Department (“C&ED”) smashed a syndicate in June 2014 which was found to have uploaded copyright contents from paid TV channels to overseas servers for Internet transmission to set-top boxes sold to local consumers (the “Maige Box case”). Three offenders were convicted of the offences of providing circumvention device or service under the CO and the common law offence of conspiracy to defraud and received heavy custodial sentences.

5.6 The CO also provides remedy to a party who charges for reception of programmes included in a broadcasting or cable programme service or sends encrypted transmissions against any person who makes or deals in any apparatus or device to enable others to receive the programmes or other transmissions when they are not entitled to do so.³⁰ In addition, as and when the communication right contained in the legislative proposals of the 2014 Bill is incorporated into our statutory framework, it will put beyond doubt that all forms of unauthorised electronic transmission (including streaming) of copyright works to the public is prohibited. Coupled with the proposed elaboration of the meaning of “authorisation” of copyright infringement,³¹ certain illicit activities involving ISDs will be subject to civil and/or criminal liabilities of copyright infringements under the CO as applicable.

5.7 On the enforcement front, C&ED spares no effort in protecting the legitimate interest of copyright owners, and closely collaborates with the law enforcement agencies outside Hong Kong on intelligence exchange, joint enforcement operations, experience sharing and capacity building. The Government has also been maintaining close collaboration with network service providers, striving to remove infringing messages, links or users in confirmed infringing cases; and working in alliance with online platform operators and copyright owners to monitor infringing activities on the Internet and curb online piracy. For instance, the Government is supportive of the Hong Kong Infringing Website List (“HK-IWL”) Scheme, an industry-led best practice put in place in

²⁹ Sections 273B and 273C of the CO provide that any person who carries out any of the following activities may be subject to civil and criminal liabilities: (a) making circumvention devices for sale or hire; (b) importing or exporting circumvention devices for sale or hire; (c) dealing in circumvention devices (including selling, letting, exhibiting in public or distributing in the course of trade or business); and (d) providing a commercial circumvention service which enables customers to circumvent technological measures used to protect copyright works.

³⁰ Section 275 of the CO.

³¹ To determine whether a certain act may amount to “authorisation” of copyright infringement, the court may take into account all the circumstances of the case and, in particular – (a) the extent of that person’s power (if any) to control or prevent the infringement; (b) the nature of the relationship (if any) between that person and that other person; and (c) whether that person has taken any reasonable steps to limit or stop the infringement (Clause 9(4) of the 2014 Bill).

December 2016 and maintained by the Hong Kong Creative Industries Association. The HK-IWL is an online database which keeps track of websites identified to be providing infringing materials.

5.8 During the deliberation of the 2014 Bill at the LegCo Bills Committee, some copyright owners suggested that the Government should impose liability on manufacturers and dealers of ISDs. The Government considered that the 2014 Bill was a balanced package that had struck a fair balance between different interests, but acknowledged copyright owners' concerns about online piracy. The Government agreed at the time to consider the matter in a future copyright review.

Arguments Relating to Introducing Specific Provisions in Copyright Law to Combat ISDs

5.9 Arguments for not introducing specific provisions in copyright law to combat ISDs include –

(a) *No genuine need*

As demonstrated in the Maige Box case, the existing legal regime has been used successfully to deal with ISDs. After the introduction of communication right for copyright owners and the elaboration of the meaning of “authorisation” of copyright infringement as put forth in the legislative proposals of the 2014 Bill, certain illicit activities involving ISDs will be subject to civil and/or criminal liabilities of copyright infringements. Copyright owners will be able to take actions against unauthorised communication of copyright works (e.g. through streaming or other electronic means) to the public more effectively. It may not be necessary or proportionate to create specific and additional liabilities for ISDs.

(b) *Risk of banning legitimate use of neutral devices*

Set-top boxes and Apps take many forms nowadays. Neutral by nature, they are applied widely to serve legitimate purposes for accessing authorised copyright contents from TVs, smartphones, tablets and computers, and are an indispensable part of the online copyright ecosystem. It is extremely difficult to provide precise legal definitions in the legislation to effectively combat infringements involving ISDs while not prohibiting the legitimate use of set-top boxes or other neutral devices at the same time.

- (c) *No internationally consistent approach and uncertainty about effectiveness of specific provisions*

As elaborated in paragraphs 5.2 to 5.3 above, most overseas jurisdictions do not have specific provisions concerning ISDs in their copyright legislation, and Singapore is the only common law jurisdiction that has enacted ISD specific provisions. The effectiveness of these provisions has yet to be observed.

5.10 Arguments for introducing specific provisions in copyright law to combat ISDs include –

- (a) *Provide legal certainty*

Specific provisions may define the nature, scope and extent of liabilities of parties engaged in infringing acts relating to ISDs, for better transparency and enhancing awareness for traders and the general public.

- (b) *Facilitate enforcement*

Specific provisions may facilitate day-to-day enforcement efforts in reducing online copyright infringements involving ISDs.

5.11 We are of the view that the CO already contains various provisions to deal with online copyright infringement activities that could be applied to combat ISDs. Our tools against online infringements will be further enhanced when the communication right contained in the 2014 Bill is incorporated into our statutory framework. Most overseas jurisdictions do not have specific provisions concerning ISDs in their copyright legislation, and so far, Singapore is the only common law jurisdiction that has enacted ISD specific provisions and the effectiveness of such statutory provisions has yet to be observed. Taking into account the above, it is the Government's position not to introduce specific provisions in the copyright law to combat ISDs.

Question

5.12 Against the above analysis, we would like to invite views on the following issue:

- Hong Kong should not introduce specific provisions to the CO to govern devices used for accessing unauthorised contents on the Internet, including set-top boxes and Apps.

Chapter 6 Judicial Site Blocking

6.1 Judicial site or website blocking is a judicial process through which copyright owners may apply to the court for an order of injunction, requiring OSPs to take steps³² to prevent or disable their local subscribers or users from accessing websites or online locations, usually operated outside the territory,³³ that are identified to have dedicated to distributing infringing contents of copyright works (e.g. music, movies and games), or facilitating such distribution (e.g. file sharing, storage and streaming) without authorisation. The aim of a site blocking order is to stop copyright infringement activities occurring on or via a particular online platform. Depending on the law of the relevant jurisdiction, site blocking orders or injunctions may be granted by the courts in the exercise of their inherent jurisdiction or pursuant to statutory provisions whether in general or dedicated to infringements of IP rights.

Overseas Practices

6.2 In recent years, site blocking orders have been granted by the courts on the application of copyright owners in many jurisdictions. The legal basis for granting such orders varies from one jurisdiction to another. Australia, Singapore and the UK have enacted specific express provisions in their copyright legislation to empower courts to grant site blocking orders.³⁴ Some EU countries also have copyright-specific provisions, while others rely on more general provisions in granting blocking orders. Whichever approach is adopted, overseas courts have developed case jurisprudence specific to their legal regimes, such as a range of factors to be taken into account when considering blocking applications.³⁵ Apart

³² Three mostly used techniques for executing site blocking injunctions are (i) Domain Name System (DNS) blocking; (ii) Internet Protocol (IP) address blocking; and (iii) Uniform Resource Locator (URL) filtering.

³³ If the infringing online location is inside the territory, other remedies may be more direct and effective, such as law enforcement against criminal piracy.

³⁴ In Australia, when applying for an injunction to block access to an infringing online location, a copyright owner may also request the court to order an online search engine provider to take reasonable steps not to provide search results that refer to the same online location by, for example, de-indexing or stop indexing such search results.

³⁵ For example, the factors to be weighed by the courts in the UK include necessity, effectiveness, dissuasiveness, complexity and cost, avoidance of barriers to legitimate use, fairness and balance between fundamental rights, proportionality and safeguards against abuse.

from static blocking orders, some overseas courts have also granted orders with terms tailored to suit the circumstances of the cases.³⁶

6.3 While there is no express statutory powers in Canada’s copyright legislation, the Canadian Federal Court has, based on its existing equitable jurisdiction and power to grant injunctions,³⁷ issued a site blocking order recently.³⁸ Similarly in the UK, where there is no specific provision in the trade mark legislation empowering the courts to grant site blocking orders corresponding to that in the copyright law, a website blocking order was granted in a trade mark infringement case mainly based on a provision pertaining to the grant of injunctions by the court in general,³⁹ which is broadly similar to the provision in Hong Kong’s High Court Ordinance (Cap. 4) (“HCO”).⁴⁰

6.4 Some overseas jurisdictions have conducted reviews of the introduction of specific provisions to enable site blocking injunctions. For example, in New Zealand and Canada, the issue has been covered in recent legislative review and public consultation exercises respectively in November 2018 and April 2021. The respective governments noted that there were public concerns about limits on users’ access to information and freedom of expression and so far, no legislative proposals have been made.

6.5 In the US, the copyright legislation generally empowers the court to grant injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright and this might include ordering an OSP to block access to online locations outside the US in specific circumstances under the safe harbour

³⁶ Flexible “dynamic” blocking injunctions have been granted in Australia, Singapore and the UK to deal with continued occurrence of repetitive infringements through new or additional pathways (i.e. changed or shifted domain names, IP addresses or URLs) providing access to the *same* infringing website, without the need to return to court on each occurrence. Furthermore, “live” blocking orders have been made to cope with the fast evolving digital world by blocking primarily servers that facilitate access to unauthorised live streaming of broadcasts of popular sports events and matches.

³⁷ Sections 4 and 44 of the Canadian Federal Courts Act, RSC, 1985, c. F-7 and section 34(1) of the Canadian Copyright Act, RSC, 1985, c. C-42.

³⁸ In May 2021, in *Teksavvy Solutions Inc. v. Bell Media Inc.* 2021 FCA 100, the Canadian Federal Court of Appeal affirmed the first website blocking order granted in November 2019 by the Canadian Federal Court.

³⁹ Section 37(1) of the UK’s Senior Courts Act 1981 was relied on in obtaining a website blocking order in *Cartier International AG v. British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch); [2016] EWCA Civ 658 and [2018] UKSC 28.

⁴⁰ Section 21L of the HCO.

regime.⁴¹ In 2011, a legislative bill was proposed to introduce an extensive site blocking mechanism to stop online piracy. The matter generated heated debates and grave concerns from the Internet and technology industry over Internet censorship, uncertain liabilities and the erosion of freedom of expression. The US government dropped the bill at the end.

Local Discussion

6.6 Injunction is an equitable relief and one of the remedies available to copyright owners in an action for infringement of their rights.⁴² Section 21L of the HCO specifically provides that the Court of First Instance may by order grant an injunction in all cases in which it appears to the court to be just or convenient to do so. Injunctions may be permanent or temporary, and may be granted unconditionally or subject to such terms as the court thinks just. As such, depending on the facts of the case, where there is evidence of large scale infringing activities originating from identified online locations, the access to which is enabled by certain local OSPs, copyright owners may consider seeking an appropriate injunction from the court, within its jurisdiction, by ordering the OSPs to block the access thus preventing such infringing activities. There are currently no copyright-specific statutory provisions for site blocking injunctions in Hong Kong.

6.7 During the deliberation of the 2014 Bill at the LegCo Bills Committee, some copyright owners suggested that the Government should introduce judicial site blocking orders to prevent users from accessing infringing online contents. The Government considered that the proposal involved complicated technical and legal issues which would require more careful consideration, but acknowledged copyright owners' concerns about online piracy. The Government agreed at the time to consider the matter in a future copyright review.

6.8 Meanwhile, one of the main focuses of the 2014 Bill is that the Government would take every possible step to combat online piracy. Apart from introducing the communication right and associated criminal liability, the 2014 Bill also proposes to introduce a safe harbour regime to provide incentives for OSPs to cooperate with copyright owners to combat online piracy, and to provide sufficient protection for their actions. In particular, under the "Notice and Takedown" system of the proposed safe harbour regime, OSPs that provide storage on their service platforms would be required to remove infringing materials or disable access to the materials or activities residing on their service platforms after being notified by copyright owners.

⁴¹ Sections 502 and 512(j) of Title 17 of the United States Code.

⁴² Section 107(2) of the CO.

Arguments Relating to Introducing Copyright-specific Statutory Provisions for Site Blocking Injunctions

6.9 Arguments for not introducing copyright-specific statutory provisions include –

(a) *Lack of evidence*

The existing relief under the HCO is a ready tool for seeking injunctions against online copyright infringements. No evidence has been adduced by the trade that the current injunctive relief mechanism is inadequate for the purpose. On the contrary, overseas experience as elaborated in paragraph 6.3 above shows that blocking orders against OSPs granted under the court's general powers to order on injunctive relief could equally serve the purpose. It is questionable whether a copyright-specific statutory mechanism would bring any real added benefits.

(b) *Costs of compliance with judicial site blocking order*

Concerns have arisen in overseas jurisdictions over the costs of OSPs in complying with site blocking orders.⁴³ Courts are often required to deal with the compliance cost on a case by case basis even in jurisdictions with copyright-specific provisions for site blocking.

(c) *Concern about freedom of access to information*

There are many debates and controversies on the potential impact of site blocking injunctions. With the injunctive remedy currently available under the HCO, adding an extra layer of remedy specifically for copyright infringements would generate concerns over potential abuse which might result in adverse impact on freedom of access to information.

6.10 Arguments for introducing copyright-specific statutory provisions include –

(a) *Provide certainty and expediency to copyright owners*

Site blocking provisions with defined statutory procedures and safeguards dedicated to deal with copyright infringements (e.g. threshold

⁴³ When OSPs are put to shoulder the heavy burden of compliance with site blocking orders, it is argued that such compliance cost should be borne by copyright owners as the protection of private IP rights is ordinarily and naturally a cost of their business, especially in cases where the OSPs are “mere conduits”.

requirements, notice process, etc.) would give copyright owners a more direct avenue to seek injunctions to require OSPs to block access to identified online locations with infringing contents of copyright works or otherwise involved in copyright infringement activities. Such a mechanism may enhance expediency in dealing with online infringements.

(b) *Provide clarity to OSPs*

Dedicated provisions could spell out the nature and extent of an OSP's responsibilities, providing clarity to OSPs on the appropriate action to be taken where they are named as parties to applications for injunctions initiated by copyright owners.

6.11 We consider that the HCO already provides a ready tool for seeking injunctions against online copyright infringements. In the absence of evidence that the relief currently available could not serve the purpose of empowering the courts to grant site blocking injunctions, and to avoid any public concerns over potential abuse which might result in adverse impact on freedom of access to information, it is the Government's position not to introduce a copyright-specific judicial site blocking mechanism.

Question

6.12 Against the above analysis, we would like to invite views on the following issue:

- Hong Kong should not introduce a copyright-specific judicial site blocking mechanism to the CO.

Chapter 7 Possible New Issues for Further Studies

7.1 This consultation exercise is just a new beginning reactivating a long overdue legislative amendment exercise seeking to enhance copyright protection. It is by no means an end to a continuous journey to update our copyright regime for the further development of Hong Kong into a regional IP trading centre. We fully recognise that more work needs to be done in the future in addressing various new and emerging copyright issues arising from technological development, which may include, but are not limited to the following –

(a) *Extension of copyright term of protection*

Copyright protection arises automatically at the time of creation of a work. At the international level, the minimum requirement for the term of copyright protection is the life of the author plus 50 years after his or her death. In recent years, certain overseas jurisdictions including Australia, Japan, Singapore, South Korea, the UK and the US have extended the term of protection under their copyright regimes to 70 years after the life of the author. Canada has also committed to adopting a similar extension by end 2022. The regimes in the Mainland, Malaysia, New Zealand and Thailand are, on the other hand, still operating on the 50-year norm.

(b) *Introduction of specific copyright exceptions for text and data mining*

Text and data mining involves the use of automated techniques to analyse text, data and other content (all legally accessible) to generate insights and information that may not have been possible to obtain through manual effort. Some overseas jurisdictions including the EU, Japan, Singapore and the UK have introduced text and data mining exceptions in their copyright laws to facilitate research and innovation. There have also been discussions of the introduction of text and data mining exceptions in Australia, Canada and New Zealand.

(c) *AI and copyright*

AI generally refers to a discipline of computer science aiming at developing machines and systems that can carry out tasks considered to require human intelligence. Issues related to AI and copyright, such as whether AI-created work is protectable by copyright; who the copyright owner should be; who should be held liable for copyright infringements in relation to AI-created works, etc. have generated considerable discussions and debates at the international level. That said, we are not aware of any overseas jurisdiction that has specifically provided for AI-

related matters in their copyright laws to date.

7.2 As a starting point of our on-going effort to maintain a robust and competitive copyright regime, the Government considers it important to first address the most imminent and fundamental issues left off from the unfinished business of the 2014 Bill. We will consider carefully the views collected in the consultation exercise, with a view to preparing a new amendment Bill for introduction into LegCo. This will also lay a solid foundation for further discussion with different stakeholders on other copyright issues in future. Looking ahead, the Government will continue our efforts of regularly reviewing our copyright law to address new and emerging copyright issues such as those listed above, taking into account the latest technological advancement.

Chapter 8 Invitation of Views

8.1 You are invited to provide your views on the issues set out in this consultation document on or before 23 February 2022 by post, facsimile or email

—

Mail: Division 3
Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
23rd Floor, West Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

Fax: 2147 3065

Email: co_consultation@cedb.gov.hk

8.2 An electronic copy of this consultation document is available on the websites of the Commerce and Economic Development Bureau (CEDB) (www.cedb.gov.hk/citb) and the Intellectual Property Department (IPD) (www.ipd.gov.hk).

8.3 Submissions received will be treated as public information, which may be reproduced and published in whole or in part and in any form for the purposes of this consultation exercise and any directly related purposes without seeking permission of or providing acknowledgement to the respondents.

8.4 It is voluntary for any respondent to supply his or her personal data upon providing comments. The names and background information of the respondents may be posted on the website of CEDB and IPD, referred to in other documents published for the same purposes, or transferred to other relevant bodies for the same purposes. If you do not wish your name and/or your background information to be disclosed, please state so when making your submission. For access to or correction of personal data contained in your submission, please write to CEDB via the above means.

Public Consultation on Updating Hong Kong's Copyright Regime
Summary of Written Views Received

(I) Using the 2014 Bill as the Basis of Legislation		
	Responding Organisations / Groups / Individuals	Summary of Views
I.1	Copyright owners / organisations / groups	<ul style="list-style-type: none">• The vast majority of copyright owners / organisations / groups agree that there is an imminent need for Hong Kong to update our copyright regime and generally support using the key legislative proposals in the 2014 Bill as the basis for amending the CO. They call for the early passage of the amendment bill to keep Hong Kong's copyright regime abreast with times and in line with international standards. That said, some copyright owners / organisations / groups have different views on individual provisions of the 2014 Bill. For example, some suggest that Hong Kong's copyright regime should provide more stringent protection for copyright owners in the light of the latest technological developments and relating copyright infringements. <p><i>Communication right and criminal liability</i></p> <ul style="list-style-type: none">• The majority of copyright owners / organisations / groups welcome the introduction of the new technology-neutral exclusive communication right and the corresponding criminal liability to address technological developments and protect the rights of copyright owners, but some respondents consider that the proposed provisions on communication right are unable to provide adequate protection for copyright owners. In particular, many respondents consider that the scope of coverage of the proposed new section 28A(4) to (6) of the 2014 Bill is too broad, and will render the amendment bill unable to effectively combat

(I) Using the 2014 Bill as the Basis of Legislation		
		<p>infringing activities, including those involving unauthorised retransmission, ISDs and related software applications (“Apps”), as well as websites which aggregate links to infringing materials hosted on third party websites (“link aggregate websites”), etc. They therefore suggest that the Government should delete or amend the relevant provisions. Among these respondents, some consider that while some online platform operators do not determine the content of the communication, they generate enormous profits by operating platforms that allow subscribers to upload unauthorised contents. Such acts should be regarded as “communication to the public”, and these online platform operators should obtain licences from copyright owners. Furthermore, any person who provides devices or software specifically used for communicating infringing contents, or knowingly creates link aggregate websites should not be exonerated from liability regardless of whether that person could determine the content of the communication. A copyright owner / organisation / group even expresses that if its proposal of deleting the new section 28A(4) to (6) is not accepted, it will not support this copyright amendment exercise. Individual copyright owners / organisations / groups also suggest that the new section 28A should be amended to expressly provide that electronic communication includes live streaming and transmission of live content, and to stipulate that a communication may take place where the communicator is situated or where the target audience is located.</p> <ul style="list-style-type: none"> • A copyright owner / organisation / group considers that the factors for determining “authorisation” introduced in the proposed section 22(2A) is too broad. This may exclude digital service providers from certain copyright infringement liability that they should be held responsible and also limit the ability of copyright owners to enforce their rights. The respondent suggests that the Government should make reference to the European Union (“EU”)’s approach and stipulate in the law that online platform operators allowing subscribers to upload copyright protected works is an act of communication / making such works available to the public.

(I) Using the 2014 Bill as the Basis of Legislation		
		<ul style="list-style-type: none"> Some copyright owners / organisations / groups express their views on the issue of criminal liability. The respondents suggest that the thresholds of criminal liability for the existing “prejudicial distribution offence” and the proposed new “prejudicial communication offence” should be explicitly set out; the criminal sanctions should be clearly clarified so that systematic, repetitive or large-scale infringements by individuals are equally punishable as infringements by commercial entities; acts of uploading and distributing infringing hyperlinks should attract criminal liability; the maximum custodial sentence for the offence of unauthorised communication of copyright works should be increased; and wording used in the proposed provisions on criminal liability should be amended. <p><i>Safe harbour and relevant Code of Practice</i></p> <ul style="list-style-type: none"> Some copyright owners / organisations / groups consider that the proposed safe harbour regime and relevant Code of Practice are unable to keep up with the latest technological developments and should be re-examined and updated as appropriate (e.g. with reference to the EU’s latest approach) to ensure that they are kept abreast of the latest operating modes of OSPs in the current digital environment. Some copyright owners / organisations / groups consider that the scope of the proposed safe harbour is too broad, and suggest that it should only apply to OSPs which are neutral and merely providing technological services and those which are passive intermediaries. It should not provide protection to OSPs which are aware of and facilitate the conduct of infringing activities, or OSPs which even actively or proactively communicate infringing contents. Individual copyright owners / organisations / groups propose that the Government should

(I) Using the 2014 Bill as the Basis of Legislation		
		<p>stipulate that OSPs must meet certain additional conditions in order to benefit from protection under the safe harbour scheme, for example, specify that infringing contents or hyperlinks must be removed within a specified short period of time; adopt a “Notice and Staydown” system and include a “disabling access” requirement for infringing content to replace the “Notice and Takedown” system; stipulate that OSPs should proactively take measures to prevent uploading of infringing content; and set out clear liability provisions or penalties against OSPs which fail to observe the conditions of the safe harbour scheme.</p> <ul style="list-style-type: none"> • Individual copyright owners / organisations / groups consider that a voluntary Code of Practice will result in non-compliance by some OSPs. They also consider it necessary to clearly explain the actual and potential legal issues in the implementation of the CO and Code of Practice. <p><i>Copyright exceptions</i></p> <ul style="list-style-type: none"> • Different copyright owners / organisations / groups respectively express various views on certain revised or new copyright exceptions for different purposes proposed in the 2014 Bill. In general, most respondents consider that certain copyright exceptions should be tightened, or that clear scopes or conditions of use should be prescribed. It should also be ensured that the relevant exceptions meet the “three-step test” stipulated under the Berne Convention for the Protection of Literary and Artistic Works. An individual respondent considers that the current copyright exception framework is already sufficiently broad and comprehensive, and there is no need to further expand the existing exceptions. • While some copyright owners / organisations / groups support the new copyright exceptions in giving greater flexibility to the education sector, they consider that the copyright exceptions provided for educational purposes should only apply to non-profit-making organisations or

(I) Using the 2014 Bill as the Basis of Legislation		
		<p>be for “non-commercial purposes”, and should not be applicable to privately-run organisations, educational institutions or tutorial centres. They suggest that the Government should prescribe the conditions of use for the relevant exceptions.</p> <ul style="list-style-type: none"> • A copyright owner / organisation / group considers that the use of copyright exceptions in the digital environment by the education sector, libraries, museums, archives and non-governmental organisations (“NGOs”) should be limited to certain percentages of usage, and applications should be submitted to inform copyright owners of their intention of use. On the other hand, a respondent expresses that the permissible percentage of use of books should not be included in the education-related copyright exceptions, as this would make the conditions less flexible and affect the current cooperative arrangement between the textbook industry and the Education Bureau. • A copyright owner / organisation / group suggests that the exception for lending books should be clarified and should not include e-books or electronic versions of copyright protected works. • Regarding the proposed new exception for media shifting of sound recordings, a copyright owner / organisation / group considers that the relevant exception should not be introduced; a respondent considers that the relevant exception should not apply to sound recordings of literary works; and a respondent suggests that the Government should introduce a levy system for media shifting of sound recordings. • Regarding the proposed new exception for parody, satire, caricature and pastiche, a copyright owner / organisation / group considers that the relevant exception is not necessary at all; some respondents suggest that the exception should only exempt fair dealing of an original work for the purpose of parody. Separately, some respondents consider that the relevant exception

(I) Using the 2014 Bill as the Basis of Legislation		
		<p>should exclude any commercial use, and the fact that the relevant exception may degrade the original copyright work and affect the moral rights of the author should also be taken into account.</p> <ul style="list-style-type: none"> • A few copyright owners / organisations / groups disagree with the introduction of the proposed new exception for commenting on current events, arguing that this is different from international practices. Separately, a respondent suggests prescribing the scope and conditions of use of the relevant exception. • A few copyright owners / organisations / groups consider that the scope of the proposed new exception for quotation is too broad, and propose that the exception should only apply to literary works. <p><i>Additional damages in civil cases</i></p> <ul style="list-style-type: none"> • Some copyright owners / organisations / groups agree with the introduction of the additional factors for the court to consider when assessing damages, and some respondents also propose to amend the relevant provisions to provide better protection for copyright owners.
I.2	IP practitioners' groups / OSPs / other professional bodies / chambers of commerce / NGOs / statutory bodies / representative offices of foreign states in Hong Kong	<ul style="list-style-type: none"> • The majority of IP practitioners' groups, other professional bodies and chambers of commerce agree that there is a need for Hong Kong to update its copyright regime as soon as possible and support using the key legislative proposals in the 2014 Bill as the basis for amending the CO to first address the most imminent and fundamental issues, on which broad consensus has already been reached. The respondents generally suggest the Government to update the copyright regime as soon as possible in light of the rapid advancements in technology, so as to ensure that Hong Kong's copyright regime is robust and competitive,

(I) Using the 2014 Bill as the Basis of Legislation		
		<p>and keeps abreast with times and international norms. Some respondents consider that the Government should continue to update the copyright regime in future so as to address emerging copyright issues.</p> <p><i>Communication right and criminal liability</i></p> <ul style="list-style-type: none"> • An IP practitioners' group and a statutory body express their support for the introduction of a technology-neutral communication right and the relevant criminal liability to address copyright issues arising from new technology such as streaming, and to bring Hong Kong's regime in line with other jurisdictions. • A chamber of commerce and a representative office of foreign states in Hong Kong propose that guidance should be provided for the proposed new section 28A(5) and (6) and the concept of "to such an extent as to affect prejudicially the copyright owner", in order to further clarify the relevant legislative intent and threshold for criminal liability. Separately, an NGO expresses concerns about members of the public having to bear criminal liability for using copyright works in creations for self-entertainment and non-profit-making purposes, because it would be difficult for creators to estimate and control the extent of dissemination of works on the Internet and their potential market value. • A statutory body considers that "orphan works" must be taken into account in the framing of provisions of criminal liability, and proposes that the exemption from the criminal liability of possessing an infringing copy of a copyright work should be aligned such that it is applicable to museums owned by statutory bodies that are exempt from taxation.

(I) Using the 2014 Bill as the Basis of Legislation		
		<p><i>Safe harbour and relevant Code of Practice</i></p> <ul style="list-style-type: none"> • Some OSPs, chambers of commerce and IP practitioners' groups agree to the introduction of the safe harbour regime, considering that it can help combat online infringing activities, as well as provide reasonable protection to OSPs. However, an IP practitioners' group considers that the Code of Practice should be reviewed in accordance with overseas practice and the interests of the relevant industries. • Some OSPs express concerns about the details and implementation of the relevant safe harbour provisions and Code of Practice, considering that severe impacts would be brought on their operation. They raise a number of suggestions with a view to ensuring that the safe harbour regime would not impose unreasonable responsibilities on OSPs, which include, for example, the practical difficulty in implementing the "Notice and Notice" system should be taken into consideration; some of the applicable conditions of the proposed safe harbour provisions are unduly strict; OSPs should be compensated for the costs borne when implementing the relevant procedures, and an administrative charge should be imposed by OSPs on the relevant copyright owners / complainants according to the "user pays" principle; and OSPs should be excluded from criminal liability and sanctions, etc. • Some OSPs are concerned that the takedown mechanism under the safe harbour scheme may be abused by copyright owners. They consider that the current practice, where copyright owners must submit an infringement claim to the court / law enforcement agency in order to obtain the particulars of the alleged infringer, should be adopted. An individual professional body suggests that the legislation should stipulate that an OSP should disclose the personal particulars of any alleged infringer to the copyright owner only when a relevant court order has been received.

(I) Using the 2014 Bill as the Basis of Legislation		
		<p><i>Copyright exceptions</i></p> <ul style="list-style-type: none"> • An IP practitioners’ group, a professional body and a statutory body welcome the various proposed new copyright exceptions. • A professional body from the education sector considers that the new copyright exceptions for educational purposes can provide flexibility to the education sector for a wider scope of non-profit-making educational activities (e.g. virtual learning, preservation of materials and other daily operational work), and proposes to expand the scope of the media shifting exception to cover other media archives for educational and academic use, so as to facilitate the relevant digital preservation by libraries, museums and archives. The respondent also proposes to introduce a new copyright exception for educational establishments subsidised by the Government, the University Grants Committee and the Research Grants Committee for making copies of copyright work for the purposes of academic quality assurance, audit and assessment. • A statutory body proposes to introduce a new exception to use “orphan works” for non-commercial activities and new copyright exceptions for activities conducted by museums. • An NGO proposes to prescribe definitions for the new exceptions such as those for “parody” and “satire”. • An NGO and a professional body consider that the scope of application of the proposed exceptions for quotation and commenting on current events should be more clearly defined.

(I) Using the 2014 Bill as the Basis of Legislation		
		<ul style="list-style-type: none"> An NGO and a professional body consider that copyright exceptions should be provided for non-commercial “secondary creation”, and suggest that the Government should amend the proposed exception for parody to address the transformative use of other copyright works, or to adopt the practice in Canada to provide an exception for user generated content. <p><i>Additional damages in civil cases</i></p> <ul style="list-style-type: none"> A professional body opposes the introduction of additional damages for copyright infringement cases as it would deviate from the general principles in civil cases where relevant damages are compensatory in nature and the claiming party must prove the relevant wrongdoing and the resulting loss. On the other hand, an IP practitioners’ group supports the introduction of additional factors for assessing additional damages, and proposes to introduce statutory damages.
I.3	Copyright users / other individuals	<ul style="list-style-type: none"> Some copyright users and individuals support updating the copyright regime, but there are also some individual respondents who consider the amendment of the CO unnecessary or oppose the exercise. <p><i>Safe harbour and relevant Code of Practice</i></p> <ul style="list-style-type: none"> An individual disagrees with the practice where OSPs only need to bear limited liability simply by removing infringing materials upon receiving notice of infringing activities under the safe harbour scheme. The respondent considers that since OSPs earn advertising income from their subscribers’ acts, they should have the responsibility to patrol subscribers’ activities. The respondent also suggests that the Government should set up a free copyright register / database for OSPs’ reference.

(I) Using the 2014 Bill as the Basis of Legislation		
		<ul style="list-style-type: none"> An individual opposes the introduction of the safe harbour scheme, and is concerned that the takedown mechanism may be abused, causing injustice to the alleged infringing subscribers and resulting in a significant amount of false accusations. <p><i>Copyright exceptions</i></p> <ul style="list-style-type: none"> A few copyright users and individuals propose that new exceptions should be introduced to cover earnest imitation of copyright works or user generated content in order to protect creators of “secondary creation”. A respondent recommends that exceptions be applied to charitable, academic and non-profit-making busking performances, and to quotation of copyright works by busking performers if it is accompanied by an acknowledgement, so as to promote the development of music, art, culture, as well as tourism. The respondent indicates that 1 117 online signatures have been obtained in support of the relevant suggestions. An individual teacher recommends that new copyright exceptions on acts such as copying (except for sale) be provided for local teachers in Government or subsidised schools and that teachers should be allowed free access to past public examination papers.

(II) Exhaustive Approach to Exceptions		
	Responding Organisations / Groups / Individuals	Summary of Views
II.1	Copyright owners / organisations / groups	<ul style="list-style-type: none"> • All copyright owners / organisations / groups which have submitted written views on this issue agree with the Government's position in maintaining the exhaustive approach to exceptions to ensure legal certainty of the copyright regime and avoid unnecessary litigations. They also consider that such approach is consistent with the approaches adopted by many other jurisdictions and complies with the "three-step test" set out in the Berne Convention for the Protection of Literary and Artistic Works and the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights. • Some copyright owners / organisations / groups disagree with the adoption of an open-ended "fair use" approach as such approach would require the support of abundant case law, but relevant case law is unavailable in Hong Kong and it would be necessary to introduce case law from other jurisdictions. They consider that not only may such approach be abused by copyright users, but it may also lead to many unnecessary litigations.
II.2	IP practitioners' groups / OSPs / other professional bodies / chambers of commerce / political think tanks / representative offices of foreign states in Hong Kong / statutory bodies	<ul style="list-style-type: none"> • Most IP practitioners' groups, chambers of commerce, a political think tank, a representative office of foreign states in Hong Kong and a statutory body which have submitted written views on this issue agree with the Government's position in maintaining the exhaustive approach to exceptions to ensure legal certainty of the copyright regime and to strike a reasonable balance between the rights and interests of copyright owners and users. They consider that such approach is also consistent with the approaches of many other jurisdictions and complies with Hong Kong's international obligations. Some respondents consider that the Government should closely monitor international trends and review the copyright exceptions regularly, as well as adopt a simplified process in amending the relevant provisions, such as by stipulating and amending the relevant exception provisions by way of

(II) Exhaustive Approach to Exceptions		
		<p>subsidiary legislation.</p> <ul style="list-style-type: none"> • A professional body and a chamber of commerce consider that both the exhaustive and non-exhaustive approaches to exceptions have their own merits. The former can provide sufficient certainty for all stakeholders, while the latter may be more conducive to creativity and innovations, but there are concerns that the four factors under the fair dealing exceptions are not clear and may hinder users from using copyright works. • An OSP and a professional body suggest that the Government should adopt the non-exhaustive approach to exceptions, for example, by making reference to the “fair use” exception adopted by Singapore and the United States (“US”). They consider that the adoption of the “fair use” approach would allow the court to flexibly apply and decide whether a certain use falls within the scope of the exception, and provide the most flexible legal framework for non-commercial “transformative use”, which is beneficial to both creators and society as a whole.
II.3	Copyright users / other individuals	<ul style="list-style-type: none"> • Only a handful of copyright users / other individuals express views on this issue. A respondent agrees with the Government’s position in maintaining the exhaustive approach to exceptions as it provides clarity to all parties as to their rights and responsibilities and avoids unnecessary litigations. There are also respondents who oppose the Government’s position and consider that the principle of “fair use” should be introduced with reference to the US’ approach, whereby copyright exceptions can be enjoyed as long as the use of the copyright works is “fair”.

(III) Contract Override		
	Responding Organisations / Groups / Individuals	Summary of Views
III.1	Copyright owners / organisations / groups	<ul style="list-style-type: none"> All copyright owners / organisations / groups which have submitted written views on this issue agree with the Government's position and consider that freedom of contract should be respected. Furthermore, given that the existing legislation allowing contract override has shown to be effective and there is no empirical evidence showing that copyright owners have used restrictive contractual provisions extensively to the detriment of users, they consider that provisions to restrict the use of contracts to limit the application of statutory copyright exceptions should not be introduced to the CO.
III.2	IP practitioners' groups / OSPs / other professional bodies / chambers of commerce / NGOs / political think tanks	<ul style="list-style-type: none"> Most IP practitioners' groups, other professional bodies, chambers of commerce, OSPs and NGOs which have submitted written views on this issue agree with the Government's position and consider that safeguarding freedom of contract is very important to business operations. Furthermore, given that the existing legislation has already offered sufficient protection for the rights of users and provided flexibility to parties, and there is no evidence showing that contract override harms the interests of users, they consider that provisions to restrict the use of contracts to limit the application of statutory copyright exceptions should not be introduced to the CO. An IP practitioners' group expresses that the terms of any contract overriding exceptions should be fair and reasonable, but considers that this should be governed by the law of contract. The respondent suggests conducting further review on this issue by making reference to international developments (including the EU and the United Kingdom ("UK")). A political think tank considers that the use of contracts to limit statutory copyright exceptions should be prohibited, as statutory provisions should prevail all contractual terms. A

(III) Contract Override		
		professional body considers that there is a need to review whether individual exceptions (e.g. those relating to human rights) should be overridden by contract, and proposes some consideration factors, such as, whether the parties to the contract have equal bargaining power which may lead to the freedom of speech being eroded.
III.3	Copyright users / other individuals	<ul style="list-style-type: none"> • Only a handful of copyright users / other individuals express views on this issue. A respondent agrees with the Government's position, while there are respondents who consider that the CO should be amended to prohibit contracts from limiting statutory copyright exceptions so as to ensure that exceptions granted by law would not be invalidated by contractual terms. • A respondent suggests amending the CO to prevent the assignment of the copyright in works created by employees outside the scope of employment from employees to employers in employment contracts.

(IV) Illicit Streaming Devices		
	Responding Organisations / Groups / Individuals	Summary of Views
IV.1	Copyright owners / organisations / groups	<ul style="list-style-type: none"> Many copyright owners / organisations / groups suggest the Government to introduce specific provisions to the CO to regulate ISDs (including set-top boxes and Apps) used to access unauthorised contents on the Internet in order to combat online infringing activities. They express that the public sale of ISDs is still very common in Hong Kong, and the existing legal framework is no longer able to deal with the latest technological developments and the changes in the online ecosystem of ISDs. Even with the introduction of the proposed communication right, they consider that this still would not be able to deal with all infringing activities involving ISDs, and hence, there is a need to introduce specific provisions to combat ISDs. Some copyright owners / organisations / groups propose that the relevant specific provisions should cover different parties involved in the chain of operation of ISDs, including imposing criminal liabilities on manufacturers, distributors and sellers. The legal provisions should also clearly define ISDs to avoid affecting the legitimate use of neutral devices. Some respondents suggest that reference be made to similar provisions in Singapore, Malaysia and Taiwan. A copyright owner / organisation / group opines that there is no simple way to define the legitimacy of streaming devices. Even with the introduction of specific provisions, infringers could still use technical means to circumvent regulations. Therefore, the respondent considers that the Government should study how to address the relevant issue together with the industry. A copyright owner / organisation / group does not object to the Government's position of not introducing specific provisions in the copyright law to combat ISDs, but is doubtful as to whether the updated CO would be able to deal with the problem of ISDs. The respondent

(IV) Illicit Streaming Devices		
		considers that relevant specific provisions should be introduced to the CO if the new communication right cannot deal with ISDs effectively.
IV.2	IP practitioners' groups / OSPs / other professional bodies / chambers of commerce / political think tanks	<ul style="list-style-type: none"> • Most IP practitioners' groups, other professional bodies, chambers of commerce and OSPs which have submitted written views on this issue agree with the Government's position and consider that it is not necessary to introduce specific provisions to the CO at the present stage to regulate ISDs (including set-top boxes and Apps) used to access unauthorised contents on the Internet. They consider that the existing legislation and the proposed communication right would be able to deal with the problem of ISDs. There are also views that the mere provision of streaming devices such as set top boxes per se may not constitute copyright infringement and the use of such devices may not be illegal either, unless such devices can only be used for the purpose of infringing copyright. A respondent considers that Singapore's ISD specific provisions do not penalise dealing with such devices per se, and the prosecution must also prove other elements of offence. The effectiveness of such provisions remains to be seen. • A political think tank considers that the Government should introduce specific provisions to regulate streaming devices, which should cover the related streaming media, platforms, Apps, etc. An IP practitioners' group also expresses that the issue of ISDs should be kept under review, and considers that Singapore's specific provisions can be shown to facilitate enforcement and encourage the use of works from legitimate sources. • A chamber of commerce suggests that the Government should consider whether the existing legislation can deal with acts of encouraging or providing guidance on illegal uploading or accessing infringing contents (e.g. publication of the relevant information in magazines).

(IV) Illicit Streaming Devices		
IV.3	Copyright users / other individuals	<ul style="list-style-type: none"> Only a handful of copyright users / other individuals express views on this issue. A respondent agrees with the Government's position and considers that specific provisions should not be introduced to the CO to combat ISDs because the legislation may not be able to keep up with technological developments, which may hinder the free and fair dissemination of creative works. There are also respondents who consider that the act of selling ISDs has caused nuisance to the public, and that the Government should legislate on ISDs and set out the civil and criminal liabilities of the relevant act.

(V) Judicial Site Blocking		
	Responding Organisations / Groups / Individuals	Summary of Views
V.1	Copyright owners / organisations / groups	<ul style="list-style-type: none"> • Most copyright owners / organisations / groups consider that while it is possible to apply for website blocking injunction against online infringements under the existing High Court Ordinance, a copyright-specific judicial site blocking mechanism should be introduced to the CO in order to tackle online infringements (especially infringing websites operating outside the territory) more effectively and expeditiously, reduce costs and enhance legal certainty. They consider that this can also provide greater certainty on the conditions and related responsibilities under an injunction ordered by the court, and provide clearer guidelines for copyright owners and OSPs on the steps to be taken in applying for and enforcing an injunction. Some respondents suggest that the Government should make reference to the approaches adopted in similar provisions in Australia, Singapore and the UK. A respondent also points out that the copyright-specific judicial site blocking mechanism should target various intermediary platforms, including search engines, and allow the grant of dynamic blocking orders in appropriate circumstances. Furthermore, the costs for complying with an injunction should be appropriately apportioned between applicants and respondents, and that applications for injunction should be heard by a specialty court (e.g. the Copyright Tribunal). • A few copyright owners / organisations / groups agree with the Government's position, and consider it not necessary to introduce a copyright-specific judicial site blocking mechanism. • Some copyright owners / organisations / groups express that it is costly to apply for an injunction and this would impose economic burden on copyright owners. They consider that the Government should examine how to provide more assistance to copyright owners, for example, whether the Government, rather than copyright owners, could apply to the court

(V) Judicial Site Blocking		
		for an injunction. A copyright owner / organisation / group suggests making reference to the practice in some overseas jurisdictions for injunctions to be issued administratively or by a regulatory body (such as the Office of the Communications Authority), as this can dissuade consumers from using pirate services more effectively and is less costly.
V.2	IP practitioners' groups / OSPs / other professional bodies / chambers of commerce / political think tanks	<ul style="list-style-type: none"> • Most IP practitioners' groups, other professional bodies, chambers of commerce, OSPs and political think tanks which have submitted written views on this issue agree with the Government's position and consider that there is no need to introduce a copyright-specific judicial site blocking mechanism to the CO, since the general injunctive remedy under the existing legal system already enables copyright owners to apply for injunctions against online copyright infringements. A political think tank expresses that the introduction of a copyright-specific judicial site blocking mechanism may generate public concerns over freedom of access to information or freedom of speech. Separately, a professional body takes the view that the present legal system, together with the takedown mechanism under the proposed safe harbour regime, should be sufficient to offer protection at this stage, but the Government can review the relevant situation again in future. • An IP practitioners' group expresses that the issue of judicial site blocking injunctions deserves further consideration, noting that Australia, Singapore and the UK have already introduced copyright-specific judicial site blocking mechanisms. The respondent suggests making reference to the UK in addressing concerns over possible abuse of the relevant provisions.
V.3	Other individuals	<ul style="list-style-type: none"> • Some individuals agree with the Government's position and consider that there is no need to introduce a copyright-specific judicial site blocking mechanism in the CO.

(VI) Other Copyright Issues		
	Responding Organisations / Groups / Individuals	Summary of Views
VI.1	Copyright owners / organisations / groups	<p><i>Extension of copyright term of protection</i></p> <ul style="list-style-type: none"> Many copyright owners / organisations / groups consider that the copyright term of protection of different types of copyright works (some respondents specifically mention sound recordings) should be extended from the current 50 years in general to 70 years or more. They consider that the extension of copyright term of protection is consistent with international trend and would ensure that Hong Kong creators can similarly continue to enjoy a longer copyright term of protection in other overseas jurisdictions in accordance with the principle of reciprocity. Such extension would also encourage overseas and local businesses to invest in Hong Kong, promoting the development of the industry and nurturing of talents, and thereby developing Hong Kong into an international IP trading centre. On the contrary, maintaining the current copyright term of protection would not be beneficial to the economy, as this would create inconsistent standards between Hong Kong and her major trading partners, in particular those in the Asia-Pacific region, and also limit the potential licensing income of Hong Kong creators. <p><i>Introduction of specific copyright exceptions for text and data mining</i></p> <ul style="list-style-type: none"> Some copyright owners / organisations / groups do not object to further reviewing this issue, but consider that the applicable scope and conditions of the relevant exceptions should be clearly stipulated. For instance, the exceptions should only apply to research conducted for non-profit-making purposes and be limited by the restrictions imposed by copyright owners through contractual terms and technological protection measures, in order to strike a reasonable balance between the rights and interests of copyright owners and users.

(VI) Other Copyright Issues		
		<ul style="list-style-type: none"> • A few copyright owners / organisations / groups oppose the introduction of specific copyright exceptions for text and data mining, as they consider that the definition of text and data mining is too broad and any such use for commercial and business purposes may unfairly prejudice the rights of copyright owners. They consider that the use of licences is the best solution to promote these activities as it can provide appropriate flexibility while protecting the rights of copyright owners. <p><i>Artificial intelligence (“AI”) and copyright</i></p> <ul style="list-style-type: none"> • Some copyright owners / organisations / groups express views on this issue. Some respondents consider that whether the works created by AI should be regarded as works protected by copyright under specific circumstances can be further considered. Apart from exploring issues such as who should own the copyright of works created by AI and infringements involving works created by AI, consideration should also be given to problems relating to the use of copyright works to train AI. Separately, some respondents consider that the introduction of any legislation relating to AI and copyright should be deferred since such technology is still in its nascence and consultations and discussions on this issue in the international community have just begun. • Some copyright owners / organisations / groups consider that the existing law can already address the problems brought by current AI technologies and provide copyright protection for computer-generated works or works created with the help of AI. Hence, there is no need to amend the CO in this regard at this stage. • A copyright owner / organisation / group considers that the basic concept of “data” which

(VI) Other Copyright Issues		
		<p>underpins AI should first be discussed and studied before exploring the issue on AI and IP.</p> <p><i>Other views</i></p> <ul style="list-style-type: none"> Other views raised by individual copyright owners / organisations / groups include – <ul style="list-style-type: none"> (i) suggest to establish an equitable remuneration for performers in accordance with the World Intellectual Property Organization Performances and Phonograms Treaty and the Beijing Treaty on Audiovisual Performances; (ii) suggest to consider establishing a private levy compensation system for cultural and creative industries; and (iii) suggest to introduce a resale royalty right scheme for visual artists to provide them with income in the resale of their works.
VI.2	IP practitioners' groups / OSPs / other professional bodies / chambers of commerce	<p><i>Extension of copyright term of protection</i></p> <ul style="list-style-type: none"> A professional body and an OSP object to extending the copyright term of protection of different types of copyright works from the current 50 years in general to 70 years. They consider that the extension of copyright term of protection would hinder the development of the creative industry and its practitioners, delay the release of copyright works into the public domain, which would in turn suppress creations and make libraries and schools lose the opportunity to present to students works which should fall into the public domain. An IP practitioners' group suggests considering the extension of the copyright term of protection to the life of the author plus 70 years for particular sectors (e.g. recorded music industry) and the provision of reciprocal treatment to jurisdictions having a term of protection

(VI) Other Copyright Issues		
		<p>of 70 years.</p> <p><i>Introduction of specific copyright exceptions for text and data mining</i></p> <ul style="list-style-type: none"> Some professional bodies and OSPs support the introduction of specific copyright exceptions for text and data mining as they consider that the relevant exceptions will help promote research and innovation in the higher education sector and increase the competitiveness of Hong Kong's AI industry, thus facilitating Hong Kong to develop into a Smart City. They consider that Hong Kong should make reference to the approaches adopted by other jurisdictions (e.g. the EU, Japan, Singapore and the UK). An IP practitioners' group suggests that the exception should cover databases. <p><i>AI and copyright</i></p> <ul style="list-style-type: none"> An IP practitioners' group, a professional body, a chamber of commerce and an OSP express views on this issue. An OSP points out that a work produced by an AI algorithm or process, without the involvement of a natural person in the creation, should not be protected by copyright law. An IP practitioners' group, a professional body and a chamber of commerce suggest that the Government should study issues relating to AI and copyright, in particular the conditions or circumstances under which a work created by AI can be entitled to copyright protection, in order to ensure that Hong Kong's copyright legislation keeps pace with modern developments. <p><i>Other views</i></p> <ul style="list-style-type: none"> Other views raised by individual IP practitioners' groups include –

(VI) Other Copyright Issues		
		<ul style="list-style-type: none"> (i) suggest to consider setting up a copyright register; (ii) suggest to review the powers and procedures of the Copyright Tribunal, for example, expanding its jurisdiction to deal with a range of copyright-related disputes; (iii) consider using innovative technology (e.g. blockchain) to assist in proving the ownership and authenticity of copyright works; (iv) consider introducing unregistered design rights; (v) suggest to explore the use of “orphan works”; (vi) suggest to update the Copyright (Libraries) Regulations; and (vii) suggest to redefine or amalgamate the definitions of “broadcast” and “cable programmes”.
VI.3	Copyright users / other individuals	<p><i>Extension of copyright term of protection</i></p> <ul style="list-style-type: none"> • Some copyright users oppose extending the copyright term of protection for different types of copyright works from the current 50 years in general to 70 years or more as they consider that the extension of copyright term of protection would provide copyright owners with an excessively long term of protection and delay the release of copyright works into the public domain. <p><i>Other views</i></p> <ul style="list-style-type: none"> • Other views raised by individual copyright users or other individuals include – <ul style="list-style-type: none"> (i) suggest to criminalise all copyright infringements and that fines should be imposed, so that creators of original works would be protected without having to go through lengthy civil litigations;

(VI) Other Copyright Issues		
		<ul style="list-style-type: none"> (ii) in the light of rapid technological developments making it difficult to distinguish whether a work is a form of expression (protected by copyright) or concept (without copyright), suggest to introduce a policy statement in the legislation on the scope of copyright, which should not include innovation which belongs to concepts but not forms of expressions; (iii) suggest to introduce a provision to the CO, stating that any rights exercised by copyright owners must not violate the constitution and laws or harm public interest, and that the Government should regulate and monitor the publishing and communication of works in order to safeguard national security; (iv) suggest the Government establish a public domain to clearly set out works that are no longer protected by copyright to facilitate creativity; and (v) suggest the Government formulate regulatory measures for non-fungible tokens.

IMPLICATIONS OF THE PROPOSAL

Economic Implications

Legislative proposals contained in the 2022 Bill will serve to update Hong Kong's copyright regime in keeping abreast with technological advancement and international standards, as well as striking a balance between the interests of copyright owners and users. On the one hand, the introduction of a technology-neutral exclusive communication right and its corresponding criminal sanctions against unauthorised communication of copyright works will provide more comprehensive protection to copyright owners to exploit their works in the digital environment. On the other hand, the new and revised copyright exceptions will enhance legal clarity and facilitate the use of copyright works, thereby helping remove uncertainties for both copyright owners and users. The updated copyright regime will be conducive to enhancing Hong Kong's position as a place of conducting commercial activities or trading in IP-related assets, contributing to the goal of developing Hong Kong into a regional IP trading centre as set out in the National 14th Five-Year Plan. It also helps creativity flourish by providing safeguards to IP rights, underpinning the development of the creative and knowledge-based economy.

Financial and Civil Service Implications

2. The proposed new criminal offences concerning unauthorised communication and making a false statement may increase the workload of C&ED and the Department of Justice ("DoJ"). In line with the existing strategy in combating counterfeiting and pirate activities on the Internet, C&ED will carry out enforcement actions mainly based on complaints and intelligence. C&ED and DoJ will absorb the additional financial and manpower requirements within their existing resources. Where necessary and justified, additional resources may be sought in accordance with the established mechanism.

Sustainability Implications

3. As far as sustainability implications are concerned, the proposal to update the copyright regime in the digital environment will help contribute to the vibrancy of Hong Kong's economy by facilitating the development of our creative industries and Hong Kong as a regional IP trading centre.