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Legislative Council Brief

Copyright Ordinance
(Chapter 528)

COPYRIGHT (AMENDMENT) BILL 2014

INTRODUCTION

At the meeting of the Executive Council on 3 June 2014, the Council ADVISED and the Chief Executive ORDERED that the Government should
A introduce the Copyright (Amendment) Bill 2014 (the 2014 Bill), at **Annex A**, into the Legislative Council (LegCo) to –

(a) provide for fair dealing exceptions for the purposes of -

(i) parody, satire, caricature and pastiche[1],
(ii) commenting on current events and
(iii) quotation;

and to provide for further clarification of the criminal liability for copyright infringement generally; and

(b) reintroduce the package of legislative amendments already scrutinised and supported by a previous LegCo Bills Committee[2].

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1 For the sake of convenience, we have used parody as a general reference to cover all the four terms in the recent consultation exercise and would continue to do so in this paper, unless otherwise stated.

For ease of reference, the Concise Oxford English Dictionary (12th Edition, 2012) 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.

2 The Copyright (Amendment) Bill 2011 which lapsed in mid-2012. See paragraph 26 on the background.

JUSTIFICATIONS

Need for update of copyright regime

2. We need to update our copyright regime for the following reasons -

(a) Rapid technological developments (notably the Internet) have been reshaping the information society. The World Intellectual Property Organization's (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), commonly known as the "Internet treaties", were adopted in 1996 to address the challenges of the new digital technologies[3]. In response, and given rapid changes in user behaviours, many overseas jurisdictions have updated their copyright regimes, including the introduction of a communication right to enhance copyright protection in the digital environment[4] and safe harbour provisions to facilitate online service providers (OSPs)[5] (see paragraphs 7-8 and 15-16 below for more discussion). We need to stay on par with international copyright developments.

(b) We are not free from the watchful eyes of the international community. Some US copyright owners associations have made submissions to the Office of the United States Trade Representative (USTR) suggesting that Hong Kong should be put under a list of "Deserving Special Mention" and "Watch List" in the Special 301 Report[6] as they allege that the existing copyright legislation of Hong Kong provides inadequate copyright protection in the digital environment. Although

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[3] They came into force in 2002. In particular, the WCT deals with protection for authors of literary and artistic works, while the WPPT protects the rights of the producers of phonograms or sound recordings, as well as the rights of performers whose performances are fixed in sound recordings.

[4] Including the European Union (the EU) (2001), Australia (2001), the United Kingdom (the UK) (2003), Singapore (2005), New Zealand (2008) and Canada (2012).

[5] Notably the United States (the US) (1998) in its Digital Millennium Copyright Act, followed by many.

[6] Under Special 301 provisions of the Trade Act of 1974, USTR must identify those countries that deny adequate and effective protection for IP rights or deny fair and equitable market access for persons that rely on IP rights protection. USTR has created a "Priority Watch List" and "Watch List". Placement of a trading partner on the lists indicates that particular problems exist with respect to IP rights protection, enforcement, or market access for persons relying on IP rights. Additionally, USTR monitors a trading partner's compliance with measures that are the basis for resolving an investigation under Section 301. USTR may apply sanctions if a country fails to satisfactorily implement such measures. Hong Kong has not been placed on the "Watch List" since February 1999.

Hong Kong has not been placed on any list in the USTR report released in April 2014, we are facing continuous pressure on this front.

(c) Our updating exercise started way back in 2006. The package of proposals contained in the Copyright (Amendment) 2011 (the 2011 Bill) with the Committee Stage Amendments (CSAs) agreed with the LegCo Bills Committee, though lapsed, is the respectable result of years of deliberations of the Government, LegCo, copyright owners, OSPs and general users representing a broad consensus in an always sensitive subject. We should conclude our efforts on this basis as soon as possible.

(d) For advanced economies which aspire to exploit innovation and creativity to drive economic growth, they would exercise proactive efforts to ensure a robust and up-to-date intellectual property (IP) regime underpinned by a clear legal framework. For instance, further to their reforms in the late 1990s and early 2000s, the UK, Australia, Ireland, the US and the EU are looking to new rounds of efforts to modernise their copyright regimes. Hong Kong cannot afford to mark time and should complete the current round in earnest to move further ahead[7].

Public consultation on parody

3. We introduced the 2011 Bill into LegCo in June 2011 to update our copyright regime but it eventually lapsed. One issue left unresolved during the scrutiny of the 2011 Bill is parody. With technological advancements, it has become easier for members of the public to express their views and commentary on current events by altering existing copyright works and to disseminate them through the Internet. We conducted a public consultation exercise (consultation paper at **Annex B**) from July to November 2013 to explore how parody and similar works should be taken care of as appropriate under our copyright regime with due regard to present day circumstances.

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[7] In our original plan, following the passage of the 2011 Bill, we would proceed with reviews on a number of copyright issues including the updates to the Copyright (Libraries) Regulations (Chapter 528B) and orphan works. We also need to consider the application of the Beijing Treaty on Audiovisual Performances and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled to Hong Kong and the necessary amendments of the Copyright Ordinance. As part of our ongoing efforts to update our copyright regime, we would also have to keep track of major developments in the international community such as discussions on the concept of User Generated Content (paragraph 19 and Annex F) and site blocking.

4. We received altogether 2 455 submissions[8]. A summary of views collected is at **Annex C**. Overall we noted polarised views in the consultation exercise- C

(a) There is a significant and voluminous view from users that championed complete freedom of expression and "secondary creations"[9], with some going to the extreme of calling for a total withdrawal of the exercise as they view the proposed options as restricting freedom of expression. We made much effort during the consultation to explain the objective and avoid any misunderstanding[10]. On the other hand, there is a strong opinion among copyright owners highlighting the importance of a robust copyright regime that would incentivise creativity and advance social and economic interests, and the need for a timely update of the regime in the digital environment.

(b) Nevertheless, there appears to be a common ground between users and owners. Parodists and users engaged in "secondary creations" believe that their personal, not-for-profit works should not conflict with the commercial interest of copyright owners; copyright owners believe that their push for legislative

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8 Out of the 2 455 written submissions we received, 2 387 submissions were from users and netizen groups such as the Copyright and Derivative Works Alliance and a couple of other Facebook groups. Amongst all these submissions, 2 125 were originated or generated from a number of online templates. There were 43 submissions from copyright owners' organisations and companies, representing a wide spectrum of creative industries. There were seven submissions from OSPs. 18 submissions were from professional bodies (such as the Hong Kong Bar Association and the Law Society of Hong Kong), academics, political parties and non-government organisations (such as Amnesty International Hong Kong).

9 We note that the local media and some sectors of the public sometimes use the term "secondary creation" ("二次創作") interchangeably with "parody". This is not a term commonly used in copyright jurisprudence and may entail a much larger scope than parody. In fact, the term "secondary creation" has been used very loosely to cover a wide-range of activities, including a mere adaptation or minimal modification of a copyright work.

10 We explained to the public that parodies which do not constitute copyright infringement under the existing law for reasons below will remain lawful in the future-

(a) the copyright owner has agreed or acquiesced
(b) the copyright protection in the underlying work has expired
(c) only the ideas of the underlying work have been incorporated
(d) only an insubstantial part of the underlying work has been reproduced
(e) one of the permitted acts under the existing Copyright Ordinance (in Division III of Part II, such as for the purposes of research, private study, education, criticism, review and reporting current events- see paragraph 11) applies.

The three options we set out in the consultation paper would provide new legal basis to make it clear that under appropriate circumstances parodies will not attract criminal and even civil liabilities. Parodists will enjoy clearer and greater protection under the law.

efforts to curb online copyright piracy is not targeting daily non-commercial activities of Internet users and indicate their preparedness to change the law to accommodate genuine parody without the unintended consequences of unchecked piracy.

5. Taking into account the views collected and relevant overseas experiences, we consider that new copyright exceptions (paragraph 13 below) and further clarification of criminal liability in relation to the existing prejudicial distribution and the proposed prejudicial communication offences (paragraphs 9-10 below) should be added to the original proposals in the 2011 Bill to form a new package for the current round of update. The new package as now contained in the 2014 Bill has been crafted following three guiding principles which we introduced at the outset of the consultation exercise and reflect the consensus forged between copyright owners and users over the consultation -

(a) a fair balance between protecting the legitimate interests of copyright owners and other public interests, such as reasonable use of copyright works and freedom of expression, should be maintained;

(b) any criminal exemption or copyright exception to be introduced must be fully compliant with our international obligations such as Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization[11] and the "three-step test" requirement under Article 13 of the TRIPS Agreement[12] respectively; and

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[11] Article 61 of the TRIPS Agreement provides that *"Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently* (sic) *with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale."*

[12] Article 13 of the TRIPS Agreement provides that *"Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."* To comply with the "three-step test", the Government must ensure that the exception (a) is confined to "special cases", (b) does not conflict with a normal exploitation of the work, and (c) does not unreasonably prejudice the legitimate interests of the copyright owner.

(c) any proposed amendment to the Copyright Ordinance must be sufficiently clear and certain so as to afford a reasonable degree of legal certainty.

Key Proposals in the Bill

6. The 2014 Bill combines original proposals contained in the 2011 Bill (with CSAs agreed with the previous Bills Committee) and new legislative proposals for the treatment of parody and related matters, covering five key areas.

A. Communication Right
(original proposal in the 2011 Bill)

7. At present, the Copyright Ordinance 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 been emerging. The current scope of statutory protection may not be adequate to cope with such rapid changes, allowing an infringer to evade liability and sanctions on technicality. We **proposed** in the 2011 Bill to introduce a new exclusive right for copyright owners to communicate their works to the public through any mode of electronic transmission. Without such protection, the copyright industry has been suffering from rampant online piracy and is pulled back from making the right investment to take advantage of the online economy.

8. Over the latest consultation on parody, copyright owners see the introduction of a technology-neutral communication right as the mainstay of the current round of legislative update to bring our copyright regime on par with international developments and follow a long line of overseas jurisdictions (paragraph 2 above). Users see this as removing some grey area in copyright protection and encouraging copyright owners to take actions against many common online activities such as parodies. **The 2014 Bill proposes the introduction of a new communication right,** and at the same time contains appropriate copyright relaxations to maintain the right balance between different interests.

B. Criminal liability
(original proposal in the 2011 Bill combined with new proposal)

9. We **proposed** in the 2011 Bill to introduce corresponding 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 proposed criminal sanctions mirror the existing sanctions available in the Copyright Ordinance against, inter alia, the distribution of infringing copies (a) for the purpose of or in the course of any trade or business which consists of dealing in infringing copies or (b) to such an extent as to affect prejudicially the copyright owners[13]. To allay netizens' concerns regarding the possible impact of the criminal liability for the proposed prejudicial communication offence on the free flow of information across the Internet and to provide greater legal certainty, we **proposed** in the 2011 Bill and the CSAs agreed to clarify what amounts to "*such an extent as to affect prejudicially the copyright owners*"[14] by underlining in the legislation the consideration of whether the infringing acts have caused "*more than trivial economic prejudice*" to the copyright owners and introducing a non-exhaustive list of relevant factors[15] to guide the Court in determining the magnitude of economic prejudice.

10. Over the recent consultation, many netizens consider a mere clarification of criminal liability in relation to the existing prejudicial distribution and the proposed prejudicial communication offences as insufficient for its lack of a clear cut exemption of specific works and the retention of possible civil liability[16]. They also criticise that the meaning of "*more than*

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[13] Section 118(1)(g) of Copyright Ordinance (Cap. 528) 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 2011 Bill reads:

"A person commits an offence if the person -
……
(b) without the licence of the copyright owner of a copyright work, communicates 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")

[14] In both section 118(1)(g) and the proposed section 118(8B)(b).

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

[16] In addition, some members of the public, at the early stage of the consultation, queried (i) if the Government would insist on prosecuting the copyright offence without involving the copyright owner, and

trivial economic prejudice"[17] is imprecise, which might leave the criminal net wide and result in legal uncertainty having a chilling effect on freedom of expression. On the other hand, copyright owners support the clarification, emphasising that they are only after piracy that would amount to a substitution for the underlying copyright works, a point that the netizens also accept. We see an important merit in clarifying the threshold for criminal enforcement for all subject matters alleged to be infringing copyright, not confined to a particular type of use. **The 2014 Bill proposes criminal sanction against unauthorised communication[18], and better clarifies the threshold of criminal liability in relation to the existing prejudicial distribution and the proposed prejudicial communication offences**, by dropping the phrase *"more than trivial economic prejudice"* and instead 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[19].

(ii) if the act of sharing a hyperlink with parodic content constitutes copyright infringement. We have clarified through various means that-

(i) According to the provisions on criminal liability in the Copyright Ordinance, the most fundamental element of copyright offences is that the relevant acts have been conducted without the consent of the copyright owner and thereby constitute copyright infringement. If the copyright owner does not object or pursue the matter any further, there is no basis for the enforcement agency to follow up any criminal allegation or investigation, not to mention laying a prosecution.

(ii) If the "hyperlink" in question merely provides those who click on it a means to access materials on another website, and the person who shares the hyperlink does not distribute an infringing copy of the copyright work (e.g. by uploading an infringing song to a website for others to download), the mere act of sharing a hyperlink will not constitute copyright infringement. In this regard, the 2011 Bill explicitly provides that a person does not communicate a work to the public if the person does not determine the content of the communication. The 2014 Bill would retain such a provision.

[17] Some considered that the phrase as "vague", "subjective", "too low", "unseen in other overseas jurisdictions or international treaties", etc.

[18] Regarding the proposed prejudicial communication offence, the 2014 Bill refines the proposed section 118(8B)(b) to read:

"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."

[19] During our consultation we also asked if a criminal exemption should be provided for parody. Users generally welcome a criminal exemption (in addition to a civil exemption), apparently for the legal certainty and safeguard it could provide. However, they advocate for a criminal exemption of a much wider scope covering all "secondary creations". On the other hand, copyright owners are agreeable, at most, to a narrow scope of criminal exemption for non-commercial parodies that comment on the original works. They are concerned that providing for a criminal exemption would inadvertently open a loophole for large-scale piracy. Some even question if a categorical criminal exemption might violate our international obligations. In our considered view, meritorious cases should have been taken care of under the new copyright exceptions as proposed in paragraph 13 for exempting both civil and criminal liabilities. With the clarification of the potential criminal liability across the board, it will be made clear that any

C. Revised and new copyright exceptions (original proposal in the 2011 Bill combined with new proposal)

11. 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. In Division III of Part II of the existing Copyright Ordinance, there are over 60 sections specifying a number of permitted acts which may be done in relation to copyright works notwithstanding the subsistence of copyright (such as for the purposes of research, private study, education, criticism, review and reporting current events), and thus attracting neither civil nor criminal liability for unauthorised use[20]. To tie in with the introduction of the communication right, we would revise and expand the scope of permitted acts as appropriate to maintain the balance between copyright protection and reasonable use of copyright works. As in the 2011 Bill, **the 2014 Bill proposes to revise existing exceptions by providing that the new communication right will as appropriate be subject to the permitted acts provided for in Division III of Part II.**

New copyright exceptions for the education sector, libraries, museums and archives, for temporary reproduction of copyright works by OSPs, and for media shifting
(original proposal in the 2011 Bill)

12. To respond to the digital environment, **the 2014 Bill proposes new copyright exceptions** –

(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) for OSPs to cache data[21] which technically involves copying,

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works which do not substitute the underlying work should not be caught by the criminal net. We therefore believe that a narrow criminal exemption for a certain genre is superfluous.

[20] In addition, public interest is accepted as an overriding justification of exceptions under our copyright regime, as provided for in section 192.

[21] 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.

a restricted act in the Copyright Ordinance. Such caching is transient or incidental in nature and technically required for the process of data transmission to function efficiently. Caching activities help save bandwidth and are indispensable for efficient transmission of information on the Internet; and

(c) for media shifting, which refers to the making of an additional copy of a copyright work from one media or format into another, usually for the purpose of viewing or listening to the work in a more convenient manner. [22] As copying a copyright work is a restricted act, media shifting may technically constitute an infringement. To give users greater certainty and having regard to similar statutory exceptions already allowed in overseas jurisdictions[23], we propose to introduce a media shifting exception limited to sound recordings.

To avoid unreasonable prejudice to the right of owners and comply with our international obligations, we have included appropriate preconditions for the new exceptions.

New fair dealing exceptions
(new proposal not found in the 2011 Bill)

13. As brought out in the recent consultation exercise, many 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 (often referring to those seen on social media websites such as YouTube, Facebook and numerous discussion forums and blogs), e.g. 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. For elaborations, please refer to **Annex D**[24]. On the other hand, copyright owners generally oppose consideration of matters outside the intended scope of the consultation exercise, as they believe that the current copyright regime with licensing as the centrepiece together with various

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

[23] Express media shifting exceptions are provided in the legislations of New Zealand and Australia. The exception in New Zealand covers only sound recordings while that in Australia covers printed works, photographs, films in analogue format as well as sound recordings.

[24] Obviously, there may be some overlapping in concept between some of the above activities. The use of original copyright works by each type varies to different degree. To the extent that the use, or copying, of the original copyright works is substantial, without consent of the owners express or implied, and does not belong to a permitted act under the Copyright Ordinance, it might amount to copyright infringement.

statutory exceptions is operating well to deal with these matters and causing no problems in practice in Hong Kong and elsewhere. To seek a broad and overall balance between different interests, **the 2014 Bill proposes new fair dealing exceptions to cover**–

(a) **use for the purposes of parody, satire, caricature and pastiche**[25], for the following reasons -

i. the scope is clear and confined, consisting of well recognised literary or artistic practices which are accommodated as appropriate in overseas copyright regimes[26];

ii. they are common means for the public to express views or comment on current events, and may promote freedom of expression;

iii. they may encourage creativity, nurture new talents and even entertainment business, and therefore contribute to the overall economic and cultural development of society; and

iv. they are commonly critical or transformative in nature, and should unlikely compete with or substitute the original works;

(b) **use for the purpose of commenting on current events**. We accept that in some cases the use of copyright works for such a purpose does not necessarily rely on parody, and in some cases there may be strong justifications for facilitating freedom of expression in such a context[27] [28]; and

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25 See footnote 1 for the dictionary meanings of the terms parody, satire, caricature and pastiche.

26 Australia and Canada provided for fair dealing exceptions for parody and satire in 2006 and 2012 respectively. Regarding the UK, subject to Parliamentary approval, the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 may come into force some time in 2014 to provide for fair dealing exceptions for parody, caricature and pastiche, which are allowed under the Copyright Directive of the EU enacted in 2001 (on the harmonisation of certain aspects of copyright and related rights in the information society).

27 After all, this was the primary concern of the public during the scrutiny of the 2011 Bill, which eventually gave rise to the consultation exercise. The Hong Kong Bar Association submitted that the provision of an exception to infringing acts is based on a balancing of rights and interests of copyright owners and the public interest. The public interest in the freedom of expression together with other public interests have been taken care of under the fair dealing exception for "reporting current events" under section 39(2) of the Copyright Ordinance. As commenting on current events is analogous or akin to "reporting current events', it can and should be given the same treatment under the Ordinance. It therefore advocated that a fair

(c) **use of a quotation the extent of which is no more than is required by the specific purpose for which it is used**.[29] This would cover common uses of copyright works which are without any alterations or parodic or like elements proposed above if it is to facilitate expression of opinions or discussions in the online and traditional environment.[30]

14. More detailed justifications for the above proposals with reference to the three-step test can be found in **Annex E**. We believe that the new fair dealing exceptions proposed above would cover, in appropriate cases, a wide range of day to day Internet activities referred to above[31], so long as they are for

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dealing exception for "commenting on current events" should be introduced by way of amending the existing fair dealing provision in section 39(2).

[28] The future statutory interpretation of "current events" may make reference to the UK jurisprudence. Like Hong Kong, the UK provides for a fair dealing exception for the purpose of reporting current events under the Copyright, Designs and Patents Act 1988. The UK case law has established that the expression *"for the purpose of reporting current events"* should be construed liberally. Copinger and Skone James on Copyright (16th edn., 2011) observes that –

(a) the exception is not confined to specific or very recent happenings, particularly where the ramifications of the event continue to be a matter of public debate and concern;
(b) the exception is not confined to the reporting of current events in a general news programme and includes, for example, the reporting of sports events in a sports news bulletin; and
(c) the work itself need not be "current", provided that it is used properly to report current events.

[29] In its Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (footnote 26 above), the UK plans to provide for, in addition to a fair dealing exception for parody, caricature and pastiche, a fair dealing exception to permit the use of quotations from copyright works including films, sound recordings, broadcasts and photographs as well as traditional text quotations for purposes such as criticism or review or otherwise. This proposal is based on Article 10 of the Berne Convention For The Protection Of Literary And Artistic Works which states that it shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose. The UK Government believes that such an exception would facilitate users to use extracts in formal works, such as academic and scholarly texts, as well as in more informal works, such as blogs and social media, to help illustrate arguments and engage in comment and debate. We consider it justified to provide for a similar exception in Hong Kong by modelling on the proposed UK legislation.

[30] Possible examples may include quotation of various copyright works such as literary or artistic works, films and sound recordings for the purposes of facilitating discussions, providing information or expressing opinions as used on blogs and social media websites. In various cases, such uses are not problematic at all. There may be consent or acquiescence from copyright owners. The use may not amount to substantial copying (for example, if the taking of a part is small in proportion and/or immaterial in relation to the whole work), or is otherwise covered by some existing exceptions.

[31] One example of Internet activities that may fall outside the enlarged scope is the online posting of *earnest performance of copyright works, for example, song singing with or without rewriting the lyrics based on the original melodies*. If it is without any parodic or like elements or any quotation purposes, nor is it related to any current events, it may be more akin to a mere expression of feelings or showing of talent, which can hardly provide sufficient public policy grounds to justify special treatment.

Another example is the unauthorised posting of *translation and adaptation works*. Again, if such works are devoid of any parodic or like elements or any quotation purposes, nor are they related to any current

the purposes of parody, satire, caricature, pastiche, commenting on current events, or quotation. This should go a long way to address the major concerns of many users who make use of existing copyright works for the above purposes in the digital environment.

D. Safe Harbour (original proposal in the 2011 Bill)

15. To provide incentives for OSPs to cooperate with the copyright owners in combating online piracy, and to provide sufficient protection for their acts, we **proposed** in the 2011 Bill to introduce safe harbour provisions to limit OSPs' liability for copyright infringement on their service platforms caused by subscribers, provided that they meet certain prescribed conditions, including taking reasonable steps to limit or stop a copyright infringement when being notified. The provisions will be underpinned by a voluntary Code of Practice which sets out practical guidelines and procedures for OSPs to follow after notification. This serves as a mechanism to deal with infringement claims in an efficient and effective manner other than court proceedings to the benefit of owners, users and intermediaries alike.

16. Over the recent consultation on parody, there is general support for the safe harbour provisions among OSPs. Some urge for an early introduction and some indicate concerns about cost of compliance, responsibility of policing the network and possible abuses. On the other hand, some users express concerns about possible circumvention of any future special copyright treatment for parodies by abusing the notice-and-take down mechanism. Some suggest that a take-down is only justified by a court ruling confirming copyright infringement and advocate a notice and notice system[32]. **The 2014 Bill proposes safe harbour provisions with various safeguards** to address such concerns, e.g.-

(a) OSPs are not required to actively police their service platforms for infringing activities in order to qualify for the "safe harbour" protection;

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events, the mere fact that they might contain certain originality elements or even be transformative in effect could hardly provide sufficient public policy grounds to justify special treatment. It is also doubtful if excluding translation and adaptation as a class from copyright protection would be in compliance with our international obligation. See Annex D for background.

[32] Under the notice and notice system, OSPs will not be required to take down materials alleged to be infringing. Instead, they will only be required to forward complaint notices to those alleged of infringement. Canada takes this approach.

(b) a subscriber may choose to request the OSP not to disclose his or her personal data when sending a copy of the subscriber's counter notice to the complainant (disclosure of personal information is subject to court scrutiny) [33];

(c) on receipt of a counter notice, an OSP must reinstate the material it has taken down unless the complainant has informed it in writing that proceedings have been commenced in Hong Kong seeking a court order in connection with the alleged infringing activity;

(d) both the complainants and subscribers are required to provide adequate and specific information to substantiate their allegations of copyright infringement and counter notices respectively. A complainant or a subscriber who submits false statements is liable to both civil and criminal sanctions (a fine at level 2 and imprisonment for 2 years); and

(e) OSPs and copyright users and owners may follow detailed guidance in a Code of Practice to be issued in future, the preparation of which is under way. The current version released in March 2012 has taken into account comments received over two rounds of consultation in August 2011 and January 2012 and been reviewed by the previous Bills Committee.

E. Civil Liability (original proposal in the 2011 Bill)

17. 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 brought out in the recent consultation on parody, many Internet users are concerned about possible abuse of civil action (e.g. through mere threatening) by owners and the resulting chilling effect in cases of unauthorised use that is not covered by copyright exceptions. On the other hand, copyright owners see civil litigation as the cornerstone of their economic rights conferred by copyright protection, and wish to address issues in upholding their legitimate interest in the digital environment, notably difficulties in proving actual loss in

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[33] In general, the complainant needs to apply to the High Court for disclosure of the personal particulars of the subscriber and prove that such disclosure is necessary, proportionate and justified. *Cinepoly Records Company Limited & Others v Hong Kong Broadband Network Limited & Others* [2006] 1 HKLRD 255.

online piracy cases.

18. In practice, in a great many trivial cases in which copyright might have been infringed technically, the economic or other interest involved might not be sufficient for an owner to take out civil proceedings, given the litigation costs and time, legal uncertainties and effectiveness of remedies in question (not to mention other large scale piracy cases on the web deserving priority attention). Frivolous or vexatious civil claims would not be entertained by the court. We recall no past local incidents of copyright owners taking any claims against parodists. But in instances where a great interest, commercial or otherwise, is at stake, it is only fair for a copyright owner to have the last resort to the court based on the fundamental principles of justice, seeking remedies including damages. As a general rule, damages are compensatory in nature. Accordingly, the copyright owner has to prove the loss suffered by him or her as a result of infringement. In view of the difficulties encountered by the copyright owner in proving actual loss, the Copyright Ordinance also allows the court to award additional damages as the justice of the case may require having regard to all the circumstances, and, in particular, a number of statutory factors[34]. Given the digital challenges, **the 2014 Bill (as in the 2011 Bill) proposes to introduce two additional factors for the court's assessment of damages, namely (a) the unreasonable conduct of an infringer after having been informed of the infringement; and (b) the likelihood of widespread circulation of infringing copies as a result of the infringement.**

User Generated Content (UGC)

19. During the consultation, the concept of UGC surfaced[35]. Many netizens urged the Administration to consider a copyright exception to exclude non-profit making UGC or UGC not disseminated in the course of trade from both civil and criminal liabilities for copyright infringement. But copyright owners firmly reject this idea[36]. The proposed UGC exception is primarily a

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[34] Section 108(2) provides that *"the Court may in an action for infringement of copyright having regard to all the circumstances, and in particular to -*

(a) the flagrancy of the infringement;
(b) any benefit accruing to the defendant by reason of the infringement; and
(c) the completeness, accuracy and reliability of the defendant's business accounts and records, award such additional damages as the justice of the case may require."

[35] The idea was proposed by the Copyright and Derivative Works Alliance, which is active on the Internet championing "secondary creations". The Alliance advocates the UGC exception in addition to taking on a fair dealing exception for parody.

[36] Copyright owners have expressed serious concern regarding Internet intermediaries which might, without paying copyright owners for a licence, be so authorised to disseminate UGC (uploaded by users for private and social purposes with no profit motives) on the Internet widely with commercial gain (notably through advertisements).

watered-down version of section 29.21 of the Canadian Copyright Act, which was introduced only in 2012. We set out our observations on the concept and relevant overseas developments in **Annex F**. In short, **we have reservation in adopting a generic concept of UGC as a subject matter for copyright exception in this round of update** for the following reasons-

F

(a) the concept of UGC is vague and undefined. There is no widely accepted definition of UGC at the international level[37]. The concept appears to be evolving alongside technological developments. We note that there is doubt on whether an UGC exception might meet the three-step test enshrined in the TRIPS Agreement, in particular the first criterion i.e. any limitation or exception should be confined to a certain special case;

(b) it is not clear what additional problems a UGC provision may be able to address, given the enlarged scope of permitted acts proposed in paragraph 13 above. In theory, this may be able to benefit some acts outside the enlarged scope. But this still begs the question why such acts are justified to be excepted from copyright protection; and

(c) the concept is unsettled and developing. Only Canada has adopted the concept in legislation. Although the Copyright Review Committee of Ireland recommended the Government to follow suit, the Irish Government has yet to make any legislative decision. Australia has rejected the idea, while the US and the EU are looking into it as part of a new round of consultation on various copyright issues. The UK does not find a case for regulatory intervention. Hong Kong should remain vigilant about mainstream international development in future.

That said, we will also continue to monitor closely overseas developments in copyright protection as part of our consideration in identifying and resolving

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

further issues for any future legislative update (Annex F).

THE 2014 BILL

20. The main provisions of the 2014 Bill are as follows-

(a) **Clause 9(3)** amends section 22 to provide for an exclusive right of the owner of the copyright in a work to communicate the work to the public;

(b) **Clause 9(4)** adds a new subsection (2A) to section 22 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 13** adds a new section 28A to elaborate on the newly established restricted act of communication (see clause 9(3)), carving out acts not constituting the communication of a work to the public;

(d) **Clause 18** substitutes new provisions for section 39 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 19** adds a new section 39A 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 dealing with a copyright work is fair;

(f) **Clauses 25 to 27** amend sections 41, 44 and 45 to allow the communication of specified works to authorised recipients for educational purposes and specify the conditions for the exceptions;

(g) **Clauses 29 and 32 to 36** amend sections 46, 51 to 53 and add new sections 51A and 52A to allow libraries, museums and archives to make copies of copyright work for preservation or replacement purposes and to communicate or play or show copyright work to users within their premises, subject to

specified conditions;

(h) **Clause 42** adds a new section 65A to allow temporary reproduction of copyright materials by OSPs, subject to specified conditions;

(i) **Clause 48** adds a new section 76A to allow media shifting of sound recordings for private and domestic use, subject to specified conditions;

(j) **Clause 50** adds a new Division IIIA (with new sections 88A to 88J of Part II) to establish a "safe harbour" for OSPs. The new section 88B sets out the conditions for limiting OSPs' pecuniary liability in relation to copyright infringements occurring on their service platforms. The new section 88C provides for the procedures for giving a notice to an OSP in respect of an alleged infringement of copyright. 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 OSP's service platform. The new section 88E specifies the format and substance of a counter notice contesting the infringement allegation. The new section 88F imposes criminal liability on a person who recklessly makes a false statement in a notice. The new 88G provides for civil liability for making false statements in a notice. The new section 88H exempts OSPs from liability for removing or disabling access to the material or activity to which an alleged infringement relates. The new section 88I provides a rebuttable presumption in favour of OSPs on evidence of compliance with the specified conditions. The new section 88J empowers the Secretary for Commerce and Economic Development to publish a code of practice in the Gazette;

(k) **Clause 55** amends section 108 to add two more factors to which the Court may have regard when considering any additional damages in an action for infringement of copyright; and

(l) **Clause 57** amends section 118 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.

21. An extract of the provisions of the Ordinance that are being amended by the 2014 Bill is attached at **Annex G**.

G

LEGISLATIVE TIMETABLE

22. The legislative timetable is as follows –

Publication in the Gazette	13 June 2014
First Reading and commencement of Second Reading debate	18 June 2014
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

23. The proposal has economic, financial, civil service and sustainability implications as set out in **Annex H**. Our proposal has no competition, environmental, family 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 Copyright Ordinance.

H

PUBLIC CONSULTATION

24. The legislative proposals contained in the 2011 Bill were drawn up after three rounds of consultation since 2006. From July to November 2013, we conducted a further public consultation exercise specifically on parody. We engaged the general public and stakeholders through different channels and forums. Two public forums were organised and various engagement sessions targeted at copyright owners and netizens were held. We had continuous engagement with stakeholders, including copyright owners and netizens groups during and after the consultation exercise. In addition, we briefed the LegCo Panel on Commerce and Industry on the consultation outcome and our proposed directions at its meetings in December 2013 and March 2014 respectively. Members generally agreed on the proposed directions. They also appreciated the genuine need to update our Copyright Ordinance to catch up with the international trend, and urged the Administration to reintroduce an amendment Bill for scrutiny as soon as possible. We will continue the wide engagement throughout the future legislative process.

PUBLICITY

25. A press release will be issued today (11 June 2014). A spokesman will be made available to answer public enquiries.

BACKGROUND

26. Following extensive consultations since 2006, we introduced the 2011 Bill into LegCo in June 2011 to update our copyright law. Parody was not a subject that the 2011 Bill sought to address, but wide-ranging views on this were expressed in the community during the examination of the Bill in LegCo. After thorough scrutiny, the LegCo Bills Committee supported passage of the Bill with suitable amendments and requested the Administration to separately consult the public on the treatment of parody in our copyright regime. But owing to other pressing business LegCo had to transact, the Bill did not resume Second Reading Debate and lapsed upon expiry of the previous term of LegCo in July 2012.

ENQUIRIES

27. Any enquiries on this brief may be addressed to Ms Patricia So, Principal Assistant Secretary for Commerce and Economic Development (Commerce and Industry) at telephone number 2810 2862.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
11 June 2014

Copyright (Amendment) Bill 2014

Contents

Clause Page

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; for limiting an online service provider's liability; for acts that may be done without infringing copyright or performers' rights; for additional factors in considering whether additional damages should be awarded in an action for infringement; and for related matters.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Copyright (Amendment) Ordinance 2014.

(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. Copyright Ordinance amended

The Copyright Ordinance (Cap. 528) is amended as set out in sections 3 to 96.

3. 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.".

4. 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".

5. Section 9 amended (cable programmes)

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".

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

(1) Section 17(5)(a)(i)—

Repeal

"or"

Substitute

"and".

(2) Section 17(5)(a)—

Repeal subparagraph (ii)

Substitute

"(ii) communication to the public; and".

(3) Section 17(5)(b)(ii)—

Repeal

"or"

Substitute

"and".

(4) Section 17(5)(b)—

Repeal subparagraph (iii)

Substitute

"(iii) communication to the public,".

(5) Section 17(5)—

Repeal paragraph (c).

7. 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".

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

(1) Section 19(6)(a), after the semicolon—

Add

"and".

(2) Section 19(6)—

Repeal paragraph (b)

Substitute

"(b) communicating to the public,".

(3) Section 19(6)—

Repeal paragraph (c).

9. 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.".

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

Section 25(3)(a)—

Repeal

", broadcasting or inclusion in a cable programme service"

Substitute

"or communicating to the public".

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

Section 26—

Repeal the section.

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

Section 28—

Repeal the section.

13. 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 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 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) 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.".

14. 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".

15. 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 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.".

16. 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".

17. 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); or".

18. 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, in the case of a published edition, in the typographical arrangement, 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, in the case of a published edition, in the typographical arrangement, 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 to the 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.".

19. 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.".

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

(1) Section 40(2)—

Repeal

"or making available".

(2) Section 40(2)—

Repeal

", broadcasting or inclusion in a cable programme service"

Substitute

"or communicating to the public".

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

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.".

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

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 whom the copy is made under subsection (1) or the person to whom the copy is supplied under that subsection, 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.".

23. Section 40D amended (intermediate copies)

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 whom 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.".

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

(1) Section 41A(5)—

Repeal

"making available of copies"

Substitute

"communication".

(2) 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".

(3) Section 41A(5)(a)(ii)—

Repeal

"copies of the work are"

Substitute

"work is".

(4) 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".

(5) Section 41A(5)(b)(ii)—

Repeal

"copies of the work are"

Substitute

"work is".

(6) 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.".

25. 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

"該複製品被用以進行".

(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 by virtue of subsection (3).".

26. 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 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

"該複製品被用以進行".

(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 by virtue of 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.".

27. 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

"該複製品被用以進行".

(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 by virtue of 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.".

28. Cross-heading before section 46 substituted

Cross-heading before section 46—

Repeal the cross-heading

Substitute

"Libraries, museums and archives".

29. 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".

30. 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)".

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

Section 50(1)(b)—

Repeal

"published edition of a literary, dramatic or musical work"

Substitute

"published literary, dramatic, musical or artistic work".

32. 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.".

33. 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 and 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.".

34. 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(2)(a), after "library"—

Add

", museum".

(6) Section 52(2), after "librarian"—

Add

", curator".

(7) Section 52(3)(a), after "librarian"—

Add

", curator".

(8) Section 52(3)(c), after "library"—

Add

", museum".

35. 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 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.".

36. 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".

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

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.".

38. 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".

39. 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".

40. 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".

41. 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".

42. Section 65A added

After section 65—

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; or

(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 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.".

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

Section 67(1)—

Repeal paragraph (b)

Substitute

"(b) communicating the whole or part of the work to the public,".

44. 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".

45. 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".

46. 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

"issue to the public of copies, or the communication to the public,".

47. 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

"該複製品被用以進行".

(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.".

48. Section 76A added

After section 76—

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 (***owner***) of the original copy 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.".

49. 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".

50. 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 the users of online services provided by the provider;

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;

standard technical measure (標準技術措施) means any technical measure widely 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 facts or circumstances that would lead inevitably to the conclusion that the infringement has 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 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 in 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) industry practice in relation to the charging for online services provided by other service providers that are similar to the online service to which the infringement relates;

(ii) whether the fee of 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 obtained by the provider for providing the online service to which the infringement relates was greater than the benefit that would usually result from

charging for the online service in accordance with accepted industry practices; and

(b) financial benefits directly attributable to the infringement do not include one-off set up fees or 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 infringing activity;

(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 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 notice in writing 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 notice of alleged infringement sent by the service provider under section 88C(7) 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 service 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;

(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) Any 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) where 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—

(a) became aware that the material or activity relates to an infringement of copyright; or

(b) became aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has 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—

(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 provide the subscriber with—

(i) information reasonably sufficient to enable the subscriber to identify the material or activity; and

(ii) the provider's reasons for the removal or disabling; and

(c) subject to subsection (7), where 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—

(a) the service provider promptly sends a copy of the counter notice to the complainant; and

(b) (if the subscriber is an individual) the service 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—

(a) 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

(b) the designated agent of the service provider has been notified in writing, by the person who brings the proceedings, of the proceedings—

(i) in the case of subsection (2)(c)(iii) or (5), within a reasonable time after the service 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 service 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; 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 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.".

51. 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 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".

52. 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);".

53. 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

", or broadcasts or includes in a cable programme service"

Substitute

"or 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".

54. 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".

55. 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,".

56. 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".

57. 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(2E)—

Repeal

"recording by the Hong Kong Film Archive"

Substitute

"recording by a designated library, museum or archive".

(3) Section 118(2E)(a)—

Repeal

"the Hong Kong Film Archive"

Substitute

"the library, museum or archive".

(4) Section 118(2E)(b)—

Repeal

"the Hong Kong Film Archive"

Substitute

"the library, museum or archive".

(5) Section 118(2F)—

Repeal

"recording by the Hong Kong Film Archive"

Substitute

"recording by a designated library, museum or archive".

(6) Section 118(2F)(a)—

Repeal

"the Hong Kong Film Archive" (wherever appearing)

Substitute

"the library, museum or archive".

(7) After section 118(2F)—

Add

"(2FA) In subsections (2E) and (2F), references to a designated library, museum or archive are 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) 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, for the purposes of subsection (2FA)(b), any library, museum or archive that is exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112).".

(8) 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 a 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.".

58. 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.".

59. 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 which—

(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 section 118(8B) 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)".

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

(1) Section 154—

Repeal paragraph (d)

Substitute

"(d) communicating the work to the public;".

(2) Section 154(e)—

Repeal

"or making available".

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

(1) Section 161—

Repeal paragraph (d)

Substitute

"(d) communicating the work to the public;".

(2) Section 161(e)—

Repeal

"or making available".

62. Section 199 amended (index of defined expressions)

(1) Section 199, English text, Table—

Repeal

"librarian (in sections 45 to 52)"

Substitute

"librarian (in sections 46 to 53)".

(2) Section 199, Table—

Repeal

"make available copies to the public section 26".

(3) Section 199, Table—

Repeal

"specified library or archive (in sections 46 to 52)"

Substitute

"specified library, museum or archive (in sections 46 to 53)".

(4) 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)".

63. 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 including the performance; or".

64. 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 which includes the unfixed performance.".

(3) Section 202—

Repeal subsection (4).

65. 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".

66. 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"

Substitute

"making a fixation of a performance available to the public".

(4) Section 205(2)—

Repeal

"the making available of copies of the fixation"

Substitute

"making the fixation available".

(5) 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".

(6) Section 205—

Repeal subsection (3).

(7) Section 205—

Repeal subsection (4)

Substitute

"(4) The mere provision of facilities by any person for enabling or facilitating the making available of fixations to the public does not of itself constitute an act of making the fixations available to the public.".

(8) Section 205(5)—

Repeal

"copies of".

67. 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).

68. 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".

69. 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)".

70. 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".

71. 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,".

72. 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);".

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

Section 238(1)—

Add in alphabetical order to the expressions

"communication to the public;".

74. 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))".

75. 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 to the 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 to the 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 in this section have the same meaning as in section 39.".

76. 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 in this section have the same meaning as in section 39A.".

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

Section 242(2)—

Repeal

", broadcasting or inclusion in a cable programme service"

Substitute

"or communicating to the public".

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

(1) Section 242A(4)—

Repeal

"making available of copies"

Substitute

"communication".

(2) 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".

(3) Section 242A(4)(a)(ii)—

Repeal

"copies of the fixation are"

Substitute

"fixation is".

(4) 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".

(5) Section 242A(4)(b)(ii)—

Repeal

"copies of the fixation are"

Substitute

"fixation is".

(6) 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.".

79. 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

"該錄製品被用以進行".

(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 by virtue of subsection (2).".

80. 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 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

"該紀錄或複製品被用以進行".

(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 by virtue of subsection (1A).".

81. 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 which 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 by virtue of 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 section 51A.".

82. 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".

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

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.".

84. 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".

85. 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; or

(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.".

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

Section 253(1)—

Repeal paragraph (b)

Substitute

"(b) of communicating the whole or part of the reading or recitation to the public,".

87. 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).

88. 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".

89. 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);".

90. 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 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 sounding recording; or"

Substitute

"or communicates to the public the sound recording.".

(5) Section 272E(2)(c)—

Repeal subparagraph (ii).

91. 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).

92. 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).

93. 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).

94. 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".

95. 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".

96. 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".

Explanatory Memorandum

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

2. Clause 1 sets out the short title and provides for commencement.

Right of communication to public

3. 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 9(3) and 13). 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.

4. Consequential amendments are made to the Ordinance to delete or modify the references to the acts that are subsumed by the expression "communication to the public" as defined in the new section 28A added by clause 13 (the acts are mentioned in paragraph 3), and other similar references (clauses 6, 7, 8, 9(1) and (2), 10, 11, 12, 16, 20, 43, 44, 46, 47(1), 49, 51(1), (3), (6), (9), (10), (11) and (13), 53(1), (3), (6) and (7), 54, 56, 60, 61, 62(2) and 96).

5. 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 4, 5, 24(1), (2), (3), (4) and (5), 38, 39, 40, 41, 45, 51(2), (4), (5), (7), (8)

and (12) and 53(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.

6. Similar amendments are made to the provisions of Parts III, IIIA and IV of the Ordinance in relation to the rights of a performer to communicate the performance to the public, circumvention of effective technological measures and rights management information (clauses 63, 64, 66, 67, 68, 69, 70, 73, 74, 77, 78(1), (2), (3), (4) and (5), 84, 86, 87, 88, 90, 91, 92, 93 and 95).

7. 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 57(8)). 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 58).

8. 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 59(1)).

Limitations on liability of online service providers

9. A new Division IIIA (new 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 copyright in a work that has occurred on the provider's service platform (clause 50). In particular—

(a) new section 88A provides for the meaning of the expressions used in the new Division;

(b) 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 has occurred on the provider's service platform;

(c) 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) 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 facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred;

(e) new section 88E provides for the procedures for giving a counter notice to dispute the alleged infringement;

(f) 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) 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) 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 relates, disabling access to the material or activity to which an alleged infringement relates, reinstating the material, or ceasing disabling access;

(i) new section 88I provides for a rebuttable presumption that a service provider has complied with the conditions specified in that section; and

(j) 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

10. 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 copyright so as to—

(i) cover the use of a quotation from a work for the purpose of criticism, review or otherwise; and

(ii) cover fair dealing with a work for the purpose of commenting on current events (clause 18).

11. 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 19).

12. 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 26(2)).

13. 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 27(5)).

14. 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 30).

15. 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 31).

16. 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 33).

17. 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 any sound recording or film held in the permanent collection of the library, museum or archive to the public (clause 35).

18. Certain permitted acts under the Ordinance that are applicable to specified libraries and archives are extended to cover museums (clauses 32, 34, 36 and 82).

19. 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 42).

20. 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 48).

21. 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 a performance or fixation for the purpose of criticism, review or otherwise; and

(ii) cover fair dealing with a performance or fixation for the purpose of commenting on current events (clause 75).

22. 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 76). The new permitted act is similar to that provided by the new section 39A added by clause 19.

23. 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 80(2)). The new permitted act is similar to that provided by the new section 44(1A) added by clause 26(2).

24. 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 81).

25. 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 81).

26. 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 85). The new permitted act is similar to that provided by the new section 65A added by clause 42.

Additional damages

27. 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 55(3) and 71(3)).

Related amendments

28. 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 given to "sound recording" in section 6(1) of the Ordinance is to be protected as a sound recording (clause 3).

29. 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 9(4)).

30. 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 a copy of a work is made to such an extent as to affect prejudicially the owner of the copyright in the work (clauses 15(2) and 57(1)).

31. Sections 40B(6), 40C(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 define the meaning of the expression "dealt with" in the relevant provisions of the Ordinance (clauses 21, 22, 23, 24(6), 25(3), 26(6), 27(9), 37, 47(4), 78(6), 79(3), 80(6) and 83).

32. 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 57(2), (3), (4), (5) and (6)). New subsections (2FA) and (2FB) are added to section 118 of the Ordinance to provide that the designation is to be made by the Secretary for Commerce and Economic Development (clause 57(7)).

Annex B

Treatment of Parody under the Copyright Regime
Consultation Paper

Introduction

In pace with the rapid development of the knowledge-based economy, we keep our copyright law under regular review to ensure that the regime continues to strike a balance between the legitimate interests of copyright owners and users and the general public, and to serve the best interest of Hong Kong. Following extensive consultations since 2006, a Bill[1] was introduced into the Legislative Council (LegCo) in June 2011 to update the Copyright Ordinance (Cap. 528). Among other things, it sought to introduce a technology-neutral communication right[2] to better protect copyright works in the digital environment[3].

2. Parody was not a subject that the Bill sought to address, but wide-ranging views on this were expressed in the community during the examination of the Bill in LegCo. After thorough scrutiny, the LegCo Bills Committee supported passage of the Bill with suitable amendments and requested the Administration to separately consult the public on the treatment of parody in our copyright regime[4]. But owing to other pressing business LegCo had to transact, the Bill did not resume Second Reading Debate and lapsed upon expiry of the previous term of LegCo in July 2012.

3. The Administration would now like to consult the public on the treatment of parody under our copyright regime in order to map out the way forward for the package of legislative amendments already scrutinised and supported by the LegCo Bills Committee. This will enable the re-introduction of a new amendment Bill into LegCo to update our copyright regime in earnest.

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1 The Copyright (Amendment) Bill 2011.

2 At present, the Copyright Ordinance (Cap.528) gives copyright owners a number of 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 copyright work in a cable programme. The current modes of transmission specified in the Ordinance, including "making available", "broadcasting" and "inclusion in cable programme" may not be adequate to cope with future developments in electronic transmission. Introduction of a new communication right would ensure that our copyright law will endure the test of rapid advances in technology to obviate the need to change the law every time a new communication mode emerges.

3 The Bill also fosters cooperation between copyright owners and online service providers to combat online copyright infringement, and facilitates new modes of uses of copyright works such as e-learning and media shifting.

4 See the report of the Bills Committee at www.legco.gov.hk/yr11-12/english/hc/papers/hc0420cb1-1610-e.pdf.

Copyright and Parody

4. The use of parody taking advantage of an existing work as a form of expression is not new. With advances in technology, it has become easier for members of the public to express their views and commentary on current events by altering existing copyright works and to disseminate them through the Internet. In Hong Kong, popular forms of this genre in recent years include (a) combining existing news photos or movie posters with pictures of political figures; (b) providing new lyrics to popular songs; and (c) editing a short clip from a television drama or movie to relate to a current event (sometimes with new subtitles or dialogues).

5. An important feature of this genre is the inclusion of an element of imitation or incorporation of certain elements of an underlying copyright work. Depending on the circumstances in individual cases, this might or might not amount to copyright infringement. In overseas jurisdictions, a variety of terms such as parody, satire, caricature and pastiche[5] are used to describe this genre in legislation or policy discussion as well as in case law, referencing different perspectives or emphasis (such as the intended purposes or effects). For the sake of consistency and convenience, we would collectively use the term "parody" in this consultation paper as a general reference to such imitations[6].

Copyright and Freedom of Expression

6. Copyright as a property right is recognised and protected under the Basic Law as well as the local law of Hong Kong[7]. At the international level, Hong Kong has an obligation to protect copyright pursuant to several international copyright conventions which apply to Hong Kong[8]. Freedom of

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[5] The Oxford English Dictionary defines the terms as follows –

Parody:	an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect
Satire:	the use of humour, irony, exaggeration, or ridicule to expose and criticise people's stupidity or vices, particularly in the context of contemporary politics and other topical issues
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

[6] We note that the local media and some sectors of the public sometimes use the term "secondary creation" ("二次創作") interchangeably with "parody". This is not a term commonly used in copyright jurisprudence and may entail a much larger scope than parody. In fact, the term "secondary creation" has been used very loosely to cover a wide-range of activities, including a mere adaptation or modification of a copyright work. As such, the subject of the present consultation is parody but not "secondary creation".

[7] Article 6 of the Basic Law provides that the HKSAR *"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."*

[8] These treaties include The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), 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.

expression on the other hand is entrenched under the Basic Law and the Hong Kong Bill of Rights ("BOR")[9]. Both copyright and freedom of expression are not absolute. They are subject to certain restrictions[10].

7. Since competing rights are involved, a fair balance needs to be struck between copyright protection and the freedom of expression on the part of those who seek to use or communicate copyright works.

The issue and arguments

8. During the discussion of the Bill, there were suggestions that the Government should clarify the treatment of parody or similar acts under the existing law and the Bill because some were worried that the parody practice commonly seen today might be inadvertently caught by the criminal net. Some also proposed introducing some forms of criminal exemptions or copyright exceptions for parody. While some copyright owners have no objections to the exemption of parody from the criminal net, they are concerned that a new copyright exception for parody would adversely affect their legitimate interests. The pertinent issue to address is whether our copyright regime should be changed to deal with parody.

9. Those who support some forms of special treatment consider that parody -

(a) causes little or no economic damage to the copyright owners as a parody is unlikely to substitute the original work;

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[9] Article 27 of the Basic Law provides, inter alia, that *"Hong Kong residents shall have freedom of speech, of the press and of publication"*. BOR Article 16(2) provides that *"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*

[10] For copyright, the existing Copyright Ordinance (Cap.528) provides for a number of exceptions (paragraph 14 below). For freedom of expression, BOR Article 16(3) qualifies the right to freedom of expression by recognising that the exercise of the right "*carries with it special duties and responsibilities"*, and that this right may be subject to restrictions which are provided by law and are necessary for the specified purposes, including *"respect of the rights or reputations of others"*. The English Court of Appeal had commented that *"freedom of expression should not normally carry with it the right to make free use of another's work."* See *Ashdown v Telegraph Group Ltd*. [2002]R.P.C. 5, per Lord Phillips M.R. paragraph 46. In considering the issue of freedom of expression and copyright protection, Lord Phillips has made the following comments in paragraph 39 of the judgment: "*We have already observed that in most circumstances, the principle of freedom of expression will be sufficiently protected if there is a right to publish information and ideas set out in another's literary work, without copying the very words which that person has employed to convey the information or express the ideas. In such circumstances, it will normally be necessary in a democratic society that the author of the work should have his property in his own creation protected. Strasbourg jurisprudence demonstrates, however, that circumstances can arise in which freedom of expression will only be fully effective if an individual is permitted to reproduce the very words spoken by another."* On the other hand, it is trite law that the court will apply the "proportionality test" in determining whether restrictions on fundamental rights including the freedom of expression are lawful. We note that the restriction of the freedom of expression should be rationally connected to a specified purpose, and is no more than necessary to achieve the purpose. See *HKSAR v Ng Kung Siu* [1999] HKCFA 10.

(b) may, in some cases, make the original work more popular by drawing attention to it;

(c) encourages creativity, nurtures new talents and even entertainment business, and therefore contributes to the overall economic and cultural development of society; and

(d) serves as effective tools for the public to express views or comment on social and public affairs, and enhances freedom of expression.

10. On the other hand, those who oppose a special treatment of parody consider that -

(a) the present regime (discussed in paragraphs 11-16 below) already strikes a fair balance between the legitimate interests of different parties, and evidently has not hindered the creation and dissemination of parody;

(b) a special treatment of parody would create uncertainty and increase opportunities for abuse by blurring the line between parody and outright copyright infringement;

(c) a special parody treatment would affect copyright owners' legitimate interests in seeking licensing revenue over use of their works for parody, lowering the returns for their creative works and thereby dampening creativity; and

(d) a special parody treatment might conflict with certain moral rights of creators, e.g. right to be attributed and right to preserve the integrity of their works[11].

Current legal position in Hong Kong

11. Not all parodies involve copyright infringement.

[11] Under the copyright regime, moral rights allow the authors of literary, dramatic, musical and artistic works, and the directors of films to preserve their relationship with the creation of their works. Sections 89(1), 92(1) and 96(1) of the Copyright Ordinance (Cap. 528) afford protection to three kinds of moral rights, namely (a) the right to be identified as author or director, (b) the right to object to derogatory treatment of a work, and (c) the right not to have a work falsely attributed to him as author or director. The first two rights are recognised by the Berne Convention which is applicable to Hong Kong. Only civil liabilities will be attracted by violating these rights, and to our best knowledge, there is no local court decision on infringement.

12. For parodies that only incorporate the idea or reproduce an insubstantial part of the underlying works, they do not constitute any copyright infringement as copyright only prohibits substantial copying of the original work and does not grant a monopoly over the underlying ideas or information.

13. Parodies incorporating a substantial part of the underlying work with consent from the copyright owner, including such as by way of an appropriate Creative Commons licence[12] are lawful. Parodies can also be lawfully produced by incorporating works in the public domain[13] with expired copyrights such as classical painting like Leonardo da Vinci's "*Mona Lisa*" and songs like Beethoven's "*For Elise*" provided that the production does not involve the use of sound recordings or other works which are protected by copyright.

14. In addition, the existing Copyright Ordinance provides for a number of copyright exceptions or permitted acts for users to facilitate the reasonable use of copyright works in various ways[14]. For instance, the fair dealing of copyright works for the purposes of education, research and private study[15], criticism and review (regarding the subject copyright works or other works)[16], and news reporting[17] are permissible with qualifying conditions. Parodies that are created for such purposes may fall within the ambit of the permitted acts in appropriate circumstances.

15. For parodies that fall outside the aforementioned exemptions and exceptions, they may attract civil liability for copyright infringement under the existing copyright law of Hong Kong. Furthermore, if a person distributes a copy of an infringing parody to the public in the course of any trade or business or to such an extent as to affect prejudicially the copyright owner, he

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[12] A Creative Commons (CC) licence is a set of standard terms licence devised by a private organisation called Creative Commons. CC licences are meant to facilitate copyright owners in licensing their works for use by others free of charge based on certain preset terms and conditions. The public may copy, distribute, display and perform a CC licensed work and/or any derivative works based on it, subject to any conditions the author has specified, such as acknowledging the author of the underlying work and for non-commercial purposes etc.

[13] According to section 17 of the Copyright Ordinance (Cap. 528), copyright in literary, dramatic, musical or artistic work expires at the end of the period of 50 years from the end of calendar year in which the author dies subject to certain exceptions.

[14] There are over 60 provisions on permitted acts under the existing Copyright Ordinance (Cap. 528) governing the reasonable use of copyright works under specific circumstances.

[15] Section 38 of the Copyright Ordinance (Cap. 528).

[16] Section 39(1) of the Copyright Ordinance (Cap. 528).

[17] Section 39(2) and (3) of the Copyright Ordinance (Cap. 528).

may be subject to criminal liability[18]. However, in reality, it appears unlikely that the distribution of a copy of an infringing parody will be considered as "*to the extent as to affect prejudicially the copyright owner*". Parodies in general target different markets from those of the underlying works and do not displace the legitimate market of the underlying works[19]. We are also unaware of any criminal prosecution against parody in Hong Kong or in other common law jurisdictions that we have surveyed.

16. As a further safeguard, the court has jurisdiction to prevent or restrict the enforcement of copyright on the ground of public interest[20].

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[18] See section 118(1) of Copyright Ordinance (Cap. 528) :

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

(a) makes for sale or hire an infringing copy of the work;

(b) imports an infringing copy of the work into Hong Kong otherwise than for his private and domestic use;

(c) exports an infringing copy of the work from Hong Kong otherwise than for his private and domestic use;

(d) sells, lets for hire, or offers or exposes for sale or hire an infringing copy of the work for the purpose of or in the course of any trade or business;

(e) exhibits in public or distributes an infringing copy of the work for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works;

(f) possesses an infringing copy of the work with a view to -
(i) its being sold or let for hire by any person for the purpose of or in the course of any trade or business; or
(ii) its being exhibited in public or distributed by any person for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works; or

(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."

As mentioned in paragraph 1, the Copyright (Amendment) Bill 2011 sought to introduce a technology-neutral communication right. The proposed criminal sanction against unauthorised communication of a copyright work to the public in the Bill mirrors the existing offences under section 118(1) of Copyright Ordinance. The proposed section 118(8B) reads:

"A person commits an offence if the person -

(a) without the licence of the copyright owner of a copyright work, communicates 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) without the licence of the copyright owner of a copyright work, communicates 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."

[19] In *HKSAR v Chan Nai Ming* [2005]4 HKLRD 142 (Reasons for Verdict of Tuen Mun Mgistrates' Court), the presiding magistrate considered that "prejudice" is not necessarily restricted to economic prejudice though economic prejudice would be the obvious area to which attention should be directed.

[20] Section 192(3) of the Copyright Ordinance (Cap. 528) provides that "*Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.*" The English Court of Appeal in *Ashdown v Telegraph Group Ltd.* concluded that *"the circumstances in which public interest may override copyright are not capable of precise categorisation or definition"*. (paragraph 58 of the judgment).

Situations in other jurisdictions

Australia

17. In 2006 Australia introduced a fair dealing exception for parody and satire into its Copyright Act 1968[21]. However, no statutory definition for the terms "parody" and "satire" has been provided in the legislation. The concepts of "parody" and "satire" are therefore subject to interpretation by the court. According to the "Fact Sheet on Parody and Satire" issued by the Attorney-General's Department of Australia in 2007, the two concepts "*are similar and can overlap*". It notes that while "*parody often involves the imitation of the characteristic style of an author or a work for comic effect or ridicule*", "*satire often involves attacking an idea or attitude, an institution or a social practice, through irony, derision, or wit*".

18. To qualify for the copyright exception, a parody or satire must be "fair" to the copyright owner, but the law has not specified how "fairness" should be assessed. The Attorney-General's Department suggests that it "*requires a court to make an objective assessment of how and why the material has been used*" and a number of relevant factors have to be considered, such as whether the material is published or unpublished; the nature of the material and the nature of the use; the possibility of obtaining permission from the rights holder and whether there has been any impropriety in obtaining the material[22].

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[21] The new exceptions were introduced into Australia's Copyright Act 1968 after a public consultation on "Fair Use and Other Copyright Exceptions". The Australian government then decided not to adopt the US open-ended exceptions for fair use but introduced two fair dealing exceptions for parody and satire under the new sections 41A and 103AA of its Copyright Act 1968, which respectively provides that -"*A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.*" (s.41A)
"*A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of parody or satire.*" (s.103AA)

However, in a Discussion Paper entitled "Copyright and the Digital Economy" published in June 2013, the Australian Law Reform Commission proposes, among other things, that a broad, flexible exception for fair use similar to that of the US should be provided in Australia's Copyright Act to replace some of its existing "fair dealing" exceptions, such as the fair dealing exception for parody or satire; and suggests introducing a list of non-exhaustive factors similar to that of the US for the court to determine "fairness". A non-exhaustive list of illustrative uses or purposes that may qualify as fair use such as "research or study, criticism or review, parody or satire" is suggested to be included in the fair use provisions. The consultation will run until end July 2013. The Commission will deliver the final report to the Attorney-General of Australia by end November 2013.

[22] Although Australia's fair dealing provision on parody does not set out the factors for determining "fairness", the factors suggested by the Attorney-General's Department are similar to the consideration applicable to our existing fair dealing provisions in the Copyright Ordinance (Cap. 528).

19. As there has not been any decided case on this statutory exception, the precise scope and the effect of the Australian fair dealing provision remain to be seen [23].

New Zealand

20. There is no copyright exception for parody or satire in New Zealand's copyright law. Similar to Hong Kong, New Zealand has fair dealing provisions for criticism, review and news reporting. In 2008, New Zealand's Ministry of Economic Development conducted an inquiry to determine the need for parody and satire exceptions in their copyright law. However, owing to the change of government, the review was halted.

The US

21. Apart from providing for an open-ended fair use exception covering acts done for the purposes of criticism, comment, news reporting, teaching, scholarship or research, etc, there is no specific copyright exception for parody or satire in the US Copyright Act, nor is there any presumption of fair use in favour of parody or satire in the US jurisprudence. Whether a parody or satire constitutes fair use of a copyright work has to be determined on a case-by-case basis by balancing different factors[24]. According to the judicial reasoning of decided cases, the US court tends to consider "satire" as a separate category, and is less inclined to consider it a fair use[25].

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[23] In its commentary on the Australian exception on parody and satire, the Australian Copyright Council suggests that the purpose of a true parody is to make some comment on the imitated work or on its creator while the purpose of a satire, on the other hand, is to draw attention to characteristics or actions – such as vice or folly – by using certain forms of expression – such as irony, sarcasm and ridicule. The Council further comments that making something funny is not enough to make it a parody or satire. Some form of commentary (which may be implied) on the underlying work or on characteristics or actions such as vice or folly is required. Changing words of songs or other material in an incongruous context is not necessarily parody or satire. It is required to consider whether a relevant kind of comment has been made. The Australian Copyright Council is an independent, non-profit making organisation representing the major bodies of professional artists and contents creators working in Australia's creative industries and Australia's major copyright collecting societies. It works to promote understanding of copyright law and its application, lobbies for appropriate law reform in respect of copyright and fosters collaboration between content creators and consumers.

[24] The US courts balance the following factors when considering the defence of fair use –

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

But there have been conflicting decisions in the US on parodies over similar facts, as in the cases of ***Columbia Pictures Industries Inc v Miramax Films Corp*** and ***Leibovitz v Paramount Pictures Corporation***.

[25] See Campbell v Acuff-Rose Music, Inc. 510 U.S. 569 (1994).

Canada

22. The Canadian Copyright Modernization Act, which came into effect in November 2012, has expanded its previous fair dealing exception for research and private study to cover fair dealing for parody or satire[26]. Similar to the Australian law, the Canadian Copyright Act does not define what a "parody" or "satire" is. We are also unaware of any official record providing any explanation about the intended scope of this new exception.

The UK

23. Currently, the UK copyright law does not provide for any specific exception for parody[27]. In August 2011, with a view to taking forward the recommendations made in the Hargreaves Report[28], the UK Government conducted a public consultation exercise on a number of copyright exceptions including that for parody, caricature and pastiche[29]. In December 2012, the UK Government released its response to the public consultation[30].

24. The UK Government decided to introduce, among other things, a fair dealing exception to allow limited copying for parody, caricature and pastiche, while maintaining the current system of moral rights. The reasons quoted include economic, cultural and social benefits similar to those referred to in paragraph 9 above. The "fair dealing" requirement is proposed as an additional safeguard to minimise misuse of the exception.

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[26] The revised section 29 of the Copyright Act provides that: *"Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright."*

[27] In 2001 the EU issued Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society. It allows Member States to provide for exceptions or limitations to the rights in the case of use for the purpose of caricature, parody or pastiche on an optional basis. Nevertheless, the exceptions and limitations provided for shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder. The current position of the UK does not take advantage of the Directive. On the other hand, a number of EU member states such as Belgium, France, the Netherlands and Spain do include a certain parody exception under their respective copyright laws in a civil law system. However, it should be noted that the copyright regime in many of the civil law European countries is rather different from that of Hong Kong, including for example, the presence of levy systems for private copying in those countries.

[28] Hargreaves, I. 2011. "Digital Opportunity: A Review of Intellectual Property and Growth". London: Intellectual Property Office. Available at www.ipo.gov.uk/ipreview.

[29] The consultation document – "Proposals to change the UK's copyright system" (December 2011), available at www.ipo.gov.uk/consult-2011-copyright.pdf.

[30] "Modernising Copyright: a modern, robust and flexible framework" (www.ipo.gov.uk/response-2011-copyright-final.pdf). As reported in the Government website: "The response sets out Government decisions on changes to the framework for 'copyright exceptions'. These changes will introduce greater freedoms in copyright law to allow third parties to use copyright works for a variety of economically and/or socially valuable purposes without the need to seek permission from copyright owners. Protections for the interests of copyright owners and creators are built in to the revised framework."

Observations

25. There is obviously no unified approach in dealing with the issue of parody, but a few observations may be pertinent -

(a) The US adopts a general fair use doctrine. While parody may be considered as a fair use under appropriate circumstances, the US court tends to consider "satire" as a separate category, and is less inclined to consider it a fair use.

(b) Among other common law jurisdictions, Australia and Canada have provided a copyright exception for parody and satire, which is crafted within the ambit of "fair dealing" with no statutory definition of those terms. The precise scope of the exception and the issue of "fairness" are to be determined by the court. But to our knowledge there is no decided case on the application of these statutory exceptions. It appears that the UK is following a similar approach in taking forward a fair dealing exception for parody, caricature and pastiche.

(c) In introducing a copyright exception for parody and satire, neither Australia nor Canada had found it necessary to change the moral rights provisions under their pre-existing laws[31]. In the UK's latest proposal for a copyright exception for parody, it has indicated that the current system of moral rights will be maintained[32].

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[31] But it should be reckoned that in the respective regimes of Australia and Canada, the exercise of moral rights is subject to the consideration of reasonableness. For example, sections 195AR and 195AS of Australia's Copyright Act 1968 respectively provides that "*no infringement of the right of attribution of authorship if it was reasonable not to identify the author*" and "*no infringement of right of integrity of authorship if derogatory treatment or other action was reasonable*". Section 14.1 of Canada's Copyright Act provides that the author's right to the integrity of a work and the right to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous only arises "*where reasonable in the circumstances*".

In contrast, in the absence of similar general provisions for reasonableness, the Hong Kong regime (footnote 11 above) subjects the moral rights to certain specific exceptions and qualifications as provided for in sections 91, 93 and 94 of the Copyright Ordinance (Cap. 528). For example, the right to be identified as author or director (section 89) is not infringed by an act covered by the fair dealing exception regarding criticism, review and news reporting (section 39) so far as it relates to the reporting of current events by means of a sound recording, film, broadcast or cable programme.

[32] The draft provision of the UK's proposed copyright exception for caricature, parody and pastiche is as follows -

"30B Caricature, parody or pastiche

(1) Copyright in a copyright work is not infringed by any fair dealing with the work for the purposes of caricature, parody or pastiche.

(2) To the extent that the term of a contract purports to restrict or prevent the doing of any act which would otherwise be permitted under this section, that term is unenforceable."

Guiding principles

26. In considering the arguments (paragraphs 9 and 10 above) and possible options for addressing the issue, we should be guided by the following broad principles –

(a) a fair balance between protecting the legitimate interests of copyright owners and other public interests, such as reasonable use of copyright works and freedom of expression, should be maintained;

(b) any criminal exemption or copyright exception to be introduced must be fully compliant with our international obligations such as Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization (WTO)[33] and the "three-step test" requirement under Article 13 of TRIPS Agreement[34] respectively; and

(c) any proposed amendment to the Copyright Ordinance must be sufficiently clear and certain so as to afford a reasonable degree of legal certainty.

Questions

27. We would like to invite views on the following questions -

(a) whether the application of criminal sanction of copyright infringement should be clarified under the existing copyright regime in view of the current use of parody;

(b) whether a new criminal exemption or copyright exception for parody or other similar purposes should be introduced into the Copyright Ordinance ;

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[33] Article 61 of the TRIPS Agreement provides that *"Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale."*

[34] Article 13 of the TRIPS Agreement provides that *"Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."* To comply with the "three-step test", the Administration must ensure that the exception (a) is confined to "special cases", (b) does not conflict with a normal exploitation of the work, and (c) does not unreasonably prejudice the legitimate interests of the copyright owner.

(c) if a new criminal exemption or copyright exception for parody is to be introduced, what should be the scope of and the appropriate qualifying conditions or limitations for such a criminal exemption or copyright exception; and

(d) whether moral rights for authors and directors should be maintained notwithstanding any special treatment of parody in the copyright regime.

Options for Change

Option 1 – Clarifying the existing general provisions for criminal sanction

28. As discussed in paragraphs 11 to 16 above, there is reasonable room for the creation and dissemination of parodies under Hong Kong's current copyright regime. We may maintain the status quo so that the existing balance of interests between copyright owners and users is not altered.

29. Nevertheless, there may be a case for clarifying the provisions for criminal sanction under the Copyright Ordinance (regarding both the existing "prejudicial distribution" offence and the proposed "prejudicial communication" offence[35]) to better reflect the policy intent to combat commercial-scale copyright infringement. The purpose of the amendment will be to demonstrate that parodies commonly disseminated nowadays which do not displace the legitimate market of the underlying works would likely fall outside the criminal net. As supported by the LegCo Bills Committee in 2012, we may underline in the legislation the consideration of whether the infringing acts have caused "more than trivial" economic prejudice to the copyright owners and introduce relevant factors as guidance to the court in determining the magnitude of economic prejudice. Details of this proposal, and the legislative language agreed before, can be found at **Annex A**.

Annex A

[35] Please refer to footnote 18 for section 118(1)(g) of the Copyright Ordinance (Cap. 528) and the proposed new s.118(8B) under the Bill.

Option 2 – Introducing a specific criminal exemption for parody

30. Alternatively, we may consider introducing a criminal exemption to specifically exclude parody from the existing "prejudicial distribution" and the proposed "prejudicial communication" offences[36], subject to compliance with our international obligations under the TRIPS Agreement to provide for criminal procedures and penalties at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.[37] This proposal has the benefit of clarifying that dissemination of parody, so long as it meets the qualifying conditions specified in the relevant provisions, will not attract any criminal liability under those provisions. Moreover, the proposal will not deprive copyright owners of their existing rights to pursue civil claims (if there is indeed a case) against creators and/or distributors of infringing parodies. In other words, the existing balance of rights between copyright owners and users will essentially be maintained.

31. If this option is to be pursued, we have to consider some principal issues as follows in relation to the scope and application of the exemption -

(a) What subject matter should be covered by the exemption? Should it cover infringing copy or communication for the purpose of "parody", "satire", "caricature" or "pastiche", or a certain combination of such terms? Or should the exemption instead cover a more specific formulation such as "commentary on current events, social, economic or political issues"? It is of paramount importance that the subject matters must be crafted clear enough to provide legal certainty.

(b) Should a statutory definition of "parody", "satire" or other relevant terms be provided or would the ordinary dictionary meanings of these terms be sufficient?

(c) What should be the qualifying conditions for the exemption? Should reference be made to elements like economic prejudice?

Details of this proposal, and the possible legislative language for consultation purposes, can be found at **Annex B**.

Annex B

[36] Please refer to footnote 18 for section 118(1)(g) of the Copyright Ordinance (Cap. 528) and the proposed new s.118(8B) under the Bill.

[37] See footnote 33 above.

Option 3 – Introducing a fair dealing exception for parody

32. We may also consider introducing a fair dealing exception for parody based on the experience or approach in Australia, Canada and the UK. Under this option, distribution and communication of parody will not attract any civil nor criminal liability for copyright infringement if the qualifying conditions of the exception are met.

33. The proposal of limiting the exception on a fair dealing basis aims at curbing abuse and minimising any possible adverse impact on the copyright owners, following the jurisprudence in our copyright regime in other areas of exceptions. We may also consider providing a list of non-exhaustive factors for determining fairness as currently set out in sections 38 and 41A of the Copyright Ordinance[38]. Whether a particular dealing is fair would be considered by reference to the overall circumstances of individual cases, and may eventually be determined by the court.

34. There are concerns that this option would limit copyright owners' control over their works and their rights to pursue civil proceedings against parodists for copyright infringement. As such, we must be very cautious in devising the scope of the exception to ensure that it will strike a fair balance between competing interests and comply with the "three-step test" set out in the TRIPS Agreement.

35. Separately, the issue of moral rights (paragraph 10(d) above) which concern civil liabilities may be relevant. There are arguments that a parody would fail in its inherent purpose if the underlying work has to be identified and thus the right of attribution should not necessarily apply to parody. It is for consideration whether the current exceptions to the right of attribution in appropriate circumstances as set out in the existing Copyright Ordinance[39] should be expanded to cover the new fair dealing exception for parody as may be warranted[40].

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[38] The relevant factors for determining whether the dealing of a copyright works is fair include -
(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.

[39] See footnote 31 above.

[40] On the other hand, the genre of parody does not appear to carry anything intrinsic that should justify an erosion of the right to object to derogatory treatment which is already crafted in a very measured manner to protect the honour and reputation of authors and directors (sections 92 and 93 of the Copyright Ordinance (Cap. 528)), nor the right of protection from false attribution of work (section 96 of the Copyright Ordinance (Cap. 528)).

Annex C

36. To pursue this option, we need to address a number of specific issues. **Annex C** set out the details and some possible legislative language for consultation purposes.

Views Sought

37. The Government is open to how the subject matters raised in this consultation document should be addressed. You are invited to provide your views on the various issues set out in this consultation document on or before 15 October 2013 through the 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

38. An electronic copy of this document is available at the following websites -

http://www.cedb.gov.hk/citb
http://www.ipd.gov.hk

Annex D

39. A statement of personal data collection is available at **Annex D**.

Option 1 – Clarifying the existing provisions on the criminal offences for "prejudicial distribution/communication"

- Currently, the distribution of an infringing copy of a copyright work for the purpose of or in the course of any trade or business which consists of dealing in (e.g. selling) infringing copies of copyright works may constitute an offence under section 118(1)(e) of the Copyright Ordinance. In other cases, distribution of an infringing copy may constitute an offence under section 118(1)(g) if the distribution is made to such an extent as to affect prejudicially the copyright owner. Section 118 (1)(g) reads -

  "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."

- As previously agreed by the LegCo Bills Committee in the scrutiny process, a new section 118(2AA) along the following line may be added after section 118(2) of the Copyright Ordinance -

  "(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 may take into account all the circumstances of the case and, in particular, whether more than trivial economic prejudice is caused to the copyright owner as a consequence of the distribution having regard to, amongst others -

  (a) the nature of the work, including its commercial value (if any);

  (b) the mode and scale of distribution; and

  (c) whether the infringing copy so distributed amounts to a substitution for the work.".

- A similar provision may be provided in relation of the offence related to the communication right (proposed 118(8B) and (8C) of the Bill) , as follows -

"(8B) A person commits an offence if the person -

(a) without the licence of the copyright owner of a copyright work, communicates 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) without the licence of the copyright owner of a copyright work, communicates 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 may take into account all the circumstances of the case and, in particular, whether more than trivial economic prejudice is caused to the copyright owner as a consequence of the communication having regard to, amongst others -

(a) the nature of the work, including its commercial value (if any);

(b) the mode and scale of communication; and

(c) whether the communication amounts to a substitution for the work."

Annex B

Option 2 – Introducing a criminal exemption for parody

- Section 118 (1)(g) of the Copyright Ordinance reads -

  "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."

- A new section along the following line may be added after section 118(2) of the Copyright Ordinance -

  "Subsection (1)(g) does not apply to any distribution of an infringing copy of a work for the purpose of ***[parody]***[41] *if the distribution does not cause more than trivial economic prejudice to the copyright owner.".*

- A similar exemption may be provided for the offence related to the communication right, as follows -

  "Subsection (X) does not apply to any communication of the work to the public for the purpose of ***[parody]***[42] *if the communication does not cause more than trivial economic prejudice to the copyright owner.".*

[41] Or a certain combination of these terms: parody, satire, caricature and pastiche.

[42] Or a certain combination of these terms: parody, satire, caricature and pastiche.

Option 3 – Fair dealing exception

- To pursue this option, we have to consider, among other things, the following issues -

  (a) What subject matters should be covered by the exception? The corresponding fair dealing exceptions in Australia and Canada are confined to "parody or satire" but the UK refers the subject matters as "parody, caricature or pastiche" without mentioning "satire". While there does not appear to be any difference in the treatment of "parody" and "satire" under the relevant fair dealing provision in Australia and Canada, the US jurisprudence suggests that "parody" is more likely than "satire" to be covered by its fair use exception.

  (b) Should a statutory definition of "parody", "satire" or other relevant terms be provided or would the ordinary dictionary meanings of these terms be sufficient?

  (c) Alternatively, in view of the possible varied scope of "parody" and like terms, should the exception be crafted to cover a more specific formulation such as "commentary on/criticism/review of current events"? A drawback is that we are not aware of any common law jurisdiction that has adopted a similar formulation in providing for a fair dealing exception and hence there will not be any relevant case law for reference.

  (d) Should the proposed exception be subject to the requirement of making sufficient acknowledgement as in the current fair dealing exceptions for criticism or review[43]? If the requirement of making sufficient acknowledgement for parody is not necessary, should a corresponding exception to the relevant moral right be added in respect of the parody exception, in particular, the right to be identified as author or director of a work[44]?

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[43] See section 39 of the Copyright Ordinance (Cap. 528). There has been suggestion that generally speaking, the underlying work or author of a successful parody are easily identifiable by the audience and the requirement of making sufficient acknowledgement in this context may not be necessary as it will defy the humorous or critical quality of a parody or satire.

[44] See footnote 31 above.

(e) Should all classes and types of copyright works be covered by the exception? Is there any reason for excluding any particular classes or types of works from the exception? For instance, should we exclude unpublished works from the exception or should we leave it as one of the factors for determining whether the dealing is fair?

(f) Should a list of factors for determining fairness (similar to that as provided in the existing permitted acts under sections 38 and 41A) be stipulated?

- Existing Section 39 of the Copyright Ordinance reads -

"(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, if it is accompanied by a sufficient acknowledgement, does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) Fair dealing with a work for the purpose of reporting current events, if (subject to subsection (3)) it is accompanied by a sufficient acknowledgement, does not infringe any copyright in the work.

(3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme."

- We may amend the existing fair dealing provisions in section 39(1) by adding a new provision along the following line -

"(1A) Fair dealing with a work for the purpose of commenting current events does not infringe any copyright in the work."

- Alternatively, like the approach in the Copyright Act 1968 of Australia, a specific, free-standing fair dealing exception for parody along the following line may be added after section 39 of the Copyright Ordinance -

*"**39A. [Parody]***

*Fair dealing with a work for the purposes of **[parody]**[45] does not infringe any copyright in the work."*

[45] Or a certain combination of these terms: parody, satire, caricature and pastiche.

- Either provision will exempt a user from both civil and criminal liabilities for copyright infringement if the use falls under the proposed exception.

- Regarding the moral right of attribution, section 91(4) provides that the right to be identified as author or director is not infringed by an act which by virtue of a number of specific provisions set out would not infringe copyright in the work. We may make consequential amendments to section 91(4) by adding the following provision to the existing ones to cover the new parody exception if necessary–

  "(g) section [39A or 39(1A)] (fair dealing for parody)."

Annex D

Personal Data Collection

It is voluntary for members of the public to supply their personal data when providing views on this consultation document. Any personal data provided with a submission will only be used for the purpose of this public consultation exercise. The submissions and personal data collected may be passed to relevant Government bureaux and departments for purposes directly related to this consultation exercise.

2. We may publish the submissions made in response to this consultation note for public viewing after the conclusion of the public consultation exercise. If you do not wish your name or your affiliation (or both) to be disclosed, please state so when making your submission.

3. Any sender providing personal data to us in the submission will have the rights of access and correction with respect to such personal data. Any requests for data access or correction of personal data should be made in writing to -

Address : 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 number : 2147 3065

Email address : co_consultation@cedb.gov.hk

Annex C

Summary Note

During the Consultation period (and shortly thereafter), the Administration received a total of 2 455 written submissions from different stakeholders including individuals, netizen groups, companies, organisations, etc. For ease of reference, their views are summarised under four groupings, namely, (1) Users; (2) Copyright Owners; (3) Online Service Providers (OSPs); and (4) Others.

There are a total of 2 387 submissions from users and netizen groups such as the Copyright and Derivative Works Alliance and a couple of other Facebook groups. Amongst all these submissions, 2 125 are originated or generated from a number of online templates[1].

There are 43 submissions from copyright owners' organisations and companies, representing a wide spectrum of creative industries, including music, film and video, comics and animation, multimedia services, licensing bodies, publishers associations, composers and authors society, international motion picture association, and Hong Kong Copyright Concern Group.

As to the "OSPs", there are seven submissions from various associations and alliances such as the Hong Kong Internet Service Providers Association, Internet Professional Association, Online Service Providers Alliance, Asia Internet Coalition (which was formed by major search engines and social media platforms such as Google, Yahoo, Facebook, Linkedin, eBay, and Salesforce) and Hong Kong In-media.

18 submissions are put under the "Others" grouping, the stakeholders of which include professional bodies (such as the Hong Kong Bar Association, the Law Society of Hong Kong, and the Institute of Hong Kong Trade Mark Practitioners), academics, political parties and non-government organisations (such as Amnesty International).

[1] See e.g. http://slot.miario.com/machines/74629

Public Consultation on Treatment of Parody under the Copyright Regime

Summary of Views Received

A.	**Overview**	
	Organisations / Individuals	**Views / Concerns**
A.1	Copyright owners	● There was a general consensus on the need to protect copyright to provide incentive for creation. Many respondents advocated a speedy resumption of the Copyright (Amendments) Bill 2011 ("the Bill") for updating the Copyright Ordinance. ● A majority of respondents emphasised that any proposed change to the law to cater for parody (or related works) should be in full compliance with our international obligations, such as Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization ("TRIPS Agreement") as well as the "three-step test" set out in both the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") and the TRIPS Agreement. ● Most respondents believed that there was insufficient evidence to justify or necessitate any special treatment for parody to strike a balance between copyright protection and freedom of expression. ● Some respondents were concerned that a parody exception might result in possible abuses and involve practical problems in its implementation. For instance, it may cause confusion or uncertainty as to what is and what is not a parody, weaken the protection of moral right and violate Hong Kong's international obligations. ● Some respondents submitted that it would be a mistake to contemplate any sort of blanket exemption

A.	Overview	
		from liability for "parody", "satire", "caricature" or "pastiche". ● Most respondents noted that the predominant concern of parodists was that they might be prosecuted by the Government to suppress political dissents and suggested that efforts should be focused on removing such fear. Many pointed out that parodists had never been sued or prosecuted in Hong Kong which illustrated that the fear of parodists was unfounded. ● Many respondents suggested that the existing copyright regime had provided adequate room for parody, such as through the provision of numerous copyright exceptions in the Copyright Ordinance and the operation of various licensing schemes. ● Some respondents strongly disagreed that copyright impeded freedom of expression, in particular with respect to the derivative work/adaptation right and argued that on the contrary, copyright was compatible with free speech principles and was in fact the "engine of free expression". ● Many respondents from the publishing industry agreed that parody contributed to a free society and plays a part in enabling continuing evolution of culture. Some respondents also commented that parody was a way of expression and a good means of learning. ● Some respondents opined that it was a matter of basic respect that creators should be consulted before their works are taken for parody use. ● Amongst the options, providing a criminal exemption to parody (without covering satire, caricature and pastiche) appeared to be the most popular option followed by Option 1. Some respondents supported a variant of Option 3. ● None of the respondents supported an exception for user-generated content ("UGC").
A.2	Users	*General comments* ● There were views opposing all of the proposals in the Consultation Paper and calling for an extension, postponement, abandonment or withdrawal of the Consultation or the Bill. Some respondents expressed negative sentiment about the Government Bill and named the Bill as "Internet Article 23".

A.	Overview	
		● Many considered that this was not a suitable time to introduce the Bill nor was it a subject matter of urgency. They cited the lack of universal suffrage as a reason. ● There were also calls for the maintenance of the status quo. Some respondents considered that there was no need to amend the current laws to cater for parodies or address any loss caused to the copyright owners as the current laws had already provided sufficient protection to copyright owners. ● Some respondents considered that the Consultation remained ambiguous in respect of the definition, scope and applicability of the options and the proposed exemptions. One respondent considered that the three options were leniently drafted to conceal the danger that laid within. ● Some respondents submitted there should be no restriction to secondary creation or creativity, including the freedom to share. Activities on the Internet should not be regulated. Some respondents noted that no other countries had imposed restrictions on parody and, instead, some countries had provided an exemption for parodies. ● Some respondents regarded the Bill as an attempt to criminalise secondary creation, which was unwarranted when civil remedies were sufficient to compensate copyright owners, and that no new criminal or civil liabilities should be introduced for secondary creation. ● Some considered that none of the options could adequately protect secondary creation for personal use from criminal sanctions, which was intended to tackle large and commercial scale piracy. The burden of proof should not be shifted to the defendants. ● Some respondents were concerned that the Government would take legal action against the parodists without the consent or complaint from the copyright owners, resulting in white terror. If copyright owners considered themselves aggrieved by secondary creation, they should be the ones to enforce their rights in courts. There were concerns as to how the enforcement authority would exercise its power against parodists. ● Some respondents noted that copyright laws were meant to protect the original authors to ensure the sustainability of creative industry. They considered that any uses of copyright work not causing harm to the authors should be exempted from liabilities. ● Some respondents considered that neither civil nor criminal liabilities should be exempted if such

A.	Overview	
		work is used for commercial purposes. On the other hand, some respondents considered that an allowance should be given to parodists to receive a small income from their works and the level of total profit should be used as a benchmark to assess its commerciality. ● There was a suggestion that copyright laws only protected copyright owners and were no longer able to protect the authors and therefore should be abolished. ● Some respondents suggested that the Government should clarify the loopholes of the current laws, for example, the difficulty in preventing piracy committed through certain new modes of communication and explain that the Government would not by-pass copyright owners in criminal prosecution. One respondent observed that the general perception towards the Bill was negative and showed certain misunderstandings in the scope and effect of the amendments and considered that any effort to re-introduce the Bill should come with strong publicity. *Restriction of freedom of speech, expression and creativity* ● Some respondents commented that the protection of freedom of speech, expression and creativity conferred by the Basic Law as well as international treaties on human rights should be the guiding principles in formulating copyright policy and parody exception. These rights were core values worth protecting over economic benefits and should only be subject to reasonable restrictions. The three options were considered by some respondents as ineffective in protecting such freedom. ● Some respondents considered that parodies or secondary creation represented major and effective tools for citizens to voice out their dissatisfaction against the Government. While the Bill might further strengthen protection to copyright owners, there were concerns that the Bill (and some consider the current Copyright Ordinance too) might potentially threaten the freedom of speech, expression and creativity, and be used as a means to suppress dissenting voices. Parodists should not be asked to impose self-censorship on their works. The remedy for "derogatory treatment" was also perceived as a means to restrict freedom of expression. ● There were calls for a blanket protection of rights to secondary creation, for example, in the form of full exemption of civil and criminal liabilities, or for personal, non-commercial or non-defamatory use of copyright work, considering it of paramount importance in leading to true freedom of speech, expression and creativity. Any civil or criminal liabilities would scare off parodists from

A.	Overview	
		continuing their works. Some described that secondary creation only survived in the gaps of the existing law, which would eventually be filtered out by the Bill. ● Some respondents thought that, while most Western countries adhered to the "international obligations" on copyright, their governments did a better job in protecting human rights. It was also suggested that any selective adherence to international obligations as the Government thought fit was unfair. ● Some considered that copyright was not merely economic or commercial in nature. Its formulation should take into account the rights of users, and had cultural, arts and social perspectives. *Values of secondary creation* ● Some respondents advocated secondary creation and pointed out that different forms of secondary creation had long existed and had been recognised as art forms throughout the history, such as poetry and appropriation art. Learning and imitating past ideas were indispensable steps in developing artistic ability and creativity. Some respondents considered parodies as new works which derived from the existing works but with an apparent intention to attribute, pay tribute and transform the original work. There was a view that, upon transformation, the secondary creation targeted at a different market from the original work and should be exempted from both criminal and civil liabilities even if the uses were commercial, as long as it did not substitute the original work. ● In addition to their political roles, some respondents also considered works of secondary creation as products of creativity and a part of local culture. The comical effect also brought entertainment to the public. They should not be unreasonably inhibited. ● Some respondents commented that cases of actual loss caused by secondary creation were rare. One respondent noted that there had all along been a reasonable balance between parodists and copyright owners and they were at peace with each other, and considered that if this balance was disturbed by the Bill, there would be an adverse effect on the creative industry. ● Instead of blaming secondary creation as a cause to the dwindling creative industry, some respondents believed that it actually helped nurture talents for the industry. The "damage" of secondary creation had been exaggerated, while the benefits they brought to the original work and the contribution of parodists had been neglected. One respondent also noted that any synergy

A.	Overview	
		resulting from secondary creation was lost if all participants were required to obtain licences and consent from the copyright owners. ● There were views that secondary creation did not necessarily bring harm to copyright owners but promoted their works by drawing public's attention to the original works. Parodists did not have an intention to generate profit from their works nor disrespect the copyright of the original author. One respondent noted that works of secondary creation and copyright works are in principle not in conflict with each other. Another commented that secondary creation was fundamentally different from piracy and, in fact, it was a form of recognition for the underlying work to be selected as the subject of secondary creation. ● Some considered that the protection of secondary creation among members of the public was not in conflict with international obligations. Some respondents appealed to the international trend in encouraging the use of secondary creation to enhance the popularity of the original work and considered that the Government should adopt an encouraging attitude towards secondary creation. Some respondents suggested the use of creative commons licence as a solution to copyright disputes. ● One respondent commented that caricature and pastiche should be exempted not because they were part of parodies, but because they were recognised as art forms. ● On the other hand, some respondents held the contrary view that the trend in secondary creation is exasperating as it departs from attribution to apparent copying, which was detrimental to the original authors. The public should be encouraged to create but not merely imitate. ● One respondent submitted that works of secondary creation might severely harm the reputation of the targeted person. This should not be allowed even if secondary creation was exempted. However, another respondent commented that such damage in reputation should not be dealt with by the laws of copyright, but the laws of defamation.
A.3	Online service providers	● In general, the respondents agreed on the need to protect the interests of copyright owners. In particular, there was a general consensus that large-scale commercial piracy should be severely punished. ● Some respondents considered it important to adopt an approach that would promote / safeguard

A.	Overview	
		creativity and freedom of expression / speech for both entertainment and commentary purposes and cater for technological developments in the digital era. ● One of the respondents submitted that apart from the economic aspects, there were also social and cultural dimensions to copyright that are recognised and safeguarded internationally. One should take into account such dimensions in considering amendments to the Copyright Ordinance. ● One of the respondents acknowledged that parodies were not new to our society. However, technological advances had made it easier for people to express views and comments on current events by altering existing works and disseminating them online. ● One of the respondents submitted that a derivative work based on an existing work that was relevant and appropriate could be a useful tool to express the public's opinion on social issues. Restrictions on the same would result in loss to the society. ● One of the respondents noted that a parody exception would support free flow of information and further bolster Hong Kong's position as a key place to do business. At the same time, a healthy environment for entertainment and commentary would be cultivated. ● Some of the respondents considered it important to adopt an approach that would maximize the room for creation of parodies / secondary creations and lower the risks faced by their authors. ● One of the respondents noted that the options did not offer adequate protection to those involved in secondary creation. ● One of the respondents disagreed that a parody exception created uncertainty and increased opportunities for abuse by blurring the line between parody and outright copyright infringement. Nor was there any support for the notion that the exception would adversely affect copyright owners' revenues from licensing parodies, lower their return on investment and thereby dampen their creativity. ● One of the respondents submitted that the relevant provisions should be clear and easily understood to avoid confusion among the public, which might in turn have an adverse effect on creativity.

A.	Overview	
A.4	Others	● Many respondents commented that there was a need to strike a right balance between competing rights including copyright protection and freedom of expression and any proposed changes must comply with Hong Kong's international obligations including the "three-step test". ● Some respondents opined that the principles of human rights in the Universal Declaration of Human Rights ratified by the General Assembly of the United Nations should be regarded as of paramount importance in considering amendments to the copyright laws. Artistic and creative expression should be allowed to flourish in an atmosphere free of persecution and parody should not be restrained. In light of these principles, they were of the view that the current legislation already gave adequate and reasonable protection in any infringement of copyright. ● One respondent[2] suggested that the existing copyright law was satisfactory and it was neither necessary nor urgent to create an exception for parody. Further, it opined that the protection of free speech was almost always not affected by copyright protection as copyright only protected the expression of ideas but not ideas themselves. It highlighted that a copyright exception for parody would only be a defence to copyright infringement and had no effect upon other areas of laws such as defamation or criminal incitement. ● One respondent commented that there was a need to amend Hong Kong's copyright law as it was outdated and there was a need to provide better protection to copyright owners and to maintain Hong Kong's competitiveness in the aspect of creative technological developments. It opined that as there were cases in the US where parodies involving commercial elements might cause economic loss to copyright owners, the issue of parody should be handled with care. ● One respondent commented that the present copyright regime favoured copyright owners than users and consumers and it was difficult for users to identify the copyright owners and obtain licences to conduct activities such as secondary creation. It was suggested that social and cultural issues should also be taken into account in assessing the overall social benefit when amending the Copyright Ordinance and that only large scale, organised and commercial copyright piracy instead of secondary creation should be prosecuted.

[2] The Law Society of Hong Kong

A.	Overview	
		● One respondent commented that none of the three options alone could adequately address the needs, interests and concerns of internet users. It was submitted that a global trend had emerged towards providing more access to copyright works and introducing more limitations and exceptions and countries around the world no longer subscribe to the view that stronger intellectual property protection would always be better regardless of the country's internal needs, interests, conditions and priorities. ● One respondent commented that copyright exceptions promoted creativity and should not be viewed as “evil” by collecting societies and to a certain extent, they also benefited from a regime with more relaxed copyright protection. ● One respondent supported all three options to be incorporated into the Copyright Ordinance on the basis that they add legal certainty to what was currently a grey area in law, which was particularly important for developers of online content and online users who worked collaboratively to create works or users of 3D printing or additive manufacturing technology who might create works that could fall under the ambit of “parody”.

B.	**Scope of special treatment**	
	Organisations / Individuals	**Views / Concerns**
B.1	Copyright owners	● Some respondents commented that the scope of "parody" (including "satire", "caricature" and "pastiche") was so broad that would overlap with the normal licensing activities, including copying, adaptation and synchronisation. Some respondents believed that any special treatment for parody should be limited to parodies which comment on the underlying work. ● One respondent submitted that there were important distinctions between terms such as parody, pastiche, satire and caricature, which needed to be taken into account when considering the impact on copyright owners' interests, those terms should not be used interchangeably for the purposes of this Consultation. ● Some respondents commented that the concept of "secondary creation" should not mingle with the issue of parody.
B.2	Users	● While some respondents agreed that the scope should cover parody, satire, caricature and pastiche, others considered that it did not cover all works and carriers of secondary creation. Some respondents noted that it did not reflect the mainstream view in the discussion of the Bill. Another considered that defining the terms on the basis of comical and political intention would unfairly rule out many other forms of "serious" secondary creations. It was considered that confining the Consultation to only the four types of secondary creation reflected that (a) the Government did not recognise the values of creativity in secondary creation; and (b) it was a step to pigeonhole future cases for easy criminal sanction. ● There were also calls for exemptions on specific activities: - translation; - adaptation ; - sharing of secondary creation; - filling in alternate lyrics for a piece of music;

B.	**Scope of special treatment**	
		- Vocaloid; - real-time streaming of video game playing; - online posting of private song singing; - capturing TV/Movie frames and captioning movies; and - doujinshi. *Definitions* ● Some respondents disagreed with the Government's view that the term "secondary creation" "is not a term commonly used in copyright jurisprudence" and "may blur the line between infringing and non-infringing works, create uncertainty and increase opportunities for abuse". They commented that the Government was disconnected with the academia, and note that the term was a professional terminology clearly defined in the academia. ● Some respondents agreed that no statutory definitions should be provided for the terms. Interpretation should be left to the court with reference to decisions of other common law jurisdictions. Attempting to define the terms might limit the scope of secondary creation, which was well understood in society and clearly distinguishable from piracy. It was also suggested that setting definitions for artistic concepts were infeasible. On the contrary, some respondents considered that a clear definition should be provided. ● Some respondents considered that definitions of the "parodies" remained unclear under this Consultation, the public might fall into the trap of uncertain legal consequences and the room for suppressing dissenting voices was enlarged. ● Some respondents took the view that it was impractical to ask parodists to evaluate every time beforehand if their secondary creation fell into exempted categories according to the definitions and/or qualifying conditions. ● One respondent considered that categorising "pastiche" as "parodies" would blur the line of copying.

B.	**Scope of special treatment**	
B.3	Online service providers	● Some of the respondents considered that the relevant provisions should expressly refer to parody, satire, caricature and pastiche to minimise uncertainty as to whether they were covered by the copyright exception. ● Some of the respondents submitted that it was not necessary or possible to introduce legal definitions for parody, satire, caricature and pastiche, especially in view of the frequent changes in technology and nature of these kinds of works. ● One of the respondents commented that in the majority of cases, it should be easy to differentiate parody or related works from outright infringements. ● One of the respondents noted that the general public was concerned with political prosecution under the disguise of copyright infringement. Hence the Government should focus on providing special treatment to satire (in particular political satire). ● One of the respondents noted that over 1,000 netizens had expressed their views on the Consultation on hkgolden.com. In particular, they generally considered that a fair dealing exception should be granted in relation to derivative works involving social or public interest (e.g. commentary on Government policies, officials, public figures etc.).
B.4	Others	● Most of the respondents[3] were of the view that the scope of the protection should include parody, satire, caricature and pastiche. ● A majority of the respondents[4] were of the view that it was not necessary to provide statutory definitions to terms such as “parody”, “satire”, “caricature” and “pastiche” which was the common practice in other jurisdictions and definitions might turn out restricting the scope of protection. One of them suggested that Hong Kong might consider providing examples of parody in the legislation for reference and leave to the Court’s discretion to determine on a case-by-case basis.

[3] Including the Law Society of Hong Kong
[4] Including the Amnesty International (Hong Kong), the Law Society of Hong Kong and the Journalism and Media Studies Centre of the University of Hong Kong

B. **Scope of special treatment**		
		● While some respondents were of the view that the protection should not be restricted to for the purpose of commenting on/criticising/reviewing of current affairs, social economic or political issues or a certain class or types of works only, one respondent[5] expressed its preference for introducing a fair dealing exception for "commenting on current affairs" instead of parody, satire, caricature and/ or pastiche as it might be difficult to define or understand the terms "parody", "satire", "caricature" and "pastiche", and the types of use of copyright works contemplated by the Government in the Consultation Paper might not actually fall within the definitions of the same. It also submitted that there was no sufficient public interest justification to create an exception specifically for parody and/ or satire (irrespective of purpose). ● One respondent suggested that the exemption should apply to parody and satire but further consideration should be given to "pastiche" which might be relevant to UGC, derivative artworks and "artistic works" used in a commercial context. ● One respondent suggested that overseas scholars should be invited to provide an independent and objective analysis on how to define "parody". ● One respondent commented that terms such as "parody", "more than trivial economic prejudice", "fair dealing", etc. should be given a clearer definition. ● One respondent commented that the issue of "parody" and "secondary creation" should be dealt with separately since the definition of "secondary creation" was comparatively vague and might involve adaptation, translation, etc. which were legal rights owned by copyright owners.

[5] The Hong Kong Bar Association

C.	Option 1 – Clarification of criminal liability	
	Organisations / Individuals	**Views / Concerns**
C.1	Copyright owners	● This was a fairly popular option among the respondents and many respondents including the Copyright Concern Group supported this option. No respondent opposed this option. ● Some respondents considered that this proposal was the best option as it fulfilled the requirements of international conventions and provided parodists with greater room for creation as well as protecting the legitimate interests of copyright owners. ● Those who supported this option commented that the proposal clarified the scope of criminal liability and provided legal certainty, which might alleviate public concerns about criminal liability for non-commercial dissemination of parody works. ● Some respondents supported introducing relevant factors for the court to determine the magnitude of economic prejudice or what acts constituted "more than trivial" economic prejudice and clarify the existing provisions on criminal offences for "prejudicial distribution" and the proposed "prejudicial communication".
C.2	Users	● Some respondents considered the wording "whether more than trivial economic prejudice is caused to the copyright owner" ambiguous in its scope or definition, subjective and unseen in other jurisdictions or international treaties. Various respondents considered that this threshold leaned in favour of the copyright owners and was too low or too strict. It was incapable of protecting parodists and would increase the workload of the court without offering any certainty to copyright owners. One respondent noted that it failed to distinguish acts of mere copyright infringement from piracy on a commercial scale. On the other hand, one respondent took the view that there should be criminal liability if the secondary creation had caused economic damage of any degree. ● Some respondents considered that a clarification of the existing laws did not specify what types of works were exempted and did not confer sufficient protection to parodists. The threshold of criminal and civil liabilities was in fact unchanged. Some perceived this option as a replay of the Bill. The pressure of civil litigation, or merely its threat, was dire enough to cause an effect of

C.	Option 1 – Clarification of criminal liability	
		self-censorship and stifle secondary creation. Some further submitted that once criminal liability was established, the chance of success in corresponding civil action would be very high. ● Some respondents considered that this option provided a channel for copyright owners to file complaints to the Customs and Excise Department (C&ED), asking the C&ED to take action on behalf of them which encouraged wasting of public resources. ● Some considered that there was a need to further define or quantify how much was "more than trivial". The current test was uncertain as courts might take into account various factors in determining "more than trivial economic prejudice". Various respondents suggested adopting the term "commercial scale" as used in Article 61 of TRIPS Agreement, "substantial economic damage" or "significant loss" instead. If the Government opted for this option, "communication" should not replace "distribution". ● Some respondent advocated the deletion of the proposed sections 118(8B) and 118(8C). ● One respondent stated that this option was detrimental to the creative industry. Another respondent considered that the law should clearly stipulate that there would be no criminal liability if the respective markets of the parody work and the original work did not overlap. ● One respondent noted that a clarification of criminal liabilities was not necessary, which was there to tackle piracy (rather than parody) in the first place. Another respondent suggested that a mere clarification gave no confidence to the public. One respondent noted that whether the work eventually amounted to a substitution of the original work was usually out of the hand of the parodists.
C.3	Online service providers	● Some respondents considered that criminal laws should not apply to parodies / derivative works / secondary creations. They should be limited to large scale, intentional, commercial instances of "outright copyright infringement". ● Some respondents noted that the results of a survey on hkgolden.com revealed that this option was the least preferred one among the three options set out in the Consultation Paper.

C.	Option 1 – Clarification of criminal liability	
		● One of the respondents noted that there are parodies that incorporate portions of previous copyrighted works in transformative, creative ways that do not harm the economic interests of the original, and provide new cultural or social insights. This option (i.e. remaining the status quo) was not the most desirable, as some parodies might be considered infringing and subject to possible criminal prosecution unless they fell within existing exceptions. ● One of the respondents opposed this option as it might cause anxiety among users, lead to self-censorship and adversely affect the freedom of creation and expression. ● One of the respondents noted that over 1,000 netizens had expressed their views on the Consultation on hkgolden.com. In particular, they generally considered that criminal liability should be determined by the initial cause of the act in question (e.g. whether it involves commercial activity) instead of the consequences of economic loss.
C.4	Others	● Some respondents supported the formulation of this option as outlined in the Consultation Paper. ● Some respondents were of the view that the "more than trivial economic prejudice" threshold was not comprehensive as it only considered the economic implications of a parody work instead of whether the work was for a commercial purpose or not and the extent of the threshold was not clear and would cause uncertainties. Some respondents suggested that additional factors, such as the motive and use of the creation, the extent of modification and/ or modes of distribution should also be taken into account. One respondent[6] commented that the word "substantial" should be used instead of "more than trivial" economic prejudice to provide an important reminder that section 118 was enacted to combat large-scale copyright piracy. ● One respondent submitted that although this option was not the best to solve the parody issue, the proposed "more than trivial" economic prejudice test could provide guidance to other non-commercial, small-scale distribution cases. ● Some respondents opposed this option as they were of the view that the threshold of "more than

[6] The Journalism and Media Studies Centre of the University of Hong Kong

C.	Option 1 – Clarification of criminal liability	
		trivial economic prejudice" for attracting criminal liability was too low and this option did not provide an overall exemption for civil and criminal liability in relation to parody and secondary creation. Some respondents were of the view that this threshold would lead to self-censorship by users and would affect the freedom of creation and expression. • One respondent commented that under this option, enforcement agencies would have the right to conduct criminal investigations before seeking evidence and support from copyright owners, which might lead to selective prosecution and affect political discussions in public.

D.	Option 2 – Criminal exemption	
	Organisations / Individuals	**Views / Concerns**
D.1	Copyright owners	● Many respondents from the publishing industry supported this option. Many respondents commented that as the perceived harm was the danger of Government's repression over political parody, the introduction of a criminal exemption for parody was the least disruptive option. ● Most of the supporters considered that the exemption should be for parody only without extending to satire, caricature and pastiche and commented that extending the meaning of "parody" to cover acts of satire, caricature and pastiche would likely have the effect of unnecessarily broadening the exemption beyond the special case. ● While some respondents supported the wording/formulation proposed in the Consultation Paper, many respondents[7] suggested that the wording of the formulation should be revised to focus on the parody itself rather than the distributor or communicator by replacing the words "...distribution of an infringing copy of a work for the purpose of parody" with "...distribution of an infringing copy of a work MADE for the purpose of parody". They also suggested that the exemption should be clearly defined and narrowly tailored to adequately protect against unfair use such as those uses which caused more than trivial economic prejudice or damage to the reputation of original works. ● Many respondents suggested that the courts should be given a reasonable degree of discretion in determining whether the distribution of parody should be exempted from criminal liability by evaluating all relevant factors and circumstances of the case. ● Some respondents suggested that the parody must be for non-commercial purposes. One respondent specifically mentioned that "monetisation" of videos on online platforms should be considered as commercial exploitation and not to be covered by any exemption. ● Some respondents from the music industry did not support this option. ● Some respondents considered that no criminal exemption should be granted to parodies as the

[7] Including Hong Kong and International Publishers' Alliance

D.	Option 2 – Criminal exemption	
		existing Copyright Ordinance had provided some exceptions or permitted acts and a true parody which complied with the "three-step test" would rarely substitute the original work and would not attract criminal liability. One respondent commented that criminal sanction of our present Copyright Ordinance dealt with commercial dealing of infringing copies of copyrighted works and was legally impossible to target against people who used copyrighted materials within the ambit of fair dealing such as education or even parody as long as it satisfied Schweppes test. ● Some respondents were of the view that the proposed exemption may not ease parodists' worries which predominantly stem from the fear that the Government can prosecute them without the authorization of copyright owners and suggested that the Government should focus on this point and clarify the misconception. ● One respondent submitted that although chances are rare for criminal prosecution to be brought against copyright infringement on the ground of parody, there is no reason why criminal remedies be singled out if a parody were to supplant the legitimate market of a work. It was argued that criminal exemption for parody will swipe the fundamental requirement of dealing of a work to be fair, which is likely to fail the "three-step" test as it is too wide in scope and does not require the dealing of the work to be fair. ● One respondent was of the view that should this option be pursued, the Government was reminded that it must consider (a) what are covered by the exemption; (b) should it cover infringing copy communicated for the purpose of "parody" etc. or a combination of these terms; and (c) what should be the qualifying conditions for the exemption. ● One respondent submitted that there was nothing inherent about parody alone that should justify a specific criminal exemption and argued that a criminal exemption for parody would likely fail the "three-step test". ● One respondent considered that the proposed exemption would cause numerous arguments on how parody should be defined, how the issues of moral rights should be resolved, how trivial economic prejudice was to be considered and how copyright ownership in respect of the parody should be determined. ● One respondent noted that some neighbouring Asian countries had introduced the right of

D.	Option 2 – Criminal exemption	
		communication many years ago without granting a parody exemption.
D.2	Users	● While acknowledging and agreeing that there should be an exemption of criminal liabilities, some respondents worried that there continued to be civil liabilities. In view of the pressure and costs arising from legal proceedings or the threats alone, the presence of civil liabilities was damaging to freedom of speech and expression. On the other hand, whilst similarly considering that secondary creation should be exempted from criminal liabilities, some respondents stated that copyright owners or the original authors were entitled to pursue loss caused to them through civil claims. ● By applying the same wording "more than trivial economic prejudice" as in Option 1, some respondents considered this option unclear, uncertain and unadvisable. There was a view that the situation might be even worse than that under Option 1 given that the factors for the court to determine "whether any distribution/communication of the work to the public is made to an extent as to affect prejudicially the copyright owner" and "whether more than trivial economic prejudice is caused" did not appear in this option. ● Some respondents thought that the threshold to criminal liabilities of "prejudicial distribution" was unchanged under this option. The court continued to consider factors such as whether the loss was "more than trivial economic prejudice". ● Some considered that the conditions for exemption were too stringent and the exemption did not cover civil liabilities. Although there had yet been any civil case against parodists, some respondents attributed this fact to the uncertainty of wording in the current legislation (such as the definition of "distribution"). When such uncertainty was removed by the Bill, there was a real chance that copyright owners would commence legal action against parodists. ● Some respondents considered that the criminal exemption should cover all non-commercial or non-profitable acts of secondary creation with sufficient acknowledgement. One respondent noted that, in view of the freedom of speech and expression, secondary creation should not be considered as a criminal act even if they harmed the economic rights of the copyright owners. ● Some respondents perceived this option to be in favour of copyright owners. On the other hand,

D.	Option 2 – Criminal exemption	
		another noted that the existing copyright law was capable of handling disputes of secondary creation. Exploring the scope of the criminal exemption would only complicate the matter and create new loopholes. ● One respondent stated that one would attract criminal liability only by reason of economic loss caused to copyright owners due to the overlapping of the market of the original work and its substitution effect.
D.3	Online service providers	● Some respondents considered that criminal laws should not apply to parodies / derivative works / secondary creations. They should be limited to large scale, intentional, commercial instances of "outright copyright infringement". ● Some respondents noted that the results of a survey on hkgolden.com revealed that while the netizens did not consider any of the three options set out in the Consultation Paper to be ideal, this option was the most favourable one among such options. ● One of the respondents noted that this option was more favourable than Option 1 but opposed it nevertheless as it left room for abuse by way of civil claims. This could lead to monopolies and adversely affect freedom of creation and expression. ● One of the respondents noted that over 1,000 netizens have expressed their views on the Consultation on hkgolden.com. In particular, they generally consider that criminal liability should be determined by the initial cause of the act in question (e.g. whether it involved commercial activity) instead of the consequences of economic loss. ● One of the respondents considered that none of the proposed options was the most ideal. To address the controversial issues that the general public was concerned with (i.e. political prosecution under the disguise of copyright infringement), it was proposed that an exemption for satire, and in particular, satire that concerned "political and public figures" or that was for non-commercial purpose should be introduced.

D.	Option 2 – Criminal exemption	
D.4	Others	● Some respondents supported this option and they were of the view that the criminal exemption should cover all subject matters (e.g. political and social situations, parody on individuals or groups, etc.) without prejudicing the principle of fair balance between the legitimate interests of copyright owners and other public interests. ● Some respondents opposed this option. Many of them were of the view that only exempting criminal liability was not sufficient and suggested that civil liability should also be exempted. ● One respondent commented that only exempting criminal liability might lead to copyright owners abusing the civil litigation process and create a monopoly by restricting distribution of works and hence affecting freedom of creation and expression. ● One respondent commented that adopting this option would require introducing further conditions and providing statutory definitions to "parody" and "satire". As it would be difficult to reach a public consensus on these issues and other jurisdictions (e.g. Australia, US, Canada, UK, etc.) did not have such similar provisions for HK's reference, it would increase the difficulty in the legislative process. ● One respondent commented that if only criminal liability in relation to parodies that did not cause more than trivial economic prejudice was exempted, many highly effectively parodies that serve public interest would remain criminalised. The criminal threshold should be restricted to those parody works which "amount to a substitution for the original works".

E.	Option 3 – Fair dealing exception	
	Organisations / Individuals	**Views / Concerns**
E.1	Copyright owners	● Many respondents commented that an exception for parody was not necessary to achieve the balance between protection of intellectual property rights and freedom of expression. For instance, it was suggested that sections 38, 39 and 41A of the existing Ordinance could protect parodists to certain extent and music publishers had well established efficient systems to grant synchronisation licenses to cater for requests for parodic uses or adaptation of works. Some respondents considered that there was no justification for lessening copyright owners' rights at this point in time, when the fears of the public could be allayed simply by eliminating the likelihood of criminal prosecution for fair and honest parodies. ● Some respondents were concerned that a parody exception might result in possible abuses and involve practical problems in its implementation. For instance, it might cause confusion or uncertainty as to what was and what was not a parody, weaken the protection of moral right and violate Hong Kong's international obligations. ● Some respondents commented that a fair dealing exception for parody might limit copyright owners' control over their works and their rights to pursue civil proceedings against parodists for copyright infringement. ● Some respondents pointed out that if Hong Kong would include parody as part of fair dealing regime in our copyright law, it must comply with its international obligations and ensure that criminal sanction against piracy must remain as effective and efficient as before. ● Some respondents supported Option 3 although the views were split in terms of the scope and qualifying conditions. One respondent welcomed the Government's proposal to introduce a fair dealing exception for parody (covering satire, caricature and pastiche) to exempt civil and criminal liability but did not support that proposed qualifying condition (causing no "more than trivial economic prejudice" to copyright owners). ● Some respondents had no objection to a variant of the option for a carefully drafted exception for parodies (excluding satires, pastiches and caricatures to the extent that they did not comment on the underlying works) subject to certain qualifying conditions to strike a balance between the interests of

E.	Option 3 – Fair dealing exception	
		users and rights holders. ● Some respondents submitted that providing a statutory definition for parody would be ideal to create legal certainty and provide useful guidance to the court as well as to copyright owners and users. It was suggested that the definition should make it clear that parody referred to commenting on the underlying work (and not making an unrelated comment on something else) with deliberate exaggeration for comic effect. It was argued that while taking expression from a work in order to make a parody of that work might be justified since it was difficult to parody a work without using some of its expression, that justification was absent when the only purpose in using a work was to express comments on current events, social, economic or political issues that had nothing to do with the work that was being used. ● One respondent submitted that if a fair dealing exception for parody is to be introduced, the parody should: ■ comment on the original underlying work; ■ have humorous or critical intent; ■ acknowledge directly or indirectly the source of the original work; ■ be created/ distributed for non-commercial purpose; ■ cause no adverse effect on the market of the original underlying work or cause no more than trivial economic prejudice to the copyright owner; ■ incorporate only as much of the underlying works as is necessary; ■ be an original work in itself; ■ be sufficiently distinguishable from the underlying work so that there would be no risk of confusion; and ■ is not a straightforward lift of the underlying work. ● One respondent submitted that the introduction of a parody exception would not drive economic growth while at the same time not causing disadvantage to copyright owners of the original works.

E.	Option 3 – Fair dealing exception	
		● One respondent submitted that the alleged difficulties in the licensing process were not insurmountable. It was suggested that efforts should be made to facilitate and realise such approval process rather than to unfairly deprive the right-owners' legitimate control of their intellectual property. ● One respondent submitted that in a U.K. fair dealing defence case based on the argument of freedom of expression, the U.K. Court of Appeal held that the freedom of expression was not the right to take someone else's copyrighted expression and copy it. ● One respondent specifically pointed out that "monetisation" of videos on YouTube should be considered commercial exploitation and should not be exempted from both civil and criminal liabilities. ● One respondent pointed out that the fact that there had never been a legal case against parodies in Hong Kong suggested that Hong Kong copyright owners did respect the right of free expression of parodists and they were now expecting the same from parodists as well and that the content industry did respect the right of a copyright owner of an original work by obtaining the relevant licence from it before adapting or transforming the original work into a new work or better known as a derivative work. ● One submission pointed out that when a parody was made of parts of different copyright works together with parts of new creation by the parodist, the parodist would likely to claim copyright in his new creation. It was commented that the proposed exemption would allow parodists to combine their own creation with other copyrighted material without setting out how to share the copyright in the new work. ● One submission from the music industry explained that licensing for adaptation and reproduction of copyright material (commonly known as "synchronisation") required the consent of the songwriters by respecting songwriters' will on how they would like their songs be exploited.
E.2	Users	● Some respondents supported this option on the basis that it could provide full exemption of secondary creation from both criminal and civil liabilities. An exemption of both civil and criminal liabilities was considered to be fundamental to the protection of freedom of speech, expression and creativity. ● Some respondents also commented that, although this option was preferable to Options 1 and 2, it was still flawed. The scope of exception was unclear or not wide enough to cover all common

E.	Option 3 – Fair dealing exception	
		means and purposes of secondary creation. Some respondents commented that the current exception was too narrow and failed to protect secondary creation. There was still a chance of being sued. ● Some respondents considered that, as the doctrine of "fair use" was not adopted, only limited categories of works would be exempted under this option. For example, (a) displaying artworks in public exhibitions; (b) filling in alternate lyrics for a piece of music; (c) capturing and captioning screen grabs, though endowed with new cultural meaning, might not be considered an act of fair dealing. It was suggested that in response to the said restrictions of fair dealing, the Government should (a) expand the current scope to cover all UGC (see below for further discussion) and secondary creation; (b) adopt the doctrine of fair use; or (c) seek reference from other common law jurisdictions. ● Some respondents considered that, under the existing Ordinance, there was only an exception for fair dealing for the purpose of reporting current events. Some respondents suggested that the word "parody" could refer to the work itself, as well as the method or purpose of creation. Noting that fair dealing usually exempted the subject-matter but not the purpose for which it was made, it was hoped that the exemption under this option would include "fair dealing for the purpose of parody". There was a serious discrepancy between the Chinese and English versions of the proposed section 39A: "Fair dealing with a work for the purposes of parody does not infringe any copyright in work" and "為[戲仿作品]而公平處理某一作品，不屬侵犯該作品的任何版權". ● Some respondents worried that judges, who were not from the design profession, would not rule in favour of freedom of creativity. ● Some respondents considered it difficult to define "fair dealing". One respondent commented that education and private study should be included as factors for considering whether a dealing was fair. On the other hand, one respondent commented that the court could be entrusted to determine whether a treatment of copyright work was fair dealing / complied with Article 13 of TRIPS Agreement even if no specific factors were provided in the legislation. ● One respondent noted that all transformative and orthogonal uses or dealings should fall within the copyright exception. There was no need to consider whether the work was transformative in

E.	Option 3 – Fair dealing exception	
		substance. The application of the original work in a new way should suffice. ● One respondent considered that commercial and profitable secondary creation should enjoy the benefit under the fair dealing exception. ● One respondent advocated that, instead of being a defence under the fair dealing exception, the right of parody should be protected in writing.
E.3	Online service providers	● Some respondents noted that the results of a survey on hkgolden.com revealed that while the netizens did not consider any of the three options set out in the Consultation Paper to be ideal, this option was more favourable than Option 1. ● Some of the respondents considered that this option was more favourable than the other two options and supported the creation of a copyright exception for parodies. This option encouraged creativity, protected the relevant author's economic interests and was in line with international development. However, a Canadian style UGC exception should also be introduced to cater for secondary creations that did not fall under the categories of parody, satire, caricature and pastiche. ● One of the respondents supported a parody exception that took into account internationally accepted factors. It considered that the exception should not be disallowed if the parodist receives financial benefit as parodies rarely harm the market for the original and this may affect works that were created for non-profit purposes but which later become popular. ● Some of the respondents considered that the relevant provisions should expressly refer to parody, satire, caricature and pastiche to minimise uncertainty as to whether they were covered by the copyright exception. ● One of the respondents noted that over 1,000 netizens had expressed their views on the Consultation on hkgolden.com. In particular, they generally considered that a fair dealing exception should be granted in relation to derivative works involving social or public interest (e.g. commentary on Government policies, officials, public figures etc.). ● One of the respondents submitted that the exception should apply to all classes and types of copyright works to avoid confusion and uncertainty.

E.	Option 3 – Fair dealing exception	
		● One of the respondents submitted that a copyright exception should be created to support the creation of non-commercial parodies that did not prejudice the interests of copyright owners. In view of this and the importance to safeguard freedom of speech, the widest scope of protection should be provided to parodists. Thus all options and proposals that were not mutually exclusive should be adopted as conditions of the copyright exception. ● One of the respondents considered that the requirements under Options 1 and 3 and the UGC exception proposed by the Concern Group of Rights of Derivative Works were not mutually exclusive and could be included as alternate conditions for the copyright exception. ● One of the respondents noted that the non-exhaustive factors for determining fairness would allow the court to undertake a balancing exercise in light of the general public interest. ● One of the respondents believed that the fair dealing approach was more appropriate than the fair use approach. Benefits of the fair dealing approach included more certainty and less chances of litigation. ● One of the respondents welcomed the introduction of a parody exception but advocated the introduction of a US style open-ended flexible exception in the next round of reform. This would allow Hong Kong to keep up with the rapid technological developments and benefit from the same.
E.4	Others	● Most respondents preferred this option with modification to the first 2 options. For example, some respondents advocated that this option should be modified to protect secondary creation and non-profit-making/non-commercial UGCs as well. ● One respondent[8] supported the introduction of a fair dealing exception for parody (including satire, caricature and pastiche). It opined that "free riding" by the parodist for commercial purposes should not be permitted and, at the very least, the parody should contain added, independent creative content. It commented that while all classes and types of copyright works should be covered by the exception, a sufficient acknowledgement should be required. It preferred not to include a list of "fairness" factors which the court should be well-equipped to determine such matters in light of all the surrounding circumstances. Unpublished works should not be excluded and, in each case, the

[8] The Law Society of Hong Kong

E.	Option 3 – Fair dealing exception	
		fairness of the dealing in question should determine whether the exception should apply. ● One respondent[9] submitted that the issue was best addressed by introducing a fair dealing exception for "commenting on current affairs", which it believed to strike the correct balance between protecting the public's freedom of expression and the legitimate rights and interests of copyright owners. It suggested that analogous to the existing fair dealing exception for reporting current events, the proposed exception was conditional upon the making of a sufficient acknowledgement, unless the commenting on current events were by means of a sound recording, film, broadcast or cable programme. The exemption could be incorporated into the Ordinance by amending the existing sections 39(2) and (3). It submitted that an exception for parody and/or satire (irrespective of purpose) might give rise to difficulties of definition and understanding and would have the undesired effect of exempting activities which did not have sufficient public interest justification. ● One respondent commented that although this option might change the status quo and balance between copyright owners and users, it was fairer than the first 2 options since it determined whether there was copyright infringement through the actual usage of a work and would provide better protection to non-commercial users. One respondent commented that the current fair dealing exceptions are insufficient to address concerns of the public and create uncertainty for copyright owners and parodists. It was suggested that freedom of speech and social and commercial innovation had to be balanced with the need to protect against the use or appropriation of copyright works that caused harm to the original copyright owner (economic or otherwise), or resulted in unjust enrichment for the creator of a derivative work. ● One respondent commented that to avoid abuse of the exception and to ensure Hong Kong's compliance with its international obligations relating to copyright protection, qualifying conditions such as "non-commercial use", "not to replace the market of the original work", "without causing 'more than trivial' economic prejudice to the copyright owners" should be included in this option. ● One respondent suggested that this fair dealing provision should be interpreted in a more lenient manner. ● One respondent commented that while this option could offer better protection to freedom of

[9] The Hong Kong Bar Association

E.	Option 3 – Fair dealing exception	
		creation, it was important to ensure that the interests of different stakeholders were protected and balanced to avoid the abuse of the exemption when determining the scope of the exemption. ● One respondent commented that the current section 38 of the Copyright Ordinance already provided a non-exhaustive list of factors to consider whether a dealing was fair and suggested adding in "economic prejudice" as well. It also suggested that the law should clarify that "the degree to which the use of a parody work competes with the exploitation of the copyright work by the owner causing potential economic harm to the copyright owner" was only one of the factors to consider fairness and competition in the same market or economic harm should not be determinative of whether a dealing was fair. ● One respondent suggested using "economic loss" to parties (in particular copyright owners) to determine which level of infringement a parody work belonged to and that it was more objective to use the rights of copyright owners as a starting point to determine the severity of infringement.

F.	Other options	
	Organisations / Individuals	**Views / Concerns**
F.1	Copyright owners	● Some respondents noted that some creators welcomed free parody uses of their works. It was suggested that an official and open platform could be set up for copyright owners who were willing to open their works for free parody purposes. This platform might not be limited to melodies and lyrics but might also cover different types of copyright works. ● Some respondents[10] suggested providing a "for-the-avoidance-of-doubt" provision to exclude true parodist from being criminally prosecuted. It had been suggested that the existing section 118(1)(g) and the proposed section 118(8B)(1) of the Copyright Ordinance should be clarified that they did not apply to an infringing copy of work for the purpose of parody if the use of the original copyright work was solely for non-commercial purposes and the parody was not a substitute of the original underlying work. It was suggested that the factors to be highlighted to the court should be "whether it causes or has the potential to cause unreasonable loss of income to the copyright owner" and "whether the purpose and character of the use is of parody nature". ● None of the respondents supported an exception for UGC and many respondents expressed strong disapproval of the 4th option proposed by users. ● Many respondents submitted that the scope of UGC was too wide which was outside the scope of the Consultation and should not be introduced at this stage so as to provide copyright owners with an opportunity to establish voluntary, cross-industry agreements that could resolve the issue in a well-balanced and user-friendly way without unjustifiably restricting the exclusive rights of authors and copyright owners. One respondent suggested that if UGC might be added into the Consultation, a number of other copyright reform proposals which were crucial to the development of the creative industries in Hong Kong should also be included. ● Many respondents commented that the actual scope and interpretation of various terms in the Canadian UGC exception provisions were still uncertain. Some respondents pointed out that some scholars had suggested that the Canadian UGC provisions might be in breach of the adaption right of the authors and the "three-step test" and it remained to be seen how Canadian court would interpret

[10] Including the Hong Kong Copyright Concern Group

F.	Other options	
		the working of UGC provisions in the context of international obligations. Some respondents also raised that there would be other complications with an UGC exception (e.g. ownership of copyright in the UGC, impact on moral rights). Many respondents suggested that the 4th option would not give clarity to the satisfaction of netizens as users and copyright owners would eventually have to seek judicial interpretation of these terms from courts in view of the uncertainties embedded in the UGC exception. ● Some respondents criticised that the Canadian UGC exception and/ or the 4th option would provide an unjustifiable safe harbour to intermediaries which disseminated UGC commercially. There were concerns that the proposed UGC exception would create a loophole in the law whereby online platforms would be able to exploit and generate substantial profits from seemingly non-commercial UGC posted on commercial platforms. Many respondents believed that intermediaries should at least share profits with the copyright owners for their commercial dissemination of UGCs. ● Some respondents were of the view that the proposed exception for UGC could not be considered a "special case" as it would, in effect, introduce a blanket permission to reproduce, adapt or create derivative works from copyright works. ● Some respondents pointed out that there were numerous examples of "mash-up" works in Hong Kong which copied or adapted certain musical works, sound recordings or posters in order to attack or smear an artist or a musical work. They noted that such "mash-up" works were offensive and prejudicial to the reputation of the author or artist, and would constitute derogatory treatment and expressed concerns that the proposed UGC exception failed to address how the authors' and performers' right of integrity could be protected. ● Many respondents considered that a fair dealing exception for UGC based on the Canadian approach was premature as the Canadian UGC exception only came into force in June 2012. It was unclear what exactly the scope of "non-commercial purposes" or a "substantial adverse effect, financial or otherwise" was. ● Some respondents submitted that Hong Kong needed to re-examine the role of users, copyright owners, safe harbour provisions for OSPs when considering introducing the UGC exception, which should be a topic for the next round of public consultation.

F.	Other options	
		● One respondent submitted that there should not be any safe harbour provisions for OSPs when dealing with UGC and no exception for UGC should be introduced without conducting a public consultation on the role of OSPs, the impact of UGC on the creative industries and its impact on Hong Kong's economical, political, social and cultural policies.
F.2	Users	*Combination of different options* ● Some respondents preferred the parallel introduction of the first, second and/or third options. Many respondents supported the parallel introduction of the third option and the UGC proposal. *The UGC proposal* ● There were calls for the introduction of a "fourth option", i.e. an exemption of UGC for personal and non-commercial purposes, with reference to the Canadian exemption for UGC ("the UGC proposal") in addition to the third option so as to fully exempt secondary creation.[11] Some respondents were of the view that Canada's Copyright Act provided fuller protection to creators of UGC for non-commercial purpose on top of its fair dealing exception for parody and satire. ● Some respondents recommended that the scope of UGC should be adopted or, in addition to parody, satire, caricature and pastiche, the scope should be expanded to include UGC. It was noted that the UGC proposal was able to confer standalone and comprehensive exemption of civil and criminal liabilities. So long as the UGC was for personal and non-commercial/non-profitable use, the UGC was not (entirely) copyright piracy and would not substitute the market of the original work or otherwise adversely affect the underlying work. The users would be exempted from civil and criminal liabilities. ● Some respondents considered that the UGC proposal was more preferable than the three options listed in the Consultation Paper. It was considered that the current options were unable to cover all modes of communication and types of secondary creation, including transformative use and dealing. On the contrary, the UGC proposal was able to provide exemption with reference to the purpose of the users. The proposal was easy to understand, clear and would protect freedom of speech and

[11] This was advocated by the Copyright and Derivative Works Alliance and the Concern Group of Rights of Derivative Works.

F.	Other options	
		expression. Some respondents referred to the UGC proposal as their bottom line. ● Some respondents considered that the adoption of the UGC proposal was an act that followed the international trend, proposed by the European Union and Ireland and legislated in Canada. Some respondents took the view that the UGC proposal did not contravene the "three-step test" in the TRIPS Agreement or other international obligations, which was concerned with trade and businesses. They argued that the UGC proposal would pass the "first step" by limiting it to special cases, as the exception was only for non-commercial UGC made by individuals. Further, it "does not conflict with the normal exploitation of the underlying work, and did not unreasonably prejudice the legitimate interests of the copyright owner" which would pass the "second and third steps" as the exception required the UGC not to be used in the course of business or trade and not to substitute the market of the original work. In addition, they considered that the laws for the UGC exception had been passed in Canada after careful consideration. Some respondent considered that the UGC proposal was stricter than the "fair use" doctrine and noted that there had not been any complaints against these proposals on the international level. ● As opposed to the "three-step test" set out in the TRIPS Agreement, some respondents proposed a "cultural three-step test". The "cultural three-step test" focused on whether a piece of new legislation would restrict existing freedom of creativity and cultural development. The respondents suggested that the UGC proposal would satisfy the "cultural three-step test". ● Some respondents also considered that the exception provided by the UGC proposal did not weaken the power to fight piracy and submitted that, there was no reason for the Hong Kong copyright industry to object to this proposal. It was noted that the proposal's emphasis on non-commerciality best fitted the interests of all parties, in particular, this significantly eased the concerns over the potential economic damage done to copyright owners. ● Some respondent also called for an exemption for intermediaries to use, disseminate or communicate UGC. This was advocated to strengthen freedom of expression and communication by ensuring a proper platform for delivery of works of secondary creation. *The doujin proposal* ● Some respondents were dissatisfied that the three options did not accommodate doujin culture and

F.	Other options	
		made a "doujin proposal". Based on the UGC proposal or the fair dealing exception, the doujin proposal sought to extend the umbrella of exemption to derivative / doujin works created by interest groups or fans groups. Derivative / doujin / adapted works created based on the original work and involved rewritten story developments or outcomes should be exempted by taking into account of the following factors: - whether the work was intended to pass off or substitute the original work; - whether the work was intended to cause damage to the legitimate interests of the original author; - whether the work, or the venue and means of distribution of the same, was intended to be used in conflict with the normal exploitation of the original work; - whether the venue and means of distribution would substitute all or a substantial part of the market of the original work; - the intended venue and means of distribution; and - the degree of transformation of the work. ● Some respondents further asked the exception to cover works that generated a small or trivial income, in order to accommodate the doujin activities which might inevitably involve sale of doujin products. They were of the view that this kind of small income should not be considered as trade or business substituting the market of the original work. Some respondents strongly opposed the copyright industry's "fifth option" which only covered political satire. Some respondents considered it unreasonable to request parodists, in order to determine whether their works qualify for exemption, to go through an excessive list of criteria before the process of creation.
F.3	Online service providers	● One of the respondents noted that the options were not mutually exclusive. To allow the provision of the widest scope of protection to parodists, all options and proposals that were not mutually exclusive should be adopted as conditions of the copyright exception.

F.	Other options	
		● Some of the respondents advocated the introduction of a Canadian style UGC exception on top of Option 3. This could address future issues involved in the creation of secondary creations arising from technological developments. Under this proposal, there would be no civil or criminal liability for a person who creates non-commercial UGC. ● One of the respondents considered that the requirements under Options 1 and 3 and the UGC exception proposed by the Concern Group of Rights of Derivative Works were not mutually exclusive and could be included as alternate conditions for the copyright exception.
F.4	Others	● Some respondents[12] supported adopting a 4th option to provide a copyright exception for non-commercial UGC. They were of the view that such an exception could promote overall creativity in Hong Kong and also offer better protection for freedom of speech and expression. ● On the other hand, some respondents raised their concerns about the UGC exemption as proposed by some members of the public. They submitted that although the Canadian UGC exception could be of reference to Hong Kong, the definition of UGC, the conditions attached to the exemption and its actual scope and application in the Canadian law were not clear. Since there was no case tested in courts yet, it was uncertain as to what extent users might be protected. The exception would also have to be governed by the existing principles and framework of "fair dealing". ● One respondent commented that to cater for future possible means and ways of expressions, a less specific and more neutral exemption should be adopted and the Government should be responsible to counter-propose a provision to overcome the "three-step test" if it was of the view that the UGC exemption might not pass the test. ● One respondent commented that the Government could consider the Canadian UGC exception provided that the UGC does not cause actual prejudice to the original work. ● One respondent commented that it did not support UGC exemption at this stage since the definition of UGC and the conditions attached to this exemption were not clear, and beyond the scope of the parody consultation. In addition, if the scope of the exemption was not based on the contents of the work but simply to be determined by the purpose or mode of distribution, more extensive

[12] Including Amnesty International (Hong Kong), Hong Kong Civil Liberties Union and The Journalism and Media Studies Centre of the University of Hong Kong

F.	Other options	
		discussions were necessary. It was also hard to estimate the effect of UGCs on to the markets of original works and the economy, e.g. the degree of originality versus the degree of copying and the corresponding effect on other online activities, etc. ● One respondent[13] recommended the adoption of all three options outlined in the Consultation Paper in combination with a 4th option, namely, an exception for predominantly non-commercial UGC (PNCUGC), which was modeled on the Canadian UGC exemption but replaced the word "solely" with "predominantly". It further suggested if this proposed option tilted the balance of the copyright regime to internet users, a reciprocal licence that allowed the copyright owner to use the parody work for non-commercial purposes might be included. If the exception was further expanded to cover commercial UGCs, a profit-sharing arrangement could also be introduced. If there were concerns on compliance with the “three-step test” in relation to this proposal, a special exception for the fair dealing of a copyright work for the purposes of creating PNCUGC, making a transformative use of a copyright work, or both might be introduced instead. In addition, factors for determining “fairness” in sections 38 and 41A of the Ordinance and the “three-step test” itself might also be added into this proposal.

[13] The Journalism and Media Studies Centre of the University of Hong Kong

G.	Moral rights	
	Organisations / Individuals	**Views / Concerns**
G.1	Copyright owners	● Among those respondents which commented on the issue, all opined that moral rights should be maintained notwithstanding any special treatment for parody. ● Many respondents considered that it was vital to maintain moral rights, in particular those rights related to preserving the integrity of an original work as it offered the most fundamental respect to creators and performers. It was submitted that such right encouraged creativity and innovation as creators and performers might publish their works without fear that their works or performances would be abused or mutilated after they were made available to the public. ● Some respondents considered that acknowledging the source of the work would be the first step in recognising the author's right of freedom of expression. ● Some respondents were of the view that it was important to encourage a legitimate creative culture based on mutual respect and thus it was appropriate to retain the attribution right in its present form. It was also suggested that acknowledgement would assist copyright owners in locating and monitoring parody works online. ● Some respondents submitted that parodies should at least implicitly acknowledge the underlying work or make sufficient acknowledgment or qualification if it is reasonable in the circumstances to do so. ● One respondent submitted that human rights also protected the authorship of the original writer and under no circumstances should there be any change of the existing moral rights.
G.2	Users	● There were comparatively fewer comments from the respondents on the issue of whether moral rights should be maintained in view of the new exceptions. Their views were diverse. ● Some respondents considered that the moral rights of directors and authors should be retained. One respondent commented on the necessity to retain the moral rights given that they were granted under international treaties. Others considered that there was no need to retain the same regardless of the

G.	Moral rights	
		treatment. ● One respondent opined that moral rights of attribution and false attribution should be exempted but moral rights of integrity should be maintained. ● One respondent considered that the requirement to acknowledge the original work was unfavourable to many new forms of secondary creation.
G.3	Online service providers	● One of the respondents submitted that moral rights claims should be maintained but limited to situations where the injury to one's honour or reputation stemmed from sources other than parody. Such situations were best evaluated on a case-by-case basis.
G.4	Others	● Some respondents submitted that moral rights of authors should be respected and not to be eliminated as it was consistent with the existing law. However, they were of the view that parodists should be exempted for breach of moral rights (e.g. the right to be identified as the author/director of the copyright work and the right to object to derogatory treatment of that work) in reasonable circumstances to avoid any moral rights acknowledgement requirement rendering the parody work less effective for its purposes or affect the freedom of expression due to the uncertainty of the meaning of "derogatory treatment". On the other hand, one respondent opined that no exception to moral rights should be introduced. ● Some respondents submitted that the question of whether moral rights had been infringed should be assessed as part of the enquiry as to whether the dealing is "fair".

H. Other issues		
(1) Communication right		
	Organisations / Individuals	**Views / Concerns**
H(1).1	Copyright owners	● Some respondents supported reform of the copyright regime in Hong Kong to encourage creativity and freedom of expression whilst safeguarding publishers' and authors' economic rights. ● Some respondents commented that the majority of the public's concern over the introduction of the Bill was directed towards the failure to include a parody exemption in the face of strengthening rights of copyright owners. ● Some respondents submitted that the existing copyright law of Hong Kong obviously lagging behind other countries and urged the Government to pass the Bill as soon as possible to strengthen copyright protection in the digital environment. ● Some respondents submitted that effective copyright protection was the cornerstone for the sustainable developments of Hong Kong's creative industries. ● One respondent noted that some neighbouring Asian countries had introduced the right of communication many years ago without granting a parody exemption.
H(1).2	Users	● There were calls for clarification that the sharing of hyperlinks and content on the Internet or via social media or live streaming would constitute "prejudicial distribution" and copyright infringement. ● Some of the respondents submitted that in some cases the user could not control whether the content was communicated to the public or not. They considered that the proposed amendment in relation to communication rights increased the risk of criminal and civil liabilities and suppresses secondary creation. ● One respondent considered that the proposed amendment should reflect the original legislative

H. Other issues		
(1) Communication right		
		intent to combat piracy.
H(1).3	Online service providers	● One of the respondents welcomed the clarification that a person did not initiate communication of a work to the public if he does not determine the content of the communication. ● One respondent proposed amendments to the Bill to expressly confirm that users would not incur liability for sharing links on social media sites.
H(1).4	Others	● Some respondents submitted that the Government should clarify in the law whether the mere act of posting or sharing a hyperlink would constitute "communication of a work to the public".

H. Other issues		
(2) Safe harbour		
	Organisations / Individuals	**Views / Concerns**
H(2).1	Copyright owners	● Some respondents submitted that in view of the fast moving cloud computing age, the current Consultation should be concluded swiftly and move onto other real concerns expressed by the community at large, such as the lack of "safe harbour provisions" for the IT industry.
H(2).2	Users	● Some respondents considered that the safe harbour provisions and the notice and takedown mechanism in effect required OSPs to remove allegedly infringing materials in the absence of a court order. The notice and takedown mechanism failed to balance the interests between copyright owners and users and was prone to abuse. For instance: - The mechanism might be used to circumvent any future exemption of parodies or UGC; and - The subscriber's information might be provided to the complainant while the complainant's information was not made known to the subscriber. ● Some respondents proposed the use of the notice and notice system in complement with a comprehensive copyright exemption for secondary creation (e.g. under the UGC proposal), so that any disputed content was not removed until the complainant commenced legal action. ● Some respondents called for a separate consultation on the safe harbour provisions, amendments to or the withdrawal of the Code of Practice.
H(2).3	Online service providers	● Among the respondents who provided comments on the safe harbour provisions under the Bill, most of them supported the creation of a safe harbour which protected the interests of OSPs. ● Some of the respondents had concerns about the implementation of the safe harbour mechanism in practice. They expressed concerns that the Consultation did not cover the safe harbour

H. Other issues		
(2) Safe harbour		
		provisions / the Code of Practice and urged the Government to consult on the same. ● Some of the respondents submitted that the Code of Practice should be agreed / reviewed by the industry on a regular basis and reflect self-governance. ● Some of the respondents were concerned about potential abuse of the mechanism despite sections 88E and F of the Bill and the significant costs incurred by OSPs as a result. To minimise abuse, one of the respondents suggested imposing charges on the filing of notices. Another respondent proposed to expand the coverage of sections 88E and F of the Bill to cover the reckless submission of non-compliant notices. ● One of the respondents expressed concerns about the significant costs incurred by OSPs as result of a large volume of notices and proposed to impose charges on the filing of notices and counter notices. ● One of the respondents noted that the notice and takedown procedure was much more complicated than that adopted in other jurisdictions. The procedure also included retention requirements. This imposed extra costs on the OSPs which should be recoverable from the copyright owners. ● One of the respondents submitted that the notice and takedown system did not strike a balance between the rights of copyright owners and Internet users. It objected to the proposal for OSPs to takedown materials in the absence of Court orders i.e. simply based on mere allegations of infringement. ● One of the respondents considered that the proposed mechanism was not in line with its goal to safeguard freedom of speech and expression and refrain from monitoring or filtering the contents uploaded by its users. ● One of the respondents was concerned that parodies that qualified under a future exception might be removed as a result of application of the notice and takedown procedure. ● One of the respondents considered that the complainant should be required to provide the URL

H. Other issues		
(2) Safe harbour		
		and relevant particulars. It did not agree that OSPs should block access to materials given that the materials at the destination could be subsequently changed or removed by the uploader. ● One of the respondents requested for a clear definition for "reasonable time". ● One of the respondents commented that the mechanism should not allow complainants to obtain the personal information of subscribers. Such information should be passed to the High Court if appropriate. ● One of the respondents suggested that C&ED / IPD should handle the complaint notices instead. ● One of the respondents commented that the safe harbour provisions and the Code of Practice could help to improve the copyright regime, provide guidance to OSPs and are in line with overseas development. ● One of the respondents urged the Government to implement the safe harbour provisions and Code of Practice as soon as possible.
H(2).4	Others	● Some respondents submitted that even if the third option or the exemption for UGC was incorporated into the laws, the "safe harbour" regime contained deficiencies which might lead to removal of secondary creation by OSPs without considering whether such work was exempted. It was submitted that any removal should be made pursuant to court orders only and therefore the Code of Practice in consultation should be amended accordingly. ● Some respondents submitted that the Code of Practice relating to OSPs should be further consulted in light of the parody consultation.

H. Other issues		
(3) Licensing platform		
	Organisations / Individuals	**Views / Concerns**
H(3).1	Copyright owners	● Some respondents suggested that there should be an official platform to facilitate licensing between copyright owners who were willing to open their works and parodists.
H(3).2	Users	● Some respondents were dissatisfied with the commercial copyright organisations and copyright licensing bodies. They considered that these bodies operated in a non-transparent, unregulated and arbitrary manner. It was impossible for parodists to deal with these bodies or copyright owners at arm's length. They also noted that some authors had been forced to join these bodies and were unwillingly represented. They also accused the Government of taking sides with these bodies. ● Some respondents advocated the general regulation of the copyright industry and in particular the copyright licensing bodies, to enhance the transparency, uniformity and clarity of the charging system. One respondent commented that the level of fees to be paid for non-commercial uses should not be calculated on the same basis as commercial uses by conventional media. ● One respondent considered that in view of the difficulty in obtaining consent to use copyright works at reasonable cost, within a reasonable period of time and with reasonable ease, liability should be imposed on copyright owners who respond to requests for personal and non-commercial use in an unreasonable manner. ● Some respondents considered that commercial copyright organisations had monopolised the copyright regime. The current proposed legislation was lopsided to cater for the interests of these organisations and severely restricts the public's freedom of creativity. Some respondents were dissatisfied with the presumption that users were potential copyright infringers while copyright owners were the victims. Some respondents noted that, internationally, copyright owners and online service providers ("OSPs") generally gave acquiescence or were amicable towards non-commercial uses of works of secondary creation. However, commercial copyright organisations in Hong Kong had accused parodists of infringement even though consent from the

H. Other issues		
(3) Licensing platform		
		original author had been obtained.
H(3).3	Online service providers	● One of the respondents considered that the current copyright regime was biased towards copyright owners. Copyright ownership and licensing related regimes were complicated and non-transparent. It further observed that it was very difficult for users to obtain licences to create secondary creations such as parodies etc. The licences might also contain unreasonable restrictions affecting such creation.
H(3).4	Others	● One of the respondents submitted that use of licensing platforms such as "Creative Commons" should be encouraged and the Government should review on how to improve the implied licensing system for the benefits of users of copyrighted contents in the online environment. ● One of the respondents suggested that the Government should consider public opinions such as establishing a public centre for handling copyright similar to that advocated by the Hargreaves Report, the public could register their secondary creation and provide a safe harbour for parody. This could also protect the rights of copyright owners at the same time.

H. Other issues		
(4) Others		
	Organisations / Individuals	**Views / Concerns**
H(4).1	Copyright owners	N/A
H(4).2	Users	*Scope of consultation* ● Some respondents considered the Consultation unsatisfactory as it only addressed the subject of parodies. Without the full picture, it was difficult to appreciate the real effect of the Bill. ● Some respondents observed that there were many outstanding issues from the Bill, such as questions concerning the safe harbour provisions and communication rights etc.. There was a need to consult on the whole Bill or other new proposals, such as the UGC proposal. *Other issues* ● Some respondents commented that concepts such as "substantial copying", "potential market value", and "degree of transformative use" were abstract and subject to dispute. ● Some respondents called for the adoption of the doctrine of "fair use" while others queried the reason behind using fair dealing rather than fair use. ● Some respondents disagreed with the Government's use of some terms, for example, referring to derivative work as "secondary creation", and secondary creation to "infringing work" instead of "work in dispute". ● One respondent commented that the penalty for parodies was disproportionate. Others considered that prosecution policies should distinguish acts of piracy or copyright infringement according to the gravity of such acts, from non-commercial and small scale distribution, (which was the least severe), to intentional and commercial distribution (being the most severe). ● One respondent queried how acquiescence regarding the use of copyright works could apply in the

H. Other issues		
(4) Others		
		online environment where materials were abundant. Another respondent noted the difficulties in locating the authors at times. Some suggested setting a time limit for the copyright owner to reply, and thereafter he would be taken to have acquiesced use of the copyright work pursuant to the request and be barred from enforcing his rights. ● One respondent noted that there existed a real difficulty in differentiating the persons involved in distribution or communication of secondary creation from those involved in the creation of such works. There were worries that everyone will be pre-emptively arrested for the purpose of investigation. ● One respondent submitted that there should be a regular consultation every two years after the Bill is passed.
H(4).3	Online service providers	● One of the respondents advocated the introduction of a US style open-ended flexible exception in the next round of reform. This would allow Hong Kong to keep up with the rapid technological developments and benefit from the same. ● One of the respondents considered that the Government should adopt a bottom up approach in consultations and use more online channels e.g. social media, online poll etc..
H(4).4	Others	● Some respondents submitted that the Government should strengthen public education on protection of intellectual property rights in the online environment and respect for intellectual property rights in general. ● Some respondents suggested clarifying in the law whether sharing and re-posting of hyperlinks containing possible infringing materials would constitute an infringement under the Copyright Ordinance. ● One respondent suggested the Government should consider amending section 39(3) of the Ordinance with reference to its UK counterpart (section 30(3) of UK Copyright, Designs and

H. Other issues		
(4) Others		
		Patents Act 1988). ● One respondent submitted that since the fair use doctrine was not adopted in Hong Kong, neither of the three options rendered protection to secondary creations. ● One respondent commented that the Government should also have public consultations on "secondary creation". As recognised in United Nations reports on human rights, the special qualities of the internet should be considered when reviewing the measures and rules governing traditional media, which might not be applicable in the internet environment. Secondary creation itself was a creation and could stimulate creativity and encourage public participation and discussion on different issues and involvement in cultural activities and restricting secondary creation would mean restricting freedom of expression and therefore any restrictions must abide by principles laid down in the United Nation's ICCPR Clause 19. ● One respondent commented that the exact scope of "secondary creation" should be clarified since it is not a term normally used in the context of copyright law. ● One respondent submitted that the Government should consider the issue of a parody exception under the trade mark laws. ● One respondent[14] also expressed the following comments/ suggestions: - Law- and policymakers should use their best efforts to avoid foreseeable conflicts between amendments to the Copyright Ordinance and the Basic Law and Hong Kong Bill of Rights. - Hong Kong should think ahead about whether to shift from a fair dealing regime in its copyright laws to a fair use regime given the change in global trend to adopt the latter as it could better accommodate the needs and interests of internet users, Hong Kong could also become more competitive in the IT area and attract internet-related foreign investments and to develop its creative environment.

[14] The Journalism and Media Studies Centre of the University of Hong Kong

H. Other issues		
(4) Others		
		- A broad exception for works that was qualified only by the condition of whether it constituted a substitution of the underlying work should be adopted so that socially-productive parodies, satires, caricatures and pastiches would be protected. - Issues concerning Government copyright works had raised complications in the past as wider dissemination of such works was important, considering that taxpayers' money could have been better utilised if such works were more widely available to the public to use or to develop secondary creations. Moreover, the infringement of the copyright in Government works might lead to law enforcement agencies taking actions against alleged infringers direct. Allowing Government works to be widely accessible through the current digital copyright reform would benefit all parties – copyright owners, internet users, OSPs and other for-profit and not-for-profit organisations. - Copyright regime was not designed to enable copyright owners to capture whatever benefits they could obtain. - As it was difficult to identify copyright owners in real life situations, wider copyright exceptions promoted greater flexibility in the use of copyright works by users and also assisted in resolving the problems created by orphan works. - Providing exceptions from civil and criminal liability alone would not suffice unless there were additional safeguards against the misuse or abuse of copyright claims.

Annex D

Daily-seen Internet Activities

Many users believe that consideration of special treatment should be given to a wide range of activities on the Internet which might make use of copyright works (often referring to those seen on social media websites such as YouTube, Facebook and Twitter and numerous discussion forums and blogs). The following are illustrative examples of many types of works mentioned –

- mashups/remixes/sampling[1]
- altered pictures/videos
- appropriation art[2]
- doujinshi[3]
- fanfiction[4]

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[1] These terms may encompass overlapping concepts and may be used interchangeably.

The US Department of Commerce described remixes as "works created through changing and combining existing works to produce something new and creative" in its Green Paper "Copyright Policy, Creativity, and Innovation in the Digital Economy" released in July 2013. It also noted that other terms such as "mash-ups" or "sampling" are also used, especially with reference to music.

On the other hand, the Australian Law Reform Commission (ALRC) referred to the dictionary meaning in using these terms. In its paper "Copyright and the Digital Economy" released in June 2013, "sampling", "mashups" or "remixes" are discussed together under a section on "transformative works": "Sampling is the act of taking a part, or sample, of a work and reusing it in a different work. The concept is most well-known in relation to music……a mashup is a composite work comprising samples of other works. In music, a mashup is a song created by blending two or more songs, usually by overlaying the vocal track of one song onto the music track of another. Remixes are generally a combination of altered sound recordings of musical works."

For our present purposes, we would use "mashups" generally to cover also "remixes" and "sampling".

[2] According to the Dictionary on Modern and Contemporary Art, appropriation art refers to the use of pre-existing objects or images with little transformation. It is a practice that is often associated with a critique of the notions of originality and authenticity, central to some definition of art.

[3] Doujinshi is a Japanese term which may refer to self-published works, usually magazines, comics or novels. They are often works of amateurs who are fans of the original works. We understand that doujinshin has over the years established a presence in Hong Kong, with the local comic industry adopting an accommodating approach to the doujinshin works (physical copies and items) under the current copyright regime. For example, Comic World, an organised doujinshin event, has been held in Hong Kong since 1998, now twice a year. Doujinshin fans may take part in the event to share, promote and even sell their works in a small scale manner, subject to the house rules and, where necessary, consent from individual owners (who may even scout for talents at such events). A certain balance is apparently established. In the event that a dispute is brought to the court in future under our proposed enlarged scope of special treatment, the fairness assessment would need to take into account the industry practice established over the years.

[4] A fiction written by a fan of, and featuring characters from, a particular TV series, film, etc.

- kuso[5]
- image/video capture[6]
- streaming of video game playing[7]
- homemade video[8]
- posting of earnest performance of copyright works[9]
- rewriting lyrics for songs[10]
- adaptation[11]
- translation[12] [13]

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5 Kuso is a Japanese term used for the internet culture which generally includes all types of style and parody. It is also used to describe outrageous matters and objects of poor quality e.g. political parodies targeting political figures.

6 Image capture and sharing may refer to the use of an image of a TV drama/movie/music video, which can be seen on online discussion forums or sharing platforms as a means to express personal feelings or comments.

7 This may refer to the sharing of the continuous screen capture of the playing of a video game on online platforms such as YouTube. Graphics and music captured in the video clip may involve copyright materials.

8 Homemade videos are usually made by ordinary users documenting their social life.

9 This may refer to, for example, the uploading of one's earnest performance of a copyright song to online sharing platforms. YouTube has dedicated channels for music and our search for "songs and amateurs" returned with about 39 000 clips.

10 This may refer to the act of rewriting lyrics of songs based on the same melodies. A mere textual presentation of totally rewritten lyrics (i.e. without substantial copying of the original lyrics) should not infringe copyright. But the online posting of the performance of the song in the rewritten lyrics might be infringement.

11 Daily examples include adapting a comic book into a movie or vice versa.

12 Daily examples include translating an English novel into Chinese, as well as subtitles of a foreign TV drama into the local language.

13 The rights of translation and adaptation are expressly protected by the Berne Convention under Articles 8, 12 and 14 as follows -

Right of Translation (Articles 8):
"Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works."

Right of Adaptation, Arrangement and Other Alteration (Article 12):
"Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works."

Cinematographic and Related Rights (Article 14):
"(1) Authors of literary or artistic works shall have the exclusive right of authorizing:
(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;
(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.
(2) The adaptation into any other artistic form of a cinematographic production derived from literary or artistic works shall, without prejudice to the authorization of the author of the cinematographic production, remain subject to the authorization of the authors of the original works.
(3) The provisions of Article 13(1) shall not apply."

2. Obviously, there may be some overlapping in concept between some of the above activities. The use of original copyright works by each type varies to different degree. To the extent that the use, or copying, of the original copyright works is substantial, without consent of the owners express or implied, and does not belong to a permitted act (in Division III of Part II of the Copyright Ordinance), it might amount to copyright infringement.

3. Some of the above activities may in appropriate cases be covered as a permitted act already.

4. One example is the *posting of video game playing clips as recorded by players*, the graphics and music in which may involve copyright materials. Generally speaking, many such clips are covered by the players' voice-over as commentary or guidance over the course of the playing of the video game[14]. To the extent that such commentary or guidance amounts to criticism or review of the underlying works, the practice may come under the existing fair dealing exception for those purposes[15]. More importantly, game developers generally welcome and give consent to such postings which would indeed attract players and increase popularity of the games[16]. There is indeed a huge volume of such video clips on the YouTube platform with dedicated channels[17].

5. Another example is the *posting of homemade video* documenting social life with incidental incorporation of some copyright works (such as the unintentional inclusion of music or television broadcast in the home background). Section 40 of the Copyright Ordinance already provides that copyright in a work is not infringed by its incidental inclusion in an artistic work, sound recording, film, broadcast or cable programme[18].

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[14] In some cases, players may merely upload or live stream the screen capture of their playing without making any commentary.

[15] Section 39 of the Copyright Ordinance.

[16] For instance, Microsoft does not object to game players using its game contents (which are published by Microsoft Studios and where it owns the copyright) to make and redistribute new creations such as videos, web contents, etc (and other derivative works), for non-commercial and personal uses provided that they comply with its Usage Rules.

[17] On YouTube, our search for "streaming of video games playing" has returned with 15 million clips, many of which attract significant viewing.

[18] The exception explicitly excludes deliberate inclusion of musical works. This reflects a fair balance and should not be tipped. It is hard to justify a differential treatment between, for example, the video shooting of a wedding by a professional contractor and by an amateurish friend, both with post-shooting editing and incorporation of a popular love song as background. Licence clearance is a business norm in such situations today.

Annex E

Justifications for new fair dealing exceptions with reference to the three-step test

Principal arguments for and against new exceptions

One principal line of argument for special treatment of the common internet activities (paragraph 13 of the paper) is that the use of the original copyright works may be "transformative" in nature or use, resulting in a new message or fresh insight in different context – the label of "secondary creation" is employed in such instances. Where the use does not fit this bill, another line of argument is that the use is very common among users on the Internet taking advantage of all the usual IT tools and platforms available and their use is "private". Some vocal users therefore advocate the concept of User Generated Content (UGC) that encompasses all kinds of works as a case for special treatment (paragraph 19 of the paper).

2. On the other hand, copyright owners generally oppose to consideration of matters outside the intended scope of the consultation exercise, as they 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. Many indeed consider parody, or specifically political parody, as the only matter worthy of some special treatment and have reservations in extending the coverage to other subject matters raised in the consultation. Overall they firmly reject consideration of the idea of UGC in this round of update.

3. The arguments on both sides have their own merits and demerits. Transformative use and common Internet behaviour are relevant considerations, but as a matter of principle, each *alone* cannot be a sufficient justification for crafting an exception. Transformative use in itself is a wide concept and may be unfair to the original author or copyright owner in some circumstances. A behaviour that is common and prevalent cannot in itself be a justification for exception, and online activities are not necessarily private[1]. On the other hand, a narrow

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[1] Some users consider that sharing the works they created by using a copyright work on social media platforms such as Youtube and Facebook is private use and thus merits a copyright exception. In discussing whether an unauthorised private use of copyright material infringes copyright, the Australian Law Reform Commission (ALRC) noted that many stakeholders held the view that the copyright law should take account of consumer expectations and some private uses of copyright material are widely thought by the public to be fair. The Commission pointed out that there is a distinguished difference between private and social uses - *"Uploading a copyrighted song or video clip to Youtube or Facebook is not a private use. Whether or not such cases should sometimes be considered fair, these uses are clearly not private and so will not be captured by the fair use illustrative purpose for 'non-commercial private use'…… the ALRC does not recommend that 'social uses' be included as an illustrative purpose for fair use."* (paragraphs 10.98-10.99, Copyright and the Digital Economy-Final Report, ALRC, November 2013)

expansion of copyright exceptions to cover only parody, or political parody for that matter, may not be accepted as a proper balance of interests when considered all together with the total package of updating. The proposed introduction of a new communication right, though necessary following international developments, is seen by many users as further tilting the balance in favour of copyright owners (paragraphs 7-8 of the paper).

Enlarging the scope of special treatment

4. To seek a broad and overall balance of different interests, we should follow the three-step test as the overarching yardstick at the international treaty level. As a first step, we should confine any prospective copyright exceptions to certain special cases, by crafting them within a narrow and clearly defined scope and justified by some exceptional or distinctive objectives. As set out in paragraph 13 of the paper, the 2014 Bill proposes enlarging the scope of special treatment to cover use -

(a) for the purposes of parody, satire, caricature and pastiche,

(b) for the purpose of commenting on current events and;

(c) of a quotation the extent of which is no more than is required by the specific purpose for which it is used.

Fairness assessment by the court as safeguard

5. It would be futile to suggest that all activities covered by the enlarged scope of special treatment are necessarily justified exceptions to copyright protection. We must look to the remaining criteria in the three-step test and determine whether an act in question may -

- conflict with a normal exploitation of the original copyright work

- unreasonably prejudice the legitimate interests of the copyright owner

6. As set out in paragraph 14 of the paper, the 2014 Bill subjects the above enlarged scope of special treatment to a fairness assessment embodied as fair dealing provisions. Such a legislative device has been widely used in common law jurisdictions[2], including Hong Kong[3], to enable

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[2] The US has a long history in resorting to a fairness assessment by the court in applying the fair use doctrine, as do many other common law jurisdictions (including Australia, Canada and the UK) in dealing with specific copyright exceptions (such as for education, libraries and archives and news reporting purposes). Australia, Canada and the UK follow such a course in introducing a new exception for parody.

[3] Copyright exceptions in the existing Copyright Ordinance (Division III, Part II) are either being narrowly crafted with certain qualifying conditions for specific justifiable purposes (such as for persons with a print disability or preservation or archival purposes of libraries), the application of which may perhaps carry greater certainty,

the court to undertake a fairness assessment that would take into account the overall circumstances of a case in dispute put before it. Over the consultation we conducted last year, there is general support for this judicial approach in crafting any new copyright exceptions to minimise abuse[4].

7. As in our own Copyright Ordinance[5] and is common overseas, the 2014 Bill also includes in each of the new fair dealing exceptions a non-exhaustive list of relevant factors for assessment that would help the court analyse individual cases and balance different interests to arrive at a fair result, as follows -

(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.

8. The above factors were put up in the consultation exercise and have received general support. The ensuing paragraphs analyse the application of these factors by the court in overseas jurisdictions to facilitate an understanding of the fairness assessment.

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or subject to a fairness assessment embodied as fair dealing provisions (such as for the purposes of research, private study, giving and receiving education instructions, criticism, review and reporting current events). The proposed new copyright exceptions in paragraph 13 of the paper are examples of the former type. But in more complicated areas where the proper balance is not that straightforward, it might be difficult to agree upon the conditions at the outset in view of many competing interests, and such an approach might be mechanical and inadvertently lead to unintended and undesirable results. A fairness assessment by the court should have better merits.

[4] In a like vein, regarding the need for statutory definitions of the terms of parody, satire, caricature and pastiche if they are to be included in future legislation, we observe that while there have been some earlier views in favour for the sake of certainty, a solid stream of opinion has emerged over consultation that defining the terms may pose significant difficulties and may unnecessarily restrain the court in statutory interpretation to arrive at a fair result balancing different interests.

[5] Save for section 39 regarding criticism, review and news reporting, each of the fair dealing exceptions in the existing Copyright Ordinance (Division III, Part II) contains such a non-exhaustive list of factors, which indeed mirrors the statutory list underpinning the fair use doctrine enshrined in the copyright statutes of the US.

9. According to decided cases in the US involving parody, satire and appropriation art, in considering the purpose and nature of the dealing (paragraph 7(a)), it is important to consider whether and to what extent the new work is "transformative", namely, whether the new work merely supersedes the original creation or adds something new, with a further purpose or different character, altering the underlying work with new expression, meaning or message[6]. The courts appear to be generally of the view that the more transformative is the new work, the less will be the significance of other factors, such as the commercial nature of the new work, that may weigh against a finding of fair use.

10. In respect of the nature of the original work (paragraph 7(b)), a particular use is more likely to be considered fair when the copied work is factual rather than creative. The courts recognise that some works are closer to the core of intended copyright protection than others, with the consequence that it would be more difficult to establish fair use when the former works are copied.

11. Regarding the amount and substantiality of the portion dealt with in relation to the original work as a whole (paragraph 7(c) above), this factor calls for consideration not only about the quantity of the material used, but also their quality and importance of the amount copied. Whether a substantial portion of the new work was copied "verbatim" from the underlying work is also a relevant question for considering fairness, for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm to the underlying work which will be discussed below.

12. As to effect of the use upon the potential market for or value of the copyright work (paragraph 7(d) above), the courts note that when a commercial use amounts to a mere duplication of the entirety of the original, it clearly supersedes the "objects" of the original and serves as a market replacement, resulting in a recognisable market harm to the original work. Not only will the extent of market harm caused by particular actions of the alleged infringers to the underlying work be considered, but also whether unrestricted and widespread conduct of the sort engaged in by the alleged infringer would result in a substantially adverse impact on the potential market for the original will also be a relevant consideration. The enquiry must take into account not only of harm to the original work but also of harm to the potential market, including market for derivative works. Hence, if the use of a copyright work in a way that substitutes for the original in the market, it will weigh against fairness.

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6 Campbell v Acuff-Rose Music, Inc, Supreme Court of the United States, 510, U.S. 569, 114 Ct. 1164, Blanch v Koons 467 F.3d 244 (Court of Appeals (2nd Circuit), 2006) and Cariou v Prince 714 F.3d 694 (Court of Appeals (2nd Circuit), 2013).

Annex F

Observations on User Generated Content and Relevant Overseas Developments

User Generated Content (UGC)

During the consultation, the concept of UGC surfaced. Many netizens urged the Administration to consider a copyright exception to exclude non-profit making UGC or UGC not disseminated in the course of trade from both civil and criminal liabilities for copyright infringement. But the copyright owners firmly reject this idea. The proposed UGC exception is primarily a watered-down version of section 29.21 of the Canadian Copyright Act, which was introduced only in 2012. A comparison is as follows –

UGC as proposed by the netizens	**UGC in the Canadian provision**
A new work, a work of joint authorship or a work with transformative purposes, in which copyright subsists (i.e. the work does not have to be transformative).	A new work where copyright subsists (i.e. the work must be transformative).
At the time of the use or the authorisation to disseminate, the new work or work of joint authorship is done mainly for non-profit making purposes or not in the course of business.	The use or the authorization to disseminate the work is solely for non-commercial purposes.
Acknowledgement of the source of the existing work (if it is reasonable in the circumstances to do so) is one of the factors for the court to determine whether it is reasonable to believe that the existing work was not infringing.	Acknowledgement of the source of the existing work (if it is reasonable in the circumstances to do so) is one of the qualifying conditions for invoking the exception; and the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright.
The act does not have a substantial adverse financial effect on the exploitation or market for the existing work to the extent that the work substitutes for the existing work.	The act does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or on an existing or potential market for it, including that the new work is not a substitute for the existing one.

2. In both the Canadian provision and the netizens' proposal, it is not an infringement of copyright for an individual to use a UGC work or to authorise an intermediary to disseminate it.

Relevant overseas developments

3. UGC as a copyright exception is a concept new to us and the international community. Except Canada, no overseas jurisdictions have adopted it in their copyright regimes.

4. On the other hand, further to their reforms in the late 1990s and early 2000s in response to the digital environment, many key overseas jurisdictions are looking to new rounds of efforts to further modernise their copyright regimes. In this larger context, they have identified UGC as one of the issues to be examined, reflecting on its controversial and unsettled nature -

Australia

- In June 2013, the Australian Law Reform Commission (ALRC) issued a paper entitled "Copyright and the Digital Economy", examining a number of copyright issues such as indexing, broadcasting, data and text mining and transformative use of copyrighted materials, for example sampling, remixes and mashups and seeking public views on whether exceptions and statutory licenses in the *Copyright Act 1968* are adequate and appropriate in the digital environment and whether further exceptions should be recommended. Among other things, it rejects a standalone transformative use exception, after studying the Canadian UGC model and identifying many problems associated with it[1]. The ALRC reaffirmed this position in its Final Report submitted to the Australian Government in November 2013[2].

The US

- The US Department of Commerce started in July 2013 a comprehensive review of its copyright policy, examining a wide

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[1] Notably, it may not provide adequate protection for the owner of the underlying copyright work from the possible effects on that owner's interests of dissemination of the new work by the internet intermediary. The ALRC observes that "[l]imiting any transformative use exception to non-commercial purposes is problematic because the boundary between non-commercial and commercial purposes is not clear given 'a digital environment that monetises social relations, friendships and social interactions'."

[2] "The ALRC agrees with the Copyright Council Expert Group's observation that user-generated content 'reflects a full spectrum of creative and non-creative re-uses' and should not automatically qualify for protection under any proposed exception aimed at fostering innovation and creativity." (paragraph 10.108)

range of issues such as privacy policy, global free flow of information, mass digitalisation, cyber security, and their respective relationships to innovation in the Internet economy.

- In the Green Paper, it highlights the promising trend of using filtering technology such as the Content ID system in allowing users to post remixes that may be monetised by the relevant rights holder, or by way of the Creative Commons licence through which creators can authorise remixes of their works subject to certain provisos[3]. It also underlines certain UGC principles established in 2007 by a group of private companies (i.e. copyright owners and UGC services should cooperate with regard to creating "content-rich, infringement-free services"[4]) "to foster an online environment that promotes the promises and benefits of UGC Services and protects the rights of Copyright Owners." An Internet Policy Task Force of the Department of the Commerce of the US will convene a series of roundtables to examine the issue of remixes[5].

The EU

- The EU launched in December 2013 a public consultation exercise as part of its on-going efforts to review and modernise EU copyright rules. UGC is one of the many subjects under review, alongside with rights and the functioning of the Single Market, further limitations and exceptions in the Single

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[3] A Creative Commons licence is a set of standard terms licence devised by a private organisation called Creative Commons. The licences are meant to facilitate copyright owners in licensing their works for use by others free of charge based on certain preset terms and conditions. The public may copy, distribute, display and perform a Creative Commons licenced work and/or any derivative works based on it, subject to any conditions the author has specified, such as acknowledging the author of the underlying work and for non-commercial purposes etc.

[4] To which end they "should cooperate in the testing of new content identification technologies and should update these principles as commercially reasonable, informed by advances in technology, the incorporation of new features, variations in patterns of infringing conduct, changes in users' online activities and other appropriate circumstances." Principles for User Generated Content Services, http://www.ugcprinciples.com/.

[5] The US Green Paper discusses the issue of "remixes" (other terms such as "mashups" or "sampling" are also used, especially with reference to music). Often, these works are part of a growing trend of "user-generated content" that has become a hallmark of today's Internet, including sites like YouTube. Despite the availability of a number of possibilities to address the issue (such as the fair use doctrine, Content ID system of YouTube and Creative Commons licence), the paper accepts that a considerable area of legal uncertainty remains. The way forward is to consult widely on questions like - "Is there a need for new approaches to smooth the path for remixes, and if so, are there efficient ways that right holders can be compensated for this form of value where fair use does not apply? Can more widespread implementation of intermediary licensing play a constructive role? Should solutions such as microlicensing to individual consumers, a compulsory licence, or a specific exception be considered? Are any of these alternatives preferable to the status quo, which includes widespread reliance on uncompensated fair uses?" Apparently, the Canadian model is not the only answer.

Market, private copying and reprography, fair remuneration of authors and performers, need for a single EU Copyright Title, etc. Regarding UGC, it is noted in the consultation document that there are questions raised with regard to fundamental rights such as freedom of expression and the right to property. It recalls that during previous rounds of discussions, no consensus was reached among stakeholders on either the problems to be addressed or even the definition of UGC. The document invites views as to experiences of different stakeholders (users, owners and online service providers) and the best way to respond to this phenomenon.

The UK

- Following the Hargreaves Review[6], the UK government has conducted several rounds of public consultations on various copyright issues and announced in December 2012 its intention to provide new copyright exceptions for private copying, data mining, parody, archiving and preservation, education and people with disabilities, and quotation (but not UGC). In March 2014 the UK Government announced that the new exceptions would come into force some time in 2014. On the other hand, in February 2014, the UK published its responses to the EU consultation on modernising copyright rules. Regarding UGC, "[t]he UK believes more transparency for users regarding blanket licensing arrangements for UGC platforms would be useful, as would a focus on educating users and creators of UGC about copyright rules more broadly. As the recent EU stakeholder dialogue found, the case for any other regulatory intervention in this area remains to be made."

Ireland

- A Copyright Review Committee in Ireland submitted a report entitled "Modernising Copyright" to the Minister for Jobs, Enterprise and Innovation in October 2013. It recommends introducing a new copyright exception for non-commercial UGC along similar lines of the Canadian model. Nevertheless, no legislative proposal has been made by the Irish Government in this regard so far.

Preliminary assessment of UGC

5. The concept of UGC is a contentious subject. Whether the

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6 In November 2010 the UK Government commissioned an independent review of how the IP framework supports growth and innovation. Chaired by Professor Ian Hargreaves, the review reported to the UK Government in May 2011, listing ten recommendations to ensure that the UK has an IP framework best suited to supporting innovation and promoting economic growth in the digital environment.

Canadian provision meets the international requirements has attracted debates within Canada and the international community. To comply with the "three-step test" under the TRIPS Agreement and the Berne Convention, any copyright exception must (a) be confined to "special cases", (b) not conflict with a normal exploitation of the work, and (c) not unreasonably prejudice the legitimate interests of the author/copyright owner. The ensuing paragraphs attempts a preliminary assessment on compliance of the Canadian UGC exception with the three-step tests under the TRIPS Agreement and the Berne Convention.

"Certain special cases" (the first step)

6. According to the WTO Panel Report (WT/DS160/R), "special" means that an exception or limitation must be clearly defined and should be narrow in scope and has an exceptional or distinctive objective. The use of an existing work in the creation of a new work in which copyright subsists solely for non-commercial purposes as provided by section 29.21(1)(a) of the Canadian UGC exception may not be regarded as "clearly defined". In particular, the dividing line "for non-commercial purposes" may be too vague. Further, the scope may not be considered "narrow" given the large number of potential users. The "for non-commercial purposes" requirement may not suggest "an exceptional or distinctive objective". In view of the above, it is arguable as to whether this exception complies with the first step.

7. In fact, it was the view of the former Assistant Director General of WIPO, Dr. Mihaly Ficsor that the Canadian UGC exception does not meet the first step of the three-step test as it was not a "special case". In particular, he noted that the mere reason that a derivative work was created and made available and that therefore it should be free in order to guarantee the freedom of expression was hardly an acceptable reason alone since articles 12 and 14(1) of Berne provided for an exclusive right of adaptation which "by definition" covered the creation of derivative works. Dr. Ficsor considered that much more substantive criteria would be necessary to reduce the scope and nature of the UGC exception to a "special case"[7].

"Not conflict with a normal exploitation of the work" (the second step)

8. Regarding the second step of the three-step test under the TRIPS Agreement and Berne, at first glance it appears that they can be satisfied by the qualifying conditions for the Canadian UGC exception which specifies that the use of, or the authorisation to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work, including that the new work or other subject matter is not a substitute for the existing one. Nevertheless, Dr. Ficsor considered that

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[7] Please see paragraph 51 of Comments on the UGC provisions in the Canadian Bill C-32: potential dangers for unintended consequences in the light of the international norms on copyright and related rights by Dr. Mihaly Ficsor (October 2010). http://www.copyrightseesaw.net/archive/?sw_10_item=31

the Canadian UGC exception overlooked the requirement that the three-step test was applied having regard to the overall effects on the actual or potential markets for a work. He noted that the exception did not consider the overall actual or potential impacts on the market for a work when the acts are multiplied, or take into account the effect on the actual or potential market for derivative works of the existing work. As such, Dr. Ficsor expressed reservations on whether the Canadian UGC exception complied with the second step of the three-step test.

"Not unreasonably prejudice the legitimate interests of the copyright owner/author" (the third step)

9. There are subtle differences between the third steps under the TRIPS Agreement and Berne respectively. "Interests" in the context of the third step of the three-step test under Berne refer to those of the "author" (but not of the "right holder" as under the TRIPS Agreement) and would cover those of both a pecuniary and non-pecuniary kind. The discussion in paragraph 7 on "not conflicting with a normal exploitation of the work" is relevant to the consideration of whether the Canadian UGC exception complies with the third step under the TRIPS Agreement as it will have a direct bearing on whether the UGC exception will unreasonably prejudice the legitimate interests of the copyright owner.

10. In respect of the third step under Berne, Dr. Ficsor noted that "interests" would include the moral rights of the author as well as the author's legitimate interests in controlling the adaptations and future uses of his or her work. The Canadian UGC exception seems to have removed the safeguard guaranteed for the respect of the moral right of integrity by the indirect control through the exercise of the relevant economic rights[8], and this may have a bearing on the overall assessment of whether the legitimate interests of the author are unreasonably prejudiced. According to Dr. Ficsor, the opening of the door to any kinds of free alterations of protected works might inevitably involve uncontrolled alterations that might violate the integrity of the works concerned. Dr. Ficsor also commented that the exception did not protect the reasonable interests of authors in being able to authorise the creation and dissemination of adaptations which they might find objectionable on literary, artistic, moral, political, or other grounds, or the juxtaposition of their works or adapted works with other works or new works, or causes which they might find objectionable on any number of grounds[9]. Hence it was his view that the Canadian UGC exception would not pass the third step of the three-step test under Berne.

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[8] Please see paragraphs 62 to 63 of Comments on the UGC provisions in the Canadian Bill C-32: potential dangers for unintended consequences in the light of the international norms on copyright and related rights by Dr. Mihaly Ficsor (November 2012). http://www.copyrightseesaw.net/archive/?sw_10_item=31

[9] Please see paragraphs 62 to 63 of Comments on the UGC provisions in the Canadian Bill C-32: potential dangers for unintended consequences in the light of the international norms on copyright and related rights by Dr. Mihaly Ficsor (November 2012). http://www.copyrightseesaw.net/archive/?sw_10_item=31

Other discussions

11. Apart from Dr Ficsor, there have been extensive discussions in Canada about the UGC exception. In October 2013, a renowned law school in Canada[10] hosted a symposium on the UGC exception. Mr. Barry Sookman, who is one of Canada's foremost authorities in the area of information technology and intellectual property law and Professor Joost Blom of the University of British Columbia Faculty of Law both delivered presentations at the final panel session on the international context of the Canadian UGC. Both speakers suggested the UGC exception would face limits and restrictions at an international level.

12. Focusing his talk on whether or not the Canadian UGC exception complies with international obligations, in particular under Berne and the TRIPS Agreement, Mr. Sookman mentioned that by creating "an unprecedented breath" of new exceptions in its Copyright Act, Canada could run afoul of its international obligations. He argued that the UGC exception, which applies to all works and subject matters so long as it is used in a non-commercial context, did not qualify as a "special case", nor was it "certain"[11]. Moreover, in addressing economic impact of the UGC on rights holders, it used the terminology "does not have a substantial adverse effect" rather than "does not conflict with the normal exploitation of the work" which might have created a higher burden for rights holders than that expressed under Berne and the TRIPS Agreement.

13. Prof. Blom further raised an issue which can be problematic to Canadian users when relying on the UGC exception. Given that there is no corresponding UGC exception to copyright infringement in other jurisdictions, a broad UGC exception in Canada could only provide limited protection to users when the UGC work is disseminated on the Internet as the UGC exception would be ineffective against proceedings for copyright infringement brought outside Canada. As such, Canadian users may expose to the risks of potential copyright infringement when they communicate the UGC on the Internet.

14. On the other hand, there are academic views that the Canadian UGC exception complies with the three-step test as the issue had come up during the legislative process. Professor Peter Yu of the United States suggested that after multi-year deliberations of the bills, Canadian law- and policymakers were confident that the significant qualifying conditions of the exception, such as "the identification of the source, the legality of the work or the copy used, and the absence of a substantial adverse effect on the exploitation of the original work", would ensure that the Canadian

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[10] Osgoode Hall Law School of Canada.

[11] Please see http://www.iposgoode.ca/2013/10/international-aspects-of-the-new-user-generated-content-exception-in-the-copyright-act/

UGC provision passed the three-step test.[12]

15. In his academic writing, Prof. Peter Yu further pointed out that many commentators were of the view that the Canadian UGC exception provided a much more limited exception than the fair use provision in the US, which allowed for the transformative use of copyright works for commercial purposes. It was suggested that if the US "fair use" provision passed the three-step test, a narrow form of the US fair use provision, such as the Canadian UGC exception, would not fail that same test. He recommended Hong Kong to introduce a new copyright exception for predominantly non-commercial user-generated content (PNCUGC), which is modelled after section 29.21 of the Canadian Copyright Act and similar to that proposed by the netizens. He argued that such an exception that is modelled after Canadian and US copyright laws should be TRIPS-compliant.

Summing Up

16. We have set out in the paper our reservation in adopting a generic concept of UGC as a subject matter for copyright exception in this round of update. In our considered view, it is highly unlikely that UGC which does not amount to a substitute for the original copyright work will be caught by the criminal net. The position will be made clear with clarification of the criminal liability of the existing prejudicial distribution and the proposed prejudicial communication offences (paragraphs 10-11 of the paper). The remaining thrust of the UGC proponents' argument is that without such a provision to exempt civil liability generally, UGC works would be subject to frequent taking down by copyright owners who may liberally serve an infringement notice with the intermediaries such as YouTube and Facebook. There is also fear that the threat of civil litigation by resourceful owners would create a chilling effect dampening creativity of individual users and parodists many of whom are lack of means. We do not think this is necessarily the case, given the operation of the proposed safe harbour provisions and the principles governing civil liability. There should be reasonable safeguards to minimise abuse.

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[12] Please see p.27 of Professor Peter Yu's article on "Digital Copyright and the Parody Exception in Hong Kong: Accommodating the Needs and Interests of Internet Users", as a submission on behalf of the Journalism of Media Studies Centre, University of Hong Kong in the consultation exercise. See also his latest article on "Can the Canadian UGC Exception Be Transplanted Abroad?" (Intellectual Property Journal, Vol. 27, March 2014). Professor Yu is Kern Family Chair in Intellectual Property Law, Drake University Law School in the United States.

Annex G

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date
Section:	7	Films		30/06/1997

(1) In this Part "film" (影片) means a recording on any medium from which a moving image may by any means be produced.

(2) The sound-track accompanying a film is to be treated as part of the film for the purposes of this Part.

(3) Without prejudice to the generality of subsection (2), where that subsection applies-

(a) references in this Part to showing a film include playing the film sound-track to accompany the film; and

(b) references to playing a sound recording do not include playing the film sound-track to accompany the film.

(4) Copyright does not subsist in a film which is, or to the extent that it is, a copy taken from a previous film.

[cf. 1988 c. 48 s. 5B U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date
Section:	8	Broadcasts	36 of 2000	16/06/2000

(1) In this Part a "broadcast" (廣播) means a transmission by wireless telegraphy of sounds or of visual images and sounds or of representations thereof which-

(a) is capable of being lawfully received by members of the public in Hong Kong or elsewhere; or

(b) is transmitted for presentation to members of the public in Hong Kong or elsewhere,

otherwise than through a service for making available to the public of copies of works or fixations of performances.

(2) An encrypted transmission is regarded as capable of being lawfully received by members of the public in Hong Kong or elsewhere only if decoding equipment has been made available to members of the public in Hong Kong or elsewhere by or with the authority of the person making the transmission or the person providing the contents of the transmission.

(3) References in this Part to the person making a broadcast, broadcasting a work, or including a work in a broadcast are-

(a) to the person transmitting the programme, if he has responsibility to any extent for its contents; and

(b) to any person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission,

and references in this Part to a programme, in the context of broadcasting, are to any item included in a broadcast.

(4) For the purposes of this Part the place from which a broadcast is made is the place where, under the control and responsibility of the person making the broadcast, the programme-carrying signals are introduced into an uninterrupted chain of communication (including, in the case of a satellite transmission, the chain leading to the satellite and down towards the earth).

(5) References in this Part to the reception of a broadcast include reception of a broadcast relayed by means of a telecommunications system. (Amended 36 of 2000 s. 28)

(6) Copyright does not subsist in a broadcast which infringes, or to the extent that it infringes, the copyright in another broadcast or in a cable programme.

[cf. 1988 c. 48 s. 6 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date
Section:	9	Cable programmes	36 of 2000	16/06/2000

(1) In this Part-

"cable programme" (有線傳播節目) means any item included in a cable programme service;

"cable programme service" (有線傳播節目服務) means a service which consists wholly or mainly in the lawful sending by any person, by means of a telecommunications system (whether run by himself or by any other person), of sounds, visual images, other information or any combination of them either- (Amended 36 of 2000

s. 28)

(a) for lawful reception, otherwise than by wireless telegraphy, at 2 or more places in Hong Kong or elsewhere, whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service; or

(b) for lawful reception, by whatever means, at a place in Hong Kong or elsewhere for the purposes of their being presented there either to members of the public or to any group of persons,

and includes such a service that has as a component a multipoint microwave distribution system, but does not include the services excepted under subsection (2);

"interconnection" (互相連接) includes interconnection that involves a change of technical characteristics, format or parameters;

"sounds" (聲音), for the purposes of the exclusion in subsection (2)(a), means speech or music or both except that they do not include, in relation to any telecommunications system, speech providing information for the purpose of facilitating the use of a telecommunications service provided by means of that system; (Amended 36 of 2000 s. 28)

"visual images" (影像), for the purposes of the exclusion in subsection (2)(a), means visual images which are such that sequences of them may be seen as moving pictures.

(2) The following are excepted from the definition of "cable programme service"-

(a) a service (such as the services commonly known as video conferencing and video telephony) which consists wholly or mainly in the transmission of sounds or visual images or both by any person if it is an essential feature of the service that, while they are being transmitted, there will or may be transmitted from each place of reception, by means of the telecommunications system or (as the case may be) the part of it by means of which they are transmitted, sounds or visual images or both for reception by that person; (Amended 36 of 2000 s. 28)

(b) a service for making available to the public of copies of works or fixations of performances, but excluding a service in which the transmission of moving visual representational images is an essential feature (such as the service commonly known as video-on-demand);

(c) the running by a broadcaster of a telecommunications system in the case of which every transmission made by it is either- (Amended 36 of 2000 s. 28)

(i) a transmission, by wireless telegraphy, from a transmitting station for general reception of sounds, visual images or signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images; or

(ii) a transmission within a single set of premises of sounds, visual images or such signals which are to be or have been so transmitted;

(d) the running of a telecommunications system in the case of which the only agency involved in the transmission of things thereby transmitted is light and the things thereby transmitted are so transmitted as to be capable of being received or perceived by the eye and without more; (Amended 36 of 2000 s. 28)

(e) the running by a person of a telecommunications system which is not connected to another telecommunications system and in the case of which all the apparatus comprised therein is situated either- (Amended 36 of 2000 s. 28)

(i) on a single set of premises in single occupation (other than a service operated as part of the amenities provided for residents or inmates of premises run as a business); or

(ii) in a vehicle, vessel, aircraft or hovercraft or in 2 or more vehicles, vessels, aircraft or hovercraft mechanically coupled together;

(f) the running by a single individual of a telecommunications system which is not connected to another telecommunications system and in the case of which- (Amended 36 of 2000 s. 28)

(i) all the apparatus comprised therein is under his control; and

(ii) everything transmitted by it that is speech, music and other sounds, visual images, signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images, or signals serving for the actuation or control of machinery or apparatus is transmitted solely for his domestic purposes,

and references in paragraph (e) and this paragraph to another telecommunications system do not

include references to such a system as is mentioned in paragraph (c) (whether run by a broadcaster or by any other person); or (Amended 36 of 2000 s. 28)

(g) in the case of a business carried on by a person, the running, for the purposes of the business, of a telecommunications system which is not connected to another telecommunications system and with respect to which the following conditions are satisfied- (Amended 36 of 2000 s. 28)

(i) that no person except the person carrying on the business is concerned in the control of the apparatus comprised in the system;

(ii) that nothing that is speech, music and other sounds, visual images, signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images, or signals serving for the actuation or control of machinery or apparatus is transmitted by the system by way of rendering a service to another;

(iii) that, in so far as sounds or visual images are transmitted by the system, they are not transmitted for the purpose of their being heard or seen by persons other than the person carrying on the business or any employees of his engaged in the conduct thereof;

(iv) that, in so far as signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images are transmitted by the system, they are not transmitted for the purpose of imparting matter otherwise than to the person carrying on the business, any employees of his engaged in the conduct thereof or things used in the course of the business and controlled by him; and

(v) that, in so far as signals of speech, music and other sounds are transmitted by the system, they are not transmitted for the purpose of actuating or controlling machinery or apparatus used otherwise than in the course of the business.

(3) The Chief Executive in Council may by order amend subsection (2) so as to remove exceptions, subject to such transitional provision as appears to him to be appropriate. (Amended 22 of 1999 s. 3)

(4) References in this Part to the inclusion of a cable programme or work in a cable programme service are to its transmission as part of the service; and references to the person including it are to the person providing the service.

(5) Copyright does not subsist in a cable programme if-

(a) it is included in a cable programme service by reception and immediate re-transmission of a broadcast; or

(b) it infringes, or to the extent that it infringes, the copyright in another cable programme or in a broadcast.

[cf. 1988 c. 48 s. 7 U.K. & 1956 c. 74 s. 14A U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	17	Duration of copyright in literary, dramatic, musical or artistic works		30/06/1997

Expanded Cross Reference:
182, 183, 184

Duration of copyright

(1) The following provisions have effect with respect to the duration of copyright in a literary, dramatic, musical or artistic work.

(2) Copyright expires at the end of the period of 50 years from the end of the calendar year in which the author dies, subject as follows.

(3) If the work is of unknown authorship, copyright expires-

(a) at the end of the period of 50 years from the end of the calendar year in which the work was first made; or

(b) if during that period the work is made available to the public, at the end of the period of 50 years from the end of the calendar year in which it is first so made available,

subject as follows.

(4) Subsection (2) applies if the identity of the author becomes known before the end of the period specified in

subsection (3)(a) or (b).

(5) For the purposes of subsection (3) making available to the public includes-

(a) in the case of a literary, dramatic or musical work-

(i) performance in public; or

(ii) being broadcast or included in a cable programme service;

(b) in the case of an artistic work-

(i) exhibition in public;

(ii) a film including the work being shown in public; or

(iii) being included in a broadcast or cable programme service;

(c) making available of copies of a work to the public within the meaning of section 26,

but in determining generally for the purposes of that subsection whether a work has been made available to the public no account is to be taken of any unauthorized act.

(6) If the work is computer-generated the above provisions do not apply and copyright expires at the end of the period of 50 years from the end of the calendar year in which the work was made.

(7) The provisions of this section are adapted as follows in relation to a work of joint authorship-

(a) the reference in subsection (2) to the death of the author is to be construed-

(i) if the identity of all the authors is known, as a reference to the death of the last of them to die; and

(ii) if the identity of one or more of the authors is known and the identity of one or more others is not, as a reference to the death of the last whose identity is known; and

(b) the reference in subsection (4) to the identity of the author becoming known is to be construed as a reference to the identity of any of the authors becoming known.

(8) This section does not apply to Government copyright or Legislative Council copyright (see sections 182 to 184) or to copyright which subsists by virtue of section 188 (copyright of certain international organizations). <* Note - Exp. X-Ref.: Sections 182, 183, 184 *>

[cf. 1988 c. 48 s. 12 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	18	Duration of copyright in sound recordings		30/06/1997

(1) The following provisions have effect with respect to the duration of copyright in a sound recording.

(2) Copyright expires-

(a) at the end of the period of 50 years from the end of the calendar year in which it is made; or

(b) if during that period it is released, 50 years from the end of the calendar year in which it is released,

subject as follows.

(3) For the purposes of subsection (2) a sound recording is "released" when it is first published, played in public, broadcast or included in a cable programme service; but in determining whether a sound recording has been released no account is to be taken of any unauthorized act.

[cf. 1988 c. 48 s. 13A U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	19	Duration of copyright in films		30/06/1997

(1) The following provisions have effect with respect to the duration of copyright in a film.

(2) Copyright expires at the end of the period of 50 years from the end of the calendar year in which the death occurs of the last to die of the following persons-

(a) the principal director;

(b) the author of the screenplay;

(c) the author of the dialogue; or

(d) the composer of music specially created for and used in the film,

subject as follows.

(3) If the identity of one or more of the persons referred to in subsection (2)(a) to (d) is known and the identity

of one or more others is not, the reference in that subsection to the death of the last of them to die is to be construed as a reference to the death of the last whose identity is known.

(4) If the identity of the persons referred to in subsection (2)(a) to (d) is unknown, copyright expires at-

(a) the end of the period of 50 years from the end of the calendar year in which the film was made; or

(b) if during that period the film is made available to the public, at the end of the period of 50 years from the end of the calendar year in which it is first so made available.

(5) Subsections (2) and (3) apply if the identity of any of those persons becomes known before the end of the period specified in subsection (4)(a) or (b).

(6) For the purposes of subsection (4) making available to the public includes-

(a) showing in public;

(b) making available of copies of a work to the public within the meaning of section 26; or

(c) being broadcast or included in a cable programme service,

but in determining generally for the purposes of that subsection whether a film has been made available to the public no account is to be taken of any unauthorized act.

(7) If in any case there is no person falling within subsection (2)(a) to (d) the above provisions do not apply and copyright expires at the end of the period of 50 years from the end of the calendar year in which the film was made.

(8) For the purposes of this section the identity of any of the persons referred to in subsection (2)(a) to (d) is to be regarded as unknown if it is not possible for a person to ascertain his identity by reasonable inquiry; but if the identity of any such person is once known it shall not subsequently be regarded as unknown.

[cf. 1988 c. 48 s. 13B U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	22	The acts restricted by copyright in a work	15 of 2007	06/07/2007

The acts restricted by copyright

(1) The owner of the copyright in a work has, in accordance with the following provisions of this Division, the exclusive right to do the following acts in Hong Kong-

(a) to copy the work (see section 23);

(b) to issue copies of the work to the public (see section 24);

(c) to rent copies of the work to the public (see section 25); (Replaced 15 of 2007 s. 5)

(d) to make available copies of the work to the public (see section 26);

(e) to perform, show or play the work in public (see section 27);

(f) to broadcast the work or include it in a cable programme service (see section 28);

(g) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 29),

and those acts are referred to in this Part as the "acts restricted by the copyright".

(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorizes another to do, any of the acts restricted by the copyright.

(3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it-

(a) in relation to the work as a whole or any substantial part of it; and

(b) either directly or indirectly,

and it is immaterial whether any intervening acts themselves infringe copyright.

(4) This Division has effect subject to-

(a) the provisions of Division III (acts permitted in relation to copyright works); and

(b) the provisions of Division VIII (provisions with respect to copyright licensing).

[cf. 1988 c. 48 s. 16 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	25	Infringement by rental of work to the public	L.N. 47 of 2008; L.N. 48 of 2008	25/04/2008

Remarks:

* Italicized part is not yet in operation.

(1) The rental of copies of any of the following works to the public is an act restricted by the copyright in the work-

(a) a computer program;
(b) a sound recording;
(c) a film;
(d) a literary, dramatic or musical work included in a sound recording;
[(e) a literary or artistic work included in a comic book; or*
(f) the typographical arrangement of a published edition of a comic book.] (Replaced 15 of 2007 s. 6)

(2) In this Part, subject to the following provisions of this section, "rental" (租賃) means making a copy of the work available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage.

(3) The expression "rental" (租賃) does not include-

(a) making available for the purpose of public performance, playing or showing in public, broadcasting or inclusion in a cable programme service;
(b) making available for the purpose of exhibition in public; or
(c) making available for on-the-spot reference use.

(4) References in this Part to the rental of copies of a work include the rental of the original.

[cf. 1988 c. 48 s. 18A U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	26	Infringement by making available of copies to the public		30/06/1997

(1) The making available of copies of the work to the public is an act restricted by copyright in every description of copyright work.

(2) References in this Part to the making available of copies of a work to the public are to the making available of copies of the work, 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 the making available of copies of works through the service commonly known as the INTERNET).

(3) References in this Part to the making available of copies of a work to the public include the making available of the original.

(4) The mere provision of physical facilities for enabling the making available of copies of works to the public does not of itself constitute an act of making available of copies of works to the public.

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	28	Infringement by broadcasting or inclusion in a cable programme service		30/06/1997

The broadcasting of the work or its inclusion in a cable programme service is an act restricted by the copyright in-

(a) a literary, dramatic, musical or artistic work;
(b) a sound recording or film; or
(c) a broadcast or cable programme.

[cf. 1988 c. 48 s. 20 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	29	Infringement by making adaptation or act done in relation to adaptation		30/06/1997

Expanded Cross Reference:

(1) The making of an adaptation of the work is an act restricted by the copyright in a literary, dramatic or musical work. For this purpose an adaptation is made when it is recorded, in writing or otherwise.

(2) The doing of any of the acts specified in sections 23 to 28, or subsection (1), in relation to an adaptation of the work is also an act restricted by the copyright in a literary, dramatic or musical work. For this purpose it is immaterial whether the adaptation has been recorded, in writing or otherwise, at the time the act is done. <* Note - Exp. X-Ref.: Sections 23, 24, 25, 26, 27, 28 *>

(3) In this Part "adaptation" (改編本)-

(a) in relation to a literary work, other than a computer program, or dramatic work, means-

(i) a translation of the work;

(ii) a version of a dramatic work in which it is converted into a non-dramatic work or, as the case may be, of a non-dramatic work in which it is converted into a dramatic work;

(iii) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical;

(b) in relation to a computer program, means an arrangement or altered version of the program or a translation of it;

(c) in relation to a musical work, means an arrangement or transcription of the work.

(4) In relation to a computer program a "translation" (翻譯本) includes a version of the program in which it is converted into or out of a computer language or code or into a different computer language or code.

(5) No inference is to be drawn from this section as to what does or does not amount to copying a work.

[cf. 1988 c. 48 s. 21 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	31	Secondary infringement: possessing or dealing with infringing copy	15 of 2007	06/07/2007

(1) The copyright in a work is infringed by a person who, without the licence of the copyright owner- (Amended 64 of 2000 s. 2)

(a) possesses for the purpose of or in the course of any trade or business; (Replaced 64 of 2000 s. 2. Amended 15 of 2007 s. 7)

(b) sells or lets for hire, or offers or exposes for sale or hire;

(c) exhibits in public or distributes for the purpose of or in the course of any trade or business; or (Replaced 64 of 2000 s. 2. Amended 15 of 2007 s. 7)

(d) distributes (otherwise than for the purpose of or in the course of any trade or business) to such an extent as to affect prejudicially the owner of the copyright, (Amended 64 of 2000 s. 2; 15 of 2007 s. 7)

a copy of a work which is, and which he knows or has reason to believe to be, an infringing copy of the work.

(2) It is immaterial for the purpose of subsection (1)(a) and (c) whether or not the trade or business consists of dealing in infringing copies of copyright works. (Added 64 of 2000 s. 2)

[cf. 1988 c. 48 s. 23 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	32	Secondary infringement: providing means for making infringing copies	15 of 2007	06/07/2007

(1) Copyright in a work is infringed by a person who, without the licence of the copyright owner-

(a) makes;

(b) imports into Hong Kong or exports from Hong Kong;

(c) possesses for the purpose of or in the course of any trade or business; or (Amended 64 of 2000 s. 3; 15 of 2007 s. 8)

(d) sells or lets for hire, or offers or exposes for sale or hire,

an article specifically designed or adapted for making copies of that work, knowing or having reason to believe that it is to be used to make infringing copies.

(2) Copyright in a work is infringed by a person who, without the licence of the copyright owner, transmits the work by means of a telecommunications system (otherwise than by broadcasting or inclusion in a cable programme service), knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission in Hong Kong or elsewhere.

(3) It is immaterial for the purpose of subsection (1)(c) whether or not the trade or business consists of dealing in articles specially designed or adapted for making copies of copyright works. (Added 64 of 2000 s. 3)

[cf. 1988 c. 48 s. 24 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date
Section:	35	Meaning of "infringing copy"	15 of 2007	06/07/2007

Expanded Cross Reference:
118, 118A, 119, 120, 121, 122, 123, 124, 125, 125, 126, 128, 129, 130, 131, 132, 133

Infringing copy

(1) In this Part "infringing copy" (侵犯版權複製品), in relation to a copyright work, is to be construed in accordance with this section.

(2) A copy of a work is an infringing copy if its making constituted an infringement of the copyright in the work in question.

(3) Except as otherwise provided in section 35A or 35B, a copy of a work other than a copy of an accessory work is also an infringing copy if- (Amended 27 of 2003 s. 2; 15 of 2007 s. 9)

(a) it has been or is proposed to be imported into Hong Kong; and

(b) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

(4) For the purposes of sections 118 to 133 (criminal provisions) "infringing copy" (侵犯版權複製品) does not include a copy of a work- <* Note - Exp. X-Ref.: Sections 118, 118A, 119, 120, 121, 122, 123, 124, 125, 125, 126, 128, 129, 130, 131, 132, 133 *>

(a) that was lawfully made in the country, territory or area where it was made;

(b) that has been or is proposed to be imported into Hong Kong at any time after the expiration of 15 months beginning on the first day of publication of the work in Hong Kong or elsewhere; and (Amended 15 of 2007 s. 9)

(c) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work,

or a copy of an accessory work-

(i) that was lawfully made in the country, territory or area where it was made;

(ii) that has been or is proposed to be imported into Hong Kong; and

(iii) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

(5) For the purposes of Division VII (proceedings relating to importation of infringing articles), "infringing copy" (侵犯版權複製品) does not include a copy of a work or a copy of an accessory work-

(a) that was lawfully made in the country, territory or area where it was made;

(b) that has been or is proposed to be imported into Hong Kong; and

(c) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

(6) Where in any proceedings the question arises whether a copy of a work is an infringing copy and it is shown-

(a) that it is a copy of the work; and

(b) that copyright subsists in the work or has subsisted at any time,

it shall be presumed until the contrary is proved that the copy was made at a time when copyright subsisted in the

work.

(6A) Where, in any proceedings, a question arises as to whether a copy of a work that was lawfully made in the country, territory or area where it was made is an infringing copy by virtue only of subsection (3), and it is shown-

(a) in the case of a copy of a work that is stored in an optical disc, that the optical disc is not marked with a manufacturer's code as required under section 15 of the Prevention of Copyright Piracy Ordinance (Cap 544);

(b) that a label or mark on the copy, the article in which the copy is embodied or the packaging or container in which the copy is packaged or contained indicates that the copy was made in a country, territory or area outside Hong Kong; or

(c) that a label or mark on the copy, the article in which the copy is embodied or the packaging or container in which the copy is packaged or contained indicates that distribution, sale or supply of the copy is prohibited in Hong Kong or restricted to countries, territories or areas outside Hong Kong,

then, unless there is evidence to the contrary, the copy shall be presumed to have been imported into Hong Kong. (Added 15 of 2007 s. 9)

(6B) In subsection (6A)(a)-

"manufacturer's code" (製造者代碼) has the meaning assigned to it by section 2(1) of the Prevention of Copyright Piracy Ordinance (Cap 544);

"marked" (標上) has the meaning assigned to it by section 15(3) of the Prevention of Copyright Piracy Ordinance (Cap 544);

"optical disc" (光碟) has the meaning assigned to it by section 2(1) of the Prevention of Copyright Piracy Ordinance (Cap 544). (Added 15 of 2007 s. 9)

(7) In this Part, "infringing copy" (侵犯版權複製品) includes a copy which is to be treated as an infringing copy by virtue of any of the following provisions-

(a) section 35B(5) (imported copy not an “infringing copy” for purposes of section 35(3));

(b) section 40B(5) (accessible copies made for persons with a print disability);

(c) section 40C(7) (accessible copies made by specified bodies for persons with a print disability);

(d) section 40D(2) (intermediate copies possessed by specified bodies);

(e) section 40D(7) (intermediate copies dealt with by specified bodies);

(f) section 41A(7) (copies made for purposes of giving or receiving instruction);

(g) section 41(5) (copies made for purposes of instruction or examination);

(h) section 44(3) (recordings made by educational establishments for educational purposes);

(i) section 45(3) (reprographic copying by educational establishments for purposes of instruction);

(j) section 46(4)(b) (copies made by librarian or archivist in reliance on false declaration);

(k) section 54A(3) (copies made for purposes of public administration);

(l) section 64(2) (further copies, adaptations, etc. of work in electronic form retained on transfer of principal copy);

(m) section 72(2) (copies made for purpose of advertising artistic work for sale); or

(n) section 77(4) (copies made for purposes of broadcast or cable programme). (Replaced 15 of 2007 s. 9)

(8) For the purpose of subsections (3), (4) and (5), "accessory work" (附屬作品) means a work incorporated in or consisting of-

(a) a label affixed to, or displayed on, an article;

(b) the packaging or container in which an article is packaged or contained;

(c) a label affixed to, or displayed on, the packaging or container in which an article is packaged or contained;

(d) a written instruction, warranty or other information incidental to an article and provided with the article on its sale; or

(e) an instructional sound recording or film incidental to an article and provided with the article on its sale,

and the economic value of the article (inclusive of the label, packaging, container, instruction, warranty, other information, sound recording or film, as the case may be) is not predominantly attributable to the economic value of the work.

(9) (Repealed 27 of 2003 s. 2)

[cf. 1988 c. 48 s. 27 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	39	Criticism, review and news reporting		30/06/1997

(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, if it is accompanied by a sufficient acknowledgement, does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) Fair dealing with a work for the purpose of reporting current events, if (subject to subsection (3)) it is accompanied by a sufficient acknowledgement, does not infringe any copyright in the work.

(3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.

[cf. 1988 c. 48 s. 30 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	40	Incidental inclusion of copyright material		30/06/1997

(1) Copyright in a work is not infringed by its incidental inclusion in an artistic work, sound recording, film, broadcast or cable programme.

(2) The copyright is also not infringed by the issue or making available to the public of copies, or the playing, showing, broadcasting or inclusion in a cable programme service, of anything whose making was, by virtue of subsection (1), not an infringement of the copyright.

(3) A musical work, words spoken or sung with music, or so much of a sound recording, broadcast or cable programme as includes a musical work or such words, is not regarded as incidentally included in another work if it is deliberately included.

[cf. 1988 c. 48 s. 31 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	40B	Making a single accessible copy for a person with a print disability	15 of 2007	06/07/2007

(1) If-

(a) a person with a print disability possesses a copy of the whole or part of a literary, dramatic, musical or artistic work (referred to in this section as "master copy"); and

(b) the master copy is not accessible to him because of the disability,

it is not an infringement of copyright in the work or, in the case of a published edition, in the typographical arrangement, for one accessible copy of the master copy to be made by or on behalf of the person for his personal use.

(2) Subsection (1) does not apply-

(a) if the master copy is an infringing copy;

(b) if the master copy is of a musical work or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of the work; or

(c) if the master copy is of a dramatic work or part of a dramatic work, and the making of an accessible copy would involve recording a performance of the work or part of the work.

(3) Subsection (1) does not apply unless, at the time when the accessible copy is made by or on behalf of the person with a print disability, the maker of the copy is satisfied, after making reasonable enquiries, that copies of the relevant copyright work in a form that is accessible to the person cannot be obtained at a reasonable commercial price.

(4) If a person makes an accessible copy on behalf of a person with a print disability under this section and charges for it, the sum charged must not exceed the cost incurred in making and supplying the copy.

(5) Where an accessible copy which apart from this section would be an infringing copy is made or supplied in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy-

(a) for the purpose of that dealing; and

(b) if that dealing infringes copyright, for all subsequent purposes.

(6) In subsection (5), "dealt with" (被用以進行交易) means sold, let for hire, or offered or exposed for sale

or hire.

(Added 15 of 2007 s. 13)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	40C	Making multiple accessible copies by specified bodies for persons with a print disability	15 of 2007	06/07/2007

(1) If-

(a) a specified body possesses a copy of the whole or part of a commercial publication of a literary, dramatic, musical or artistic work (referred to in this section as "master copy"); and

(b) the master copy is not accessible to persons with a print disability,

it is not an infringement of copyright in the work or, in the case of a published edition, in the typographical arrangement, for the specified body to make for those persons or supply to those persons accessible copies of the master copy for their personal use.

(2) Subsection (1) does not apply-

(a) if the master copy is an infringing copy;

(b) if the master copy is of a musical work or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of the work; or

(c) if the master copy is of a dramatic work or part of a dramatic work, and the making of an accessible copy would involve recording a performance of the work or part of the work.

(3) Subsection (1) does not apply unless, at the time when the accessible copies are made, the specified body is satisfied, after making reasonable enquiries, that copies of the relevant copyright work in a form that is accessible to a person with a print disability cannot be obtained at a reasonable commercial price.

(4) The specified body must-

(a) within a reasonable time before making or supplying the accessible copies, notify the relevant copyright owner of its intention to make or supply the accessible copies; or

(b) within a reasonable time after making or supplying the accessible copies, notify the relevant copyright owner of the fact that it has made or supplied the accessible copies.

(5) The requirement under subsection (4) does not apply if the specified body cannot, after making reasonable enquiries, ascertain the identity and contact details of the relevant copyright owner.

(6) If the specified body charges for making and supplying an accessible copy under this section, the sum charged must not exceed the cost incurred in making and supplying the copy.

(7) Where an accessible copy which apart from this section would be an infringing copy is made or supplied in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy-

(a) for the purpose of that dealing; and

(b) if that dealing infringes copyright, for all subsequent purposes.

(8) In subsection (7), "dealt with" (被用以進行交易) means sold, let for hire, or offered or exposed for sale or hire.

(Added 15 of 2007 s. 13)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	40D	Intermediate copies	15 of 2007	06/07/2007

(1) A specified body entitled to make accessible copies of a master copy under section 40C may possess an intermediate copy of the master copy which is necessarily created during the production of the accessible copies, but-

(a) the specified body may possess the intermediate copy only for the purpose of the production of further accessible copies; and

(b) the specified body must destroy the intermediate copy within 3 months after it is no longer required for that purpose.

(2) An intermediate copy possessed otherwise than in accordance with subsection (1) is to be treated as an infringing copy.

(3) A specified body may lend or transfer an intermediate copy possessed under subsection (1) to another

specified body which is also entitled to make accessible copies of the relevant copyright work under section 40C.

(4) The specified body must-

(a) within a reasonable time before lending or transferring the intermediate copy, notify the relevant copyright owner of its intention to lend or transfer the intermediate copy; or

(b) within a reasonable time after lending or transferring the intermediate copy, notify the relevant copyright owner of the fact that it has lent or transferred the intermediate copy.

(5) The requirement under subsection (4) does not apply if the specified body cannot, after making reasonable enquiries, ascertain the identity and contact details of the relevant copyright owner.

(6) If the specified body charges for lending or transferring an intermediate copy under this section, the sum charged must not exceed the cost incurred in lending or transferring the copy.

(7) Where an intermediate copy which apart from this section would be an infringing copy is possessed, lent or transferred in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy-

(a) for the purpose of that dealing; and

(b) if that dealing infringes copyright, for all subsequent purposes.

(8) In subsection (7), "dealt with" (被用以進行交易) means sold, let for hire, or offered or exposed for sale or hire.

(Added 15 of 2007 s. 13)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	41A	Fair dealing for purposes of giving or receiving instruction	15 of 2007	06/07/2007

Education

(1) Fair dealing with a work by or on behalf of a teacher or by a pupil for the purposes of giving or receiving instruction in a specified course of study provided by an educational establishment does not infringe the copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) In determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular-

(a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;

(b) the nature of the work;

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

(d) the effect of the dealing on the potential market for or value of the work.

(3) Where any dealing with a work involves the inclusion of any passage or excerpt from a published literary or dramatic work in an anthology-

(a) if the inclusion is not accompanied by a sufficient acknowledgement, the dealing is not fair dealing under subsection (1); and

(b) if the inclusion is accompanied by a sufficient acknowledgement, subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

(4) Where any dealing with a work involves the making of a recording of a broadcast or cable programme or a copy of such a recording-

(a) if an acknowledgement of authorship or other creative effort contained in the work recorded is not incorporated in the recording, the dealing is not fair dealing under subsection (1); and

(b) if an acknowledgement of authorship or other creative effort contained in the work recorded is incorporated in the recording, subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

(5) Where any dealing with a work involves the making available of copies of the work through a wire or wireless network wholly or partly controlled by an educational establishment-

(a) if the educational establishment fails to-

(i) adopt technological measures to restrict access to the 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 the work for the purposes of giving or receiving instruction in the specified course of study in question or for the purposes of maintaining or managing the network; or

(ii) ensure that the copies of the work are not stored in the network for a period longer than is necessary for the purposes of giving or receiving instruction in the specified course of study in question or, in any event, for a period longer than 12 consecutive months,

the dealing is not fair dealing under subsection (1); and

(b) if the educational establishment-

(i) adopts technological measures to restrict access to the 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 the work for the purposes of giving or receiving instruction in the specified course of study in question or for the purposes of maintaining or managing the network; and

(ii) ensures that the copies of the work are not stored in the network for a period longer than is necessary for the purposes of giving or receiving instruction in the specified course of study in question or, in any event, for a period longer than 12 consecutive months,

subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

(6) Without affecting the generality of section 37(5), where any dealing with a work involves the making of reprographic copies, the fact that the making of the copies does not fall within section 45 does not mean that it is not covered by this section, and subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

(7) Where a copy which apart from this section would be an infringing copy is made in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy-

(a) for the purpose of that dealing; and

(b) if that dealing infringes copyright, for all subsequent purposes.

(8) In subsection (7), "dealt with" (被用以進行交易) means sold, let for hire, or offered or exposed for sale or hire.

(Added 15 of 2007 s. 14)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	41	Things done for purposes of instruction or examination		30/06/1997

(1) Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied, to a reasonable extent, in the course of instruction or of preparation for instruction, if the copying-

(a) is done by a person giving or receiving instruction; and

(b) is not by means of a reprographic process.

(2) Copyright in a sound recording, film, broadcast or cable programme is not infringed by its being copied by making a film or film sound-track in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, if the copying is done by a person giving or receiving instruction.

(3) Copyright is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions.

(4) Subsection (3) does not extend to the making of a reprographic copy of a musical work for use by an examination candidate in performing the work.

(5) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, the copy is treated as an infringing copy for the purpose of that dealing and if that dealing infringes copyright, for all subsequent purposes.

For this purpose "dealt with" (進行交易) means sold or let for hire or offered or exposed for sale or hire.

[cf. 1988 c. 48 s. 32 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	44	Recording by educational establishments of broadcasts and cable programmes		30/06/1997

(1) A recording of a broadcast or cable programme, or a copy of such a recording may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing the copyright in the broadcast or cable programme, or in any work included in it, if-

(a) an acknowledgement of authorship or other creative effort contained in the work recorded is incorporated in the recording made by the establishment; and

(b) it is not made for gain.

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

(3) Where a recording or copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, the copy is treated as an infringing copy for the purposes of that dealing and if that dealing infringes copyright, for all subsequent purposes.

For this purpose "dealt with" (進行交易) means sold or let for hire or offered or exposed for sale or hire.

[cf. 1988 c. 48 s. 35 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	45	Reprographic copying made by educational establishments or pupils of passages from published works	15 of 2007	06/07/2007

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

(Amended 15 of 2007 s. 16)

(1) Reprographic copies of artistic works or of passages from published literary, dramatic or musical works may, to a reasonable extent, be made by or on behalf of an educational establishment for the purposes of giving instruction, or by a pupil for the purposes of receiving instruction in a specified course of study provided by an educational establishment, without infringing any copyright in the work, or in the typographical arrangement. (Amended 15 of 2007 s. 16)

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

(3) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, it is treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright, for all subsequent purposes.

For this purpose "dealt with" (進行交易) means sold or let for hire or offered or exposed for sale or hire.

[cf. 1988 c. 48 s. 36 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	46	Libraries and archives: introductory	L.N. 130 of 2007	01/07/2007

Expanded Cross Reference:
47, 48, 49, 50, 51, 52, 53

Remarks:

For the saving and transitional provisions relating to the amendments made by the Resolution of the Legislative Council (L.N. 130 of 2007), see paragraph (12) of that Resolution.

Libraries and archives

(1) The Secretary for Commerce and Economic Development may- (Amended L.N. 173 of 2000; L.N. 106 of 2002; L.N. 130 of 2007)

(a) by regulations prescribe conditions; and

(b) by notice in the Gazette specify libraries or archives,

for the purposes of any provision in sections 47 to 53 (copying by librarians and archivists). <* Note - Exp. X-Ref.: Sections 47, 48, 49, 50, 51, 52, 53 *>

(2) In sections 47 to 53- <* Note - Exp. X-Ref.: Sections 47, 48, 49, 50, 51, 52, 53 *>

(a) references in any provision to the prescribed conditions are to the conditions prescribed for the purposes of that provision under subsection (1)(a); and

(b) references in any provision to a specified library or archive are to a library or archive of a description specified for the purposes of that provision under subsection (1)(b).

(3) The regulations may-

(a) provide that, where a librarian or archivist is required to be satisfied as to any matter before making or supplying a copy of a work-

(i) he may rely on a signed declaration as to that matter by the person requesting the copy, unless he is aware that it is false in a material particular; and

(ii) in such cases as may be prescribed, he shall not make or supply a copy in the absence of a signed declaration in such form as may be prescribed;

(b) make different provisions for different descriptions of libraries or archives and for different purposes.

(4) Where a person requesting a copy makes a declaration which is false in a material particular and is supplied with a copy which would have been an infringing copy if made by him-

(a) he is liable for infringement of copyright as if he had made the copy himself; and

(b) the copy is treated as an infringing copy.

(5) References in this section, and in sections 47 to 53, to the librarian or archivist include a person acting on his behalf. <* Note - Exp. X-Ref.: Sections 47, 48, 49, 50, 51, 52, 53 *>

[cf. 1988 c. 48 s. 37 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	48	Copying by librarians: parts of published works		30/06/1997

(1) The librarian of a specified library may, if the prescribed conditions are complied with, make and supply from a published edition a copy of part of a literary, dramatic or musical work (other than an article in a periodical) without infringing any copyright in the work, in any illustrations accompanying the work or in the typographical arrangement.

(2) The prescribed conditions must include the following-

(a) that copies are supplied only to persons satisfying the librarian that they require them for purposes of research or private study, and will not use them for any other purpose;

(b) that no person is furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work; and

(c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production.

[cf. 1988 c. 48 s. 39 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	50	Copying by librarians: supply of copies to other libraries		30/06/1997

(1) The librarian of a specified library may, if the prescribed conditions are complied with, make and supply to another specified library a copy of-

(a) an article in a periodical;

(b) the whole or part of a published edition of a literary, dramatic or musical work; or

(c) a sound recording or film,

without infringing any copyright in the text of the article, in the work, in any illustration accompanying it, in the typographical arrangement, or in the sound recording or film, as the case may be.

(2) Subsection (1)(b) and (c) does not apply if at the time the copy is made the librarian making it knows, or could by reasonable inquiry ascertain, the name and address of a person entitled to authorize the making of the copy.

[cf. 1988 c. 48 s. 41 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	51	Copying by librarians or archivists: replacement copies of works		30/06/1997

(1) The librarian or archivist of a specified library or archive may, if the prescribed conditions are complied with, make a copy from any item in the permanent collection of the library or archive-

(a) in order to preserve or replace that item by placing the copy in its permanent collection in addition to or in place of it; or

(b) in order to replace in the permanent collection of another specified library or archive an item which has been lost, destroyed or damaged,

without infringing the copyright in any literary, dramatic or musical work, in any illustrations accompanying such a work or, in the case of a published edition, in the typographical arrangement or, in the case of a sound recording or a film, in the sound recording or film.

(2) The prescribed conditions must include provision for restricting the making of copies to cases where it is not reasonably practicable to purchase a copy of the item in question to fulfill that purpose.

[cf. 1988 c. 48 s. 42 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	52	Copying by librarians or archivists: certain unpublished works		30/06/1997

(1) The librarian or archivist of a specified library or archive may, if the prescribed conditions are complied with, make and supply a copy of the whole or part of-

(a) a literary, dramatic or musical work from a document (including a document in electronic form); or

(b) a sound recording or film,

in the library or archive without infringing any copyright in the work or any illustrations accompanying it or in the sound recording or film.

(2) This section does not apply if-

(a) the work had been published before it was deposited in the library or archive; or

(b) the copyright owner has prohibited copying of the work,

and at the time the copy is made the librarian or archivist making it is, or ought to be, aware of that fact.

(3) The prescribed conditions must include the following-

(a) that copies are supplied only to persons satisfying the librarian or archivist that they require them for purposes of research or private study and will not use them for any other purpose;

(b) that no person is furnished with more than one copy of the same material; and

(c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library or archive) attributable to their production.

[cf. 1988 c. 48 s. 43 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	53	Copying by librarians or archivists: articles of cultural or historical importance		30/06/1997

The librarian or archivist of a specified library or archive may make a copy of an article of cultural or historical importance or interest and deposit the copy at the specified library or archive without infringing any copyright in respect of the article if the article is likely to be lost to Hong Kong through sale or export.

[cf. 1988 c. 48 s. 44 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	54A	Fair dealing for purposes of public administration	15 of 2007	06/07/2007

Public administration

(1) Fair dealing with a work by the Government, the Executive Council, the Judiciary or any District Council for the purposes of efficient administration of urgent business does not infringe the copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) In determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular-

(a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;

(b) the nature of the work;

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

(d) the effect of the dealing on the potential market for or value of the work.

(3) Where a copy which apart from this section would be an infringing copy is made in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy-

(a) for the purpose of that dealing; and

(b) if that dealing infringes copyright, for all subsequent purposes.

(4) In subsection (3), "dealt with" (被用以進行交易) means sold, let for hire, or offered or exposed for sale or hire.

(Added 15 of 2007 s. 17)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date
Section:	55	Statutory inquiries		30/06/1997

(1) Copyright is not infringed by anything done for the purposes of the proceedings of a statutory inquiry.

(2) Copyright is not infringed by anything done for the purposes of reporting any such proceedings held in public; but this is not to be construed as authorizing the copying of a work which is itself a published report of the proceedings.

(3) Copyright in a work is not infringed by the issue or making available to the public of copies of the report of a statutory inquiry containing the work or material from it.

(4) In this section-

"statutory inquiry" (法定研訊) means an inquiry held or investigation conducted in pursuance of-

(a) the Commissions of Inquiry Ordinance (Cap 86); or

(b) a duty imposed or power conferred by or under an Ordinance.

[cf. 1988 c. 48 s. 46 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date
Section:	56	Material open to public inspection or on official register	22 of 1999	01/07/1997

Remarks:
Adaptation amendments retroactively made - see 22 of 1999 s. 3

(1) Where material is open to public inspection pursuant to a statutory requirement, or is on a statutory register, copyright is not infringed by the copying of so much of the material as contains factual information of any description, by or with the authority of the appropriate person, for a purpose which does not involve the issuing or making available of copies to the public.

(2) Where material is open to public inspection pursuant to a statutory requirement, copyright is not infringed by the copying or issuing or making available to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of enabling the material to be inspected at a more convenient time or place or otherwise facilitating the exercise of any right for the purpose of which the requirement is imposed.

(3) Where material which is open to public inspection pursuant to a statutory requirement, or which is on a statutory register, contains information about matters of general scientific, technical, commercial or economic interest, copyright is not infringed by the copying or issuing or making available to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of disseminating that information.

(4) The Chief Executive may by regulation provide that subsection (1), (2) or (3) applies, in such cases as may be specified in the regulation, only to copies marked in such manner as may be so specified. (Amended 22 of 1999 s. 3)

(5) The Chief Executive may by regulation provide that subsections (1) to (3) apply, to such extent and with such modifications as may be specified in the regulation- (Amended 22 of 1999 s. 3)

(a) to material made open to public inspection by-

(i) an international organization specified in the regulation; or

(ii) a person so specified who has functions in Hong Kong under an international agreement to which Hong Kong is a party; or

(b) to a register maintained by an international organization specified in the regulation,

as they apply in relation to material open to public inspection pursuant to a statutory requirement or to a statutory register.

(6) In this section-

"appropriate person" (適當的人) means the person required to make the material open to public inspection or, as the case may be, the person maintaining the statutory register;

"statutory register" (法定登記冊) means a register maintained in pursuance of a requirement imposed by or under an Ordinance;

"statutory requirement" (法例規定) means a requirement imposed by or under an Ordinance.

[cf. 1988 c. 48 s. 47 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	57	Material communicated to the Government in the course of public business		30/06/1997

(1) This section applies where a work has in the course of public business been communicated to the Government for any purpose, by or with the licence of the copyright owner and a document or other material thing recording or embodying the work is owned by or in the custody or control of the Government.

(2) The Government may, for the purpose for which the work was communicated to it, or any related purpose which could reasonably have been anticipated by the copyright owner, copy the work, or issue or make available copies of the work to the public without infringing any copyright in the work.

(3) The Government may not copy a work, or issue or make available copies of a work to the public, by virtue of this section if the work has previously been published otherwise than by virtue of this section.

(4) In subsection (1) "public business" (公務) includes any activity carried on by the Government.

(5) This section has effect subject to any agreement to the contrary between the Government and the copyright owner.

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

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	65	Certain acts permitted where works made available to the public		30/06/1997

Notwithstanding section 23, copyright in a work is not infringed by the making of a transient and incidental copy which is technically required for the viewing or listening of the work by a member of the public to whom a copy of the work is made available.

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	67	Use of notes or recordings of spoken words in certain cases		30/06/1997

(1) Where a record of spoken words is made, in writing or otherwise, for the purpose of-

(a) reporting current events; or

(b) broadcasting or including in a cable programme service the whole or part of the work,

it is not an infringement of any copyright in the words as a literary work to use the record or material taken from it (or to copy the record, or any such material, and use the copy) for that purpose, if the conditions in subsection (2) are met.

(2) The conditions are that-

(a) the record is a direct record of the spoken words and is not taken from a previous record or from a broadcast or cable programme;

(b) the making of the record was not prohibited by the speaker and, where copyright already subsisted in the work, did not infringe copyright;

(c) the use made of the record or material taken from it is not of a kind prohibited by or on behalf of the speaker or copyright owner before the record was made; and

(d) the use is by or with the authority of a person who is lawfully in possession of the record.

[cf. 1988 c. 48 s. 58 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	68	Public reading or recitation		30/06/1997

(1) The reading or recitation in public by one person of a reasonable extract from a published literary or dramatic work does not infringe any copyright in the work if it is accompanied by a sufficient acknowledgement.

(2) Copyright in a work is not infringed by the making of a sound recording, or the broadcasting or inclusion in a cable programme service, of a reading or recitation which by virtue of subsection (1) does not infringe copyright in the work, if the recording, broadcast or cable programme consists mainly of material in relation to which it is not necessary to rely on that subsection.

[cf. 1988 c. 48 s. 59 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	69	Abstracts of scientific or technical articles		30/06/1997

(1) Where an article on a scientific or technical subject is published in a periodical accompanied by an abstract indicating the contents of the article, it is not an infringement of copyright in the abstract, or in the article, to copy the abstract or issue or make available copies of it to the public. [cf. 1988 c. 48 s. 60(1) U.K.]

(2) This section does not apply if, or to the extent that, licences under licensing schemes are available authorizing the act in question and the person so acting knew or ought to have been aware of that fact.

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	71	Representation of certain artistic works on public display		30/06/1997

(1) This section applies to-

(a) buildings; and

(b) sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public.

(2) The copyright in such a work is not infringed by-

(a) making a graphic work representing it;

(b) making a photograph or film of it; or

(c) broadcasting or including in a cable programme service a visual image of it.

(3) Nor is the copyright infringed by the issue or making available to the public of copies, or the broadcasting or inclusion in a cable programme service, of anything whose making was, by virtue of this section, not an infringement of the copyright.

[cf. 1988 c. 48 s. 62 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	72	Advertisement of sale of artistic work	15 of 2007	06/07/2007

(1) It is not an infringement of copyright in an artistic work to copy it, or to issue or make available copies to the public, for the purpose of advertising the sale of the work.

(2) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, the copy is treated as an infringing copy for the purposes of that dealing and, if that dealing infringes copyright, for all subsequent purposes. (Amended 15 of 2007 s. 20)

For this purpose "dealt with" (進行交易) means sold or let for hire, offered or exposed for sale or hire, exhibited in public or distributed.

[cf. 1988 c. 48 s. 63 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	83	Provision of sub-titled copies of broadcast or cable programme	L.N. 130 of 2007	01/07/2007

Remarks:

For the saving and transitional provisions relating to the amendments made by the Resolution of the Legislative Council (L.N. 130 of 2007), see paragraph (12) of that Resolution.

(1) A body designated under subsection (3) may, for the purpose of providing people who are deaf or hard of hearing, or physically or mentally handicapped in other ways, with copies which are sub-titled or otherwise modified for their special needs, make copies of television broadcasts or cable programmes and issue and make available copies to the public, without infringing any copyright in the broadcasts or cable programmes or works included in them.

(2) This section does not apply if, or to the extent that, licences under licensing schemes are available authorizing the act in question and the person so acting knew or ought to have been aware of that fact.

(3) The Secretary for Commerce and Economic Development may, by notice in the Gazette, designate bodies for the purposes of this section, and the Secretary shall not designate a body unless he is satisfied that it is not established or conducted for profit. (Amended L.N. 173 of 2000; L.N. 106 of 2002; L.N. 130 of 2007)

[cf. 1988 c. 48 s. 74 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	89	Right to be identified as author or director		30/06/1997

Right to be identified as author or director

(1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work in the circumstances mentioned in this section; but the right is not infringed unless it has been asserted in accordance with section 90.

(2) The author of a literary work (other than words intended to be sung or spoken with music) or a dramatic work has the right to be identified whenever-

(a) the work is published commercially, performed in public, broadcast or included in a cable programme service; or

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

and that right includes the right to be identified whenever any of those events occur in relation to an adaptation of the work as the author of the work from which the adaptation was made.

(3) The author of a musical work, or a literary work consisting of words intended to be sung or spoken with music, has the right to be identified whenever-

(a) the work is published commercially, performed in public, broadcast or included in a cable programme service;

(b) copies of a sound recording of the work are issued or made available to the public; or

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

and that right includes the right to be identified whenever any of those events occur in relation to an adaptation of the

work as the author of the work from which the adaptation was made.

(4) The author of an artistic work has the right to be identified whenever-

(a) the work is published commercially or exhibited in public, or a visual image of it is broadcast or included in a cable programme service;

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

(c) in the case of a work of architecture in the form of a building or a model for a building, a sculpture or a work of artistic craftsmanship, copies of a graphic work representing it, or of a photograph of it, are issued or made available to the public.

(5) The author of a work of architecture in the form of a building also has the right to be identified on the building as constructed or, where more than one building is constructed to the design, on the first to be constructed.

(6) The director of a film has the right to be identified whenever the film is shown in public, broadcast or included in a cable programme service or copies of the film are issued or made available to the public.

(7) The right of the author or director under this section is-

(a) in the case of commercial publication or the issue or making available to the public of copies of a film or sound recording, to be identified in or on each copy or, if that is not appropriate, in some other manner likely to bring his identity to the notice of a person acquiring a copy;

(b) in the case of identification on a building, to be identified by appropriate means visible to persons entering or approaching the building; and

(c) in any other case, to be identified in a manner likely to bring his identity to the notice of a person seeing or hearing the performance, exhibition, showing, broadcast or cable programme in question,

and the identification must in each case be clear and reasonably prominent.

(8) If the author or director in asserting his right to be identified specifies a pseudonym, initials or some other particular form of identification, that form must be used; otherwise any reasonable form of identification may be used.

(9) This section has effect subject to section 91.

[cf. 1988 c. 48 s. 77 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	91	Exceptions to right	15 of 2007	06/07/2007

(1) The right conferred by section 89 (right to be identified as author or director) is subject to the following exceptions.

(2) The right does not apply in relation to the following descriptions of work-

(a) a computer program;

(b) the design of a typeface;

(c) any computer-generated work.

(3) The right does not apply to anything done by or with the authority of the copyright owner where copyright in the work originally vested in the author's employer by virtue of section 14(1) (employee works).

(4) The right is not infringed by an act which by virtue of any of the following provisions would not infringe copyright in the work-

(a) section 39 (fair dealing for certain purposes), so far as it relates to the reporting of current events by means of a sound recording, film, broadcast or cable programme;

(b) section 40 (incidental inclusion of work in an artistic work, sound recording, film, broadcast or cable programme);

(c) section 41(3) (examination questions);

(ca) section 54B (Legislative Council); (Added 15 of 2007 s. 24)

(d) section 54 (judicial proceedings); (Amended 15 of 2007 s. 24)

(e) section 55(1) or (2) (statutory inquiries);

(f) section 66 or 75 (acts permitted on assumptions as to expiry of copyright, etc.).

(5) The right does not apply in relation to any work made for the purpose of reporting current events.

(6) The right does not apply in relation to the publication in-

(a) a newspaper, magazine or similar periodical; or

(b) an encyclopaedia, dictionary, yearbook or other collective work of reference,

of a literary, dramatic, musical or artistic work made for the purposes of such publication or made available with the

consent of the author for the purposes of such publication.

(7) The right does not apply in relation to-

(a) a work in which Government copyright or Legislative Council copyright subsists; or

(b) a work in which copyright originally vested in an international organization by virtue of section 188,

unless the author or director has previously been identified as such in or on published copies of the work.

[cf. 1988 c. 48 s. 79 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date
Section:	92	Right to object to derogatory treatment of work		30/06/1997

Right to object to derogatory treatment of work

(1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right in the circumstances mentioned in this section not to have his work subjected to derogatory treatment.

(2) For the purposes of this section-

(a) "treatment" (處理) of a work means any addition to, deletion from or alteration to or adaptation of the work, other than-

(i) a translation of a literary or dramatic work; or

(ii) an arrangement or transcription of a musical work involving no more than a change of key or register; and

(b) the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director,

and in the following provisions of this section references to a derogatory treatment of a work are construed accordingly.

(3) In the case of a literary, dramatic or musical work the right is infringed by a person who-

(a) publishes commercially, performs in public, broadcasts or includes in a cable programme service a derogatory treatment of the work; or

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

(4) In the case of an artistic work the right is infringed by a person who-

(a) publishes commercially or exhibits in public a derogatory treatment of the work, or broadcasts or includes in a cable programme service a visual image of a derogatory treatment of the work;

(b) shows in public a film including a visual image of a derogatory treatment of the work or issues or makes available to the public copies of such a film; or

(c) in the case of-

(i) a work of architecture in the form of a model for a building;

(ii) a sculpture; or

(iii) a work of artistic craftsmanship,

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

(5) Subsection (4) does not apply to a work of architecture in the form of a building; but where the author of such a work is identified on the building and it is the subject of derogatory treatment he has the right to require the identification to be removed.

(6) In the case of a film, the right is infringed by a person who-

(a) shows in public, broadcasts or includes in a cable programme service a derogatory treatment of the film; or

(b) issues or makes available to the public copies of a derogatory treatment of the film.

(7) The right conferred by this section extends to the treatment of parts of a work resulting from a previous treatment by a person other than the author or director, if those parts are attributed to, or are likely to be regarded as the work of, the author or director.

(8) This section has effect subject to sections 93 and 94 (exceptions to and qualifications of right).

[cf. 1988 c. 48 s. 80 U.K.]

False attribution of work

(1) A person has the right in the circumstances mentioned in this section-

(a) not to have a literary, dramatic, musical or artistic work falsely attributed to him as author; and

(b) not to have a film falsely attributed to him as director,

and in this section an "attribution" (署名), in relation to such a work, means a statement (express or implied) as to who is the author or director.

(2) The right is infringed by a person who-

(a) issues or makes available to the public copies of a work of any of those descriptions in or on which there is a false attribution; or

(b) exhibits in public an artistic work, or a copy of an artistic work, in or on which there is a false attribution.

(3) The right is also infringed by a person who-

(a) in the case of a literary, dramatic or musical work, performs the work in public, broadcasts it or includes it in a cable programme service as being the work of a person; or

(b) in the case of a film, shows it in public, broadcasts it or includes it in a cable programme service as being directed by a person,

knowing or having reason to believe that the attribution is false.

(4) The right is also infringed by a person who issues or makes available to the public or displays in public material containing a false attribution in connection with any of the acts mentioned in subsection (2) or (3).

(5) The right is also infringed by a person who for the purpose of or in the course of any trade or business- (Amended 64 of 2000 s. 5; 15 of 2007 s. 27)

(a) possesses or deals with a copy of a work of any of the descriptions mentioned in subsection (1) in or on which there is a false attribution; or

(b) in the case of an artistic work, possesses or deals with the work itself when there is a false attribution in or on it,

knowing or having reason to believe that there is such an attribution and that it is false.

(6) In the case of an artistic work the right is also infringed by a person who for the purpose of or in the course of any trade or business- (Amended 64 of 2000 s. 5; 15 of 2007 s. 27)

(a) deals with a work which has been altered after the author parted with possession of it as being the unaltered work of the author; or

(b) deals with a copy of such an altered work as being a copy of the unaltered work of the author,

knowing or having reason to believe that that is not the case.

(6A) It is immaterial for the purpose of subsections (5) and (6) whether or not the trade or business consists of dealing in-

(a) works or copies of works in or on which there are false attributions; or

(b) altered works or copies of altered works. (Added 64 of 2000 s. 5)

(7) References in this section to dealing are to selling or letting for hire, offering or exposing for sale or hire, exhibiting in public, or distributing.

(8) This section applies where, contrary to the fact-

(a) a literary, dramatic or musical work is falsely represented as being an adaptation of the work of a person; or

(b) a copy of an artistic work is falsely represented as being a copy made by the author of the artistic work,

as it applies where the work is falsely attributed to a person as author.

[cf. 1988 c. 48 s. 84 U.K.]

Section:	108	Provisions as to damages in infringement action		30/06/1997

(1) Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.

(2) 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.

[cf. 1988 c. 48 s. 97 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	116	Presumptions relevant to sound recordings, films and computer programs		30/06/1997

(1) In proceedings brought by virtue of this Division with respect to a sound recording, where copies of the recording as issued or made available to the public bear a label or other mark stating-

(a) that a named person was the owner of copyright in the recording at the date of issue or making available of the copies; or

(b) that the recording was first published in a specified year or in a specified country,

the label or mark is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved.

(2) In proceedings brought by virtue of this Division with respect to a film, where copies of the film as issued or made available to the public bear a statement-

(a) that a named person was the director or producer of the film;

(b) that a named person was the principal director, the author of the screenplay, the author of the dialogue or the composer of music specifically created for and used in the film;

(c) that a named person was the owner of copyright in the film at the date of issue or making available of the copies; or

(d) that the film was first published in a specified year or in a specified country,

the statement is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved.

(3) In proceedings brought by virtue of this Division with respect to a computer program, where copies of the program are issued to the public in electronic form or made available to the public bearing a statement-

(a) that a named person was the owner of copyright in the program at the date of issue or making available of the copies; or

(b) that the program was first published in a specified country or that copies of it were first issued to the public in electronic form or made available to the public in a specified year,

the statement is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved.

(4) The above presumptions apply equally in proceedings relating to an infringement alleged to have occurred before the date on which the copies were issued or made available to the public.

(5) In proceedings brought by virtue of this Division with respect to a film, where the film as shown in public, broadcast or included in a cable programme service bears a statement-

(a) that a named person was the director or producer of the film;

(b) that a named person was the principal director of the film, the author of the screenplay, the author of the dialogue or the composer of music specifically created for and used in the film; or

(c) that a named person was the owner of copyright in the film immediately after it was made,

the statement is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved.

This presumption applies equally in proceedings relating to an infringement alleged to have occurred before the date on which the film was shown in public, broadcast or included in a cable programme service.

(6) For the purposes of this section, a statement that a person was the director of a film is to be taken, unless a contrary indication appears, as meaning that he was the principal director of the film.

[cf. 1988 c. 48 s. 105 U.K.]

Expanded Cross Reference:
115, 116, 117

Offences

(1) A person commits an offence if he, without the licence of the copyright owner of a copyright work-
- (a) makes for sale or hire an infringing copy of the work;
- (b) imports an infringing copy of the work into Hong Kong otherwise than for his private and domestic use;
- (c) exports an infringing copy of the work from Hong Kong otherwise than for his private and domestic use;
- (d) sells, lets for hire, or offers or exposes for sale or hire an infringing copy of the work for the purpose of or in the course of any trade or business;
- (e) exhibits in public or distributes an infringing copy of the work for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works;
- (f) possesses an infringing copy of the work with a view to-
  - (i) its being sold or let for hire by any person for the purpose of or in the course of any trade or business; or
  - (ii) its being exhibited in public or distributed by any person for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works; or
- (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. (Replaced 15 of 2007 s. 31)

(1A) Where-
- (a) a person exhibits in public or distributes an infringing copy of a copyright work for the purpose of or in the course of any trade or business; and
- (b) the circumstances in which the infringing copy is so exhibited or distributed give rise to a reasonable suspicion that the trade or business consists of dealing in infringing copies of copyright works,

then, unless there is evidence to the contrary, the trade or business is presumed, for the purposes of any proceedings instituted under subsection (1)(e), to be a trade or business which consists of dealing in infringing copies of copyright works. (Added 15 of 2007 s. 31)

(1B) Where-
- (a) a person possesses an infringing copy of a copyright work with a view to its being exhibited in public or distributed by any person for the purpose of or in the course of any trade or business; and
- (b) the circumstances in which the infringing copy is so possessed give rise to a reasonable suspicion that the trade or business consists of dealing in infringing copies of copyright works,

then, unless there is evidence to the contrary, the trade or business is presumed, for the purposes of any proceedings instituted under subsection (1)(f)(ii), to be a trade or business which consists of dealing in infringing copies of copyright works. (Added 15 of 2007 s. 31)

(2) Subsections (1)(b) and (c) and (4)(b) and (c) do not apply to an article in transit.

(2A) A person commits an offence if he, without the licence of the copyright owner of a copyright work to which this subsection applies, possesses an infringing copy of the work for the purpose of or in the course of any trade or business with a view to its being used by any person for the purpose of or in the course of that trade or business. (Added 15 of 2007 s. 31)

(2B) Subsection (2A) applies to a copyright work that is-
- (a) a computer program;
- (b) a movie;
- (c) a television drama;
- (d) a musical sound recording; or

(e) a musical visual recording. (Added 15 of 2007 s. 31)

(2C) Subsection (2A) does not apply to an infringing copy of a computer program in a printed form. (Added 15 of 2007 s. 31)

(2D) Subsection (2A) does not apply to the possession of an infringing copy of a computer program if-

(a) the computer program incorporates the whole or any part of a work that is not a computer program itself, and the computer program is technically required for the viewing or listening of the work by a member of the public to whom a copy of the work is made available; or

(b) the computer program is incorporated in a work that is not a computer program itself, and the computer program is technically required for the viewing or listening of the work by a member of the public to whom a copy of the work is made available. (Added 15 of 2007 s. 31)

(2E) Subsection (2A) does not apply to the possession of an infringing copy of a movie, television drama, musical sound recording or musical visual recording by the Hong Kong Film Archive for the purpose of heritage conservation if-

(a) the infringing copy was donated or given to the Hong Kong Film Archive by the public; or

(b) the infringing copy was made by the Hong Kong Film Archive to preserve or replace the infringing copy referred to in paragraph (a) against loss, deterioration or damage. (Added 15 of 2007 s. 31)

(2F) Subsection (2A) does not apply to the possession of an infringing copy of a movie, television drama, musical sound recording or musical visual recording by the Hong Kong Film Archive for the purpose of doing any act in relation to the infringing copy (other than for the purpose referred to in subsection (2E)) if-

(a) the infringing copy was-

(i) an infringing copy donated or given to the Hong Kong Film Archive by the public; or

(ii) an infringing copy made by the Hong Kong Film Archive to preserve or replace the infringing copy referred to in subparagraph (i) against loss, deterioration or damage;

(b) it is not possible by reasonable enquiry to ascertain the identity and contact details of the copyright owner of the work in question; and

(c) a copy (other than an infringing copy) of the work in question cannot be obtained on reasonable commercial terms. (Added 15 of 2007 s. 31)

(2G) Subsection (2A) does not apply if-

(a) the person who possesses an infringing copy does so for the purpose of providing legal service in relation to the infringing copy, and-

(i) the person is enrolled on the roll of solicitors or the roll of barristers kept under the Legal Practitioners Ordinance (Cap 159); or

(ii) the person has been admitted as a legal practitioner in a jurisdiction other than Hong Kong;

(b) the person who possesses an infringing copy is serving a pupillage under the Barristers (Qualification for Admission and Pupillage) Rules (Cap 159 sub. leg. AC) and he possesses the infringing copy for the purpose of assisting the barrister with whom he serves the pupillage in providing legal service in relation to the infringing copy;

(c) the person who possesses an infringing copy does so for the purpose of providing investigation service in relation to the infringing copy to the copyright owner or exclusive licensee of the copyright work concerned; or

(d) the person who possesses an infringing copy does so on his client's premises and the infringing copy is provided to him by his client. (Added 15 of 2007 s. 31)

(2H) Without prejudice to section 125, where a body corporate or a partnership has done an act referred to in subsection (2A), the following person shall, unless there is evidence showing that he did not authorize the act to be done, be presumed also to have done the act-

(a) in the case of the body corporate-

(i) any director of the body corporate who, at the time when the act was done, was responsible for the internal management of the body corporate; or

(ii) if there was no such director, any person who, at the time when the act was done, was responsible under the immediate authority of the directors of the body corporate for the internal management of the body corporate;

(b) in the case of the partnership-

(i) any partner in the partnership who, at the time when the act was done, was responsible for the internal management of the partnership; or

(ii) if there was no such partner, any person who, at the time when the act was done, was responsible

under the immediate authority of the partners in the partnership for the internal management of the partnership. (Added 15 of 2007 s. 31)

(2I) A defendant charged with an offence under subsection (2A) by virtue of subsection (2H) is taken not to have done the act in question if-

(a) sufficient evidence is adduced to raise an issue that he did not authorize the act to be done; and

(b) the contrary is not proved by the prosecution beyond reasonable doubt. (Added 15 of 2007 s. 31)

(2J) For the purposes of subsection (2I)(a)-

(a) the defendant shall be taken to have adduced sufficient evidence if the court is satisfied that-

(i) the defendant has caused the body corporate or partnership concerned to set aside financial resources, and has directed the use of the resources, for the acquisition of a sufficient number of copies of the copyright work to which the proceedings relate, which are not infringing copies, for the use of the body corporate or partnership; or

(ii) the body corporate or partnership concerned has incurred expenditure for the acquisition of a sufficient number of copies of the copyright work to which the proceedings relate, which are not infringing copies, for the use of the body corporate or partnership;

(b) subject to paragraph (a), in determining whether sufficient evidence is adduced, the court may have regard to, including but not limited to, the following-

(i) whether the defendant has introduced policies or practices against the use of infringing copies of copyright works by the body corporate or partnership;

(ii) whether the defendant has taken action to prevent the use of infringing copies of copyright works by the body corporate or partnership. (Added 15 of 2007 s. 31)

(3) It is a defence for the person charged with an offence under subsection (1) or (2A), to prove that he did not know and had no reason to believe that the copy in question was an infringing copy of the copyright work. (Amended 15 of 2007 s. 31)

(3A) It is a defence for the person charged with an offence under subsection (2A) to prove that-

(a) he possessed the infringing copy in question in the course of his employment; and

(b) the infringing copy in question was provided to him by or on behalf of his employer for use in the course of his employment. (Added 15 of 2007 s. 31)

(3B) Subsection (3A) does not apply to an employee-

(a) who, at the time when the infringing copy in question was acquired, was in a position to make or influence a decision regarding the acquisition of the infringing copy; or

(b) who, at the time when the offence in question was committed, was in a position to make or influence a decision regarding the use or removal of the infringing copy in question. (Added 15 of 2007 s. 31)

(4) A person commits an offence if he-

(a) makes;

(b) imports into Hong Kong;

(c) exports from Hong Kong;

(d) possesses; or

(e) sells or lets for hire, or offers or exposes for sale or hire,

an article specifically designed or adapted for making copies of a particular copyright work which article is used or intended to be used to make infringing copies of the copyright work for sale or hire or for use for the purpose of or in the course of any trade or business. (Amended 64 of 2000 s. 7; 15 of 2007 s. 31)

(5) It is a defence for the person charged with an offence under subsection (4) to prove that he did not know and had no reason to believe that the article was used or was intended to be used to make the infringing copies for sale or hire or for use for the purpose of or in the course of any trade or business. (Amended 64 of 2000 s. 7; 15 of 2007 s. 31)

(6) For the purpose of subsections (1)(b) and (3), where a person is charged with an offence under subsection (1) in respect of a copy of a copyright work which is an infringing copy by virtue only of section 35(3) and not being excluded under section 35(4) and which was lawfully made in the country, territory or area where it was made, if he proves that- (Amended 15 of 2007 s. 31)

(a) he had made reasonable enquiries sufficient to satisfy himself that the copy in question was not an infringing copy of the work;

(b) he had reasonable grounds to be satisfied in the circumstances of the case that the copy was not an infringing copy;

(c) there were no other circumstances which would have led him reasonably to suspect that the copy was

an infringing copy,

he has proved that he had no reason to believe that the copy in question was an infringing copy of the copyright work.

(7) In determining whether the person charged has proved under subsection (6) that he had no reason to believe that the copy in question was an infringing copy of the work, the court may have regard to, including but not limited to, the following-

(a) whether he had made enquiries with a relevant trade body in respect of that category of work;

(b) whether he had given any notice drawing attention of the copyright owner or exclusive licensee to his interest to import and to sell the copy of the work;

(c) whether he had complied with any code of practice that may exist in respect of the supply of that category of work;

(d) whether the response, if any, to those enquiries made by the defendant was reasonable and timely;

(e) whether he was provided with the name, address and contact details of the copyright owner or exclusive licensee (as the case may be);

(f) whether he was provided with the date of first day of publication of the work;

(g) whether he was provided with proof of any relevant exclusive licence.

(8) A person commits an offence if he has in his possession an article knowing or having reason to believe that it is used or is intended to be used to make infringing copies of any copyright work for sale or hire or for use for the purpose of or in the course of any trade or business. (Amended 64 of 2000 s. 7; 15 of 2007 s. 31)

(8A)(Repealed 15 of 2007 s. 31)

(9) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section. <* Note - Exp. X-Ref.: Sections 115, 116, 117 *>

(10) In this section, "dealing in" (經銷) means selling, letting for hire, or distributing for profit or reward. (Added 15 of 2007 s. 31)

[cf. 1988 c. 48 s. 107 U.K.]

Note:

*** (Amended 15 of 2007 s. 31)**

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date
Section:	119	Penalties for offences under section 118	15 of 2007	06/07/2007

(1) A person who commits an offence under section 118(1) or (2A) is liable on conviction on indictment to a fine at level 5 in respect of each infringing copy and to imprisonment for 4 years. (Amended 64 of 2000 s. 8; 15 of 2007 s. 32)

(2) A person who commits an offence under section 118(4) or (8) is liable on conviction on indictment to a fine of $500000 and to imprisonment for 8 years.

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date
Section:	121	Affidavit evidence	L.N. 68 of 2010	16/07/2010

Expanded Cross Reference:
11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

Supplementary

(1) For the purpose of facilitating the proof of subsistence and ownership of copyright, and without prejudice to the operation of sections 11 to 16 (authorship and ownership of copyright) and sections 17 to 21 (duration of copyright), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which states- <* Note - Exp. X-Ref.: Sections 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 *> (Amended 15 of 2007 s. 36)

(a) the date and place that the work was made or first published;

(b) the name of the author of the work; (Replaced 15 of 2007 s. 36)

(ba) where the author of the work is an individual-

(i) the place of domicile of the author;
(ii) the place of residence of the author; or
(iii) the place where the author has a right of abode; (Added 15 of 2007 s. 36)

(bb) where the author of the work is a body corporate-
(i) the place of incorporation of the author; or
(ii) the principal place of business of the author; (Added 15 of 2007 s. 36)

(c) the name of the copyright owner; (Amended 15 of 2007 s. 36)

(d) that copyright subsists in the work; and

(e) that a copy of the work exhibited to the affidavit is a true copy of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in any proceedings under this Ordinance.

(2) For the purpose of facilitating the proof of subsistence and ownership of copyright, and without prejudice to subsection (1) and the operation of sections 11 to 16 (authorship and ownership of copyright) and sections 17 to 21 (duration of copyright), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which- <* Note - Exp. X-Ref.: Sections 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 *> (Amended 15 of 2007 s. 36)

(a) states-
(i) that the copyright work has been registered with a Copyright Register prescribed under subsection (16); and (Amended L.N. 29 of 2004)
(ii) that copyright subsists in the work; and
(iii) the name of the copyright owner; and (Amended 15 of 2007 s. 36)

(b) has exhibited to it a copy of the certificate of registration of the work issued by the authority in charge of the Copyright Register certified to be a true copy by a person specified in subsection (4)(a),

shall, subject to the conditions contained in subsection (4), be admitted without further proof in any proceedings under this Ordinance.

(2A) For the purposes of facilitating the establishment of the matter referred to in section 35(3)(b), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which-

(a) states the name of the copyright owner;

(b) states that a copy of the work exhibited to the affidavit is a true copy of the work;

(c) states-
(i) that the copy of the work exhibited to the affidavit was made in a place outside Hong Kong by the copyright owner; or
(ii) that the copy of the work exhibited to the affidavit was made in a place outside Hong Kong by a person who has the licence of the copyright owner to make copies of the work in that place, but does not have the licence of the copyright owner to make copies of the work in Hong Kong; and

(d) states the name and address of the person (if any) referred to in paragraph (c)(ii),

shall, subject to the conditions contained in subsection (4), be admitted without further proof in any proceedings under this Ordinance. (Added 15 of 2007 s. 36)

(2B) For the purposes of any proceedings instituted under section 118(1), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which-

(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 section 118(1)(a), (b), (c), (d), (e), (f) or (g) in respect of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings. (Added 15 of 2007 s. 36)

(2C) For the purposes of any proceedings instituted under section 118(2A), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which-

(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 section 118(2A) in respect of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings. (Added 15 of 2007 s. 36)

(2D) For the purposes of any proceedings instituted under section 119B(1), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which—

(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 section 119B(1) in respect of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings. (Added 15 of 2007 s. 36)

(3) The court before whom an affidavit which complies with the conditions in subsection (4) is produced under subsection (1), (2), (2A), (2B), (2C) or (2D) shall presume, in the absence of evidence to the contrary- (Amended 15 of 2007 s. 36)

(a) that the statements made in the affidavit are true; and

(b) that it was made and authenticated in accordance with subsection (4).

(4) An affidavit may be tendered in evidence under subsection (1), (2), (2A), (2B), (2C) or (2D) if- (Amended 15 of 2007 s. 36)

(a) it is made on oath-

(i) before a solicitor or a commissioner as defined in the Oaths and Declarations Ordinance (Cap 11), if it is made in Hong Kong; or

(ii) before a notary public, if it is made outside Hong Kong;

(b) it is authenticated, so far as relates to the making thereof, by the signature of the solicitor, commissioner or notary public before whom it is made;

(c) it contains a declaration by the deponent to the effect that it is true to the best of his knowledge and belief; and

(d) subject to subsection (6), not less than 10 days before the commencement of the hearing at which the affidavit is tendered in evidence, a copy of the affidavit is served, by or on behalf of the prosecution or plaintiff, on each of the defendants.

(5) Notwithstanding that an affidavit is admissible as evidence by virtue of this section, a defendant or his solicitor may, within 3 days from the service of the copy of the affidavit, serve a notice requiring the attendance of the deponent to the affidavit in court.

(6) The parties may agree before the hearing that the requirements of subsection (4)(d) may be dispensed with.

(7) If an affidavit tendered in evidence under subsection (1), (2), (2A), (2B), (2C) or (2D)- (Amended 15 of 2007 s. 36)

(a) is made in a language other than English or Chinese, it must be accompanied by an English or Chinese translation thereof and, unless otherwise agreed by or on behalf of the prosecutor or plaintiff and defendant (or, if more than one, all the defendants), the translation must be certified by the court translator;

(b) refers to any other document as an exhibit, the copy served on any other party to the proceedings under subsection (4)(d) must be accompanied by a copy of that document or by such information as may be necessary in order to enable the party on whom it is served to inspect that document or a copy thereof.

(8) Without prejudice to subsection (5)-

(a) the party by whom or on whose behalf the affidavit was served may call the deponent to give evidence; and

(b) the court may of its own motion or, if the defendant who has served a notice under subsection (5) in relation to an affidavit satisfies the court-

(i) that the ownership or subsistence of the copyright in a work is, insofar as that matter is stated in the affidavit, genuinely in issue;

(ii) that whether a person has the licence of the copyright owner of a copyright work to do a particular act is, insofar as that matter is stated in the affidavit, genuinely in issue; or

(iii) where the affidavit is made under subsection (2A), that any matter stated in the affidavit, other than those referred to in subparagraphs (i) and (ii), is genuinely in issue,

either before or during the hearing, require the deponent to the affidavit to attend before the court and give evidence. (Replaced 15 of 2007 s. 36)

(9) Without prejudice to subsection (8)(a), a deponent of an affidavit which is admissible under this section shall attend before the court and give evidence if, and only if, the court so requires under subsection (8)(b).

(10) So much of an affidavit as is admitted in evidence by virtue of this section is, unless the court otherwise directs, to be read aloud at the hearing and where the court so directs an account is to be given orally of so much of any affidavit as is not read aloud.

(11) Any document or object referred to as an exhibit and identified in an affidavit admitted in evidence under this section is treated as if it had been produced as an exhibit and identified in court by the deponent.

(12) A document required by this section to be served on any person may be served-

(a) by delivering it to him or to his solicitor; or

(b) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or by sending it by registered post addressed to the secretary or clerk of that body at that office.

(13) Without prejudice to the powers of the court to award costs, the court may award costs against a defendant who-

(a) was served with an affidavit described in subsection (1), (2), (2A), (2B), (2C) or (2D); (Amended 15 of 2007 s. 36)

(b) by himself or through his solicitor served a notice under subsection (5); and

(c) was subsequently convicted of the relevant offence or found liable for the infringement, as the case may be.

(14) In awarding awards under subsection (13), the court shall have regard to the actual costs incurred by the prosecution or plaintiff as a result of the notice under subsection (5) served by the defendant and the court may award costs under subsection (13) exceeding the limit of costs, if any, which that court may award.

(15) For the purpose of subsection (1)(e), where the work is a computer program, whether in source codes or object codes, a copy of the program only in the form of object codes is also regarded as a true copy of the program.

(16) The Secretary for Commerce and Economic Development may by regulation prescribe the Copyright Registers for the purpose of subsection (2). (Amended L.N. 173 of 2000; L.N. 106 of 2002; L.N. 130 of 2007)

(17) In this section, "court" (法院) includes a magistrate.

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	154	Licensing schemes to which sections 155 to 160 apply	15 of 2007	06/07/2007

Expanded Cross Reference:
155, 156, 157, 158, 159, 160

References and applications with respect to licensing schemes

Sections 155 to 160 (references and applications with respect to licensing schemes) apply to licensing schemes operated by licensing bodies which cover works of more than one author, so far as they relate to licences for- <* Note - Exp. X-Ref.: Sections 155, 156, 157, 158, 159, 160 *>

(a) copying the work;

(b) where the work is a work referred to in section 25(1)(a), (b), (c), (d), (e) or (f), the rental of copies of the work to the public; (Amended 15 of 2007 s. 40)

(c) performing, playing or showing the work in public;

(d) broadcasting the work or including it in a cable programme service;

(e) issuing or making available copies of the work to the public;

(f) making adaptations of the work; or

(g) any other act restricted by the copyright in the work,

and references in those sections to a licensing scheme are to be construed accordingly.

[cf. 1988 c. 48 s. 117 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	161	Licences to which sections 162 to 166 apply	15 of 2007	06/07/2007

Expanded Cross Reference:
162, 163, 164, 165, 166

References and applications with respect to licensing by licensing bodies

Sections 162 to 166 (references and applications with respect to licensing by licensing bodies) apply to licences which are granted by a licensing body otherwise than in pursuance of a licensing scheme and which cover works of more than one author, so far as they authorize- <* Note - Exp. X-Ref.: Sections 162, 163, 164, 165, 166 *>

(a) copying the work;
(b) where the work is a work referred to in section 25(1)(a), (b), (c), (d), (e) or (f), the rental of copies of the work to the public; (Amended 15 of 2007 s. 41)
(c) performing, playing or showing the work in public;
(d) broadcasting the work or including it in a cable programme service;
(e) issuing or making available copies of the work to the public;
(f) making adaptations of the work; or
(g) any other act restricted by the copyright in the work,

and references in those sections to a licence are to be construed accordingly.

[cf. 1988 c. 48 s. 124 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	199	Index of defined expressions	15 of 2007	06/07/2007

The following Table shows provisions defining or otherwise explaining expressions used in this Part (other than provisions defining or explaining an expression used only in the same section)-

acts restricted by copyright	section 22(1)
adaptation	section 29(3)
archivist (in sections 46 to 53)	section 46(5)
article (in a periodical)	section 198(1)
article in transit	section 198(1)
artistic work	section 5
author	sections 11 and 12(4)
authorized officer	section 198(1)
broadcast (and related expressions)	section 8
building	section 5
business	section 198(1)
cable programme, cable programme service (and related expressions)	section 9
collective work	section 198(1)
commencement (in Schedule 2)	paragraph 1(2) of that Schedule
commercial publication	section 196
Commissioner	section 198(1)
computer-generated	section 198(1)
copy and copying	section 23
copyright (generally)	section 2
copyright (in Schedule 2)	paragraph 2(2) of that Schedule
copyright owner	sections 112(2) and 194
Copyright Tribunal	section 169
copyright work	section 2(2)
dealing in (Added 64 of 2000 s. 11)	section 198(2)
detention order	section 135
dramatic work	section 4(1)
educational establishment	section 195(1)
electronic and electronic form	section 198(1)
employed, employee, employer and employment	section 198(1)
exclusive licence	section 103(1)
export	section 198(1)
facsimile copy	section 198(1)
film	section 7
future copyright	section 102(2)

Government copyright	sections 182(2) and 183(3)
graphic work	section 5
import	section 198(1)
infringing copy	section 35
international organization	section 198(1)
issue of copies to the public	section 24
joint authorship (work of)	section 12
judicial proceedings	section 198(1)
lawfully made (Added 27 of 2003 s. 6)	section 198(3)
Legislative Council copyright	sections 184(2) and 185(5)
librarian (in sections 45 to 52)	section 46(5)
licence (in sections 158 to 162)	section 161
licence of copyright owner	sections 101(4), 102(3) and 194
licensing body (in Division VIII)	section 145(2)
licensing scheme (generally)	section 145(1)
licensing scheme (in sections 151 to 156)	section 154
literary work	section 4(1)
made (in relation to a literary, dramatic or musical work)	section 4(2)
make available copies to the public	section 26
movie (Added 27 of 2003 s. 6)	section 198(1)
musical sound recording (Added 27 of 2003 s. 6)	section 198(1)
musical visual recording (Added 27 of 2003 s. 6)	section 198(1)
musical work	section 4(1)
on behalf of (in relation to an educational establishment)	section 195(3)
performance	section 27(2)
photograph	section 5
prescribed conditions (in sections 46 to 52)	section 46(2)(a)
producer (in relation to a sound recording or film)	section 198(1)
programme (in the context of broadcasting)	section 8(3)
prospective owner (of copyright)	section 102(2)
publication and related expressions	section 196
published edition (in the context of copyright in the typographical arrangement)	section 10
pupil	section 195(2)
rental right	section 198(1)
reprographic copies and reprographic copying	section 198(1)
reprographic process	section 198(1)
right holder	section 135
sculpture	section 5
signed	section 197
sound recording	section 6
specified course of study (Added 15 of 2007 s. 48)	section 198(1)
specified library or archive (in sections 46 to 52)	section 46(2)(b)
sufficient acknowledgement	section 198(1)
sufficient disclaimer	section 198(1)
teacher	section 195(2)
telecommunications system	section 198(1)
television drama (Added 27 of 2003 s. 6)	section 198(1)
typeface	section 198(1)
unauthorized (as regards things done in relation to a work)	section 198(1)
unknown (in relation to the author of a work)	section 11(5)
unknown authorship (work of)	section 11(4)
wireless telegraphy	section 198(1)
work (in Schedule 2)	paragraph 2(1) of that Schedule
work of more than one author (in Division VIII)	section 145(3)

writing and written section 198(1)

(Amended 64 of 2000 s. 11)
[cf. 1988 c. 48 s. 179 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	200	Rights conferred on performers and persons having fixation rights	L.N. 48 of 2008	25/04/2008

Expanded Cross Reference:
201, 202, 203, 204, 205, 206, 207, 207A, 208, 209, 210, 211

Introductory

(1) This Part confers rights-
(a) on a performer, by requiring his consent to the exploitation of his performances and thus enabling him to prohibit such exploitation without his consent (see sections 201 to 207A); and <* Note - Exp. X-Ref.: Sections 201, 202, 203, 204, 205, 206, 207, 207A *> (Amended 15 of 2007 s. 49)
(b) on a person having fixation rights in relation to a performance, in relation to fixations made without his consent or that of the performer (see sections 208 to 211). <* Note - Exp. X-Ref.: Sections 208, 209, 210, 211 *>

(2) In this Part-

"fixation" (錄製品、錄製), in relation to a performance, means a film or sound recording-
(a) made directly from the unfixed performance;
(b) made from a broadcast of, or cable programme including, the performance; or
(c) made, directly or indirectly, from another fixation of the performance;

"performance" (表演) means-
(a) a dramatic performance (which includes dance and mime);
(b) a musical performance;
(c) a reading or recitation of a literary work;
(ca) a performance of an artistic work; (Added 15 of 2007 s. 49)
(cb) an expression of folklore; or (Added 15 of 2007 s. 49)
(d) a performance of a variety act or any similar presentation,

which is, or so far as it is, an unfixed performance given by one or more individuals;

"performer" (表演者) means an actor, singer, musician, dancer or any other person who acts, sings, delivers, declaims, plays in, interprets, or otherwise performs a performance.

(3) The rights conferred by this Part are independent of-
(a) any copyright in, or moral rights relating to, any work performed or any film or sound recording of, or broadcast or cable programme including, the performance; and
(b) any other right or obligation arising otherwise than under this Part.

[cf. 1988 c. 48 s. 180 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	202	Consent required for fixation, etc. of unfixed performance		30/06/1997

(1) A performer's rights are infringed by a person who, without the performer's consent-
(a) makes a fixation of the whole or any substantial part of a qualifying performance directly from the unfixed performance;
(b) broadcasts live, or includes live in a cable programme service, or makes available to the public live, the whole or any substantial part of a qualifying performance; or
(c) makes a fixation of the whole or any substantial part of a qualifying performance directly from a broadcast of, or cable programme including, the unfixed performance or directly from the unfixed performance which is made available to the public live.

(2) A performer's rights are not infringed by the making of any such fixation by a person for his private and domestic use.

(3) In an action for infringement of a performer's rights brought by virtue of this section damages shall not be awarded against a defendant who shows that at the time of the infringement he believed on reasonable grounds that consent had been given.

(4) In this section "makes available to the public live" (即場向公眾提供), in relation to a performance, means the making available of the unfixed performance, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the performance from a place individually chosen by them.

[cf. 1988 c. 48 s. 182 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	203	Consent required for copying of fixation		30/06/1997

(1) A performer's rights are infringed by a person who, without the performer's consent, makes, otherwise than for his private and domestic use, a copy of a fixation of the whole or any substantial part of a qualifying performance; and references in this Part to copying and copies are construed as follows.

(2) It is immaterial whether the copy is made directly or indirectly.

(3) Making of a copy of a fixation means reproducing the fixation in any material form. This includes storing the fixation in any medium by electronic means.

(4) The right of a performer under this section to authorize or prohibit the making of such copies is referred to in this Part as "the right of reproduction".

[cf. 1988 c. 48 s. 182A U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	205	Consent required for making available of copies to public		30/06/1997

(1) A performer's rights are infringed by a person who, without the performer's consent, makes available to the public copies of a fixation of the whole or any substantial part of a qualifying performance.

(2) References in this Part to the making available to the public of copies of a fixation of a performance are to the making available of copies of the fixation, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the fixation from a place and at a time individually chosen by them (such as the making available of copies of works through the service commonly known as the INTERNET).

(3) References in this Part to the making available of copies of a fixation of a performance include the making available of the original fixation of the unfixed performance.

(4) The mere provision of physical facilities for enabling the making available to the public of copies of a fixation of a performance does not of itself constitute an act of making available to the public of copies of the fixations.

(5) The right of a performer under this section to authorize or prohibit the making available of copies of a fixation to the public is referred to in this Part as "the right of making available to the public".

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	206	Infringement of performer's rights by use of fixation made without consent		30/06/1997

(1) A performer's rights are infringed by a person who, without the performer's consent-

(a) shows or plays in public the whole or any substantial part of a qualifying performance; or

(b) broadcasts or includes in a cable programme service the whole or any substantial part of a qualifying performance,

by means of a fixation which was, and which that person knows or has reason to believe was, made without the performer's consent.

(2) A performer's rights are also infringed by a person who, without the performer's consent, shows or plays the

whole or any substantial part of a qualifying performance in the course of making available to the public a fixation which was, and which that person knows or has reason to believe was, made without the performer's consent.

[cf. 1988 c. 48 s. 183 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	207A	Infringement of performers' rights by renting copies to the public without consent	L.N. 48 of 2008	25/04/2008

(1) A performer's rights are infringed by a person who, without the performer's consent, rents to the public copies of a sound recording in which the whole or any substantial part of a qualifying performance is fixed.

(2) In this Part, "rent" (租賃), in relation to a sound recording-

(a) subject to paragraph (b), means making a copy of the sound recording available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage;

(b) does not include-

(i) making a copy of the sound recording available for the purpose of public performance, playing or showing in public, broadcasting or inclusion in a cable programme service;

(ii) making a copy of the sound recording available for the purpose of exhibition in public; or

(iii) making a copy of the sound recording available for on-the-spot reference use.

(3) A reference in this Part to the renting of copies of a sound recording includes the renting of the original.

(4) The right of a performer under this section to rent copies of a sound recording to the public is referred to in this Part as "rental right".

(Added 15 of 2007 s. 51)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	210	Infringement of fixation rights by use of fixation made without consent		30/06/1997

(1) A person infringes the rights of a person having fixation rights in relation to a performance who, without the latter's consent or, in the case of a qualifying performance, that of the performer-

(a) shows or plays in public the whole or any substantial part of the performance; or

(b) broadcasts or includes in a cable programme service the whole or any substantial part of the performance,

by means of a fixation which was, and which that person knows or has reason to believe was, made without the appropriate consent.

(2) A person infringes the rights of a person having fixation rights in relation to a performance who, without the latter's consent or, in the case of a qualifying performance, that of the performer, shows or plays the whole or any substantial part of the performance in the course of making available to the public a fixation which was, and which that person knows or has reason to believe was, made without the appropriate consent.

(3) The reference in subsection (1) or (2) to "the appropriate consent" is to the consent of-

(a) the performer; or

(b) the person who at the time the consent was given had fixation rights in relation to the performance (or, if there was more than one such person, of all of them).

[cf. 1988 c. 48 s. 187 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	214	Duration of rights		30/06/1997

Duration of rights

(1) The following provisions have effect with respect to the duration of the rights conferred by this Part.

(2) The rights conferred by this Part in relation to a performance expire-

(a) at the end of the period of 50 years from the end of the calendar year in which the performance takes place; or

(b) if during that period a fixation of the performance is released, 50 years from the end of the calendar year in which it is released,

subject as follows.

(3) For the purposes of subsection (2) a fixation is "released" when it is first published, played or shown in public, broadcast, included in a cable programme service or made available to the public; but in determining whether a fixation has been released no account shall be taken of any unauthorized act.

[cf. 1988 c. 48 s. 191 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	221	Provisions as to damages in infringement action		30/06/1997

(1) Where in an action for infringement of a performer's economic rights or of any right conferred by this Part on a person having fixation rights it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that the rights subsisted in the fixation to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.

(2) The court may in an action for infringement of a performer's economic rights or of any right conferred by this Part on a person having fixation rights 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.

[cf. 1988 c. 48 s. 191J U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	229	Meaning of "infringing fixation"	15 of 2007	06/07/2007

(1) In this Part "infringing fixation" (侵犯權利的錄製品), in relation to a performance, is to be construed in accordance with this section.

(2) For the purposes of a performer's rights, a fixation of the whole or any substantial part of a performance of his is an infringing fixation if it is made, otherwise than for private purposes, without his consent.

(3) For the purposes of the rights of a person having fixation rights, a fixation of the whole or any substantial part of a performance subject to the exclusive fixation contract is an infringing fixation if it is made, otherwise than for private purposes, without his consent or that of the performer.

(4) Except as provided in section 229A, a fixation of a performance is also an infringing fixation if- (Amended 15 of 2007 s. 56)

(a) it has been or is proposed to be imported into Hong Kong; and

(b) its making in Hong Kong would have constituted an infringement of the rights conferred by this Part in the performance in question, or a breach of an exclusive licence agreement relating to that performance.

(5) For the purposes of Division III (proceedings relating to importation of infringing fixations) "infringing fixation" (侵犯權利的錄製品) does not include a fixation of a performance-

(a) that was lawfully made in the country, territory or area where it was made;

(b) that has been or is proposed to be imported into Hong Kong; and

(c) its making in Hong Kong would have constituted an infringement of the rights conferred by this Part in the performance in question, or a breach of an exclusive licence agreement relating to that performance.

(6) Where in any proceedings the question arises whether a fixation is an infringing fixation and it is shown-

(a) that the fixation is a fixation of the unfixed performance; and

(b) that rights conferred by this Part subsist in the performance or have subsisted at any time,

it shall be presumed until the contrary is proved that the fixation was made at a time when rights conferred by this Part

subsisted in the performance.

(7) In this Part, "infringing fixation" (侵犯權利的錄製品) includes a fixation which is to be treated as an infringing fixation by virtue of any of the following provisions-

(a) section 229A(5) (imported fixation not an “infringing fixation” for purposes of section 229(4));
(b) section 242A(3) (fixations made for purposes of giving or receiving instruction);
(c) section 243(3) (fixations made for purposes of instruction or examination);
(d) section 245(3) (fixations made by educational establishments for educational purposes);
(e) section 246A(3) (fixations made for purposes of public administration);
(f) section 251(2) (fixations of performance in electronic form retained on transfer of principal fixation); or
(g) section 256(3) (fixations made for purposes of broadcast or cable programme). (Replaced 15 of 2007 s. 56)

(8) In subsection (5)(a), "lawfully made" (合法地製作), in relation to a fixation of a performance made in a country, territory or area-

(a) means that the fixation was made by-
  (i) the performer;
  (ii) a person having fixation rights in relation to the performance in the country, territory or area, as the case may be; or
  (iii) a person having the consent of the performer or the person referred to in subparagraph (ii) to make the fixation in the country, territory or area, as the case may be; but
(b) does not include a fixation that was made in a country, territory or area where there is no law protecting rights in performances in the performance or where the rights in performances in the performance has expired. (Replaced 15 of 2007 s. 56)

[cf. 1988 c. 48 s. 197 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	238	Expressions having same meaning as in copyright provisions	15 of 2007	06/07/2007

Interpretation

(1) The following expressions have the same meaning in this Part as in Part II (copyright)-
article in transit;
artistic work; (Added 15 of 2007 s. 59)
authorized officer;
broadcast;
business;
cable programme;
cable programme service;
Commissioner;
Copyright Tribunal;
export;
film;
import;
literary work;
published; and
sound recording.

(1A) In sections 207(1A), 211(1A) and 228(1A), "dealing in" (經營) includes buying, selling, letting for hire, importing, exporting and distributing. (Added 64 of 2000 s. 15)

(2) The provisions of section 8(3) to (5), sections 9(4) and 27(4) (supplementary provisions relating to broadcasting and cable programme services) apply for the purposes of this Part, and in relation to an infringement of the rights conferred by this Part, as they apply for the purposes of Part II and in relation to an infringement of copyright.

[cf. 1988 c. 48 s. 211 U.K.]

The following Table shows provisions defining or otherwise explaining expressions used in this Part (other than provisions defining or explaining an expression used only in the same section)-

artistic work (Added 15 of 2007 s. 60)	section 238(1) (and section 5)
broadcast (and related expressions)	section 238 (and section 8)
business (Amended 64 of 2000 s. 16)	section 238(1) (and section 198(1))
cable programme, cable programme service (and related expressions)	section 238 (and section 9)
consent of performer (in relation to performer's economic rights)	section 215(2)
copy and copying	section 203
dealing in (Added 64 of 2000 s. 16)	section 238(1A)
exclusive fixation contract	section 208(1)
exclusive licence	section 218
film	section 238(1) (and section 7)
fixation (of a performance)	section 200(2)
fixation rights (person having)	section 208(2) and (3)
infringing fixation	section 229
literary work	section 238(1) (and section 4(1))
performance	section 200(2)
performer	section 200(2)
performer's economic rights	section 215(1)
performer's non-economic rights	section 224(1)
published	section 238(1) (and section 196)
qualifying performance	section 201
qualifying person	section 234
rental right (Added 15 of 2007 s. 60)	section 207A(4)
right of distribution	section 204(5)
right of making available to the public	section 205(5)
right of reproduction	section 203(4)
rights owner (in relation to performer's economic rights)	section 215(3) and (4)
sound recording	section 238(1) (and section 6)

[cf. 1988 c. 48 s. 212 U.K.]

(1) Fair dealing with a performance or fixation-

(a) for the purpose of criticism or review, of that or another performance or fixation, or of a work; or

(b) for the purpose of reporting current events,

does not infringe any of the rights conferred by this Part.

(2) Expressions used in this section have the same meaning as in section 39.

[cf. 1988 c. 48 Sch. 2 para. 2 U.K.]

Section:	242	Incidental inclusion of performance or fixation		30/06/1997

(1) The rights conferred by this Part are not infringed by the incidental inclusion of a performance or fixation in a sound recording, film, broadcast or cable programme.

(2) Those rights are also not infringed by anything done in relation to copies of, or the playing, showing, broadcasting or inclusion in a cable programme service of, anything whose making was, by virtue of subsection (1), not an infringement of those rights.

(3) A performance or fixation so far as it consists of music, or words spoken or sung with music, is not regarded as incidentally included in a sound recording, broadcast or cable programme if it is deliberately included.

(4) Expressions used in this section have the same meaning as in section 40.

[cf. 1988 c. 48 Sch. 2 para. 3 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	242A	Fair dealing for purposes of giving or receiving instruction	15 of 2007	06/07/2007

(1) Fair dealing with a performance or fixation by or on behalf of a teacher or by a pupil for the purposes of giving or receiving instruction in a specified course of study provided by an educational establishment 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 shall take into account all the circumstances of the case and, in particular-

(a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;

(b) the nature of the 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) Where a fixation which apart from this section would 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-

(a) for the purpose of that dealing; and

(b) if that dealing infringes any of the rights conferred by this Part, for all subsequent purposes.

(4) Where any dealing with a fixation involves the making available of copies of the fixation through a wire or wireless network wholly or partly controlled by an educational establishment-

(a) if the educational establishment fails to-

(i) adopt technological measures to restrict access to the 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 the fixation for the purposes of giving or receiving instruction in the specified course of study in question or for the purposes of maintaining or managing the network; or

(ii) ensure that the copies of the fixation are not stored in the network for a period longer than is necessary for the purposes of giving or receiving instruction in the specified course of study in question or, in any event, for a period longer than 12 consecutive months,

the dealing is not fair dealing under subsection (1); and

(b) if the educational establishment-

(i) adopts technological measures to restrict access to the 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 the fixation for the purposes of giving or receiving instruction in the specified course of study in question or for the purposes of maintaining or managing the network; and

(ii) ensures that the copies of the fixation are not stored in the network for a period longer than is necessary for the purposes of giving or receiving instruction in the specified course of study in question or, in any event, for a period longer than 12 consecutive months,

subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

(5) Expressions used in this section have the same meaning as in section 41A.

(Added 15 of 2007 s. 61)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	243	Things done for purposes of instruction or examination		30/06/1997

(1) The rights conferred by this Part are not infringed by the copying of a fixation of a performance, to a reasonable extent, in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, if the copying is done by a person giving or receiving instruction.

(2) The rights conferred by this Part are not infringed-

(a) by the copying of a fixation of a performance for the purposes of setting or answering the questions in an examination; or

(b) by anything done for the purposes of an examination by way of communicating the questions to the candidates.

(3) Where a fixation which would otherwise be an infringing fixation is made in accordance with this section but is subsequently dealt with, it is 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.

For this purpose "dealt with" (進行交易) means sold or let for hire, or offered or exposed for sale or hire.

(4) Expressions used in this section have the same meaning as in section 41.

[cf. 1988 c. 48 Sch. 2 para. 4 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	245	Recording of broadcasts and cable programmes by educational establishments		30/06/1997

(1) A recording of a broadcast or cable programme, or a copy of such a recording, may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing any of the rights conferred by this Part in relation to any performance or fixation included in it.

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

(3) Where a recording or copy which would otherwise be an infringing fixation is made in accordance with this section but is subsequently dealt with, it is 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.

For this purpose "dealt with" (進行交易) means sold or let for hire, or offered or exposed for sale or hire.

(4) Expressions used in this section have the same meaning as in section 44.

[cf. 1988 c. 48 Sch. 2 para. 6 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	246	Copying by librarians or archivists: articles of cultural or historical importance		30/06/1997

(1) The librarian or archivist of a specified library or archive may make a copy of an article of cultural or historical importance or interest and deposit the copy at the library or archive without infringing any right conferred by this Part in respect of that article if the article is likely to be lost to Hong Kong through sale or export.

(2) Expressions used in this section have the same meaning as in section 53.

[cf. 1988 c. 48 Sch. 2 para. 7 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	246A	Fair dealing for purposes of public administration	15 of 2007	06/07/2007

(1) Fair dealing with a performance or fixation by the Government, the Executive Council, the Judiciary or any District Council for the purposes of efficient administration of urgent business 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 shall take into account all the circumstances of the case and, in particular-

(a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;

(b) the nature of the 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) Where a fixation which apart from this section would 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-

(a) for the purpose of that dealing; and

(b) if that dealing infringes any of the rights conferred by this Part, for all subsequent purposes.

(4) Expressions used in this section have the same meaning as in section 54A.

(Added 15 of 2007 s. 63)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	252	Certain copying permitted when performances made available to the public		30/06/1997

The rights conferred by this Part in a fixed performance are not infringed by the copying of a fixation which is reasonably required for the viewing or listening of the fixation by a member of the public to whom the fixation is made available (within the meaning of section 205) provided that such act does not conflict with a normal exploitation of the fixation and does not unreasonably prejudice the legitimate interests of the performer or the person who has fixation rights in relation to the performance.

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	253	Use of fixations of spoken words in certain cases		30/06/1997

(1) Where a fixation of the reading or recitation of a literary work is made for the purpose-

(a) of reporting current events; or

(b) of broadcasting or including in a cable programme service the whole or part of the reading or recitation,

it is not an infringement of the rights conferred by this Part to use the fixation (or to copy the fixation and use the copy) for that purpose, if the conditions in subsection (2) are met.

(2) The conditions are that-

(a) the fixation is a direct fixation of the reading or recitation and is not taken from a previous fixation or from a broadcast or cable programme;

(b) the making of the fixation was not prohibited by or on behalf of the person giving the reading or recitation;

(c) the use made of the fixation is not of a kind prohibited by or on behalf of that person before the fixation was made; and

(d) the use is by or with the authority of a person who is lawfully in possession of the fixation.

(3) Expressions used in this section have the same meaning as in section 67.

[cf. 1988 c. 48 Sch. 2 para. 13 U.K.]

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	272A	Moral rights conferred on certain performers	L.N. 48 of 2008	25/04/2008

Introductory

(1) This part confers the following moral rights on a performer of a live aural performance or a performer whose performance is fixed in a sound recording-

(a) the right to be identified as a performer (section 272B); and

(b) the right not to have his performance subjected to derogatory treatment (section 272F).

(2) The moral rights are conferred on the performer only if the performance is a qualifying performance.

(3) The moral rights conferred on the performer are in addition to any other rights in relation to the performance that the performer or any other person may have under this Ordinance.

(4) In this Part-

"aural performance" (聲藝表演)-

(a) means a performance which may be perceived by the human ear; or

(b) where part of a performance may be perceived by the human ear, means that part of the performance,

and includes a musical performance, a spoken performance and a performance in any intermediate forms between singing and speaking;

"make available to the public live" (即場向公眾提供), in relation to a performance, means to make available of the unfixed performance, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the performance from a place individually chosen by them;

"performership" (演出) means participation in a performance, as the performer or one of the performers;

"sound recording" (聲音紀錄)-

(a) subject to paragraph (b), has the same meaning as in Part II (copyright);

(b) does not include a film sound-track which accompanies a film within the meaning of Part II.

(5) The following expressions have the same meaning in this Part as in Part II (copyright)-

broadcast;

business;

cable programme;

cable programme service; and

published.

(6) The following expressions have the same meaning in this Part as in Part III (rights in performances)-

fixation;

performance;

performer; and

qualifying performance.

(7) For the purposes of this Part, if a performance of a musical work is conducted by a conductor, the sounds of the performance are treated as having been made by the conductor and the person who actually made those sounds, and a reference to a performer includes a reference to the conductor.

(8) Section 204(2), (3) and (4) applies, with the necessary modifications, to references in this Part to the issue to the public of copies of a sound recording, as it applies to references in Part III to the issue to the public of copies of a fixation.

(9) Section 205(2), (3) and (4) applies, with the necessary modifications, to references in this Part to the making available to the public of copies of a sound recording, as it applies to references in Part III to the making available to the public of copies of a fixation.

(Part IIIA added 15 of 2007 s. 66)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	272B	Right to be identified as performer	L.N. 48 of 2008	25/04/2008

Right to be identified as performer

(1) A performer of a live aural performance or a performer whose performance is fixed in a sound recording has the right to be identified as a performer in the performance whenever-

(a) the performance is staged in public, made available to the public live, broadcast live or included live in a cable programme service; or

(b) copies of the sound recording in which the performance is fixed are issued or made available to the

public, broadcast or included in a cable programme service.

(2) The right of the performer under this section is, in the case of the issue or making available to the public of copies of a sound recording in which the performance is fixed, the right to be identified in or on each copy or, if that is not appropriate, in some other manner likely to bring his identity to the notice of a person acquiring a copy.

(3) The right of the performer under this section is, in any case other than the case referred to in subsection (2), the right to be identified in a manner likely to bring his identity to the notice of a person hearing the performance, broadcast or cable programme in question.

(4) The rights of the performer referred to in subsections (2) and (3) include the right to be identified in a clear and reasonably prominent or audible manner.

(5) If the performer in asserting his right to be identified specifies a pseudonym, initials or some other particular form of identification, that form must be used; otherwise any reasonable form of identification may be used.

(6) If a performance is presented by performers who use a group name, identification by using the group name is sufficient identification of the performers in the group.

(Part IIIA added 15 of 2007 s. 66)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	272D	Exceptions to right under section 272B	L.N. 48 of 2008	25/04/2008

(1) The right conferred by section 272B (right to be identified as performer) does not apply where it is not reasonably practicable to identify the performer.

(2) The right does not apply in relation to a performance given for the purposes of reporting current events.

(3) The right does not apply in relation to a performance given for the purposes of advertising any goods or services or making announcements of matters of public interest.

(4) The right is not infringed by an act which by virtue of any of the following provisions would not infringe any right conferred by Part III-

(a) section 241 (fair dealing for certain purposes), insofar as it relates to the reporting of current events by means of a sound recording, broadcast or cable programme;
(b) section 242 (incidental inclusion of performance or fixation);
(c) section 243(2) (examination questions);
(d) section 246B (Legislative Council);
(e) section 247 (judicial proceedings);
(f) section 248 (statutory inquiries).

(Part IIIA added 15 of 2007 s. 66)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	272E	Right to object to derogatory treatment	L.N. 48 of 2008	25/04/2008

Right to object to derogatory treatment

(1) A performer of a live aural performance or a performer whose performance is fixed in a sound recording has the right not to have his performance subjected to derogatory treatment.

(2) The right is infringed by a person who does any of the following acts-

(a) in relation to a live aural performance, subjects the performance, or causes the performance to be subjected, to derogatory treatment when the performance is caused to be heard in public, broadcasted, included in a cable programme service or made available to the public live;
(b) in relation to a performance fixed in a sound recording-
  (i) causes to be heard in public, broadcasts or includes in a cable programme service the performance by means of the sound recording in a manner which subjects the performance to derogatory treatment; or
  (ii) makes available to the public copies of the sound recording in a manner which subjects the performance to derogatory treatment; or
(c) in relation to a performance which has been subjected to derogatory treatment and is fixed in a sound

recording-

(i) causes to be heard in public, broadcasts or includes in a cable programme service the sounding recording; or

(ii) makes available to the public copies of the sound recording.

(3) For the purposes of this section-

(a) "treatment" (處理)-

(i) in relation to a live aural performance, means any addition to, deletion from, alteration to or adaptation of the performance; or

(ii) in relation to a performance fixed in a sound recording, means any addition to, deletion from, alteration to or adaptation of the sound recording; and

(b) the treatment of a live aural performance or a performance fixed in a sound recording is derogatory if it amounts to distortion, mutilation or other modification that is prejudicial to the reputation of the performer.

(Part IIIA added 15 of 2007 s. 66)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date
Section:	273	Interpretation of sections 273 to 273H	L.N. 141 of 2008	11/07/2008

Expanded Cross Reference:
273A, 273B, 273C, 273D, 273E, 273F, 273G, 273H

Circumvention of effective technological measures

(Replaced 15 of 2007 s. 67)

(1) In sections 273A to 273H, "circumvent" (規避), in relation to an effective technological measure which has been applied in relation to a copyright work- <* Note - Exp. X-Ref.: Sections 273A, 273B, 273C, 273D, 273E, 273F, 273G, 273H *>

(a) where the use of the work is controlled through the measure by the copyright owner of the work, means to circumvent the measure without the authority of the copyright owner;

(b) where the use of the work is controlled through the measure by an exclusive licensee of the copyright owner of the work, means to circumvent the measure without the authority of the exclusive licensee; or

(c) where the use of the work is controlled through the measure by any other person who, with the licence of the copyright owner of the copyright work-

(i) issues to the public copies of the work;

(ii) makes available to the public copies of the work; or

(iii) broadcasts the work, or includes the work in a cable programme service,

means to circumvent the measure without the authority of that other person.

(2) For the purposes of this section and sections 273A to 273H, where a technological measure has been applied in relation to a copyright work, the measure is referred to as an effective technological measure if the use of the work is controlled by any person referred to in subsection (1)(a), (b) or (c) through- <* Note - Exp. X-Ref.: Sections 273A, 273B, 273C, 273D, 273E, 273F, 273G, 273H *>

(a) an access control or protection process (including the encryption, scrambling and any other transformation of the work) which achieves the intended protection of the work in the normal course of its operation; or

(b) a copy control mechanism which achieves the intended protection of the work in the normal course of its operation.

(3) In subsection (2)-

(a) "technological measure" (科技措施) means any technology, device, component or means which is designed, in the normal course of its operation, to protect any description of copyright work;

(b) the reference to protection of a copyright work is to the prevention or restriction of acts which are done without the licence of the copyright owner of the work and are restricted by the copyright in the work;

(c) the reference to use of a copyright work does not extend to any use of the work which is outside the scope of the acts restricted by the copyright in the work.

(Replaced 15 of 2007 s. 68)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	273A	Rights and remedies in respect of circumvention of effective technological measures	L.N. 141 of 2008	11/07/2008

(1) Subject to sections 273D and 273H, this section applies where an effective technological measure has been applied in relation to a copyright work, and a person does any act which circumvents the measure, knowing, or having reason to believe, that he is doing an act which circumvents the measure.

(2) The following persons have the same rights and remedies against the person referred to in subsection (1) as a copyright owner has in respect of an infringement of copyright-

(a) the copyright owner of the work;

(b) an exclusive licensee of the copyright owner of the work; and

(c) any other person who, with the licence of the copyright owner of the work-

(i) issues to the public copies of the work;

(ii) makes available to the public copies of the work; or

(iii) broadcasts the work, or includes the work in a cable programme service.

(3) The rights and remedies conferred by subsection (2) on the copyright owner, the exclusive licensee and the person referred to in subsection (2)(c) are concurrent.

(4) Sections 112(3) and 113(1), (4), (5) and (6) apply, with the necessary modifications, in proceedings in relation to the copyright owner, the exclusive licensee and the person referred to in subsection (2)(c), as they apply in proceedings in relation to a copyright owner and an exclusive licensee with concurrent rights and remedies.

(5) Sections 115, 116 and 117 (presumptions as to certain matters relating to copyright) apply, with the necessary modifications, in proceedings instituted under this section, as they apply in proceedings instituted under Part II (copyright).

(Added 15 of 2007 s. 69)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	273B	Rights and remedies in respect of devices and services designed to circumvent effective technological measures	L.N. 48 of 2008	25/04/2008

(1) Subject to sections 273E and 273H, this section applies where an effective technological measure has been applied in relation to a copyright work, and a person-

(a) makes, imports, exports, sells or lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, any relevant device;

(b) exhibits in public, possesses or distributes any relevant device for the purpose of or in the course of any trade or business;

(c) distributes (otherwise than for the purpose of or in the course of any trade or business) any relevant device to such an extent as to affect prejudicially the owner of the copyright; or

(d) provides any relevant service.

(2) In subsection (1)-

"relevant device" (有關器件), in relation to the effective technological measure referred to in that subsection, means any device, product, component or means-

(a) which is promoted, advertised or marketed for the purpose of the circumvention of the measure;

(b) which has only a limited commercially significant purpose or use other than to circumvent the measure; or

(c) which is primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of the measure;

"relevant service" (有關服務), in relation to the effective technological measure referred to in that subsection, means any service-

(a) which is promoted, advertised or marketed for the purpose of the circumvention of the measure;

(b) which has only a limited commercially significant purpose or use other than to circumvent the

measure; or

(c) which is performed for the purpose of enabling or facilitating the circumvention of the measure.

(3) The following persons have the same rights and remedies against the person referred to in subsection (1) as a copyright owner has in respect of an infringement of copyright-

(a) the copyright owner of the work;

(b) an exclusive licensee of the copyright owner of the work; and

(c) any other person who, with the licence of the copyright owner of the work-

(i) issues to the public copies of the work;

(ii) makes available to the public copies of the work; or

(iii) broadcasts the work, or includes the work in a cable programme service.

(4) The rights and remedies conferred by subsection (3) on the copyright owner, the exclusive licensee and the person referred to in subsection (3)(c) are concurrent.

(5) Sections 112(3) and 113(1), (4), (5) and (6) apply, with the necessary modifications, in proceedings in relation to the copyright owner, the exclusive licensee and the person referred to in subsection (3)(c), as they apply in proceedings in relation to a copyright owner and an exclusive licensee with concurrent rights and remedies.

(6) The copyright owner, the exclusive licensee and the person referred to in subsection (3)(c) have the same rights and remedies under section 109 (order for delivery up) in relation to any device, product, component or means which a person has in his possession, custody or control with the intention that it is to be used to circumvent effective technological measures, as a copyright owner has in relation to an infringing copy.

(7) The rights and remedies conferred by subsection (6) on the copyright owner, the exclusive licensee and the person referred to in subsection (3)(c) are concurrent.

(8) Section 113(7) (order as to exercise of rights by copyright owner where exclusive licensee has concurrent rights) applies, with the necessary modifications, in respect of anything done under section 109 by virtue of subsection (6), in relation to the copyright owner, the exclusive licensee and the person referred to in subsection (3)(c), as it applies, in respect of anything done under section 109, in relation to a copyright owner and an exclusive licensee with concurrent rights and remedies.

(9) Section 111 (order as to disposal of infringing copy or other article) applies, with the necessary modifications, in relation to the disposal of anything delivered up under section 109 by virtue of subsection (6).

(10) Sections 115, 116 and 117 (presumptions as to certain matters relating to copyright) apply, with the necessary modifications, in proceedings instituted under this section, as they apply in proceedings instituted under Part II (copyright).

(Added 15 of 2007 s. 69)

Chapter:	528	COPYRIGHT ORDINANCE	Gazette Number	Version Date

Section:	273D	Exceptions to section 273A	L.N. 141 of 2008	11/07/2008

(1) Section 273A does not apply to an act which circumvents an effective technological measure if-

(a) the measure has been applied in relation to a computer program;

(b) the act is done with respect to the identification or analysis of particular elements of the computer program that are not readily available to the person who does the act;

(c) the act is done for the sole purpose of achieving interoperability of an independently created computer program with the computer program or another computer program;

(d) the copy of computer program in relation to which the act is done is not an infringing copy; and

(e) the act of identification or analysis referred to in paragraph (b) does not constitute an infringement of copyright.

(2) Section 273A does not apply to an act which circumvents an effective technological measure if-

(a) the act is done by or under the authority of the owner or operator of a computer, computer system or computer network; and

(b) the act is done for the sole purpose of testing, investigating or correcting a security flaw or vulnerability of the computer, computer system or computer network, as the case may be.

(3) Section 273A does not apply to an act which circumvents an effective technological measure if the act is done for the sole purpose of research into cryptography and-

(a) where the research is conducted by or on behalf of a specified educational establishment, or for the purposes of giving or receiving instruction in a specified course of study in the field of cryptography

provided by a specified educational establishment-

(i) the research does not constitute an infringement of copyright;

(ii) it is necessary for the act to be done in order to conduct the research; and

(iii) the information derived from the research is not disseminated to the public except in a specified manner; or

(b) in any other case-

(i) the research does not constitute an infringement of copyright;

(ii) it is necessary for the act to be done in order to conduct the research; and

(iii) the act or the dissemination to the public of information derived from the research does not affect prejudicially the copyright owner.

(4) In subsection (3)-

"specified educational establishment" (指明教育機構) means-

(a) an educational establishment specified in section 4, 6, 7, 8, 9, 12, 14 or 15 of Schedule 1; or

(b) Hong Kong Shue Yan University registered under the Post Secondary Colleges Ordinance (Cap 320);

"specified manner" (指明方式), in relation to the dissemination to the public of information derived from a research into cryptography-

(a) means a manner which is reasonably calculated to advance the state of knowledge or development of cryptography or related technology; and

(b) includes dissemination of the information in a journal or at a conference the target readers or audiences of which are primarily persons engaged in, or pursuing a course of study in, the field of cryptography or related technology.

(5) Section 273A does not apply to an act which circumvents an effective technological measure if-

(a) the measure, or the copyright work in relation to which the measure has been applied, has the capability to collect or disseminate personally identifying information which tracks and records the manner of a person's use of a computer network without providing conspicuous notice of such collection or dissemination to the person;

(b) the act is done for the sole purpose of identifying or disabling the function of the measure or work, as the case may be, in collecting or disseminating personally identifying information; and

(c) the act does not affect the ability of any person to gain access to any work.

(6) Section 273A does not apply to an act which circumvents an effective technological measure if-

(a) a person does the act when using a technology, product or device; and

(b) the sole purpose of the technology, product or device, as the case may be, is to prevent access of minors to harmful materials on the Internet.

(7) Section 273A does not apply to an act which circumvents an effective technological measure if-

(a) the measure has been applied in relation to a copyright work of any description issued to the public in a physical article;

(b) the measure contains regional coding or any other technology, device, component or means which has the effect of preventing or restricting access to the work for the purpose of controlling market segmentation on a geographical basis;

(c) the act is done for the sole purpose of overcoming the regional coding, technology, device, component or means, as the case may be, contained in the measure so as to gain access to the work; and

(d) the copy of the work in relation to which the act is done-

(i) is not an infringing copy; or

(ii) if it is an infringing copy, is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made.

(8) Section 273A does not apply to an act which circumvents an effective technological measure if-

(a) the measure has been applied in relation to a copy of any description mentioned in section 50(1), 51(1) or 53;

(b) the act of circumvention is done by the librarian or archivist of a specified library or archive; and

(c) the act is done for the sole purpose of the doing of any of the acts permitted under sections 50, 51 and 53.

(9) Section 273A does not apply to an act which circumvents an effective technological measure if the act is done by, or on behalf of, law enforcement agencies for the purpose of the prevention, detection or investigation of an offence, or the conduct of a prosecution.

(Added 15 of 2007 s. 69)

Rights management information

(1) A person who provides rights management information is entitled to the following rights and remedies.

(2) He has the same rights and remedies against a person who-

(a) removes or alters any electronic rights management information provided by him without his authority; or

(b) issues or 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, without his authority, works or copies of works, performances, fixations of performances to which the electronic rights management information is attached knowing that the electronic rights management information has been removed or altered without his authority,

as a copyright owner has in respect of an infringement of copyright.

(2A) The person who provides rights management information does not have the rights and remedies against the person referred to in subsection (2) unless the second-mentioned person, when doing an act referred to in subsection (2)(a) or (b), knows or has reason to believe that by doing the act he is inducing, enabling, facilitating or concealing an infringement of copyright or an infringement of rights conferred by Part III (rights in performances). (Added 15 of 2007 s. 70)

(2B) If the copyright owner of a work to which rights management information is attached, or the copyright owner's exclusive licensee, is not the person who provides the rights management information, the copyright owner or the exclusive licensee, as the case may be, has the same rights and remedies as the person who provides the rights management information has against the person referred to in subsection (2). (Added 15 of 2007 s. 70)

(2C) The rights and remedies conferred by subsection (1) on the person who provides rights management information and the rights and remedies conferred by subsection (2B) on the copyright owner and his exclusive licensee are concurrent. (Added 15 of 2007 s. 70)

(2D) Sections 112(3) and 113(1), (4), (5) and (6) apply, with the necessary modifications, in proceedings in relation to the person who provides rights management information, the copyright owner and the exclusive licensee, as they apply in proceedings in relation to a copyright owner and an exclusive licensee with concurrent rights and remedies. (Added 15 of 2007 s. 70)

(2E) Sections 115, 116 and 117 (presumptions as to certain matters relating to copyright) apply, with the necessary modifications, in proceedings instituted under this section, as they apply in proceedings instituted under Part II (copyright). (Added 15 of 2007 s. 70)

(2F) This section, except subsection (2E), applies, with the necessary modifications, in relation to-

(a) a fixation of a performance;

(b) a performer or a person having fixation rights in relation to a performance; and

(c) the rights conferred by Part III on a performer or a person having fixation rights in relation to a performance. (Added 15 of 2007 s. 70)

(3) References in this section to rights management information means-

(a) information which identifies the work, the author of the work, the owner of any right in the work, the performer, or the performance of the performer;

(b) information about the terms and conditions of use of the work, the person having fixation rights in relation to the performance, or the performance; or

(c) any numbers or codes that represent such information,

when any of these items of information is attached to a copy of a work or a fixed performance or appears in connection with the making available of a work or a fixed performance to the public.

Schedule:	2	COPYRIGHT: TRANSITIONAL PROVISIONS AND SAVINGS	L.N. 130 of 2007	01/07/2007

Expanded Cross Reference:
17, 18, 19, 20, 21, 107, 108, 109, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133

Remarks:

For the saving and transitional provisions relating to the amendments made by the Resolution of the Legislative Council (L.N. 130 of 2007), see paragraph (12) of that Resolution.

[sections 173, 191 & 199]

Introductory

1. (1) In this Schedule-

"the 1911 Act" (1911年法令) means the Copyright Act 1911 (1911 c. 46 U.K.) as extended to Hong Kong by Proclamation No. 3 of 1912 published in the Gazette of 28 June 1912;

"the 1956 Act" (1956年法令) means the Copyright Act 1956 (1956 c. 74 U.K.) as extended to Hong Kong by the Copyright (Hong Kong) Orders 1972 to 1990 (App. III, p. DD1);

"the Copyright Ordinance" (版權條例) means the Copyright Ordinance (Cap 39) in force immediately before the commencement of Part II of this Ordinance;

"the new copyright provisions" (新的版權條文) means the provisions of this Ordinance relating to copyright, that is, Part II (including this Schedule and Schedule 1) and Schedules 4 and 5 so far as they make amendments or repeals consequential on the provisions of Part II;

"the WTO Ordinance" (世界貿易組織條例) means the Intellectual Property (World Trade Organization Amendments) Ordinance 1996 (11 of 1996).

(2) References in this Schedule to "commencement", without more, are to the date on which this Ordinance (other than the provisions specified in section 1(2) of this Ordinance) comes into force.

(3) References in this Schedule to "existing works" are to works made before commencement; and for this purpose a work of which the making extended over a period is to be taken to have been made when its making was completed.

[cf. 1988 c. 48 Sch. 1 para. 1 U.K.]

2. (1) In relation to the 1956 Act, references in this Schedule to a work include any work or other subject-matter within the meaning of that Act.

(2) In relation to the 1911 Act-

(a) references in this Schedule to "copyright" include the right conferred by section 24 of that Act in substitution for a right subsisting immediately before the commencement of that Act;

(b) references in this Schedule to "copyright in a sound recording" are to the copyright under that Act in records embodying the recording; and

(c) references in this Schedule to "copyright in a film" are to any copyright under that Act in the film (so far as it constituted a dramatic work for the purposes of that Act) or in photographs forming part of the film.

[cf. 1988 c. 48 Sch. 1 para. 2 U.K.]

General principles: continuity of the law

3. The new copyright provisions apply in relation to things existing at commencement as they apply in relation to things coming into existence after commencement, subject to any express provision to the contrary.

[cf. 1988 c. 48 Sch. 1 para. 3 U.K.]

4. (1) The provisions of this paragraph have effect for securing the continuity of the law so far as the new

copyright provisions re-enact (with or without modification) earlier provisions.

(2) A reference in an enactment, instrument or other document to copyright, or to a work or other subject-matter in which copyright subsists, which apart from this Ordinance would be construed as referring to copyright under the 1956 Act is to be construed, so far as may be required for continuing its effect, as being, or as the case may require, including, a reference to copyright under this Ordinance or to works in which copyright subsists under this Ordinance.

(3) Anything done (including subsidiary legislation made), or having effect as done, under or for the purposes of a provision repealed by this Ordinance has effect as if done under or for the purposes of the corresponding provision of the new copyright provisions.

(4) References (expressed or implied) in this Ordinance or any other enactment, instrument or document to any of the new copyright provisions are, so far as the context permits, to be construed as including, in relation to times, circumstances and purposes before commencement, a reference to corresponding earlier provisions.

(5) A reference (expressed or implied) in an enactment, instrument or other document to a provision repealed by this Ordinance is to be construed, so far as may be required for continuing its effect, as a reference to the corresponding provision of this Ordinance.

(6) The provisions of this paragraph have effect subject to any specific transitional provision or saving and to any express amendment made by this Ordinance.

[cf. 1988 c. 48 Sch. 1 para. 4 U.K.]

Subsistence of copyright: general

5. (1) Copyright subsists in an existing work after commencement if copyright subsisted in it immediately before commencement.

(2) Copyright subsists in an existing work after commencement if-

(a) it would qualify for copyright protection under section 177 or 188 of this Ordinance-

(i) had it been made after commencement;

(ii) had it been published after commencement; or

(iii) in the case of a broadcast or cable programme, had it been made or sent after commencement; and

(b) copyright under the 1956 Act in the work would not have expired had copyright subsisted in it under that Act.

(3) Copyright in an existing work qualifying for copyright protection under subparagraph (2) expires at the time when copyright in the work would expire under the following provisions had copyright subsisted in it immediately before commencement.

Contrary rights

6. Where any person has before commencement incurred any significant expenditure or liability in connection with the reproduction or performance of a work or other subject-matter in a manner that at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when it would have been lawful but for the commencement, nothing in this Ordinance diminishes or prejudices any right or interest arising from or in connection with such action that is subsisting and valuable immediately before commencement unless the person who by virtue of paragraph 5(2) becomes entitled to restrain the reproduction or performances agrees to pay such compensation as the parties agree, or failing such agreement, as the Copyright Tribunal may determine.

Subsistence of copyright: films, broadcasts and cable programmes

7. (1) No copyright subsists in a film, as such, made before 12 December 1972.

(2) Where a film made before that date was an original dramatic work within the meaning of the 1911 Act, the new copyright provisions have effect in relation to the film as if it was an original dramatic work within the meaning of Part II.

(3) The new copyright provisions have effect in relation to photographs forming part of a film made before 12 December 1972 as they have effect in relation to photographs not forming part of a film.

(4) In relation to a film in which copyright does not or did not subsist as such but which is or was protected-

(a) as an original dramatic works; or

(b) by virtue of the protection of the photographs forming part of the film,

references in the new copyright provisions, and in this Schedule, to copyright in a film are to any copyright in the film as an original dramatic work or, as the case may be, in photographs forming part of the film.

[cf. 1988 c. 48 Sch. 1 para. 7 U.K.]

8. No copyright subsists in-

(a) a broadcast made before 12 December 1972; or

(b) a cable programme included in a cable programme service before 11 March 1994,

and any such broadcast or cable programme is to be disregarded for the purposes of section 20(3) of this Ordinance (duration of copyright in repeats).

[cf. 1988 c. 48 Sch. 1 para. 9 U.K.]

Authorship of work

9. The question who was the author of an existing work is to be determined in accordance with the new copyright provisions for the purposes of the rights conferred by Division IV of Part II (moral rights), and for all other purposes is to be determined in accordance with the law in force at the time the work was made.

[cf. 1988 c. 48 Sch. 1 para. 10 U.K.]

First ownership of copyright

10. (1) The question who was the first owner of copyright in an existing work is to be determined in accordance with the law in force at the time the work was made.

(2) Where before commencement a person commissioned the making of a work in circumstances falling within-

(a) section 4(3) of the 1956 Act or paragraph (a) of the proviso to section 5(1) of the 1911 Act (engravings, photographs and portraits); or

(b) the proviso to section 12(4) of the 1956 Act (sound recordings),

those provisions apply to determine first ownership of copyright in any work made in pursuance of the commission after commencement.

[cf. 1988 c. 48 Sch. 1 para. 11 U.K.]

Employee works

11. Section 14(2) of this Ordinance does not apply to an existing work.

Commissioned works

12. Section 15 of this Ordinance does not apply to an existing work.

Duration of copyright in existing works

13. (1) The following provisions have effect with respect to the duration of copyright in existing works.

The question which provision applies to a work is to be determined by reference to the facts immediately before commencement; and expressions used in this paragraph which were defined for the purposes of the 1956 Act have the same meaning as in that Act.

(2) Copyright in the following descriptions of work continues to subsist until the date on which it would have expired under the 1956 Act-

(a) literary, dramatic or musical works in relation to which the period of 50 years mentioned in the proviso to section 2(3) of the 1956 Act (duration of copyright in works made available to the public after the death of the author) has begun to run;

(b) engravings in relation to which the period of 50 years mentioned in paragraph (a) of the proviso to section 3(4) of the 1956 Act (duration of copyright in works published after the death of the author) has begun to run;

(c) published photographs and photographs taken before 12 December 1972;
(d) published sound recordings and sound recordings made before 12 December 1972;
(e) published films.

(3) Copyright in anonymous or pseudonymous literary, dramatic, musical or artistic works (other than photographs) or films continues to subsist-

(a) if the work is published, until the date on which it would have expired in accordance with the 1956 Act; and
(b) if the work is unpublished, until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force or, if during that period the work is first made available to the public within the meaning of section 17(5) or 19(6) of this Ordinance (duration of copyright in works of unknown authorship), the date on which copyright expires in accordance with that provision,

unless, in any case, the identity of the author becomes known before that date, in which case section 17(2) or 19(2) of this Ordinance applies (general rule: life of the author plus 50 years).

(4) Copyright in the following descriptions of work continues to subsist until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force-

(a) literary, dramatic and musical works of which the author has died and in relation to which none of the acts mentioned in paragraphs (a) to (e) of the proviso to section 2(3) of the 1956 Act has been done;
(b) unpublished engravings of which the author has died;
(c) unpublished photographs taken on or after 12 December 1972;
(d) unpublished films of which the person by whom the arrangements necessary for the making of the film were undertaken has died.

(5) Copyright in an unpublished sound recordings made on or after 12 December 1972 continues to subsist until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force unless the recording is published before the end of that period in which case copyright in it continues until the end of the period of 50 years from the end of the calendar year in which the recording is published.

(6) Copyright in any other description of existing work continues to subsist until the date on which copyright in that description of work expires in accordance with sections 17 to 21 of this Ordinance. <* Note - Exp. X-Ref.: Sections 17, 18, 19 , 20, 21 *>

(7) The above provisions do not apply to works subject to Government or Legislative Council copyright (see paragraphs 32 to 34 below).

[cf. 1988 c. 48 Sch. 1 para. 12 U.K.]

Acts infringing copyright

14. (1) The provisions of Divisions II and III of Part II as to the acts constituting an infringement of copyright apply only in relation to acts done after commencement; the provisions of the 1956 Act and the Copyright Ordinance continue to apply in relation to acts done before commencement.

(2) Section 25 of this Ordinance does not apply in relation to a copy of a sound recording or computer program acquired by any person before 10 May 1996 for the purpose of renting it to the public.

(3) Where any person has before 1 January 1995 incurred any significant expenditure or liability in connection with the rental of any copy of a work or subject-matter in a manner that at the time was lawful, or for the purpose of or with a view to such a rental at a time when it would have been lawful but for the commencement of section 10 of the WTO Ordinance, nothing in that Ordinance shall diminish or prejudice any right or interest arising from or in connection with such action that is subsisting and valuable immediately before the commencement of that section if that person pays to the person who by virtue of the commencement of that section becomes entitled to restrain the rental such equitable remuneration as the parties agree, or failing such agreement, as the Copyright Tribunal may determine.

(4) For the purposes of section 35 of this Ordinance (meaning of "infringing copy") the question whether the making of an article constituted an infringement of copyright, or would have done if the article had been made in Hong Kong, is to be determined-

(a) in relation to an article made on or after 10 May 1996 and before commencement, by reference to the 1956 Act as amended by the WTO Ordinance;
(b) in relation to an article made on or after 12 December 1972 and before 10 May 1996, by reference to the 1956 Act immediately before it was amended by the WTO Ordinance; and

(c) in relation to an article made before 12 December 1972, by reference to the 1911 Act.

(5) For the purposes of section 35 of the Ordinance (meaning of "infringing copy"), if an article has been imported before commencement without infringing copyright under the law existing at the time of importation, the terms of any exclusive licence agreement relating to that article are to be disregarded and, for the avoidance of doubt, any possession or dealing in the article which takes place after commencement shall not infringe copyright within the terms of sections 31 and 118 to 133 of the Ordinance. <* Note - Exp. X-Ref.: Sections 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133 *>

(6) For the purposes of the application of sections 40(2) and 71(3) of this Ordinance (subsequent exploitation of things whose making was, by virtue of an earlier provision of the section, not an infringement of copyright) to things made before commencement, it is to be assumed that the new copyright provisions were in force at all material times.

(7) Section 63 of this Ordinance (articles for producing material in a particular typeface) applies where articles have been marketed as mentioned in subsection (1) of that section before commencement with the substitution for the period mentioned in subsection (2) of that section of the period of 25 years from the end of the calendar year in which the new copyright provisions come into force.

(8) Section 64 of this Ordinance (transfer of copies, adaptations, &c. of work in electronic form) does not apply in relation to a copy purchased before commencement.

(9) In section 74 of this Ordinance (reconstruction of buildings) the reference to the owner of the copyright in the drawings or plans is, in relation to buildings constructed before commencement, to the person who at the time of the construction was the owner of the copyright in the drawings or plans under the 1956 Act or the 1911 Act.

[cf. 1988 c. 48 Sch. 1 para. 14 U.K.]

15. (1) Sections 66 and 75 of this Ordinance (anonymous or pseudonymous works: acts permitted on assumptions as to expiry of copyright or death of author) has effect in relation to existing works subject to the following provisions.

(2) Subsection (1)(b)(i) of section 66 (assumption as to expiry of copyright) does not apply in relation to photographs.

(3) Subsection (1)(b)(ii) of the sections (assumption as to death of author) applies only-

(a) where paragraph 11(3)(b) applies (unpublished anonymous or pseudonymous works), after the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force; or

(b) where paragraph 11(6) applies (cases in which the duration of copyright is the same under the new copyright provisions as under the previous law).

[cf. 1988 c. 48 Sch. 1 para. 15 U.K.]

16. The following provisions of section 7 of the 1956 Act continue to apply in relation to existing works-

(a) subsection (6) (copying of unpublished works from manuscript or copy in library, museum or other institution);

(b) subsection (7) (publication of work containing material to which subsection (6) applies), except paragraph (a) (duty to give notice of intended publication);

(c) subsection (8) (subsequent broadcasting, performance, etc. of material published in accordance with subsection (7)),

and subsection (9)(d) (illustrations) continues to apply for the purposes of those provisions.

[cf. 1988 c. 48 Sch. 1 para. 16 U.K.]

17. Where in the case of a dramatic or musical work made before 1 July 1912, the right conferred by the 1911 Act did not include the sole right to perform the work in public, the acts restricted by the copyright are to be treated as not including-

(a) performing the work in public;

(b) broadcasting the work or including it in a cable programme service; or

(c) doing any of the above in relation to an adaptation of the work,

and where the right conferred by the 1911 Act consisted only of the sole right to perform the work in public, the acts restricted by the copyright are to be treated as consisting only of those acts.

[cf. 1988 c. 48 Sch. 1 para. 17 U.K.]

18. Where a work made before 1 July 1912 consists of an essay, article or portion forming part of and first

published in a review, magazine or their periodical or work of a like nature, the copyright is subject to any right of publishing the essay, article, or portion in a separate form to which the author was entitled at the commencement of the 1911 Act.

[cf. 1988 c. 48 Sch. 1 para. 18 U.K.]

Enforcement of copyright in registrable design

19. (1) Where section 10 of the 1956 Act (effect of industrial application of design corresponding to artistic work) applied in relation to an artistic work at any time before 1 August 1989, section 87(3) of this Ordinance applies and the period of 15 years mentioned there is to be calculated from the end of the calendar year in which the articles were first marketed.

(2) Where section 10 of the 1956 Act (effect of industrial application of design corresponding to artistic work) applied in relation to an artistic work at any time on or after 1 August 1989 and before commencement, section 87(3) of this Ordinance applies with the substitution for the period of 15 years mentioned there of the period of 25 years and the period of 25 years is to be calculated from the end of the calendar year in which the articles were first marketed.

(3) Except as provided in subparagraphs (1) and (2), section 87 of this Ordinance applies only where articles are marketed as mentioned in section 87(1)(b) of this Ordinance after commencement.

[cf. 1988 c. 48 Sch. 1 para. 20 U.K.]

Abolition of statutory recording licence

20. Section 8 of the 1956 Act (statutory licence to copy records sold by retail) and the Copyright Royalty System (Records) Regulations (App. I, p. AL1) continue to apply where notice under subsection (1)(b) of section 8 was given before the repeal of that section by this Ordinance, but only in respect of the making of records-

(a) within one year of the repeal coming into force; and

(b) up to the number stated in the notice as intended to be sold.

[cf. 1988 c. 48 Sch. 1 para. 21 U.K.]

Moral rights

21. (1) No act done before commencement is actionable by virtue of any provision of Division IV of Part II (moral rights).

(2) Section 43 of the 1956 Act (false attribution of authorship) continues to apply in relation to acts done before commencement.

[cf. 1988 c. 48 Sch. 1 para. 22 U.K.]

22. (1) The following provisions have effect with respect to the rights conferred by-

(a) section 89 of this Ordinance (right to be identified as author or director); and

(b) section 92 of this Ordinance (right to object to derogatory treatment of work).

(2) The rights do not apply-

(a) in relation to a literary, dramatic, musical and artistic work of which the author died before commencement; or

(b) in relation to a film made before commencement.

(3) The rights in relation to an existing literary, dramatic, musical or artistic work do not apply-

(a) where copyright first vested in the author, to anything which by virtue of an assignment of copyright made or licence granted before commencement may be done without infringing copyright;

(b) where copyright first vested in a person other than the author, to anything done by or with the licence of the copyright owner.

(4) The rights do not apply to anything done in relation to a record made in pursuance of section 8 of the 1956 Act (statutory recording licence).

[cf. 1988 c. 48 Sch. 1 para. 23 U.K.]

Certification of rental to the public of copies of computer programs or sound recordings

23. The repeal by this Ordinance of sections 41A (special provisions as to rental of computer programs and sound recordings) and 41B (application to settle royalty or other sum payable for rental of computer programs or sound recordings) of the Copyright Ordinance does not affect the operation of those sections in relation to any certification made by the Secretary for Trade and Industry under section 41A(4) of the Copyright Ordinance before commencement.

Assignments and licences

24. (1) Any document made or event occurring before commencement which had any operation-

(a) affecting the ownership of the copyright in an existing work; or

(b) creating, transferring or terminating an interest, right or licence in respect of the copyright in an existing work,

has the corresponding operation in relation to copyright in the work under this Ordinance.

(2) Expressions used in such a document are to be construed in accordance with their effect immediately before commencement.

[cf. 1988 c. 48 Sch. 1 para. 25 U.K.]

25. (1) Section 102(1) of this Ordinance (assignment of future copyright: statutory vesting of legal interest on copyright coming into existence) does not apply in relation to an agreement made before 12 December 1972.

(2) The repeal by this Ordinance of section 37(2) of the 1956 Act (assignment of future copyright: devolution of right where assignee dies before copyright comes into existence) does not affect the operation of that provision in relation to an agreement made before commencement.

[cf. 1988 c. 48 Sch. 1 para. 26 U.K.]

26. (1) Where the author of a literary, dramatic, musical or artistic work was the first owner of the copyright in it, no assignment of the copyright and no grant of any interest in it, made by him (otherwise than by will) on or after 1 July 1912 and before 12 December 1972, shall operate to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of 25 years from the death of the author.

(2) The reversionary interest in the copyright expectant on the termination of that period may after commencement be assigned by the author during his life but in the absence of any assignment, on his death, devolves on his legal personal representatives as part of his estate.

(3) Nothing in this paragraph affects-

(a) an assignment of the reversionary interest by a person to whom it has been assigned;

(b) an assignment of the reversionary interest after the death of the author by his personal representatives or any person becoming entitled to it; or

(c) any assignment of the copyright after the reversionary interest has fallen in.

(4) Nothing in this paragraph applies to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work.

(5) In subparagraph (4) "collective work" (匯集作品) means-

(a) any encyclopaedia, dictionary, yearbook, or similar work;

(b) a newspaper, review, magazine, or similar periodical; and

(c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated.

[cf. 1988 c. 48 Sch. 1 para. 27 U.K.]

27. (1) This paragraph applies where copyright subsists in a literary, dramatic, musical or artistic work made before 1 July 1912 in relation to which the author, before the commencement of the 1911 Act, made such an assignment or grant as was mentioned in paragraph (a) of the proviso to section 24(1) of that Act (assignment or grant of copyright or performing right for full term of the right under the previous law).

(2) If before commencement any event has occurred or notice has been given which by virtue of paragraph 38 of the Seventh Schedule to the 1956 Act had any operation in relation to copyright in the work under that Act, the event or notice has the corresponding operation in relation to copyright under this Ordinance.

(3) Any right which immediately before commencement would by virtue of paragraph 38(3) of that Schedule have been exercisable in relation to the work, or copyright in it, is exercisable in relation to the work or copyright in it

under this Ordinance.

(4) If in accordance with paragraph 38(4) of that Schedule copyright would, on a date on or after 12 December 1972, have reverted to the author or his personal representatives and that date falls after the commencement of the new copyright provisions-

(a) the copyright in the work reverts to the author or his personal representatives, as the case may be; and

(b) any interest of any other person in the copyright which subsists on that date by virtue of any document made before 1 July 1912 thereupon determines.

[cf. 1988 c. 48 Sch. 1 para. 28 U.K.]

28. Section 103(2) of this Ordinance (rights of exclusive licensee against successors in title of person granting licence) does not apply in relation to an exclusive licence granted before commencement.

[cf. 1988 c. 48 Sch. 1 para. 29 U.K.]

Bequests

29. (1) Section 104 of this Ordinance (copyright to pass under will with original document or other material thing embodying unpublished work)-

(a) does not apply where the testator died before 12 December 1972; and

(b) where the testator died on or after that date and before commencement, applies only in relation to an original document embodying a work.

(2) In the case of an author who died before 12 December 1972, the ownership after his death of a manuscript of his, where such ownership has been acquired under a testamentary disposition made by him and the manuscript is of a work which has not been published or performed in public, is prima facie proof of the copyright being with the owner of the manuscript.

[cf. 1988 c. 48 Sch. 1 para. 30 U.K.]

Remedies for infringement

30. (1) Sections 107 and 108 of this Ordinance (remedies for infringement) apply only in relation to an infringement of copyright committed after commencement; section 17 of the 1956 Act continues to apply in relation to infringements committed before commencement.

(2) Section 109 of this Ordinance (delivery up of infringing copies) applies to infringing copies and other articles made before or after commencement; section 18 of the 1956 Act, and section 7 of the 1911 Act, (conversion damages, etc.), do not apply after commencement except for the purposes of proceedings begun before commencement.

(3) Sections 112 and 113 of this Ordinance (rights and remedies of exclusive licensee) apply where sections 107 to 109 of this Ordinance apply; section 19 of the 1956 Act continues to apply where section 17 or 18 of that Act applies. <* Note - Exp. X-Ref.: Sections 107, 108, 109 *>

(4) Sections 115 to 117 of this Ordinance (presumptions) apply only in proceedings brought by virtue of this Ordinance; section 20 of the 1956 Act continues to apply in proceedings brought by virtue of that Act. <* Note - Exp. X-Ref.: Sections 115, 116, 117 *>

[cf. 1988 c. 48 Sch. 1 para. 31 U.K.]

31. Sections 112 and 113 of this Ordinance (rights and remedies of exclusive licensee) do not apply to a licence granted before 12 December 1972.

[cf. 1988 c. 48 Sch. 1 para. 32 U.K.]

32. The provisions of section 118 of this Ordinance (criminal liability for making or dealing with infringing articles, etc.) apply only in relation to acts done after commencement; section 21 of the 1956 Act (penalties and summary proceedings in respect of dealings which infringe copyright) and sections 5 and 5A of the Copyright Ordinance (offences in connection with infringing copies and making infringing copies outside Hong Kong, etc.) continue to apply in relation to acts done before commencement.

[cf. 1988 c. 48 Sch. 1 para. 33 U.K.]

Ships, aircraft and hovercraft

33. Section 179 of this Ordinance (ships, aircraft and hovercraft registered in Hong Kong) does not apply in relation to anything done before commencement.

[cf. 1988 c. 48 Sch. 1 para. 39 U.K.]

Government copyright

34. (1) Section 182 of this Ordinance (general provisions as to Government copyright) applies to an existing work if-

(a) it was made, before commencement, by or under the direction or control of-
(i) Her Majesty in right of the Government of Hong Kong; or
(ii) a department of that Government; or

(b) it was first published, before commencement, by or under such direction or control, in Hong Kong,

and the work is not one to which section 183, 184 or 185 of this Ordinance applies (copyright in Ordinances, Bills and Legislative Council copyright: see paragraphs 36 and 37 below).

(2) Section 182(1)(b) of this Ordinance (first ownership of copyright) has effect subject to any agreement entered into before commencement under section 39(6) of the 1956 Act.

[cf. 1988 c. 48 Sch. 1 para. 40 U.K.]

35. (1) The following provisions have effect with respect to the duration of copyright in existing works to which section 182 of this Ordinance (Government copyright) applies.

The question which provision applies to a work is to be determined by reference to the facts immediately before commencement; and expressions used in this paragraph which were defined for the purposes of the 1956 Act have the same meaning as in that Act.

(2) Copyright in the following descriptions of work continues to subsist until the date on which it would have expired in accordance with the 1956 Act-

(a) published literary, dramatic or musical works;
(b) artistic works other than engravings or photographs;
(c) published engravings;
(d) published photographs and photographs taken before 12 December 1972;
(e) published sound recordings and sound recordings made before 12 December 1972;
(f) published films.

(3) Copyright in unpublished literary, dramatic or musical works or films continues to subsist until-

(a) the date on which copyright expires in accordance with section 182(3) of this Ordinance; or
(b) the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force,

whichever is the later.

(4) Copyright in the following descriptions of work continues to subsist until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force-

(a) unpublished engravings;
(b) unpublished photographs taken on or after 12 December 1972.

(5) Copyright in a sound recording not falling within subparagraph (2) above continues to subsist until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force, unless the recording is published before the end of that period, in which case copyright expires 50 years from the end of the calendar year in which it is published.

[cf. 1988 c. 48 Sch. 1 para. 41 U.K.]

36. Section 183 of this Ordinance (copyright in Ordinance) applies to existing Ordinances.

[cf. 1988 c. 48 Sch. 1 para. 42 U.K.]

Legislative Council copyright

37. (1) Section 184 of this Ordinance (general provisions as to Legislative Council copyright) applies to existing unpublished literary, dramatic, musical or artistic works, but does not otherwise apply to existing works.

(2) Section 185 of this Ordinance (copyright in Bills) does not apply to a Bill which was presented to the

Legislative Council and published before commencement.

[cf. 1988 c. 48 Sch. 1 para. 43 U.K.]

Copyright vesting in certain international organizations

38. (1) Any work in which immediately before commencement copyright subsisted by virtue of section 33 of the 1956 Act is deemed to satisfy the requirements of section 188(1) of this Ordinance.

(2) Copyright in any such work which is unpublished continues to subsist until the date on which it would have expired in accordance with the 1956 Act, or the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force, whichever is the earlier.

[cf. 1988 c. 48 Sch. 1 para. 44 U.K.]

Meaning of "publication"

39. Section 196(3) of this Ordinance (construction of building treated as equivalent to publication) applies only where the construction of the building began after commencement.

[cf. 1988 c. 48 Sch. 1 para. 45 U.K.]

Meaning of "unauthorized"

40. For the purposes of the application of the definition in section 198(1) of this Ordinance (minor definitions) of the expression "unauthorized" in relation to things done before commencement- (Amended 64 of 2000 s. 18)

(a) paragraph (a) applies in relation to things done before 12 December 1972 as if the reference to the licence of the copyright owner were a reference to his consent or acquiescence;

(b) paragraph (b) applies with the substitution for the words from "or, in a case" to the end of the words "or any person lawfully claiming under him"; and

(c) paragraph (c) is disregarded.

[cf. 1988 c. 48 Sch. 1 para. 46 U.K.]

Saving of subsidiary legislation

41. Until rules are made by the Chief Justice under section 174 of this Ordinance, the Copyright Tribunal Rules (App. I, p. BF1)+ in force immediately before commencement, so far as they are not inconsistent with this Ordinance, continue in force and have effect for all purposes as if made under this Ordinance, subject to such necessary adaptations and modifications as may be necessary for their having effect under this Ordinance.

42. Until rules of court under the High Court Ordinance (Cap 4) are made for the purposes of sections 144 and 271 of this Ordinance, the Copyright (Border Measures) Rules (L.N. 482 of 1996), so far as they are not inconsistent with this Ordinance, continue in force and have effect as if made for the purposes of those sections subject to such necessary adaptations and modifications as may be necessary for those rules to have effect under the appropriate Part of this Ordinance. (Amended 25 of 1998 s. 2)

43. Until regulations are made by the Secretary for Commerce and Economic Development under section 46 of this Ordinance, the Copyright (Libraries) Regulations (App. I, p. AJ1) as amended and in force immediately before commencement, so far as they are not inconsistent with this Ordinance, continue in force and have effect for all purposes as if made under this Ordinance, subject to such necessary adaptations and modifications as may be necessary for their having effect under this Ordinance. (Amended L.N. 173 of 2000; L.N. 106 of 2002; L.N. 130 of 2007)

Note:

+ Please also see L.N. 5 of 1997.

Annex H

Implications of the proposals

Economic Implications

Legislative proposals contained in the Copyright (Amendment) Bill 2014 will serve to update Hong Kong's copyright regime to bring our copyright laws on par with technological advancement and international standards, as well as to strike a balance between the interests of copyright owners and internet users. On the one hand, the introduction of a communication right and its corresponding criminal sanction 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, in particular those for parody, commenting on current events and quotation, will enhance legal clarity and facilitate the use of copyright works. A clear legal framework will help remove uncertainties and risks for both copyright owners and users, which would be important in enhancing the business environment. It also helps creativity flourish by providing safeguards to intellectual property rights.

Financial and Civil Service Implications

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

Sustainability Implications

3. As far as sustainability implications are concerned, our proposals to update our copyright regime in the digital environment will to some extent contribute to the vibrancy of Hong Kong's economy by facilitating the development of creative industries.