

**For discussion on  
19 April 2022**

**Legislative Council Panel on Commerce and Industry**

**Updating Hong Kong's Copyright Regime –  
Outcomes of Public Consultation and Proposed Way Forward**

**PURPOSE**

The Government conducted a three-month public consultation on updating Hong Kong's copyright regime and strengthening copyright protection in the digital environment from 24 November 2021 to 23 February 2022. This paper briefs Members on the outcomes of the public consultation and sets out the Government's way forward on amending the Copyright Ordinance (Cap. 528) ("CO") to update the copyright regime.

**BACKGROUND**

2. The copyright system is an important part of the intellectual property ("IP") regime. On the one hand, it effectively protects private property right arising from original works. On the other hand, it allows the public to make reasonable use of copyright works. This is crucial to encouraging creativity, technological development, as well as the dissemination and advancement of knowledge, underpinning the development of a knowledge-based economy. Hong Kong has all along been committed to enhancing our copyright regime in order to support our development needs. We aim to strike a proper balance between the legitimate interests of copyright owners and users, and serve the best interest of Hong Kong. In fact, many overseas economies which aspire to drive economic growth through innovation and creativity have taken proactive efforts to keep their copyright regimes robust and up-to-date.

3. The "Outline of the 14th Five-Year Plan for National Economic and Social Development of the People's Republic of China and the Long-Range Objectives Through the Year 2035" ("National 14th Five-Year Plan") promulgated in March 2021 raises, for the first time, the Central People's

Government's support for Hong Kong to develop into a regional IP trading centre. Leveraging the national support and building on the solid foundation we have established in the past decade on promoting IP trading, we consider it is now the most opportune time to update the copyright legislation to meet our development needs and explore business opportunities.

4. Since its enactment in 1997, we have completed several legislative amendment exercises to update the CO to address different needs of society.<sup>1</sup> The Government has since 2006 conducted three rounds of major consultations on strengthening copyright protection in the digital environment, and introduced two amendment bills, in 2011 and 2014 respectively, into the Legislative Council ("LegCo"). However, the corresponding legislative processes could not be completed before expiry of the respective LegCo terms. In particular, despite the support by the LegCo Bills Committee, the Copyright (Amendment) Bill 2014 ("the Bill") unfortunately met with filibustering by some LegCo Members, leading to the adjournment of the proceedings. As a result, Hong Kong's copyright regime has not been updated in a timely manner and lagged behind international developments. To safeguard IP rights and Hong Kong's business environment, as well as to fully leverage the advantage of the support for Hong Kong to develop into a regional IP trading centre in the National 14th Five-Year Plan, we believe there is an imminent need to revive the copyright review and the legislative amendment exercise.

## **PUBLIC CONSULTATION AND PROPOSALS OF THE CONSULTATION DOCUMENT**

5. The Government conducted a public consultation on updating Hong Kong's copyright regime and strengthening copyright protection in the digital environment from 24 November 2021 to 23 February 2022 (consultation document at [Annex A](#)). The consultation document proposed to use the Bill as the basis of legislation. The relevant legislative proposals are the result of years of deliberations of the Government, LegCo, copyright owners, online service

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

providers (“OSPs”) and copyright users, representing the consensus and balance of interests of different stakeholders. The Bill still represents a valid package which remains relevant to our economic and social needs today, allowing us to address the most imminent and fundamental copyright protection needs as soon as possible. Not only will the legislative proposals bring our copyright regime closer to the international norms, but they will also ensure that we could promptly establish a more robust copyright regime which is practical and balancing the interests and needs of all stakeholders and conducive to the development of the creative industry.

6. The consultation document proposed that priority be accorded to addressing the legislative amendment work mainly covering the following five areas, on which broad consensus has been reached –

- (a) in the light of technological developments, to give copyright owners a technology-neutral exclusive communication right so as to ensure that the protection afforded to them would cover their works communicated to the public through any mode of electronic transmission;
- (b) to introduce criminal sanctions against infringements relating to the introduction of the aforementioned exclusive communication right;
- (c) to provide for new copyright exceptions for the use of copyright works for three categories of purposes, namely parody, satire, caricature and pastiche; commenting on current events; and quotation of copyright works; and to revise and expand exceptions on various modes of using copyright works to facilitate online learning; the operation of libraries, archives and museums; and media shifting of sound recordings; so as to maintain an appropriate balance between copyright protection and reasonable use of copyright works;
- (d) to introduce “safe harbour” provisions to limit OSPs’ liability for their subscribers’ copyright infringement acts on their service platforms, provided that OSPs meet certain prescribed conditions, including taking reasonable steps to limit or stop a copyright infringement when being notified, so as to provide incentives for OSPs to cooperate with copyright owners in combating online piracy and to provide reasonable protection for their acts; and

- (e) to introduce two additional statutory factors for the court to consider when assessing whether to award additional damages to copyright owners in civil cases involving infringement, so as to strengthen protection for them in the digital environment. The two factors are (i) the unreasonable conduct of an infringer after having been informed of the infringement; and (ii) the likelihood of widespread circulation of infringing copies as a result of the infringement.

These legislative proposals will enhance protection for copyright in the digital environment and help combat large scale online piracy. At the same time, the proposed copyright exceptions will allow use of copyright works in many common Internet activities such as parody and safeguard users' freedom of expression.

7. The consultation document also set out the Government's position to maintain the status quo and that it is not necessary to amend the CO with regard to the following four copyright issues which have generated much interests, namely –

- (a) exhaustive approach to exceptions;
- (b) contract override;
- (c) illicit streaming devices (“ISDs”); and
- (d) judicial site blocking.

## **VIEWS COLLECTED DURING THE CONSULTATION PERIOD**

8. We collected views from the general public and stakeholders through different channels during the consultation period, including organising three briefing sessions for copyright owners, OSPs and IP practitioners' groups respectively, and holding an online public forum on 11 January 2022 to gauge views of the general public. We also attended six discussion meetings organised by different stakeholders to gather the views of the trade and different interested parties.

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

- (a) 21 from copyright owners' organisations, such as the Hong Kong

Copyright Forum, licensing bodies, and various local and international organisations representing different creative industries (including music, music recordings, films and videos, publishing, multimedia services, etc.);

- (b) 4 from IP practitioners' groups (including the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Institute of Trade Mark Practitioners, and the Asian Patent Attorneys Association Hong Kong Group);
- (c) 5 from OSPs;
- (d) 19 from copyright users or individuals; and
- (e) the rest from other professional bodies, chambers of commerce, non-governmental organisations, etc.

10. A detailed summary of views of different respondents with regard to the consultation issues is at **Annex B**. All written submissions received during the consultation period have also been uploaded onto the website of the Commerce and Economic Development Bureau ([www.cedb.gov.hk/citb](http://www.cedb.gov.hk/citb)).<sup>2</sup> The ensuing paragraphs summarise the views of respondents with regard to some of the key consultation issues and the corresponding Government's responses. The detailed proposals of the consultation document, the respondents' views and the Government's detailed responses are set out in **Annex C**.

## **SUMMARY OF VIEWS ON KEY ISSUES AND GOVERNMENT'S RESPONSES**

11. **The majority of respondents agree that there is an imminent need for Hong Kong to update our copyright regime and generally support using the Bill as the basis for amending the CO. They call for an early passage of the amendment bill to keep Hong Kong's copyright regime abreast with times and in line with international developments. Furthermore, the majority of respondents also support the Government's position to maintain the existing exhaustive approach to exceptions and continue allowing contracts to override exceptions.** That said, some respondents have different views on individual legislative proposals and whether to introduce specific provisions to deal with ISDs and establish a judicial site blocking mechanism.

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<sup>2</sup> We have removed certain information provided by the respondents (such as name and contact information) as per their requests.

12. Regarding the introduction of the **communication right**, many copyright owners consider that the scope of coverage of the proposed new section 28A(4)-(6)<sup>3</sup> of the Bill, which stipulates that certain acts do not constitute “communication to the public”, is too broad, and will render the amendment bill unable to effectively combat online infringing activities. They therefore suggest that the Government should delete or amend the relevant provisions. The Government reiterates that the proposed new section 28A(4)-(6) aims to strike a fine balance between the legitimate interests of copyright owners and public interests, thereby ensuring that the scope of the communication right is reasonable, including specifying that certain circumstances do not constitute “communication to the public”, such as the mere provision of facilities for the carriage of signals by OSPs, or the forwarding or sharing of a hyperlink by the general public, etc. We must stress that one should not unilaterally interpret the proposed new section 28A(4)-(6) as unconditionally absolving a person from all legal liabilities involved with unauthorised communication to the public. The relevant provisions must be interpreted alongside other applicable provisions or law according to legal principles in order to determine whether the relevant acts would be subject to civil and/or criminal liabilities of copyright infringements. The Government’s position is that **the proposed new section 28A(4)-(6) has balanced and protected the interests of different stakeholders** and will not render the amendment bill unable to achieve its intended effect. Therefore, **we do not agree to completely delete the relevant provisions. Nevertheless, taking into account the copyright owners’ concerns, we will carefully consider making appropriate clarifications or adjustments when drafting the relevant provisions.**

13. Separately, some respondents also have different views on the proposed new **safe harbour** provisions. Some copyright owners suggest that the Government should require OSPs to take a more proactive role in combating

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<sup>3</sup> The proposed section 28A(4)-(6) of the Bill is as follows –

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

online infringing activities and observe more prescribed conditions in order to benefit from protection under the safe harbour. On the contrary, some OSPs consider that the prescribed conditions specified in the proposed safe harbour provisions would impose a significant burden on them. On the other hand, some copyright users are concerned that the takedown mechanism under the safe harbour may be abused, impacting the freedom of expression. We wish to point out that the proposed new safe harbour provisions have already incorporated various safeguards to address the concerns of different stakeholders. In fact, similar safe harbour provisions are also prescribed in the copyright legislation of a number of overseas jurisdictions. We consider that the proposed safe harbour represents the result of years of deliberation of copyright owners, users and OSPs, balancing the interests of different stakeholders. **The relevant safe harbour mechanism should be established first, but we will continue to engage the trade and take into account the views of different stakeholders in enhancing the Code of Practice underpinning the relevant provisions and the operational details of the safe harbour regime.** We will also continue to monitor the latest international developments on this issue, with a view to reviewing and enhancing our safe harbour regime from time to time.

14. On the issue of **whether specific provisions should be introduced to deal with ISDs**, many copyright owners have expressed that the problem of sale of ISDs on the market is serious and should be vigorously cracked down. Some copyright owners and a few copyright users support the introduction of specific provisions in the CO to combat ISDs so as to provide legal certainty and facilitate enforcement. On the other hand, some respondents consider that it is not necessary to introduce any ISD specific provisions for now. In particular, the Hong Kong Bar Association and the Law Society of Hong Kong both consider that the existing legislation and the proposed new communication right can adequately deal with the problem of ISDs. The Government understands copyright owners' concerns about the problem of ISDs and has all along been committed to combating online infringement activities. The existing CO already contains a number of provisions to deal with online copyright infringement activities, which could be applied to combat ISDs. Furthermore, the introduction of the communication right for copyright owners to the CO will enhance our law which could hold persons involved in ISD cases accountable for the relevant civil and/or criminal liabilities. At present, most overseas jurisdictions do not have specific provisions concerning ISDs in their copyright legislation, and so far, among the common law jurisdictions, only Singapore and Malaysia have enacted ISD specific provisions, but the effectiveness of such

statutory provisions has yet to be observed. As such, **taking into account the existing law and proposed communication right, as well as overseas experience, the Government considers it inappropriate to introduce specific provisions in the CO to combat ISDs.**

15. Many copyright owners support the **introduction of a copyright-specific judicial site blocking mechanism**, as they consider it effective in dealing with copyright infringement activities involving websites that are operated outside the territory. On the other hand, organisations from different sectors (including IP practitioners' groups) consider that there is no need to introduce specific provisions as copyright owners can already seek relevant injunctions from the court under the existing mechanism. Moreover, some individual respondents are concerned about freedom of access to information and oppose the introduction of a copyright-specific judicial site blocking mechanism. The Government notes that section 21L of the existing High Court Ordinance (Cap. 4) ("HCO") already specifically provides that the Court of First Instance may by order grant an injunction in all cases in which it appears to the court to be just or convenient to do so. As such, depending on the facts of the case, copyright owners may consider seeking an appropriate injunction from the court within its jurisdiction to order the OSPs concerned to block the access to overseas websites or online locations involved in large scale infringing activities, thus preventing such infringing activities. In fact, overseas experience shows that blocking orders against OSPs granted under the court's general powers to order an injunctive relief could equally serve the purpose. Given that different stakeholders have different views on the issue concerned and the existing relief under section 21L of the HCO is already a ready tool for seeking injunctions against online copyright infringements, and considering the public debates and controversies on the potential impact of site blocking injunctions, **we consider it not necessary to introduce a judicial site blocking mechanism specifically for copyright infringements.**

## **LEGISLATIVE PROPOSALS TO UPDATE THE COPYRIGHT REGIME**

16. Taking into account the views received during the public consultation period set out above, especially the fact that most respondents generally support using the Bill as the basis of this legislative amendment exercise and call for the early passage of the amendment bill, we confirm our proposal to use the Bill as the basis to amend the CO to update the copyright regime in the digital

environment. We will carefully study different stakeholders' views and consider making appropriate clarifications or adjustments to certain individual provisions. We will also take the opportunity to make some technical amendments to the CO as appropriate, such as amending certain provisions in the CO concerning persons with a print disability which were added or amended by the Copyright (Amendment) Ordinance 2020;<sup>4</sup> aligning the enforcement powers given to investigating officers of the Customs and Excise Department for the various offences in the CO; and repealing certain outdated provisions (including certain provisions in the existing CO concerning rental rights of comic books).

## **WAY FORWARD**

17. Our target is to introduce the amendment bill into the LegCo in the first half of 2022, with a view to concluding our efforts started in 2006 to update our copyright regime in the digital environment as soon as possible. We will continue to engage stakeholders and solicit their support during the legislative amendment exercise so as to secure passage of the amendment bill as soon as possible.

18. This amendment exercise is just a starting point of our on-going effort to maintain a robust and competitive copyright regime. The passage of the amendment bill will lay a solid foundation for further discussion with different stakeholders on other copyright issues in future. Upon passage of the amendment bill, we will embark on a new round of copyright review exercise to study the issues raised by different stakeholders, but are yet to be addressed in this legislative amendment exercise.

## **ADVICE SOUGHT**

19. Members are invited to note the outcomes of the public consultation and comment on the legislative proposals.

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<sup>4</sup> The enactment of the Copyright (Amendment) Ordinance 2020 renders Hong Kong fully compliant with the standards of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

**Commerce and Economic Development Bureau**  
**Intellectual Property Department**  
**April 2022**



# UPDATING HONG KONG'S COPYRIGHT REGIME

PUBLIC CONSULTATION PAPER



## Contents

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

## Chapter 1 Introduction

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

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

1.3 Unlike trade marks, patents and registered designs which require registration, the copyright system has no registration requirement and relies on a statutory scheme setting out legal norms that balance different rights and interests to support development needs. Since its enactment in 1997, we have completed several legislative amendment exercises to update the Copyright Ordinance (Cap. 528) (“CO”) to address different needs of society.<sup>1</sup> In particular, we have launched a major review exercise to update our copyright law to strengthen copyright protection in the digital environment. To this end, we have since 2006 conducted three rounds of major consultations and introduced two amendment bills, in 2011<sup>2</sup> (“2011 Bill”) and 2014<sup>3</sup> (“2014 Bill”) respectively, into the

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

<sup>2</sup> The Copyright (Amendment) Bill 2011.

<sup>3</sup> The Copyright (Amendment) Bill 2014.

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

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

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

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

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

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

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

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

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

## Chapter 2 Key Legislative Proposals of the 2014 Bill

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

### 2011 Bill

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

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

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

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

## **2014 Bill**

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

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

### **(A) Communication Right**

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

developments and in line with the practices of many overseas jurisdictions.<sup>6</sup>

## **(B) Criminal Liability**

2.6 To tie in with the proposal to introduce a technology-neutral communication right, criminal sanctions will also be introduced against those who make unauthorised communication of copyright works to the public (a) for the purpose of or in the course of any trade or business which consists of communicating works to the public for profit or reward; or (b) to such an extent as to affect prejudicially the copyright owners. The proposed criminal sanctions mirror the existing sanctions available in the CO against the distribution of infringing copies of works.<sup>7</sup>

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

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

<sup>7</sup> Section 118(1)(g) of the CO stipulates that:

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

*.....*

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

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

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

*.....*

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

## (C) Revised and New Copyright Exceptions

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

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

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

- (a) to provide greater flexibility to the education sector in communicating copyright works when giving instructions (especially for distance learning), and to facilitate libraries, archives and museums in their daily operations and in preserving valuable works;
- (b) to allow OSPs to cache data<sup>9</sup>, which technically involves copying and is a restricted act in the CO. Such caching is transient or incidental in nature and technically required for the process of data transmission to function efficiently; and
- (c) to allow media shifting of sound recordings for private and domestic use (i.e. the making of an additional copy of a sound recording from one media or format into another, usually for the purpose of listening to the work in a more convenient manner<sup>10</sup>), which technically is an act of copying and is restricted by copyright.

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

<sup>9</sup> 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.

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

### New fair dealing exceptions

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

- (a) **use for the purposes of parody, satire, caricature and pastiche**<sup>11</sup>, which are common means for the public to express views or comment on current events, and such use is usually critical and transformative in nature and should unlikely compete with or substitute the original works;
- (b) **use for the purpose of commenting on current events**; and
- (c) **use of a quotation the extent of which is no more than is required by the specific purpose for which it is used**, so as to facilitate expression of opinions or discussions in the online and traditional environment.

2.11 The new fair dealing exceptions proposed above would cover, in appropriate cases, a wide range of day-to-day Internet activities, so long as they are for the purposes of parody, satire, caricature, pastiche, commenting on current events or quotation. This should go a long way towards addressing the major

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<sup>11</sup> The Concise Oxford English Dictionary (12th Edition, 2011) defines the terms as follows –

Parody: **1** an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect. **2** a travesty.

Satire: **1** the use of humour, irony, exaggeration, or ridicule to expose and criticise people's stupidity or vices. **2** a play, novel, etc. using satire. ■ (in Latin literature) a literary miscellany, especially a poem ridiculing prevalent vices or follies.

Caricature: a depiction of a person in which distinguishing characteristics are exaggerated for comic or grotesque effect.

Pastiche: an artistic work in a style that imitates that of another work, artist or period.

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

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

#### **(D) Safe Harbour**

2.12 To provide incentives for OSPs to cooperate with the copyright owners in combating online piracy, and to provide sufficient protection for their acts, safe harbour provisions will be introduced to limit OSPs' liability for copyright infringements on their service platforms caused by subscribers, provided that they meet certain prescribed conditions, including taking reasonable steps to limit or stop a copyright infringement when being notified. The provisions would be underpinned by a voluntary Code of Practice<sup>12</sup> which sets out practical guidelines and procedures for OSPs to follow after notification.<sup>13</sup>

#### **(E) Additional Damages in Civil Cases**

2.13 Copyright infringement attracts civil liability which is actionable by owners. The general principle behind is to right the wrong that has been done to a claimant, who must bear the burden of proof of the wrongdoing and the harm done. As a general rule, damages are compensatory in nature and copyright owner has to prove the loss suffered by him or her as a result of infringement. In view of the difficulties encountered by the copyright owner in proving actual loss, the existing CO allows the court to award additional damages as the justice of the case may require having regard to all the circumstances, and, in particular, a number of statutory factors.<sup>14</sup> Given the digital challenges, two additional factors are proposed to be introduced in the CO for the court's assessment of damages, namely (a) the unreasonable conduct of an infringer after having been informed of

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

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

<sup>14</sup> Section 108(2) of the CO provides that "*the Court may in an action for infringement of copyright having regard to all the circumstances, and in particular to –*  
(a) *the flagrancy of the infringement;*  
(b) *any benefit accruing to the defendant by reason of the infringement; and*  
(c) *the completeness, accuracy and reliability of the defendant's business accounts and records,*  
*award such additional damages as the justice of the case may require.*"

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

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

## Chapter 3 Exhaustive Approach to Exceptions

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

### Exhaustive Approach

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

- (a) the purpose and nature of the dealing, including whether it is for a non-profit-making purpose and whether it is of a commercial nature;
- (b) the nature of the work;
- (c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and
- (d) the effect of the dealing on the potential market for or value of the work.<sup>16</sup>

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

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

## **Non-exhaustive Approach**

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

## **International Development**

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

## **Local Discussion**

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

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

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

## **Arguments Relating to Maintaining an Exhaustive Exception Approach**

3.6 Arguments for maintaining an exhaustive approach include –

(a) *Provide legal certainty*

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

(b) *In line with international practices*

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

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

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

(d) *Compatible with international agreements*

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

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

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

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

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

3.7 Arguments for not maintaining an exhaustive approach include –

(a) *More flexibility*

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

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

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

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

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

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

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

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

### **Question**

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

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

## Chapter 4 Contract Override

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

### Overseas Practices

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

### Local Discussion

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

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

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

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

## **Arguments Relating to Introducing Statutory Restrictions on Contract Override**

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

(a) *Freedom of contract*

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

(b) *Privity of contract*

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

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

(c) *Lack of empirical evidence*

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

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

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

(e) *No internationally consistent and unified approach*

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

4.5 Arguments for introducing statutory restrictions on contract override include –

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

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

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

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

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

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

(c) *Provide legal certainty for users*

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

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

## **Question**

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

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

## Chapter 5 Illicit Streaming Devices

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

### Overseas Practices

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

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

law offence of conspiracy to defraud<sup>25</sup> to combat ISDs. The UK government consulted the public on the need for legislative change in relation to the issue of ISDs in 2017. Opinions received were polarised and the UK government eventually decided not to pursue any legislative changes.

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

## Local Discussion

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

5.5 For example, under the CO, where the use of copyright works<sup>27</sup> involves the circumvention of technological measures adopted by copyright owners to prevent unauthorised copying or access to their works, such act may attract civil liability for circumventing technological measures;<sup>28</sup> or civil and criminal liabilities for dealing in circumvention devices or providing circumvention

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

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

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

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

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

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

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

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

<sup>30</sup> Section 275 of the CO.

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

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

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

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

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

(a) *No genuine need*

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

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

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

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

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

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

- (a) *Provide legal certainty*

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

- (b) *Facilitate enforcement*

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

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

## **Question**

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

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

## Chapter 6 Judicial Site Blocking

6.1 Judicial site or website blocking is a judicial process through which copyright owners may apply to the court for an order of injunction, requiring OSPs to take steps<sup>32</sup> to prevent or disable their local subscribers or users from accessing websites or online locations, usually operated outside the territory,<sup>33</sup> that are identified to have dedicated to distributing infringing contents of copyright works (e.g. music, movies and games), or facilitating such distribution (e.g. file sharing, storage and streaming) without authorisation. The aim of a site blocking order is to stop copyright infringement activities occurring on or via a particular online platform. Depending on the law of the relevant jurisdiction, site blocking orders or injunctions may be granted by the courts in the exercise of their inherent jurisdiction or pursuant to statutory provisions whether in general or dedicated to infringements of IP rights.

### Overseas Practices

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>40</sup> Section 21L of the HCO.

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

## **Local Discussion**

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

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

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

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

<sup>42</sup> Section 107(2) of the CO.

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

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

(a) *Lack of evidence*

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

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

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

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

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

6.10 Arguments for introducing copyright-specific statutory provisions include –

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

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

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

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

(b) *Provide clarity to OSPs*

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

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

**Question**

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

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

## Chapter 7 Possible New Issues for Further Studies

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

(a) *Extension of copyright term of protection*

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

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

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

(c) *AI and copyright*

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

related matters in their copyright laws to date.

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

## Chapter 8 Invitation of Views

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

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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](mailto:co_consultation@cedb.gov.hk)

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

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

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

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

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

**(I) Using the Bill as the Basis of Legislation**

infringing activities, including those involving unauthorised retransmission, ISDs and related software applications (“Apps”), as well as websites which aggregate links to infringing materials hosted on third party websites (“link aggregate websites”), etc. They therefore suggest that the Government should delete or amend the relevant provisions. Among these respondents, some consider that while some online platform operators do not determine the content of the communication, they generate enormous profits by operating platforms that allow subscribers to upload unauthorised contents. Such acts should be regarded as “communication to the public”, and these online platform operators should obtain licences from copyright owners. Furthermore, any person who provides devices or software specifically used for communicating infringing contents, or knowingly creates link aggregate websites should not be exonerated from liability regardless of whether that person could determine the content of the communication. A copyright owner / organisation / group even expresses that if its proposal of deleting the new section 28A(4)-(6) is not accepted, it will not support this copyright amendment exercise. Individual copyright owners / organisations / groups also suggest that the new section 28A should be amended to expressly provide that electronic communication includes live streaming and transmission of live content, and to stipulate that a communication may take place where the communicator is situated or where the target audience is located.

- A copyright owner / organisation / group considers that the factors for determining “authorisation” introduced in the proposed section 22(2A) is too broad. This may exclude digital service providers from certain copyright infringement liability that they should be held responsible and also limit the ability of copyright owners to enforce their rights. The respondent suggests that the Government should make reference to the European Union (“EU”)’s approach and stipulate in the law that online platform operators allowing subscribers to upload copyright protected works is an act of communication / making such works available to the public.

**(I) Using the Bill as the Basis of Legislation**

- Some copyright owners / organisations / groups express their views on the issue of criminal liability. The respondents suggest that the thresholds of criminal liability for the existing “prejudicial distribution offence” and the proposed new “prejudicial communication offence” should be explicitly set out; the criminal sanctions should be clearly clarified so that systematic, repetitive or large-scale infringements by individuals are equally punishable as infringements by commercial entities; acts of uploading and distributing infringing hyperlinks should attract criminal liability; the maximum custodial sentence for the offence of unauthorised communication of copyright works should be increased; and wording used in the proposed provisions on criminal liability should be amended.

*Safe harbour and relevant Code of Practice*

- Some copyright owners / organisations / groups consider that the proposed safe harbour regime and relevant Code of Practice are unable to keep up with the latest technological developments and should be re-examined and updated as appropriate (e.g. with reference to the EU’s latest approach) to ensure that they are kept abreast of the latest operating modes of OSPs in the current digital environment.
- Some copyright owners / organisations / groups consider that the scope of the proposed safe harbour is too broad, and suggest that it should only apply to OSPs which are neutral and merely providing technological services and those which are passive intermediaries. It should not provide protection to OSPs which are aware of and facilitate the conduct of infringing activities, or OSPs which even actively or proactively communicate infringing contents.
- Individual copyright owners / organisations / groups propose that the Government should

**(I) Using the Bill as the Basis of Legislation**

stipulate that OSPs must meet certain additional conditions in order to benefit from protection under the safe harbour scheme, for example, specify that infringing contents or hyperlinks must be removed within a specified short period of time; adopt a “Notice and Staydown” system and include a “disabling access” requirement for infringing content to replace the “Notice and Takedown” system; stipulate that OSPs should proactively take measures to prevent uploading of infringing content; and set out clear liability provisions or penalties against OSPs which fail to observe the conditions of the safe harbour scheme.

- Individual copyright owners / organisations / groups consider that a voluntary Code of Practice will result in non-compliance by some OSPs. They also consider it necessary to clearly explain the actual and potential legal issues in the implementation of the CO and Code of Practice.

*Copyright exceptions*

- Different copyright owners / organisations / groups respectively express various views on certain revised or new copyright exceptions for different purposes proposed in the Bill. In general, most respondents consider that certain copyright exceptions should be tightened, or that clear scopes or conditions of use should be prescribed. It should also be ensured that the relevant exceptions meet the “three-step test” stipulated under the Berne Convention for the Protection of Literary and Artistic Works. An individual respondent considers that the current copyright exception framework is already sufficiently broad and comprehensive, and there is no need to further expand the existing exceptions.
- While some copyright owners / organisations / groups support the new copyright exceptions in giving greater flexibility to the education sector, they consider that the copyright exceptions provided for educational purposes should only apply to non-profit-making organisations or

**(I) Using the Bill as the Basis of Legislation**

be for “non-commercial purposes”, and should not be applicable to privately-run organisations, educational institutions or tutorial centres. They suggest that the Government should prescribe the conditions of use for the relevant exceptions.

- A copyright owner / organisation / group considers that the use of copyright exceptions in the digital environment by the education sector, libraries, museums, archives and non-governmental organisations (“NGOs”) should be limited to certain percentages of usage, and applications should be submitted to inform copyright owners of their intention of use. On the other hand, a respondent expresses that the permissible percentage of use of books should not be included in the education-related copyright exceptions, as this would make the conditions less flexible and affect the current cooperative arrangement between the textbook industry and the Education Bureau.
- A copyright owner / organisation / group suggests that the exception for lending books should be clarified and should not include e-books or electronic versions of copyright protected works.
- Regarding the proposed new exception for media shifting of sound recordings, a copyright owner / organisation / group considers that the relevant exception should not be introduced; a respondent considers that the relevant exception should not apply to sound recordings of literary works; and a respondent suggests that the Government should introduce a levy system for media shifting of sound recordings.
- Regarding the proposed new exception for parody, satire, caricature and pastiche, a copyright owner / organisation / group considers that the relevant exception is not necessary at all; some respondents suggest that the exception should only exempt fair dealing of an original work for the purpose of parody. Separately, some respondents consider that the relevant exception

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

**(I) Using the Bill as the Basis of Legislation**

with times and international norms. Some respondents consider that the Government should continue to update the copyright regime in future so as to address emerging copyright issues.

*Communication right and criminal liability*

- An IP practitioners' group and a statutory body express their support for the introduction of a technology-neutral communication right and the relevant criminal liability to address copyright issues arising from new technology such as streaming, and to bring Hong Kong's regime in line with other jurisdictions.
- A chamber of commerce and a representative office of foreign states in Hong Kong propose that guidance should be provided for the proposed new section 28A(5) and (6) and the concept of "to such an extent as to affect prejudicially the copyright owner", in order to further clarify the relevant legislative intent and threshold for criminal liability. Separately, an NGO expresses concerns about members of the public having to bear criminal liability for using copyright works in creations for self-entertainment and non-profit-making purposes, because it would be difficult for creators to estimate and control the extent of dissemination of works on the Internet and their potential market value.
- A statutory body considers that "orphan works" must be taken into account in the framing of provisions of criminal liability, and proposes that the exemption from the criminal liability of possessing an infringing copy of a copyright work should be aligned such that it is applicable to museums owned by statutory bodies that are exempt from taxation.

**(I) Using the Bill as the Basis of Legislation**

*Safe harbour and relevant Code of Practice*

- Some OSPs, chambers of commerce and IP practitioners' groups agree to the introduction of the safe harbour regime, considering that it can help combat online infringing activities, as well as provide reasonable protection to OSPs. However, an IP practitioners' group considers that the Code of Practice should be reviewed in accordance with overseas practice and the interests of the relevant industries.
- Some OSPs express concerns about the details and implementation of the relevant safe harbour provisions and Code of Practice, considering that severe impacts would be brought on their operation. They raise a number of suggestions with a view to ensuring that the safe harbour regime would not impose unreasonable responsibilities on OSPs, which include, for example, the practical difficulty in implementing the "Notice and Notice" system should be taken into consideration; some of the applicable conditions of the proposed safe harbour provisions are unduly strict; OSPs should be compensated for the costs borne when implementing the relevant procedures, and an administrative charge should be imposed by OSPs on the relevant copyright owners / complainants according to the "user pays" principle; and OSPs should be excluded from criminal liability and sanctions, etc.
- Some OSPs are concerned that the takedown mechanism under the safe harbour scheme may be abused by copyright owners. They consider that the current practice, where copyright owners must submit an infringement claim to the court / law enforcement agency in order to obtain the particulars of the alleged infringer, should be adopted. An individual professional body suggests that the legislation should stipulate that an OSP should disclose the personal particulars of any alleged infringer to the copyright owner only when a relevant court order has been received.

**(I) Using the Bill as the Basis of Legislation**

*Copyright exceptions*

- An IP practitioners' group, a professional body and a statutory body welcome the various proposed new copyright exceptions.
- A professional body from the education sector considers that the new copyright exceptions for educational purposes can provide flexibility to the education sector for a wider scope of non-profit-making educational activities (e.g. virtual learning, preservation of materials and other daily operational work), and proposes to expand the scope of the media shifting exception to cover other media archives for educational and academic use, so as to facilitate the relevant digital preservation by libraries, museums and archives. The respondent also proposes to introduce a new copyright exception for educational establishments subsidised by the Government, the University Grants Committee and the Research Grants Committee for making copies of copyright work for the purposes of academic quality assurance, audit and assessment.
- A statutory body proposes to introduce a new exception to use "orphan works" for non-commercial activities and new copyright exceptions for activities conducted by museums.
- An NGO proposes to prescribe definitions for the new exceptions such as those for "parody" and "satire".
- An NGO and a professional body consider that the scope of application of the proposed exceptions for quotation and commenting on current events should be more clearly defined.
- An NGO and a professional body consider that copyright exceptions should be provided for

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

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

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

**(II) Exhaustive Approach to Exceptions**

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

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

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

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

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

**(IV) Illicit Streaming Devices**

IV.3	Copyright users / other individuals	<ul style="list-style-type: none"><li>• Only a handful of copyright users / other individuals express views on this issue. A respondent agrees with the Government's position and considers that specific provisions should not be introduced to the CO to combat ISDs because the legislation may not be able to keep up with technological developments, which may hinder the free and fair dissemination of creative works. There are also respondents who consider that the act of selling ISDs has caused nuisance to the public, and that the Government should legislate on ISDs and set out the civil and criminal liabilities of the relevant act.</li></ul>
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<b>(V) Judicial Site Blocking</b>		
	<b>Responding Organisations / Groups / Individuals</b>	<b>Summary of Views</b>
V.1	Copyright owners / organisations / groups	<ul style="list-style-type: none"> <li>• Most copyright owners / organisations / groups consider that while it is possible to apply for website blocking injunction against online infringements under the existing HCO, a copyright-specific judicial site blocking mechanism should be introduced to the CO in order to tackle online infringements (especially infringing websites operating outside the territory) more effectively and expeditiously, reduce costs and enhance legal certainty. They consider that this can also provide greater certainty on the conditions and related responsibilities under an injunction ordered by the court, and provide clearer guidelines for copyright owners and OSPs on the steps to be taken in applying for and enforcing an injunction. Some respondents suggest that the Government should make reference to the approaches adopted in similar provisions in Australia, Singapore and the UK. A respondent also points out that the copyright-specific judicial site blocking mechanism should target various intermediary platforms, including search engines, and allow the grant of dynamic blocking orders in appropriate circumstances. Furthermore, the costs for complying with an injunction should be appropriately apportioned between applicants and respondents, and that applications for injunction should be heard by a specialty court (e.g. the Copyright Tribunal).</li> <li>• A few copyright owners / organisations / groups agree with the Government's position, and consider it not necessary to introduce a copyright-specific judicial site blocking mechanism.</li> <li>• Some copyright owners / organisations / groups express that it is costly to apply for an injunction and this would impose economic burden on copyright owners. They consider that the Government should examine how to provide more assistance to copyright owners, for example, whether the Government, rather than copyright owners, could apply to the court for an injunction. A copyright owner / organisation / group suggests making reference to</li> </ul>

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

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

**(VI) Other Copyright Issues**

- A few copyright owners / organisations / groups oppose the introduction of specific copyright exceptions for text and data mining, as they consider that the definition of text and data mining is too broad and any such use for commercial and business purposes may unfairly prejudice the rights of copyright owners. They consider that the use of licences is the best solution to promote these activities as it can provide appropriate flexibility while protecting the rights of copyright owners.

*Artificial intelligence (“AI”) and copyright*

- Some copyright owners / organisations / groups express views on this issue. Some respondents consider that whether the works created by AI should be regarded as works protected by copyright under specific circumstances can be further considered. Apart from exploring issues such as who should own the copyright of works created by AI and infringements involving works created by AI, consideration should also be given to problems relating to the use of copyright works to train AI. Separately, some respondents consider that the introduction of any legislation relating to AI and copyright should be deferred since such technology is still in its nascence and consultations and discussions on this issue in the international community have just begun.
- Some copyright owners / organisations / groups consider that the existing law can already address the problems brought by current AI technologies and provide copyright protection for computer-generated works or works created with the help of AI. Hence, there is no need to amend the CO in this regard at this stage.
- A copyright owner / organisation / group considers that the basic concept of “data” which

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

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

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

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

## **Updating Hong Kong’s Copyright Regime**

### **Detailed Proposals of the Consultation Document, Summary of Respondents’ Views and Government’s Detailed Responses**

#### **PROPOSALS OF THE CONSULTATION DOCUMENT**

##### **(I) Using the Bill as the Basis of Legislation**

We propose to use the Bill as the basis to update Hong Kong’s copyright regime. The Bill contains legislative proposals in the following five key areas.

##### **(A) Communication Right**

2. At present, the CO gives copyright owners certain exclusive rights, including the right to make a copyright work available to the public on the Internet, to broadcast a work or to include a work in a cable programme service. Considering that new modes of electronic transmission would emerge with advances in technology, and to ensure that the protection afforded to copyright owners would cover any mode of electronic transmission, we propose to introduce in our copyright regime a new technology-neutral exclusive communication right for copyright owners to communicate their works to the public through any mode of electronic transmission (including streaming). The introduction of a technology-neutral communication right will bring our copyright regime on par with international developments and in line with the practices of many overseas jurisdictions.<sup>1</sup>

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<sup>1</sup> Many overseas jurisdictions have long introduced a communication right to enhance copyright protection in the digital environment, including the European Union (2001), Australia (2001), the United Kingdom (“UK”) (2003), Singapore (2005), New Zealand (2008) and Canada (2012).

## (B) Criminal Liability

3. To tie in with the proposal to introduce a technology-neutral communication right, criminal sanctions will also be introduced against those who make unauthorised communication of copyright works to the public (a) for the purpose of or in the course of any trade or business which consists of communicating works to the public for profit or reward; or (b) to such an extent as to affect prejudicially the copyright owners. The proposed criminal sanctions mirror the principles of the existing sanctions available in the CO against the distribution of infringing copies of works.<sup>2</sup>

## (C) Revised and New Copyright Exceptions

4. Copyright is an intangible property right that promotes creativity by providing authors and lawful owners with economic incentives. But its protection is not without limitations. Fair access to and uses of copyright works by others are also important, not only for freedom of expression in its own right but also for dissemination and advancement of knowledge which also promotes creativity. The existing CO contains over 60 sections specifying a number of permitted acts which may be done in relation to copyright works without attracting civil or criminal liability notwithstanding the subsistence of copyright (such as for the purposes of research, private study, education, criticism, review and reporting current events).<sup>3</sup> To tie in with the introduction of the

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<sup>2</sup> Section 118(1)(g) of the existing CO stipulates that –

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

*.....*

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

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

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

*.....*

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

<sup>3</sup> In addition, our copyright regime accepts any rule of law that restricts the enforcement of copyright on the ground of public interest (section 192 of the CO).

communication right, we propose to revise and expand the scope of permitted acts as appropriate to maintain the balance between copyright protection and reasonable use of copyright works.

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

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

- (a) to provide greater flexibility to the education sector in communicating copyright works when giving instructions (especially for distance learning), and to facilitate libraries, archives and museums in their daily operations and in preserving valuable works;
- (b) to allow OSPs to cache data,<sup>4</sup> which technically involves copying and is a restricted act in the CO. Such caching is transient or incidental in nature and technically required for the process of data transmission to function efficiently; and
- (c) to allow media shifting of sound recordings (i.e. the making of an additional copy of a sound recording from one media or format into another, usually for the purpose of listening to the work in a more convenient manner)<sup>5</sup> for private and domestic use.

*New fair dealing exceptions*

6. Many copyright users believe that the scope of permitted acts should include a wide range of common activities on the Internet which might make use of copyright works, such as mash-ups, altered pictures/videos, doujinshi, image/video capture, streaming of video game playing, homemade videos, posting of earnest performance of copyright works, rewriting lyrics for songs, etc. On the other hand, copyright owners believe that the current copyright regime

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<sup>4</sup> 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.

<sup>5</sup> Media shifting is technically an act of copying and is restricted by copyright. A typical example is the copying of sound recordings from an audio compact disc to the embedded memory of a portable MP3, i.e. from compact disc digital audio format to MP3 format.

with licensing as the centrepiece together with various statutory exceptions is operating well to deal with these matters and causing no problems in practice in Hong Kong and elsewhere. To balance different interests, new fair dealing exceptions are proposed to be introduced to cover –

- (a) use for the purposes of parody, satire, caricature and pastiche,<sup>6</sup> which are common means for the public to express views or comment on current events, and such use is usually critical and transformative in nature and should unlikely compete with or substitute the original works;
- (b) use for the purpose of commenting on current events; and
- (c) use of a quotation the extent of which is no more than is required by the specific purpose for which it is used, so as to facilitate expression of opinions or discussions in the online and traditional environment.

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

(D) Safe Harbour

8. To provide incentives for OSPs to cooperate with the copyright owners

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<sup>6</sup> The Concise Oxford English Dictionary (12th Edition, 2011) defines the terms as follows –

Parody: **1** an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect. **2** a travesty.

Satire: **1** the use of humour, irony, exaggeration, or ridicule to expose and criticise people's stupidity or vices. **2** a play, novel, etc. using satire. ■ (in Latin literature) a literary miscellany, especially a poem ridiculing prevalent vices or follies.

Caricature: a depiction of a person in which distinguishing characteristics are exaggerated for comic or grotesque effect.

Pastiche: an artistic work in a style that imitates that of another work, artist or period.

The above proposed scope consists of well recognised literary or artistic practices. Similar scopes have also been covered by the copyright exceptions in other overseas copyright regimes, such as Australia, Canada and the UK.

in combating online piracy, and to provide sufficient protection for their acts, safe harbour provisions will be introduced 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<sup>7</sup> which sets out practical guidelines and procedures for OSPs to follow after notification.<sup>8</sup>

(E) Additional Damages in Civil Cases

9. Copyright infringement attracts civil liability which is actionable by owners. The general principle behind is to right the wrong that has been done to a claimant, who must bear the burden of proof of the wrongdoing and the harm done. As a general rule, damages are compensatory in nature and copyright owner has to prove the loss suffered by him or her as a result of infringement. In view of the difficulties encountered by the copyright owner in proving actual loss, the existing CO allows the court to award additional damages as the justice of the case may require having regard to all the circumstances, and, in particular, a number of statutory factors.<sup>9</sup> Given the challenges in the digital environment (especially in providing evidence), we propose to introduce two additional factors in the CO for the court to consider when determining whether to award additional damages, namely (a) the unreasonable conduct of an infringer after having been informed of the infringement; and (b) the likelihood of widespread circulation of infringing copies as a result of the infringement.

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<sup>7</sup> The draft Code of Practice ([https://www.cedb.gov.hk/assets/resources/citb/\(Eng\)%20Draft%20Code%20of%20Practice%20\(March%202012\).pdf](https://www.cedb.gov.hk/assets/resources/citb/(Eng)%20Draft%20Code%20of%20Practice%20(March%202012).pdf)) was formulated after taking into account views received in two rounds of consultation in 2011 and 2012 respectively. During the consultation, stakeholders expressed views towards the draft Code of Practice, the details of which are set out in the latter part of the paper.

<sup>8</sup> For example, the Code of Practice sets out a "Notice and Notice" system which requires OSPs to notify their subscribers or users that their accounts have been identified in connection with an alleged copyright infringement; and a "Notice and Takedown" system where OSPs are required to remove materials or disable access to materials (stored or made available for search on the service platforms by subscribers) that are found to be infringing.

<sup>9</sup> Section 108(2) of the CO provides that "*the Court may in an action for infringement of copyright having regard to all the circumstances, and in particular to –*  
(a) *the flagrancy of the infringement;*  
(b) *any benefit accruing to the defendant by reason of the infringement; and*  
(c) *the completeness, accuracy and reliability of the defendant's business accounts and records, award such additional damages as the justice of the case may require.*"

## **(II) Exhaustive Approach to Exceptions**

10. The existing CO exhaustively sets out copyright exceptions based on a specified range of purposes and circumstances, as well as the permitted acts under the legislation. If the act concerned fulfils the prescribed purposes, circumstances or conditions, a user may rely on the relevant exceptions and be exempted from legal liabilities. Most overseas jurisdictions, including Australia, Canada, the European Union (“EU”), New Zealand and the United Kingdom (“UK”), adopt such exhaustive approach to exceptions.

11. On the other hand, a handful of overseas jurisdictions, such as the United States (“US”), adopt a non-exhaustive approach in providing exceptions for copyright infringements and only provide in their legislation general open-ended exceptions having regard to whether a particular use of a work is fair (i.e. the exceptions are not confined to the purposes specified in the legislation). When determining whether a particular use of a work is fair, the court would take into account all the circumstances of the case, including factors that are not prescribed in the legislation.

12. Given that most jurisdictions worldwide adopt the exhaustive approach to exceptions and the lack of adequate empirical evidence to support that the non-exhaustive approach would promote the development of innovation and technology and bring economic benefits, it is the Government’s position to maintain the existing exhaustive approach as it will give more certainty to copyright owners and users in the exploitation of copyright works.

## **(III) Contract Override**

13. Under copyright law, contract override refers to the practice by which copyright owners and users can customise the terms and conditions for use of the relevant copyright work by entering into a contract (such as one authorising or granting a licence to use the copyright work). The contracts may include terms and conditions that exclude or restrict the application of certain statutory copyright exceptions or permitted acts. Such contracts do not affect the rights of other users to use copyright exceptions.

14. The existing CO respects the freedom of contract. There is no express provision that restricts anyone from using contract terms and conditions to exclude or restrict certain statutory copyright exceptions. There is also no unified approach in overseas jurisdictions on the use of statutory restrictions on contract override. Given that there is no empirical evidence to support that users are prevented from using existing copyright exceptions by contract override, and the importance of upholding freedom of contract in business operations, it is the Government's position to maintain a non-interference approach to contractual arrangements agreed between copyright owners and users.

#### **(IV) Illicit Streaming Devices**

15. Streaming devices usually refer to set-top boxes, which are devices that enable users to locate and access audio-visual materials available on the Internet usually via software applications ("Apps"). Set-top boxes and related Apps are widely available to serve legitimate purposes and are an indispensable part of the digital environment nowadays. However, allegedly infringing online materials could also be communicated without the authorisation of copyright owners by streaming through the use of certain suspicious set-top boxes or Apps, which are often referred to as ISDs.

16. We are of the view that the CO already contains various provisions to deal with online copyright infringement activities that could be applied to combat ISDs. Our tools against online infringements will be further enhanced when the proposed new communication right is incorporated into our statutory framework. Most overseas jurisdictions do not have specific provisions concerning ISDs in their copyright legislation, and to our knowledge, among the common law jurisdictions, only Singapore and Malaysia have relevant specific provisions in their copyright legislation<sup>10</sup> so far, but the effectiveness of such statutory provisions has yet to be observed. Taking into account the above, it is the Government's position not to introduce specific provisions in the copyright law to combat ISDs.

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<sup>10</sup> Singapore's new Copyright Act and Malaysia's Copyright (Amendment) Act 2022, which set out specific provisions concerning ISDs, took effect in November 2021 and March 2022 respectively.

## **(V) Judicial Site Blocking**

17. Judicial site blocking is a judicial process through which copyright owners may apply to the court for an order of injunction, requiring OSPs to take steps to prevent or disable their local subscribers or users from accessing websites or online locations, usually operated outside the territory, that are identified to have dedicated to distributing infringing contents of copyright works or facilitating such distribution without authorisation.

18. Site blocking orders have been granted by the courts on the application of copyright owners in many jurisdictions. The legal basis for granting such orders varies from one jurisdiction to another. Australia, Singapore and the UK have enacted specific provisions in their copyright legislation to empower the courts to grant site blocking orders.<sup>11</sup> Some EU countries also have copyright-specific provisions, while others rely on more general provisions in granting blocking orders. There are currently no copyright-specific statutory provisions for site blocking injunctions in Hong Kong. However, section 21L of the HCO specifically provides that the Court of First Instance may by order grant an injunction in all cases in which it appears to the court to be just or convenient to do so. We consider that the HCO already provides a ready tool for copyright owners to seek injunctions against online copyright infringements. In the absence of evidence that the relief currently available could not serve the purpose of empowering the courts to grant site blocking injunctions, and to avoid any public concerns over potential abuse which might result in adverse impact on freedom of access to information, it is the Government's position not to introduce a copyright-specific judicial site blocking mechanism.

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<sup>11</sup> In Australia, when applying for an injunction to block access to an infringing online location, a copyright owner may also request the court to order an online search engine provider to take reasonable steps not to provide search results that refer to the same online location by, for example, de-indexing or stop indexing such search results.

## SUMMARY OF VIEWS ON KEY ISSUES AND GOVERNMENT'S RESPONSES

### (I) Using the Bill as the Legislative Basis to Amend the CO as Soon as Possible

19. The majority of respondents agree that there is an imminent need for Hong Kong to update our copyright regime and generally support using the Bill as the basis for amending the CO. They call for an early passage of the amendment bill to keep Hong Kong's copyright regime abreast with times and in line with international developments. That said, some respondents have different views on individual provisions or legislative proposals therein.

20. Regarding the introduction of the **communication right**, many copyright owners consider that the scope of coverage of the proposed new section 28A(4)-(6) of the Bill, which stipulates that certain acts do not constitute "communication to the public", is too broad, and will render the amendment bill unable to effectively combat infringing activities, including those involving unauthorised retransmission, ISDs and related Apps, and websites which aggregate links to infringing materials hosted on third party websites ("link aggregate websites"), etc. They therefore suggest that the Government should delete or amend the relevant provisions.

21. The Government reiterates that the proposed new section 28A(4)-(6) aims to strike a fine balance between the legitimate interests of copyright owners and public interests, thereby ensuring that the scope of the communication right is reasonable, including specifying that the following circumstances do not constitute "communication to the public" –

- (a) the proposed new section 28A(4) is to illustrate that parties providing facilities for the carriage of signals (such as OSPs) would not, by the mere acts of providing the relevant facilities, be subject to legal liabilities for unauthorised communication to the public.

This proposed new provision is similar to section 26(4)<sup>12</sup> of the

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<sup>12</sup> Section 26(4) of the CO provides that "*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.*"

existing CO relating to infringement by making available of copies to the public, both of which are based on the Agreed Statement concerning Article 8 (Right of Communication to the Public) of the World Intellectual Property Organization (“WIPO”) Copyright Treaty.<sup>13</sup> That Agreed Statement clearly states that the mere provision of physical facilities for enabling or making a communication does not amount to “communication to the public”; and

- (b) the proposed new section 28A(5) and (6) is to illustrate that the daily and reasonable online behaviours of the general public would not constitute “communication to the public”, so as to prevent them from breaching the law inadvertently. For instance, the mere inclusion of hypertext in the content of, or forwarding or sharing of a hyperlink on a web page, email, social media or an instant message software by individual Internet users, or their mere viewing of or access to materials made available or communicated by others, where the user so doing does not determine the content of the communication,<sup>14</sup> should not constitute a “communication to the public”.

22. We have to stress that one should not unilaterally interpret the proposed new section 28A(4)-(6) as unconditionally absolving a person from all legal liabilities involved with unauthorised communication to the public. The relevant provisions must be interpreted alongside other applicable provisions or law according to legal principles, such as the proposed new section 22(2A) of the Bill, which provides that the court may take into account all the circumstances of the case when determining whether an act may amount to “authorisation” of

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<sup>13</sup> The WIPO Copyright Treaty is applicable to Hong Kong. The Agreed Statement concerning Article 8 of the Treaty provides that “*the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.*” We note that a provision similar to the proposed section 28A(4) is also included in Recital (27) of the EU’s Information Society Directive. Furthermore, according to cases related to the right of communication to the public in Australia and the UK, the courts also used the principles of the Agreed Statement to determine whether a certain act constituted “communication to the public”.

<sup>14</sup> Some jurisdictions, such as Australia and Singapore, also include “determining the content of a communication” as a principle to determine whether a certain act would be considered as “communication to the public” in their legislative provisions on communication right.

copyright infringement,<sup>15</sup> in order to determine whether the relevant acts would be subject to civil and/or criminal liabilities of copyright infringements.

23. When the communication right is incorporated into the CO, unauthorised retransmission or the doing of certain acts involving ISDs and related Apps or link aggregate websites may be subject to various civil and/or criminal liabilities, depending on the circumstances and evidence of individual cases. For example, such acts may constitute (a) an infringement of the right to communicate to the public;<sup>16</sup> (b) authorisation of copyright infringement;<sup>17</sup> (c) joint tortfeasance in respect of copyright infringement; (d) fraudulent reception of transmissions;<sup>18</sup> (e) circumvention of technological measures adopted by copyright owners to prevent unauthorised copying or access to their works, or dealing in circumvention devices or providing circumvention services for

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<sup>15</sup> According to the proposed new section 22(2A) of the Bill, to determine whether a certain act may amount to “authorisation” of copyright infringement, the court may take into account all the circumstances of the case and, in particular – (a) the extent of that person’s power (if any) to control or prevent the infringement; (b) the nature of the relationship (if any) between that person and that other person; and (c) whether that person has taken any reasonable steps to limit or stop the infringement.

<sup>16</sup> For example, if a person has actively taken steps in the communication process to capture and process the broadcast signals or data by other means for simultaneous and unaltered retransmission via the Internet, such person can still be considered as determining the content of the communication concerned, hence “communicating to the public”. The proposed new section 28A(4)-(6) would not absolve the person concerned of legal liabilities.

<sup>17</sup> In an Australian case, *Universal Music Australia Pty Ltd v. Cooper* [2005] FCA 972 and *Cooper v. Universal Music Australia Pty Ltd* [2006] FCAFC 187, the defendant was an operator of a links aggregate website. The relevant sound recordings downloaded were not transmitted or provided by the defendant’s links aggregate website and the downloading process did not occur on the defendant’s website. While the court ruled that the defendant did not communicate the relevant sound recordings to the public, the defendant had incurred legal liability for the authorisation of the relevant communication.

<sup>18</sup> Section 275 of the existing CO provides legal recourse to a person who charges for reception of programmes included in a broadcasting or cable programmes services or sends encrypted transmissions against any person who “makes, imports, exports or sells or lets for hire any apparatus or device designed or adapted to enable or assist persons to receive the programmes or other transmissions when they are not entitled to do so”. This section provides additional civil remedies to copyright owners against manufacturers and dealers of ISDs in appropriate cases.

commercial purposes;<sup>19</sup> and/or (f) the offence of conspiracy to defraud,<sup>20</sup> and the relevant persons involved may be held accountable for applicable civil and/or criminal liabilities.<sup>21</sup>

24. The Government's position is that **the proposed new section 28A(4)-(6) has balanced and protected the interests of different stakeholders** and will not render the amendment bill unable to achieve its intended effect. It was also the largest consensus reached amongst most of the stakeholders and supported by the LegCo Bills Committee during the scrutiny of the Bill. Therefore, **we do not agree to completely delete the relevant provisions. Nevertheless, taking into account the copyright owners' concerns, we will carefully consider making appropriate clarifications or adjustments when drafting the relevant provisions.**

25. Separately, some respondents also have different views on the proposed new safe harbour provisions and the scope of copyright exceptions.

26. On **safe harbour**, some copyright owners consider that the scope of the currently proposed safe harbour is too broad and are concerned that the relevant provisions could shelter those OSPs that profit from the sharing of infringing contents by subscribers on their platforms. They therefore suggest that the Government should require OSPs to take a more proactive role in combating online infringing activities and observe more prescribed conditions in order to benefit from protection under the safe harbour. On the contrary, some OSPs consider that the prescribed conditions specified in the proposed safe harbour provisions would impose a significant burden on them. They are also concerned that the notice of alleged infringement given by copyright owners may not be

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<sup>19</sup> The Customs and Excise Department smashed a syndicate in June 2014 which was found to have uploaded copyright contents from paid TV channels to overseas servers for Internet transmission to set-top boxes sold to local consumers (the "Maige Box case"). Three offenders were convicted of the offences of providing circumvention device or service under the CO and the common law offence of conspiracy to defraud and received heavy custodial sentences.

<sup>20</sup> The common law offence of conspiracy to defraud requires that at least two persons dishonestly conspire to commit a fraud against a victim, harming the victim's interests.

<sup>21</sup> In general, whether the prosecution of a criminal offence is successful or not depends not only on whether the act of the person involved constitutes a criminal act (*actus reus*), but also on whether the person has the relevant criminal intent (*mens rea*). Furthermore, in the prosecution of a criminal offence, apart from the principal offender, joint offenders and accomplices/accessories may also be prosecuted depending on the circumstances and evidence of the case.

complete or valid, which will make it difficult for OSPs to take steps to stop the relevant activities. Both the copyright owners and OSPs have also provided various comments on the Code of Practice. On the other hand, some copyright users are concerned that the takedown mechanism under the safe harbour may be abused, impacting the freedom of expression.

27. We wish to point out that the proposed new safe harbour provisions have already incorporated various safeguards<sup>22</sup> to address the concerns of different stakeholders. In fact, similar safe harbour provisions are also prescribed in the copyright legislation of a number of overseas jurisdictions (such as Australia, Singapore, the UK and the US) to incentivise OSPs to take reasonable measures to limit infringing activities on their service platforms. We consider that the proposed safe harbour represents the result of years of deliberation of copyright owners, users and OSPs, balancing the interests of different stakeholders. **The relevant safe harbour mechanism should be established first, but we will continue to engage the trade and take into account the views of different stakeholders in enhancing the Code of Practice underpinning the relevant provisions and the operational details of the safe harbour regime.** We will also continue to monitor the latest international developments on this issue, with a view to reviewing and enhancing our safe harbour regime from time to time.

28. On **copyright exceptions**, some copyright users and organisations suggest that the Government should introduce new exceptions to cover acts such as earnest imitation of copyright works or “secondary creations”. For example, a user generated content exception similar to the one adopted in Canada should be introduced to allow individuals to use existing copyright works to create new works for non-commercial purposes that have no material adverse effect on the exploitation of or market for the existing works, so as to provide greater flexibility and room for promoting creativity and arts development. On the contrary, some copyright owners consider that the scope of the proposed revised and new copyright exceptions should be tightened. Some are particularly concerned about the exceptions provided for educational purposes as they believe that the relevant exceptions should only apply to non-profit-making educational

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<sup>22</sup> For instance, upon receipt of a counter notice filed by a subscriber, an OSP is required to take reasonable steps to reinstate the removed material unless it has been notified in writing by the complainant that proceedings have been commenced in Hong Kong seeking a court order (such as an injunction) in connection with any infringing activity that relates to the material. In addition, both the complainant and subscriber are required to provide sufficient and specific information to substantiate their notice of alleged infringement and counter notice. A complainant or subscriber making a false statement may be subject to civil and criminal liabilities.

establishments and that more conditions of use should be prescribed for using such exceptions.

29. The Government reiterates that the revised and new copyright exceptions for educational purposes are proposed to tie in with the introduction of the communication right and to address the changes in the mode of learning in the digital environment, with a view to providing greater flexibility to the education sector in communicating copyright works when giving instructions (especially for distance learning). Not only are the relevant exceptions supported by the education sector, but some teachers also express their wish for the Government to further relax the exceptions provided for educational purposes.

30. We have to balance the interests of copyright owners and the needs of the education sector as users. To ensure that the relevant copyright exceptions would not be abused, the proposed revised and new copyright exceptions have also incorporated certain conditions of use. For example, the exceptions are only applicable for educational purposes of educational establishments; only specified persons may use or receive recordings or copies made pursuant to the exceptions and their communication; the relevant exceptions cannot be used under certain circumstances if licensing schemes are provided by copyright owners, etc. We believe that these provisions are sufficient to provide adequate protection to copyright owners. In sum, it is inevitable that copyright owners and users hold different views towards the scope of copyright exceptions. **The Government's position is that the proposed revised and new copyright exceptions have achieved the greatest balance between the interests of all parties.**

31. Taking into account the above views received during the consultation period, we consider that respondents generally support that the Bill should continue to be used as the basis for updating Hong Kong's copyright regime and that the amendment bill should be passed as soon as possible. We confirm our proposal to incorporate the key legislative proposals of the Bill into the amendment bill, and will consider the need of clarifying or adjusting certain individual provisions.

## (II) Exhaustive Approach to Exceptions

32. On the issue of **whether the exhaustive approach to exceptions should be maintained**, most respondents do not have strong views. Amongst the respondents who have expressed views on the issue, the majority support the Government's position of maintaining the status quo, while a few respondents suggest that the Government should adopt a non-exhaustive approach, such as the "fair use" exception in the US.

33. Given the lack of adequate justifications and empirical evidence to support the alleged economic benefits of a non-exhaustive approach, and that most jurisdictions worldwide (including Australia, Canada, the EU, New Zealand and the UK) continue to set out their copyright exceptions in their legislation exhaustively, **we consider that the existing exhaustive approach to exceptions should be maintained as it will give more certainty to copyright owners and users in the exploitation of copyright works.**

## (III) Contract Override

34. On **whether we should continue to allow contracts to override exceptions**, the majority of respondents who have expressed views on this issue opine that Hong Kong should not introduce provisions to the CO to restrict the use of contracts to exclude or limit the application of statutory copyright exceptions. Given the lack of empirical evidence to support that users are prevented from using existing copyright exceptions to their detriment by contract override and considering the importance of upholding freedom of contract in business operations, **we consider that the current approach should be maintained so as not to interfere with contractual arrangements agreed between copyright owners and users to override exceptions.**

## (IV) Illicit Streaming Devices

35. On the issue of **whether specific provisions should be introduced to deal with ISDs**, many copyright owners have expressed that the problem of sale of ISDs on the market is serious and should be vigorously cracked down. Some copyright owners and a few copyright users support the introduction of specific provisions in the CO to combat ISDs and that the civil and criminal liabilities of

parties engaged in infringing acts relating to ISDs should be specified, so as to provide legal certainty and facilitate enforcement. On the other hand, some respondents consider that it is not necessary to introduce any ISD specific provisions for now. In particular, the Hong Kong Bar Association and the Law Society of Hong Kong both consider that the existing legislation and the proposed new communication right can adequately deal with the problem of ISDs. The latter also mentions that Singapore's ISD specific provisions do not penalise dealing with such devices per se, and the prosecution must also prove other elements of offence. Furthermore, the effectiveness of such provisions remains to be seen. Some respondents also consider that there is no simple way to define the legitimacy of streaming devices and that the Government should conduct a more detailed study with the trade before deciding on the appropriate solution for the issue.

36. The Government understands copyright owners' concerns about the problem of ISDs and has all along been committed to combating online infringement activities. The existing CO already contains a number of provisions to deal with online copyright infringement activities, which could be applied to combat ISDs. Furthermore, as elaborated in paragraphs 22 and 23 above, the introduction of the communication right for copyright owners and the elaboration of the meaning of "authorisation" of copyright infringement will enhance our law which could hold persons involved in ISD cases accountable for the relevant civil, or even criminal, liabilities, thus helping us combat online infringements.

37. At present, most overseas jurisdictions do not have specific provisions concerning ISDs in their copyright legislation, and so far, among the common law jurisdictions, only Singapore and Malaysia have enacted ISD specific provisions, but the effectiveness of such statutory provisions has yet to be observed. As such, **taking into account the existing law and proposed communication right, as well as overseas experience, the Government considers it inappropriate to introduce specific provisions in the CO to combat ISDs.**

## **(V) Judicial Site Blocking**

38. Many copyright owners support the **introduction of a copyright-specific judicial site blocking mechanism**, as they consider it effective in dealing with copyright infringement activities involving websites that are operated outside the territory. On the other hand, organisations from different sectors (including IP practitioners' groups) consider that there is no need to introduce specific provisions as copyright owners can already seek relevant injunctions from the court under the existing mechanism. Moreover, some individual respondents are concerned about freedom of access to information and oppose the introduction of a copyright-specific judicial site blocking mechanism.

39. The Government notes that section 21L of the existing HCO already specifically provides that the Court of First Instance may by order grant an injunction in all cases in which it appears to the court to be just or convenient to do so. Injunctions may be permanent or temporary, and may be granted unconditionally or subject to such terms as the court thinks just. As such, depending on the facts of the case, where there is evidence of large scale infringing activities originating from identified overseas websites or online locations, and the access to which is enabled by certain local OSPs, copyright owners may consider seeking an appropriate injunction from the court within its jurisdiction to order the OSPs concerned to block the access to these websites or online locations, thus preventing such infringing activities. In fact, overseas experience shows that blocking orders against OSPs granted under the court's general powers to order an injunctive relief could equally serve the purpose.

40. Given that different stakeholders have different views on the issue concerned and the existing relief under section 21L of the HCO is already a ready tool for seeking injunctions against online copyright infringements, and considering the public debates and controversies on the potential impact of site blocking injunctions, **we consider it not necessary to introduce a judicial site blocking mechanism specifically for copyright infringements.**

## **(VI) Other Copyright Issues**

41. Some respondents point out that the ever-evolving technological development around the world has led to the emergence of new copyright issues and many overseas jurisdictions have therefore continuously reviewed their

copyright regimes in recent years. Some examples of the issues involved include the extension of copyright term of protection, introduction of specific copyright exceptions for text and data mining, issues related to artificial intelligence (“AI”) and copyright, use of “orphan works”,<sup>23</sup> expansion of the jurisdiction of the Copyright Tribunal, updating the Copyright (Libraries) Regulations, establishment of a copyright register, establishment of an equitable remuneration for performers, etc. Amongst the various issues listed above, more respondents express concerns on whether to extend the copyright term of protection and introduce specific copyright exceptions for text and data mining.

42. The Government’s position is as follows. The **copyright term of protection** of 50 years under the existing CO is adopted in accordance with the Berne Convention for the Protection of Literary and Artistic Works, which is applicable to Hong Kong, and is consistent with international standards. Many copyright owners express that a number of overseas jurisdictions have already extended the copyright term of protection to 70 years and consider that Hong Kong should follow suit to provide more economic incentives to encourage creations and attract overseas and local businesses to invest in Hong Kong, thereby promoting the development of the industry and nurturing of talents, as well as developing Hong Kong into an international IP trading centre. On the contrary, some professional bodies and copyright users oppose the extension of copyright term of protection. They consider that this would provide copyright owners with an excessively long term of protection and delay the release of copyright works into the public domain, which would in turn limit creators’ use of these copyright works, stifling the development of the creative industry, and hinder libraries and educational establishments from using these copyright works for dissemination of knowledge. We also note that some overseas jurisdictions have only extended the term of protection for certain types of, but not all, copyright works and their related rights to 70 years. Hence, apart from considering whether the term of protection should be extended, whether the term of protection for different types of copyright works and related rights should be extended uniformly also requires in-depth study.<sup>24</sup>

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<sup>23</sup> An “orphan work” refers to a copyright work where its owner cannot be identified, resulting in the inability of users to obtain licences for use of the work.

<sup>24</sup> We also note that provisions on copyright term of protection are included in the bilateral or multilateral trade agreements reached by some overseas jurisdictions with other countries or regions, and these jurisdictions would adjust their copyright term of protection according to the relevant provisions.

43. Regarding the **introduction of specific copyright exceptions for text and data mining**, some professional bodies support the introduction of such exceptions. They consider that this can facilitate large-scale scientific research and analysis, which will be conducive to innovation and dissemination of knowledge, enhance the competitiveness of Hong Kong's AI industry and promote Hong Kong's development into a Smart City. However, some copyright owners oppose the introduction of the relevant exceptions, considering that text and data mining have a broad meaning and any related use for commercial and business purposes may unfairly prejudice the rights of copyright owners. They recommend adopting more flexible approaches (e.g. granting licences) to deal with the use of copyright works for text and data mining to protect both parties' rights, and that any specific copyright exceptions for text and data mining should be clearly regulated, e.g. the exceptions will only apply to research conducted for non-profit-making purposes. We note the differing views tendered on the subject and that at present, there is no unified approach at the international level to provide specific copyright exceptions for text and data mining. Even in overseas jurisdictions which have provided the relevant exceptions, the scope of such exceptions also varies.

44. In sum, different stakeholders have different views towards these new copyright issues and any changes may affect the existing balance between the legitimate rights and interests of copyright owners and users. Furthermore, there are still many on-going studies and discussions on these issues at the international level. We do not recommend rushing into incorporating these issues in the amendment bill. As we have already pointed out in the consultation document, this round of public consultation and legislative amendment exercise only represents a new beginning of our continuous journey to update the copyright regime. We fully acknowledge that more work needs to be done in the future in addressing various new copyright issues arising from technological development. The new copyright issues raised by different respondents involve complex considerations and have long-term impacts on society as a whole. **We consider it necessary to carefully consider the impacts of the relevant issues on Hong Kong's copyright regime, as well as economic and social development.** We will continue to study these issues in future, including considering the development of the copyright regimes in overseas jurisdictions and collecting different stakeholders' views, with a view to formulating a balanced way forward in the best interest of Hong Kong.