

LEGISLATIVE COUNCIL BRIEF

Copyright Ordinance
(Chapter 528)

COPYRIGHT (AMENDMENT) BILL 2011

INTRODUCTION

A At the meeting of the Executive Council on 31 May 2011, the Council ADVISED and the Chief Executive ORDERED that the Copyright (Amendment) Bill 2011 (“the Bill”), at Annex A, should be introduced into the Legislative Council.

JUSTIFICATIONS

2. Advances in information technology and the prevalence of high-speed Internet connectivity have facilitated the emergence of new modes of content uses and transmissions. While such developments are generally beneficial to society at large, e.g. in promoting e-learning and enabling wider/faster access to information, the speed at which unauthorised sharing of copyright works could proliferate across the Internet has brought added challenges to copyright owners seeking to safeguard their legitimate interest.

3. The Bill seeks to update our copyright law so as to ensure that (a) it will endure the test of rapid advances in technology such that we need not change the law every time new communication technology emerges, (b) it enables cooperation between copyright owners and online service providers¹ (OSPs) in the fight against online infringement, and (c) it facilitates new modes of uses such as e-learning.

¹ The term “online service provider” covers service providers of transmissions, routing, connections or Internet access services; those providing hosting services, caching services or information location tools (such as search engine); and those providing application-based services such as social networking systems to users.

Key Proposals in the Bill

4. The key provisions in the Bill include –
- (a) introducing a *technology-neutral exclusive right* for copyright owners to communicate their works through any mode of electronic transmission, with *criminal* sanctions against those who make unauthorised communication of copyright works to the public. At the same time, we propose *providing exceptions for better preservation of works and dissemination of knowledge* (paragraphs 5 to 8 below);
 - (b) introducing statutory provisions to establish a “*safe harbour*” for OSPs so that their potential *liability* for copyright infringement occurring on their service platforms would be *limited*. This “safe harbour” is underpinned by a non-statutory *Code of Practice* which sets out the conduct expected of OSPs when notified of online piracy (paragraphs 9 to 11);
 - (c) introducing a copyright *exception for temporary reproduction* of copyright works by OSPs, which is technically required for the digital transmission process to function efficiently (paragraph 12);
 - (d) introducing a limited copyright *exception for media shifting* of sound recordings (e.g. ripping music from CD into MP3 format) for private and domestic use under prescribed conditions (paragraph 13); and
 - (e) prescribing *additional factors* to assist the Court in considering the *award of additional damages* in civil proceedings pertaining to online infringement (paragraph 14).

Communication right for copyright owners

5. At present, the Copyright Ordinance (“Ordinance”) gives copyright owners certain exclusive rights² including the right to make a copyright work available to the public on the Internet, to broadcast a work or to include a copyright work in a cable programme. With advances in technology, new modes of electronic transmission may emerge any time. The current modes of transmission specified in the Ordinance, including “making available”, “broadcasting” and “inclusion in cable programme” may not be adequate to cope with future developments in technology. We propose to introduce a new exclusive right for copyright owners to communicate their works through any mode of electronic transmission. Such a technology-neutral right encompasses future developments in electronic transmission. It facilitates copyright owners in exploiting their works in the digital environment and minimises the need to amend the law³ whenever the landscape is substantially changed by such developments.

6. To give this new exclusive communication right adequate protection, we propose to introduce corresponding criminal sanctions against those who make unauthorised communication of copyright works to the public in the course of business conducted for profit; or to such an extent as to affect prejudicially the copyright owners. The proposed criminal sanctions mirror the existing sanctions available in the Ordinance against, inter alia, the sale of infringing copies or the distribution of infringing copies to such an extent as to affect prejudicially the copyright owners. To allay netizens’ concerns regarding the impact of the new criminal liability on the free flow of information across the Internet and to provide greater legal certainty, we propose to clarify what amounts to “such an extent as to affect prejudicially the copyright owners” by introducing a non-exhaustive list of factors (e.g. the value of the work being communicated and the displacement effect on the potential market for a work)

² Such exclusive rights are specified in the Ordinance by way of various restricted acts. Performing a restricted act (such as making a copyright work available to the public) without the authorisation of copyright owners will attract civil liability and, in some circumstances, criminal sanctions. Exceptions (technically known as permitted acts) are available in the Ordinance which specifies that the performance of certain acts under prescribed conditions will not be considered as infringing copyright, e.g. quoting or reproducing part of a work with a sufficient acknowledgement for the purpose of review and criticism.

³ Other common law jurisdictions have introduced a similar communication right in their copyright laws (including Australia, New Zealand, Singapore, and the UK) to ensure that their legislation could keep pace with advances in information technology.

that the Court shall take into account when examining the “prejudicial” effect. Other overseas jurisdictions with similar provisions against prejudicial distribution or communication do not specify in their statute what amounts to “prejudicial” effect. The current proposed list of factors is largely distilled from Hong Kong case law⁴.

7. To give clarity to the outer limits of the new communication right, we have to define its interface with the many existing permitted acts/exceptions in the Ordinance. Taking into account users’ views and overseas experience, we propose to bring in new exceptions and/or modify the existing ones to provide greater flexibility to the education sector in communicating copyright works when giving instructions (especially for distance learning), and to facilitate libraries/archives/museums in their daily operations and in preserving valuable works. To ensure that the enhanced exceptions will not unreasonably affect the right of owners, we have added concomitant preconditions for the exceptions, in the form of precautionary measures to prevent unauthorised copying or further communication.

8. Ancillary to the introduction of the communication right, we need to deal with demands for greater clarity as to what constitutes “authorisation” in the digital environment, for the purposes of section 22(2) of the Ordinance⁵. We propose to introduce a non-exhaustive list of factors to facilitate the Court in considering cases involving “authorisation”.

“Safe Harbour” for OSPs

9. OSPs, of all people, are well placed to help combat infringing activities occurring on their service platforms. This is widely accepted by OSPs themselves. That said, OSPs keep reminding us that as mere “innocent middlemen” they should not bear the responsibility of policing and controlling online infringement. To provide incentives for OSPs to cooperate with the

⁴ In 2005, Customs and Excise Department took action against an Internet user who, through the use of BitTorrent software, uploaded three infringing movies on to the Internet for file sharing. The uploader (who used an alias “the Big Crook” (古惑天王) on the Internet to disguise his true identity) was prosecuted and sentenced to three months’ imprisonment. His appeal against conviction was dismissed by the Court of Final Appeal in May 2007. The factors referred to in paragraph 6 above are mainly distilled from the judgment of this case (HKSAR v Chan Nai Ming [2007] 1 HKLRD 95 (CFI) and [2007] 2 HKLRD 489 (CFA)).

⁵ Under section 22(2) of the Ordinance, any person who authorises another person to do an infringing act may attract civil liability.

copyright owners in combating online piracy, and to provide sufficient protection for their acts, we propose to introduce a set of “safe harbour” provisions. The new provisions aim to give OSPs the assurance that compliance with certain prescribed conditions (as opposed to turning a blind eye when they are informed of alleged online infringements on their service platforms) would shelter them from liability (mainly pecuniary liability) in relation to copyright infringements which may have occurred or are occurring on their service platforms.

10. To address OSPs’ concern that they may be burdened with the cost and responsibility of policing the network and their service platforms, we propose to expressly specify that OSPs are not required to actively police their service platforms for infringing activities in order to qualify for the “safe harbour” protection. Moreover, as notifications from copyright owners regarding any alleged infringement would be a crucial element for initiating OSP actions against specific infringement, we specify in the Bill the requirements for a qualifying notification (including the provision of sufficient information for locating the infringing material, contact information of the complainant, etc) under the “safe harbour”. To guard against malicious notifications, we propose to make it an offence for anyone who makes a false statement in a notice of alleged infringement.

11. This “safe harbour” will be underpinned by a non-statutory Code of Practice (“Code”) which sets out suggested practical guidelines and procedures for OSPs to follow when notified of infringing activities on their network or service platform. We intend to include in the Code two main measures, namely the “Notice and Notice”⁶ and the “Notice and Takedown”⁷ systems which are being practised in overseas jurisdictions such as the US and Singapore. While the Code is meant to be a set of good practices for OSPs, we propose that OSPs who observe the Code should be deemed to have taken reasonable steps to limit or stop the infringement (one key qualifying condition for the “safe harbour” protection).

⁶ Under the “Notice and Notice” system, OSPs are required to forward to users or subscribers notices of alleged infringement that they receive from the copyright owners.

⁷ Under the “Notice and Takedown” system, OSPs are required, upon receipt of a notice from the copyright owner concerned, to (a) take down or disable access to materials identified to be infringing; and (b) where applicable, notify the alleged infringer who makes the materials available. The alleged infringer could file a counter-notice to the OSP if he opposes the infringement claim. Upon receipt of the counter-notice, the OSP is required to reinstate the materials or restore access.

Copyright exception for temporary reproduction of copyright work by OSPs

12. Currently, the Ordinance does not provide any exception for OSPs to cache⁸ data (which technically involves copying, a restricted act in the Ordinance). Such caching is transient or incidental in nature and technically required for the process of data transmission to function efficiently. Caching activities help save bandwidth and are indispensable for efficient transmission of information on the Internet. To provide certainty for OSPs, we propose to introduce an exception for temporary reproduction of copyright works by OSPs subject to certain technological conditions.

New copyright exception for media shifting

13. Media shifting refers to the making of an additional copy of a copyright work from one media or format into another, usually for the purpose of viewing or listening to the work in a more convenient manner. A typical example is the copying of sound recordings from an audio compact disc to the embedded memory of a portable MP3 player, i.e. from compact disc digital audio format to MP3 format. Copying a copyright work is a restricted act. Hence, media shifting may technically constitute copyright infringement. With a view to giving greater certainty to users and having regard to similar statutory exceptions already allowed in overseas jurisdictions⁹, we propose to introduce a media shifting exception limited to sound recordings. To ensure that the proposed media shifting exception complies with the “three-step test”¹⁰ requirement under the Berne Convention (1971) and the Trade-Related Aspects of Intellectual Property Rights Agreement (“TRIPS”) of the World Trade Organization (“WTO”), we propose to prescribe conditions¹¹ for the exception and confine the application of the exception to private and domestic use.

⁸ 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.

⁹ Express media shifting exceptions are provided in the legislation of New Zealand and Australia. The exception in New Zealand covers only sound recordings while that in Australia covers printed works, photographs, films in analogue format as well as sound recordings.

¹⁰ The “three-step test” requires that the exceptions should (a) be confined to “certain special cases”; (b) not conflict with a normal exploitation of the work concerned; and (c) not unreasonably prejudice the legitimate interests of the copyright owner.

¹¹ These conditions include that (a) the original copy must be a genuine copyright work lawfully acquired; (b) this original copy must be retained by its owner; and (c) only one copy should be stored in each personal device.

Award of additional damages

14. A copyright owner may seek damages in an infringement action. As a general rule, damages are compensatory in nature. Accordingly, the right owner has to prove the loss suffered by him and that the infringement in question is the effective cause of such loss. In copyright infringement cases, the right owners may under the Ordinance invite the Court to award “additional damages” as the justice of the case may require¹². In recognition of the difficulties encountered by copyright owners in proving actual loss, particularly in online piracy cases, we propose to introduce two additional factors for the Court to take into account when considering the award of “additional damages” in civil cases, namely (a) the 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.

THE BILL

15. The main provisions of the Bill are as follows –

- (a) **Clause 9(3)** amends section 22 to provide for an exclusive right of the owner of the copyright in a work to communicate the work to the public;
- (b) **Clause 9(4)** adds a new subsection (2A) to section 22 to set out a non-exhaustive list of factors for determining whether a person has authorised another to do any of the acts restricted by the copyright in a work;
- (c) **Clause 13** adds a new section 28A to elaborate on the newly established restricted act of communication (cf: clause 9(3)), carving out acts not constituting the communication of a work to the public;

¹² Section 108(2) provides that “the Court may in an action for infringement of copyright having regard to all the circumstances, and in particular to -

- (a) the flagrancy of the infringement;
- (b) any benefit accruing to the defendant by reason of the infringement; and
- (c) the completeness, accuracy and reliability of the defendant’s business accounts and records,

award such additional damages as the justice of the case may require.

- (d) **Clauses 25 to 27** amend sections 41, 44 and 45 to allow the communication of specified works to authorised recipients for educational purposes and specify the conditions for the exceptions;
- (e) **Clauses 29 and 32-36** amend sections 46, 51 – 53 and add new sections 51A and 52A to allow libraries, museums and archives to make copies of copyright work for preservation or replacement purposes and to communicate or play or show copyright work to users within their premises, subject to the specified conditions;
- (f) **Clause 41** adds a new section 65A to allow temporary reproduction of copyright materials by OSPs, subject to the specified conditions;
- (g) **Clause 44** adds a new section 76A to allow media shifting of sound recordings for private and domestic use, subject to the specified conditions;
- (h) **Clause 45** adds a new Division IIIA (with new sections 88A to 88I of Part II) to establish a “safe harbour” for OSPs. The new section 88B sets out the conditions for limiting OSPs’ pecuniary liability in relation to copyright infringements occurring on their service platforms. The new section 88C provides for the procedures for giving a notice to an OSP in respect of an alleged infringement of copyright. The new section 88D provides for possible actions following the receipt of a notice of alleged infringement and specifies the format and substance of any counter notice contesting the infringement allegation. The new section 88E imposes criminal liability on any person who recklessly makes a false statement in a notice. The new section 88F provides for civil liability for making a false statements in a notice. The new section 88G exempts OSPs from liability for removing or disabling access to the material or activity to which an alleged infringement relates. The new section 88H provides a rebuttable presumption in favour of OSPs on evidence of compliance with the specified conditions. The new section 88I empowers Secretary for Commerce and Economic Development to publish a code of practice in the Gazette;
- (i) **Clause 49** amends section 108 to add two more factors to which the Court may have regard when considering any additional damages in an action for infringement of copyright; and

- (j) **Clause 51** amends section 118 to, among other things, set out the pertinent factors for determining the “prejudicial” effect of a case concerning unauthorised distribution or communication and create a new offence of unauthorised communication of a copyright work that is made in the course of business conducted for profit; or to such an extent as to affect prejudicially the copyright owners.

B 16. An extract of the provisions of the Ordinance that are being amended by the Bill is attached at Annex B.

LEGISLATIVE TIMETABLE

17. The legislative timetable is as follows –

Publication in the Gazette	3 June 2011
First Reading and commencement of Second Reading debate	15 June 2011
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

C 18. The proposal has economic, financial, civil service and sustainability implications as set out in Annex C. It has no environmental and productivity implications. The Bill is in conformity with the Basic Law, including the provisions concerning human rights. The Bill will not affect the current binding effect of the Ordinance.

PUBLIC CONSULTATION

19. The legislative proposals in this paper are drawn up after two rounds of public consultation as well as extensive discussions with the relevant stakeholder groups. We first consulted the Commerce and Industry Panel on our preliminary proposals in 2008. Having regard to the views received on the preliminary proposals, we issued a set of refined proposals in late 2009 and consulted the Panel again regarding the changes. The Panel noted without objection our intention to incorporate the refined proposals in an amendment bill. The proposals we put to the Panel in November 2009 form the basis of the Bill.

PUBLICITY

20. A press release will be issued today (2 June 2011). A spokesman will be made available to answer public enquiries.

ENQUIRIES

21. Any enquiries on this brief may be addressed to Ms Bonnie Yau, Principal Assistant Secretary for Commerce and Economic Development (Commerce and Industry) at telephone number 2918 7480.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
2 June 2011

Copyright (Amendment) Bill 2011

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A BILL

To

Amend the Copyright Ordinance to provide for the rights of the owner of the copyright in a work, and the rights of a performer in a performance, relating to the communication of the work or performance to the public; to provide for limitations on the liability of an online service provider relating to online materials; to make further provision with respect to the acts that may be done without infringing copyright or performers' rights; to provide for additional factors to which the court may have regard in considering whether additional damages should be awarded in an action for infringement of copyright or performers' rights; and to provide for related matters.

Enacted by the Legislative Council.

1. Short title and commencement

- (1) This Ordinance may be cited as the Copyright (Amendment) Ordinance 2011.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette.

2. Copyright Ordinance amended

The Copyright Ordinance (Cap. 528) is amended as set out in sections 3 to 80.

3. Section 7 amended (Films)

After section 7(4)—

Add

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

4. Section 8 amended (Broadcasts)

Section 8(1)—

Repeal

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

Substitute

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

5. Section 9 amended (Cable programmes)

Section 9(2)(b)—

Repeal

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

Substitute

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

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

(1) Section 17(5)(a)(i)—

Repeal

“or”

Substitute

“and”.

(2) Section 17(5)(a)—

Repeal subparagraph (ii)

Substitute

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

- (3) Section 17(5)(b)(ii)—

Repeal

“or”

Substitute

“and”.

- (4) Section 17(5)(b)—

Repeal subparagraph (iii)**Substitute**

“(iii) communication to the public,”.

- (5) Section 17(5)—

Repeal paragraph (c).

7. Section 18 amended (Duration of copyright in sound recordings)

Section 18(3)—

Repeal

“, broadcast or included in a cable programme service”

Substitute

“or communicated to the public”.

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

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

Add

“and”.

- (2) Section 19(6)—

Repeal paragraph (b)**Substitute**

“(b) communicating to the public,”.

- (3) Section 19(6)—

Repeal paragraph (c).

9. Section 22 amended (The acts restricted by copyright in a work)

- (1) Section 22(1)—

Repeal paragraph (d).

- (2) Section 22(1)—

Repeal paragraph (f).

- (3) Before section 22(1)(g)—

Add

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

- (4) After section 22(2)—

Add

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

- (a) the extent of that person’s power (if any) to control or prevent the infringement;
- (b) the nature of the relationship (if any) between that person and that other person; and
- (c) whether that person has taken any reasonable steps to limit or stop the infringement.”.

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

Section 25(3)(a)—

Repeal

“, broadcasting or inclusion in a cable programme service”

Substitute

“or communicating to the public”.

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

Section 26—

Repeal the section.

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

Section 28—

Repeal the section.

13. Section 28A added

Before section 29—

Add

“28A. Infringement by communicating to the public

- (1) The communication of a work of any description to the public is an act restricted by the copyright in the work.
- (2) References in this Part to the communication of a work to the public are to the electronic communication of the work to the public, including—
 - (a) the broadcasting of the work;
 - (b) the inclusion of the work in a cable programme service; and
 - (c) the making available of the work to the public.
- (3) References in this Part to making a work available to the public are to making the work available, by wire or

wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the work from a place and at a time individually chosen by them (such as by making works available through the Internet).

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

14. Section 29 amended (Infringement by making adaptation or act done in relation to adaptation)

Section 29(2)—

Repeal

“sections 23 to 28”

Substitute

“section 23, 24, 25, 27 or 28A”.

15. Section 31 amended (Secondary infringement: possessing or dealing with infringing copy)

- (1) Section 31, heading—

Repeal

“possessing or”.

(2) After section 31(2)—

Add

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

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

16. Section 32 amended (Secondary infringement: providing means for making infringing copies)

Section 32(2)—

Repeal

“broadcasting or inclusion in a cable programme service”

Substitute

“communicating to the public”.

17. Section 35 amended (Meaning of “infringing copy”)

(1) Section 35(7)(i)—

Repeal

“reprographic copying”

Substitute

“copies made”.

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

Add

“, curator”.

(3) Section 35(7)(m)—

Repeal

“or”.

(4) After section 35(7)(m)—

Add

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

18. Section 37 amended (Introductory provisions)

After section 37(5)—

Add

“(6) In sections 40B(5), 40C(7), 40D(7), 41A(7), 54A(3) and 72(2)—

dealt with (被用以進行交易), in relation to a copy of a work, means—

- (a) possessed for the purpose of or in the course of any trade or business;
- (b) sold or let for hire, or offered or exposed for sale or hire;
- (c) exhibited in public or distributed for the purpose of or in the course of any trade or business; or
- (d) distributed (otherwise than for the purpose of or in the course of any trade or business) to such an

extent as to affect prejudicially the owner of the copyright in the work.

- (7) For the purposes of paragraph (d) of the definitions of *dealt with* in subsection (6) and sections 41(6), 44(4) and 45(4), in determining whether any distribution of a copy of a work is made to such an extent as to affect prejudicially the owner of the copyright, the court may take into account all the circumstances of the case and, in particular—
- (a) the purpose of the distribution;
 - (b) the nature of the work, including its commercial value;
 - (c) the amount and substantiality of the portion copied (in relation to the work as a whole) that was distributed;
 - (d) the mode of distribution; and
 - (e) the economic prejudice caused to the owner of the copyright as a consequence of the distribution, including the effect of the distribution on the potential market for or value of the work.”.

19. Section 39 amended (Criticism, review and news reporting)

- (1) Section 39—

Repeal subsection (1)

Substitute

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

- (b) the work has been released or communicated to the public.”.

- (2) After section 39(1)—

Add

- “(1A) For the purposes of subsection (1)(b), a work has been released to the public if it has been provided to the public by any means (other than by communication to the public) including—
- (a) the issue of copies of the work to the public;
 - (b) the rental of copies of the work to the public; and
 - (c) the performance, exhibition, playing or showing of the work to the public.
- (1B) In determining whether a work has been released or communicated to the public for the purposes of subsection (1)(b), no account is to be taken of any unauthorized act.”.

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

- (1) Section 40(2)—

Repeal

“or making available”.

- (2) Section 40(2)—

Repeal

“, broadcasting or inclusion in a cable programme service”

Substitute

“or communicating to the public”.

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

Section 40B—

Repeal subsection (6).

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

Section 40C—

Repeal subsection (8).

23. **Section 40D amended (Intermediate copies)**

Section 40D—

Repeal subsection (8).

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

Section 41A—

Repeal subsection (8).

25. **Section 41 amended (Things done for purposes of instruction or examination)**

(1) Section 41(5)—

Repeal

everything after “purposes.”.

(2) Section 41(5), Chinese text—

Repeal

“有人進行該複製品的”

Substitute

“該複製品被用以進行”.

(3) After section 41(5)—

Add

“(6) In subsection (5)—

dealt with (被用以進行交易), in relation to a copy of a work, means—

- (a) possessed for the purpose of or in the course of any trade or business;
- (b) sold or let for hire, or offered or exposed for sale or hire;
- (c) exhibited in public or distributed for the purpose of or in the course of any trade or business;
- (d) distributed (otherwise than for the purpose of or in the course of any trade or business) to such an extent as to affect prejudicially the owner of the copyright in the work; or
- (e) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (3).”.

26. **Section 44 amended (Recording by educational establishments of broadcasts and cable programmes)**

(1) Section 44, heading—

Repeal

“Recording by educational establishments of broadcasts and cable programmes”

Substitute

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

(2) After section 44(1)—

Add

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

- (a) the person makes the communication for the educational purposes of the establishment; and

- (b) the establishment takes all reasonable steps to ensure that—
- (i) only authorized recipients receive the communication; and
 - (ii) the authorized recipients do not make any copy or further transmission of the communication.”.
- (3) Section 44—
Repeal subsection (2)
Substitute
 “(2) Recording, copying or communicating to authorized recipients is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the recording, copying or communication in question and the person making the recording, copies or communication in question knew or ought to have been aware of that fact.”.
- (4) Section 44(3)—
Repeal
 everything after “purposes.”.
- (5) Section 44(3), Chinese text—
Repeal
 “有人進行該複製品的”
Substitute
 “該複製品被用以進行”.
- (6) After section 44(3)—
Add
 “(4) In this section—
authorized recipient (獲授權收訊人), in relation to a communication made by a person authorized by an

- educational establishment, means a teacher or pupil of the establishment who has been authorized by or on behalf of the establishment to receive the communication;
- dealt with* (被用以進行交易), in relation to a copy of a work, means—
- (a) possessed for the purpose of or in the course of any trade or business;
 - (b) sold or let for hire, or offered or exposed for sale or hire;
 - (c) exhibited in public or distributed for the purpose of or in the course of any trade or business;
 - (d) distributed (otherwise than for the purpose of or in the course of any trade or business) to such an extent as to affect prejudicially the owner of the copyright in the work; or
 - (e) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (1A).”.
27. **Section 45 amended (Reprographic copying made by educational establishments or pupils of passages from published works)**
- (1) Section 45, heading—
Repeal
 “Reprographic copying made by educational establishments or pupils of passages from published works”
Substitute
 “Copying or communication by educational establishments or pupils: passages or extracts from published works”.

- (2) Section 45(1)—

Repeal

“Reprographic copies”

Substitute

“Copies”.

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

Add

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

- (4) Section 45(1)—

Repeal

“or in the typographical arrangement”

Substitute

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

- (5) After section 45(1)—

Add

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

- (a) the person makes the communication for the educational purposes of the establishment; and
- (b) the establishment takes all reasonable steps to ensure that—
 - (i) only authorized recipients receive the communication; and

- (ii) the authorized recipients do not make any copy or further transmission of the communication.”.

- (6) Section 45—

Repeal subsection (2)**Substitute**

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

- (7) Section 45(3)—

Repeal

everything after “purposes.”.

- (8) Section 45(3), Chinese text—

Repeal

“有人進行該複製品的”

Substitute

“該複製品被用以進行”.

- (9) After section 45(3)—

Add

“(4) In this section—

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

dealt with (被用以進行交易), in relation to a copy of a work, means—

- (a) possessed for the purpose of or in the course of any trade or business;
- (b) sold or let for hire, or offered or exposed for sale or hire;
- (c) exhibited in public or distributed for the purpose of or in the course of any trade or business;
- (d) distributed (otherwise than for the purpose of or in the course of any trade or business) to such an extent as to affect prejudicially the owner of the copyright in the work; or
- (e) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (1A).”.

28. Cross-heading before section 46 substituted

Cross-heading before section 46—

Repeal the cross-heading

Substitute

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

29. Section 46 amended (Libraries and archives: introductory)

- (1) Section 46, heading, after “**Libraries**”—
Add
“, **museums**”.
- (2) Section 46(1)(b), after “libraries”—
Add
“, museums”.
- (3) Section 46(1)—
Repeal
“(copying by librarians and archivists)”

Substitute

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

- (4) Section 46(2)(b)—

Repeal

“library or archive” (wherever appearing)

Substitute

“library, museum or archive”.

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

Add

“, curator”.

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

Add

“, museums”.

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

Add

“, curator”.

30. Section 48 amended (Copying by librarians: parts of published works)

- (1) Section 48(1)—

Repeal

“dramatic or musical work”

Substitute

“dramatic, musical or artistic work, or of a sound recording or film”.

- (2) Section 48(1)—

Repeal

“or in the typographical arrangement”

Substitute

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

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

Section 50(1)(b)—

Repeal

“dramatic or musical work”

Substitute

“dramatic, musical or artistic work”.

32. Section 51 amended (Copying by librarians or archivists: replacement copies of works)

(1) Section 51, heading—

Repeal

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

Substitute

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

(2) Section 51(1)—

Repeal

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

Substitute

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

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

Add

“, museum”.

(4) Section 51(1)(b)—

Repeal

“another specified library or archive”

Substitute

“another specified library, museum or archive”.

(5) Section 51(1)—

Repeal

“dramatic or musical work”

Substitute

“dramatic, musical or artistic work”.

(6) After section 51(1)—

Add

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

33. Section 51A added

After section 51—

Add

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

(1) If the conditions specified in subsection (2) are complied with, the librarian, curator or archivist of a specified library, museum or archive may, without infringing copyright, communicate a copy of an item in the permanent collection of the library, museum or archive made under section 51 to the users or staff of the library,

museum or archive, by making it available online to be accessed through the use of a computer terminal installed within the premises of the library, museum or archive.

- (2) The conditions are—
- (a) that only one user may access the copy at any one time; and
 - (b) that the library, museum or archive takes appropriate measures to prevent users from making further copies or communicating the copy to others.
- (3) Communicating to users and staff of a specified library, museum or archive is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the communication in question and the person making the communication in question knew or ought to have been aware of that fact.”.

34. Section 52 amended (Copying by librarians or archivists: certain unpublished works)

- (1) Section 52, heading, after “**librarians**”—
Add
“, **curators**”.
- (2) Section 52(1)—
Repeal
“librarian or archivist of a specified library or archive”
Substitute
“librarian, curator or archivist of a specified library, museum or archive”.
- (3) Section 52(1)(a)—
Repeal
“dramatic or musical work”

Substitute

“dramatic, musical or artistic work”.

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

Add

“, museum”.

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

Add

“, museum”.

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

Add

“, curator”.

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

Add

“, curator”.

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

Add

“, museum”.

35. Section 52A added

After section 52—

Add

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

- (1) If the condition specified in subsection (2) is complied with, the librarian, curator or archivist of a specified library, museum or archive may play or show any sound recording or film held in the permanent collection of the library, museum or archive to an audience consisting of members of the public within the premises of the library,

museum or archive, without infringing copyright in the sound recording or film or any work included in the sound recording or film.

- (2) The condition is that if the audience is required to pay for the playing or showing of the sound recording or film, the payment required is no more than a reasonable contribution towards the maintenance of the library, museum or archive.
- (3) The playing or showing of a sound recording or film is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the playing or showing in question and the person playing or showing the sound recording or film in question knew or ought to have been aware of that fact.”.

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

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

Add

“, **curators**”.

- (2) Section 53—

Repeal

“librarian or archivist of a specified library or archive”

Substitute

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

- (3) Section 53—

Repeal

“the specified library”

Substitute

“the library, museum”.

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

Section 54A—

Repeal subsection (4).

38. Section 55 amended (Statutory inquiries)

Section 55(3)—

Repeal

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

Substitute

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

39. Section 56 amended (Material open to public inspection or on official register)

Section 56(3)—

Repeal

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

Substitute

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

40. Section 57 amended (Material communicated to the Government in the course of public business)

- (1) Section 57(2)—

Repeal

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

Substitute

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

- (2) Section 57(3)—

Repeal

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

Substitute

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

41. Section 65A added

After section 65—

Add**“65A. Temporary reproduction by service providers**

- (1) The copyright in a work is not infringed by the making and storage of a copy of the work by a service provider if—
- (a) the sole purpose of the making and storage of the copy is to enable more efficient transmission of the work by the service provider through a network;
 - (b) the making and storage of the copy forms an automatic and essential part of a technological process, and that process neither modifies the work, nor interferes with the lawful use of technology to obtain data on the use of the work;
 - (c) the storage of the copy is temporary;
 - (d) the service provider updates the database in which the copy is stored in accordance with reasonable industry practice;
 - (e) the service provider complies with conditions (if any) on access to the work; and

- (f) the service provider acts promptly to remove the copy or disable access to the copy when either of the following facts comes to the service provider’s actual knowledge—
- (i) the work has been removed from the original source from which the copy was made; or
 - (ii) access to the work at the original source from which the copy was made has been disabled.

- (2) In this section—

service provider (服務提供者) has the meaning given by section 88A.”.

42. Section 71 amended (Representation of certain artistic works on public display)

Section 71(3)—

Repeal

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

Substitute

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

43. Section 72 amended (Advertisement of sale of artistic work)

- (1) Section 72(2)—

Repeal

everything after “purposes.”.

- (2) Section 72(2), Chinese text—

Repeal

“有人進行該複製品的”

Substitute

“該複製品被用以進行”.

44. Section 76A added

After section 76—

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

- (1) Copyright in a sound recording or in any literary, dramatic or musical work included in a sound recording is not infringed by the making of a copy of the sound recording (*private copy*) if—
- (a) the copy of the sound recording from which the private copy is made (*original copy*) is not an infringing copy;
 - (b) the private copy is made by the lawful owner (*owner*) of the original copy solely for the private and domestic use by the owner or a member of the household in which the owner lives;
 - (c) not more than one private copy of the original copy is made and stored in each device lawfully owned by the owner; and
 - (d) the owner retains the ownership of both the original copy and the private copy.
- (2) A private copy that, but for subsection (1), would be an infringing copy is to be treated as an infringing copy if—
- (a) it is used otherwise than for the purpose mentioned in subsection (1)(b); or
 - (b) the condition mentioned in subsection (1)(c) or (d) is broken.”.

45. Part II, Division IIIA added

Part II, after section 88—

Add**“Division IIIA****Limitations on Liability of Service Providers Relating to Online Materials****88A. Definitions**

In this Division—

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

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

counter notice (異議通知) means a notice given to a service provider under section 88D(3) in relation to an alleged copyright infringement;

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

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

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

online service (聯線服務) includes—

- (a) the transmission, routing, or provision of connections for or access to digital online communications, between or among points specified by a user, of material of the user's choosing;

- (b) the hosting of material that can be accessed by a user;
- (c) the storing of material in a person's system or network temporarily as an automatic response to the request of another person without modifying the material;
- (d) the linking or referral of users to an online location by the use of information location tools;
- (e) the provision of application-based services to users such as social networking services; and
- (f) the provision of access to the Internet;

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

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

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

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

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

88B. Limitations on liability of service providers

- (1) If the conditions specified in subsection (2) are complied with, a service provider is not liable for damages or any other pecuniary remedy for infringement of the copyright in a work that occurs on the service provider's service platform merely because the service provider provides or operates facilities for online services.
- (2) The conditions are—
 - (a) that the service provider has taken reasonable steps to limit or stop the infringement as soon as practicable after the service provider—
 - (i) received a notice of alleged infringement in relation to the infringement;
 - (ii) became aware that the infringement has occurred; or
 - (iii) became aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred;
 - (b) that the service provider has not received and is not receiving any financial benefit directly attributable to the infringement;
 - (c) that the service provider accommodates and does not interfere with standard technical measures that are used by copyright owners to identify or protect their copyright works; and
 - (d) that the service provider designates an agent to receive notices of alleged infringements, by supplying through the service provider's service, including on the service provider's website in a location accessible to the public, the name, address, telephone number and electronic mail address of the agent.

- (3) For the purposes of subsection (2)(a), a service provider is to be treated as having taken reasonable steps to limit or stop the infringement in question if the service provider complies with all the provisions in the code of practice respecting the course of action that a service provider may adopt in limiting or stopping an alleged infringement.
- (4) For the purposes of subsection (2)(b)—
- (a) in determining whether a service provider has received or is receiving a financial benefit directly attributable to the infringement in question, the court may take into account all the circumstances of the case and, in particular—
- (i) industry practice in relation to the charging for online services provided by other service providers that are similar to the online service to which the infringement relates;
- (ii) whether the fee of the online service provided by the service provider is for, and the value of the online service provided by the service provider lies in, providing access to infringing material; and
- (iii) whether the financial benefit obtained by the service provider for providing the online service to which the infringement relates was greater than the benefit that would usually result from charging for the online service in accordance with accepted industry practices; and
- (b) financial benefits directly attributable to the infringement do not include one-off set up fees or flat periodic payments that are charged by the service provider in respect of all users on a non-discriminatory basis.

- (5) To avoid doubt—
- (a) nothing in this Division requires a service provider to—
- (i) monitor the service provider's service or actively seek facts that indicate infringing activity, except to the extent consistent with a standard technical measure complying with subsection (2)(c); or
- (ii) gain access to, remove, or disable access to material in cases where such actions are prohibited by law,
- in order to qualify for the limitations on liability established by this section; and
- (b) the failure of a service provider to qualify for the limitations on liability established by this section has no adverse bearing on the consideration of any defence that may be available to the service provider in proceedings for infringement of copyright.
- (6) This section does not apply to proceedings for infringement of copyright commenced before the day on which this section comes into operation.

88C. Notice of alleged infringement

- (1) If it is alleged that an infringement of the copyright in a work has occurred or is occurring on a service provider's service platform, a notice in respect of the alleged infringement may be given to the service provider under this section.
- (2) A notice of alleged infringement—
- (a) must be in writing;

- (b) must be signed or otherwise authenticated by the owner of the allegedly infringed copyright or that owner's authorized representative; and
 - (c) must be provided to the designated agent of the service provider by electronic or other means.
- (3) A notice of alleged infringement—
- (a) must contain the name and address of the complainant and any other information that is reasonably sufficient for contacting the complainant;
 - (b) must substantially identify the copyright work that is alleged to have been infringed or, if the notice alleges that multiple copyright works have been infringed at a single online site, must identify a representative number of such works;
 - (c) must identify—
 - (i) the material, or the link or reference to the material, that is alleged to be infringing or to be the subject of infringing activity;
 - (ii) the activity, or the link or reference to the activity, that is alleged to be infringing;
 - (d) must contain information sufficient to enable the service provider to locate the material, activity, link or reference mentioned in paragraph (c);
 - (e) must contain a statement to the effect that the complainant believes in good faith that use of the material, or conduct of the activity, in the manner complained of is not authorized by law, and has not been authorized by the copyright owner or the authorized representative of the copyright owner;
 - (f) must contain a statement to the effect that the complainant requests the service provider to—

- (i) send a copy of the notice to the service provider's subscriber whose account for online services has been used or involved in the alleged infringement; and
 - (ii) if applicable, remove the material to which the alleged infringement relates, or disable access to the material or activity to which the alleged infringement relates; and
- (g) must contain a declaration to the effect that—
- (i) the information contained in the notice is true and accurate to the best of the complainant's knowledge and belief;
 - (ii) the complainant is the copyright owner or is authorized to act on behalf of the copyright owner; and
 - (iii) the complainant understands that the complainant commits an offence and is liable to pay compensation by way of damages to any person who suffers loss or damage as a result of any false statement contained in the notice.
- (4) A notice of alleged infringement that does not comply with subsections (2) and (3) is of no effect for the purposes of section 88B(2)(a).

88D. Counter notice

- (1) On receiving a notice of alleged infringement from a complainant, a service provider may—
- (a) send a copy of the notice to the service provider's subscriber whose account for online services has been used or involved in the alleged infringement; and

- (b) notify the subscriber that the subscriber may contact the complainant directly.
- (2) If a service provider becomes aware that an infringement of the copyright in a work has occurred on the service provider's service platform or becomes aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred, the service provider may—
 - (a) remove the material to which the infringement relates, or disable access to the material or activity to which the infringement relates; and
 - (b) by notice in writing given to the service provider's subscriber whose account for online services has been used or involved in the infringement, notify the subscriber of the removal or disabling.
- (3) On receiving a copy of notice of alleged infringement sent by the service provider under subsection (1) or a notice given by the service provider under subsection (2), the subscriber may give a counter notice to the service provider—
 - (a) disputing or denying the infringement alleged by the complainant or service provider; and
 - (b) if the service provider has removed any material, or disabled access to any material or activity, requesting the service provider to take reasonable steps to reinstate the material, or cease disabling access to the material or activity, within a reasonable time after receiving the counter notice.
- (4) A counter notice—
 - (a) must be in writing;
 - (b) must be signed or otherwise authenticated by the subscriber; and

- (c) must be provided to the designated agent of the service provider by electronic or other means.
- (5) A counter notice—
 - (a) must contain the name, address and telephone number of the subscriber;
 - (b) must identify—
 - (i) the material that has been removed or to which access has been disabled, and the location at which the material appeared before it was removed or access to it was disabled;
 - (ii) the activity to which access has been disabled, and the location at which the activity appeared before access to it was disabled;
 - (c) must contain a statement to the effect that the subscriber believes in good faith that the material was removed, or access to the material or activity was disabled, as a result of a mistake or misidentification; and
 - (d) must contain a declaration to the effect that—
 - (i) the information contained in the counter notice is true and accurate to the best of the subscriber's knowledge and belief; and
 - (ii) the subscriber understands that the subscriber commits an offence and is liable to pay compensation by way of damages to any person who suffers loss or damage as a result of any false statement contained in the counter notice.
- (6) A counter notice that does not comply with subsections (4) and (5) is of no effect for the purposes of subsection (3)(b).

88E. Offence of making false statements

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

88F. Civil liability for making false statements

- (1) Any person who makes any statement in a notice of alleged infringement or counter notice that the person knows to be false, or does not believe to be true, in a material respect, is liable in damages to any person who suffers loss or damage as a result of the making of the statement.
- (2) In this section—
loss or damage (損失或損害), in relation to a statement, means loss or damage that is reasonably foreseeable as likely to result from the making of the statement.

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

- (1) Subject to subsection (2), if a service provider has, in good faith, removed any material, or disabled access to any material or activity, pursuant to a notice of alleged infringement, the service provider is not liable to any person for any claim made in respect of the removal or disabling, whether or not the material or activity is ultimately determined to be infringing.

- (2) Subsection (1) does not apply with respect to material residing at the direction of a subscriber of the service provider on the service provider's service platform and that is removed, or to material or activity residing at the direction of a subscriber of the service provider on the service provider's service platform and to which access is disabled, unless—
 - (a) the service provider takes reasonable steps to notify the subscriber that the service provider has removed the material or disabled access to the material or activity;
 - (b) the service provider takes reasonable steps to send a copy of the notice of alleged infringement to the subscriber; and
 - (c) where the subscriber gives a counter notice to the service provider—
 - (i) the service provider promptly sends a copy of the counter notice to the complainant; and
 - (ii) subject to subsection (7), the service provider takes reasonable steps to reinstate the material, or cease disabling access to the material or activity, within a reasonable time after receiving the counter notice.
- (3) Subject to subsection (4), if a service provider has, in good faith, removed any material, or disabled access to any material or activity, after the service provider became aware that the material or activity relates to an infringement of copyright or became aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred, the service provider is not liable to any person for any claim made in respect of the removal or disabling, whether or not the material or activity is ultimately determined to be infringing.

- (4) Subsection (3) does not apply with respect to material residing at the direction of a subscriber of the service provider on the service provider's service platform and that is removed, or to material or activity residing at the direction of a subscriber of the service provider on the service provider's service platform and to which access is disabled, unless—
- (a) the service provider takes reasonable steps to notify the subscriber that the service provider has removed the material or disabled access to the material or activity;
 - (b) the service provider takes reasonable steps to provide the subscriber with—
 - (i) information reasonably sufficient to enable the subscriber to identify the material or activity; and
 - (ii) the service provider's reasons for the removal or disabling; and
 - (c) subject to subsection (7), where the subscriber gives a counter notice to the service provider, the service provider takes reasonable steps to reinstate the material, or cease disabling access to the material or activity, within a reasonable time after receiving the counter notice.
- (5) Subject to subsections (6) and (7), if a service provider has, in good faith, reinstated any material, or ceased disabling access to any material or activity, pursuant to a counter notice, the service provider is not liable to any person for any claim made in respect of the reinstatement or cessation, whether or not the material or activity is ultimately determined to be infringing.
- (6) Subsection (5) does not apply in a case where the material was removed, or access to the material or activity was disabled, pursuant to a notice of alleged

infringement unless the service provider takes reasonable steps to send a copy of the counter notice to the complainant.

- (7) Subsections (2)(c)(ii), (4)(c) and (5) do not apply if the designated agent of the service provider has been notified that proceedings have been commenced in Hong Kong seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material or activity on the service provider's service platform.

88H. Evidence of compliance with conditions

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

- (a) a condition described in section 88B; or
- (b) a condition specified in the code of practice,

the court must presume, in the absence of evidence to the contrary, that the service provider has complied with that condition.

88I. Code of practice

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

- (b) the course of action that a service provider may adopt on receiving a notice of alleged infringement or counter notice.
- (3) The Secretary for Commerce and Economic Development may from time to time revise the whole or any part of the code of practice published under subsection (1) in a manner consistent with the Secretary's power to publish the code under that subsection, and any reference to the code of practice in this Ordinance is to be construed as a reference to the code as so revised.
- (4) Any code of practice published under subsection (1) is not subsidiary legislation.”.

46. Section 89 amended (Right to be identified as author or director)

- (1) Section 89(2)(a)—

Repeal

“, broadcast or included in a cable programme service”

Substitute

“or communicated to the public”.

- (2) Section 89(2)—

Repeal paragraph (b)

Substitute

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

- (3) Section 89(3)(a)—

Repeal

“, broadcast or included in a cable programme service”

Substitute

“or communicated to the public”.

- (4) Section 89(3)—

Repeal paragraph (b)

Substitute

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

- (5) Section 89(3)—

Repeal paragraph (c)

Substitute

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

- (6) Section 89(4)(a)—

Repeal

“broadcast or included in a cable programme service”

Substitute

“communicated to the public”.

- (7) Section 89(4)—

Repeal paragraph (b)

Substitute

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

- (8) Section 89(4)(c)—

Repeal

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

Substitute

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

- (9) Section 89(6)—

Repeal

“, broadcast or included in a cable programme service”

Substitute

“or communicated to the public.”.

- (10) Section 89(6)—

Repeal

“or made available”.

- (11) Section 89(7)(a)—

Repeal

“or making available”.

- (12) After section 89(7)(a)—

Add

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

- (13) Section 89(7)(c)—

Repeal

“, broadcast or cable programme”

Substitute

“or communication”.

47. Section 92 amended (Right to object to derogatory treatment of work)

- (1) Section 92(3)(a)—

Repeal

“, broadcasts or includes in a cable programme service”

Substitute

“or communicates to the public”.

- (2) Section 92(3)—

Repeal paragraph (b)

Substitute

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

- (3) Section 92(4)(a)—

Repeal

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

Substitute

“or communicates to the public”.

- (4) Section 92(4)(b)—

Repeal

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

Substitute

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

- (5) Section 92(4)(c)—

Repeal

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

Substitute

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

- (6) Section 92(6)(a)—

Repeal

“, broadcasts or includes in a cable programme service”

Substitute

“or communicates to the public”.

- (7) Section 92(6)(b)—

Repeal

“or makes available”.

48. Section 96 amended (False attribution of work)

- (1) Section 96(3)(a)—

Repeal

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

Substitute

“or communicates it to the public”.

- (2) Section 96(3)(b)—

Repeal

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

Substitute

“or communicates it to the public”.

49. Section 108 amended (Provisions as to damages in infringement action)

- (1) Section 108(2)(b)—

Repeal

“and”.

- (2) Section 108(2)(c)—

Repeal

“records,”

Substitute

“records;”.

- (3) After section 108(2)(c)—

Add

“(d) the conduct of the defendant after the act constituting the infringement occurred, including but not limited to the conduct of the defendant after having been informed of the infringement; and

- (e) the likelihood of widespread circulation of infringing copies as a result of the infringement.”.

50. Section 116 amended (Presumptions relevant to sound recordings, films and computer programs)

Section 116(5)—

Repeal

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

Substitute

“or communicated to the public”.

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

(1) After section 118(2)—

Add

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

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

(2) Section 118(2E)—

Repeal

“recording by the Hong Kong Film Archive”

Substitute

“recording by a specified library, museum or archive”.

(3) Section 118(2E)(a)—

Repeal

“the Hong Kong Film Archive”

Substitute

“the library, museum or archive”.

(4) Section 118(2E)(b)—

Repeal

“the Hong Kong Film Archive”

Substitute

“the library, museum or archive”.

(5) Section 118(2F)—

Repeal

“recording by the Hong Kong Film Archive”

Substitute

“recording by a specified library, museum or archive”.

(6) Section 118(2F)(a)—

Repeal

“the Hong Kong Film Archive” (wherever appearing)

Substitute

“the library, museum or archive”.

(7) Before section 118(9)—

Add

“(8B) A person commits an offence if the person—

- (a) without the licence of the copyright owner of a copyright work, communicates the work to the public for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward; or
- (b) without the licence of the copyright owner of a copyright work, communicates the work to the public (otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward) to such an extent as to affect prejudicially the copyright owner.

- (8C) For the purposes of subsection (8B)(b), in determining whether any communication of the work to the public is made to such an extent as to affect prejudicially the copyright owner, the court may take into account all the circumstances of the case and, in particular—
- (a) the purpose of the communication;
 - (b) the nature of the work, including its commercial value;
 - (c) the amount and substantiality of the portion communicated in relation to the work as a whole;
 - (d) the mode of communication; and
 - (e) the economic prejudice caused to the copyright owner as a consequence of the communication, including the effect of the communication on the potential market for or value of the work.
- (8D) It is a defence for a person charged with an offence under subsection (8B) to prove that the person did not know and had no reason to believe that, by communicating the work in question in the circumstances described in subsection (8B)(a) or (b), the person was infringing the copyright in the work.”

52. Section 119 amended (Penalties for offences under section 118)

Section 119(1)—

Repeal

“section 118(1) or (2A)”

Substitute

“section 118(1), (2A) or (8B)”.

53. Section 121 amended (Affidavit evidence)

- (1) After section 121(2C)—

Add

- “(2CA) For the purposes of any proceedings instituted under section 118(8B), an affidavit that purports to have been made by or on behalf of the copyright owner of a copyright work and which—
- (a) states the name of the copyright owner; and
 - (b) states that the person named in the affidavit does not have the licence of the copyright owner to do an act referred to in section 118(8B) in respect of the work,
- is, subject to the conditions contained in subsection (4), to be admitted without further proof in the proceedings.”.

- (2) Section 121(3), after “(2C)—

Add

“, (2CA)”.

- (3) Section 121(4), after “(2C)—

Add

“, (2CA)”.

- (4) Section 121(7), after “(2C)—

Add

“, (2CA)”.

- (5) Section 121(13)(a), after “(2C)—

Add

“, (2CA)”.

54. Section 154 amended (Licensing schemes to which sections 155 to 166 apply)

- (1) Section 154—

Repeal paragraph (d)

Substitute

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

- (2) Section 154(e)—

Repeal

“or making available”.

55. Section 161 amended (Licences to which sections 162 to 166 apply)

- (1) Section 161—

Repeal paragraph (d)

Substitute

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

- (2) Section 161(e)—

Repeal

“or making available”.

56. Section 199 amended (Index of defined expressions)

- (1) Section 199, English text, Table—

Repeal

“librarian (in sections 45 to 52)”

Substitute

“librarian (in sections 46 to 53)”.

- (2) Section 199, Table—

Repeal

“make available copies to the public section 26”.

- (3) Section 199, Table—

Repeal

“specified library or archive (in sections 46 to 52)”

Substitute

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

- (4) Section 199, Table—

Add in alphabetical order

“communication to the public	section 28A
curator (in sections 46 to 53)	section 46(5)”.

57. Section 200 amended (Rights conferred on performers and persons having fixation rights)

Section 200(2), definition of *fixation*—

Repeal paragraph (b)

Substitute

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

58. Section 202 amended (Consent required for fixation, etc. of unfixed performance)

- (1) Section 202(1)—

Repeal paragraph (b)

Substitute

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

- (2) Section 202(1)—

Repeal paragraph (c)

Substitute

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

- (3) Section 202—

Repeal subsection (4).

59. Section 203 amended (Consent required for copying of fixation)

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

Add

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

60. Section 205 amended (Consent required for making available of copies to public)

(1) Section 205, heading—

Repeal

“copies”

Substitute

“fixations”.

(2) Section 205(1)—

Repeal

“copies of”.

(3) Section 205(2)—

Repeal

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

Substitute

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

(4) Section 205(2)—

Repeal

“making available of copies of the fixation”

Substitute

“making the fixation available”.

(5) Section 205(2)—

Repeal

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

Substitute

“by making fixations available through the Internet”.

(6) Section 205—

Repeal subsection (3).

(7) Section 205—

Repeal subsection (4)

Substitute

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

(8) Section 205(5)—

Repeal

“copies of”.

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

(1) Section 206(1)(b)—

Repeal

“broadcasts or includes in a cable programme service”

Substitute

“communicates to the public”.

(2) Section 206—

Repeal subsection (2).

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

Section 207A(2)(b)(i)—

Repeal

“, broadcasting or inclusion in a cable programme service”

Substitute

“or communicating to the public”.

63. Section 210 amended (Infringement of fixation rights by use of fixation made without consent)

(1) Section 210(1)(b)—

Repeal

“broadcasts or includes in a cable programme service”

Substitute

“communicates to the public”.

(2) Section 210—

Repeal subsection (2).

(3) Section 210(3)—

Repeal

“or (2)”.

64. Section 214 amended (Duration of rights)

Section 214(3)—

Repeal

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

Substitute

“or communicated to the public”.

65. Section 221 amended (Provisions as to damages in infringement action)

(1) Section 221(2)(b)—

Repeal

“and”.

(2) Section 221(2)(c)—

Repeal

“records,”

Substitute

“records;”.

(3) After section 221(2)(c)—

Add

“(d) the conduct of the defendant after the act constituting the infringement occurred, including but not limited to the conduct of the defendant after having been informed of the infringement; and

(e) the likelihood of widespread circulation of infringing copies as a result of the infringement,”.

66. Section 229 amended (Meaning of “infringing fixation”)

(1) Section 229(2)—

Repeal

“private purposes”

Substitute

“private and domestic use”.

(2) Section 229(3)—

Repeal

“private purposes”

Substitute

“private and domestic use”.

(3) After section 229(3)—

Add

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

(4) After section 229(7)(d)—

Add

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

67. Section 238 amended (Expressions having same meaning as in copyright provisions)

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

Add

“communication to the public;”.

68. Section 239 amended (Index of defined expressions)

Section 239, Table, after entry relating to cable programme, cable programme service (and related expressions)—

Add

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

69. Section 243 amended (Things done for purposes of instruction or examination)

(1) Section 243(3)—

Repeal

everything after “purposes.”.

(2) Section 243(3), Chinese text—

Repeal

“有人進行如此製作的錄製品”

Substitute

“該錄製品被用以進行”.

70. Section 245 amended (Recording of broadcasts and cable programmes by educational establishments)

(1) Section 245, heading—

Repeal

“Recording of broadcasts and cable programmes by educational establishments”

Substitute

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

(2) After section 245(1)—

Add

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

(a) the person makes the communication for the educational purposes of the establishment; and

(b) the establishment takes all reasonable steps to ensure that—

(i) only authorized recipients receive the communication; and

(ii) the authorized recipients do not make any copy or further transmission of the communication.”.

(3) Section 245—

Repeal subsection (2)

Substitute

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

(4) Section 245(3)—

Repeal

everything after “purposes.”.

(5) Section 245(3), Chinese text—

Repeal

“有人進行該紀錄或複製品的”

Substitute

“該紀錄或複製品被用以進行”.

71. Sections 245A and 245B added

After section 245—

Add

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

- (1) The making of a copy of part of a sound recording or film by or on behalf of an educational establishment for the education purposes of that establishment does not infringe any of the rights conferred by this Part in relation to any performance or fixation included in it.
- (2) A person authorized by an educational establishment may, without infringing the rights conferred by this Part, communicate to an authorized recipient a copy of part of a sound recording or film that has been made in accordance with subsection (1) if—

- (a) the person makes the communication for the educational purposes of the establishment; and
- (b) the establishment takes all reasonable steps to ensure that—
 - (i) only authorized recipients receive the communication; and
 - (ii) the authorized recipients do not make any copy or further transmission of the communication.

- (3) Copying or communicating to authorized recipients is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the copying or communication in question and the person making the copies or communication in question knew or ought to have been aware of that fact.
- (4) Where a copy which would otherwise be an infringing fixation is made in accordance with this section but is subsequently dealt with, it is to be treated as an infringing fixation for the purposes of that dealing, and if that dealing infringes any right conferred by this Part, for all subsequent purposes.
- (5) Expressions used in this section have the same meaning as in section 45.

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

- (1) The communication of a sound recording or film made by the librarian, curator or archivist of a specified library, museum or archive under section 51A to the users or staff of the library, museum or archive, by making it available online to be accessed through the use of a computer terminal installed within the premises of the library, museum or archive, does not infringe any of

the rights conferred by this Part in relation to any performance or fixation included in it.

- (2) The playing or showing by the librarian, curator or archivist of a specified library, museum or archive under section 52A of a sound recording or film held in the permanent collection of the library, museum or archive to an audience consisting of members of the public within the premises of the library, museum or archive does not infringe any of the rights conferred by this Part in relation to any performance or fixation included in it.
- (3) The communication, playing or showing of a sound recording or film is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the communication, playing or showing in question and the person communicating, playing or showing the sound recording or film in question knew or ought to have been aware of that fact.”.

72. Section 252A added

After section 252—

Add

“252A. Temporary reproduction by service providers

- (1) The rights conferred by this Part in a fixed performance are not infringed by the making and storage of a copy of a fixation by a service provider if—
 - (a) the sole purpose of the making and storage of the copy is to enable more efficient transmission of the fixation by the service provider through a network;
 - (b) the making and storage of the copy forms an automatic and essential part of a technological process, and that process neither modifies the fixation, nor interferes with the lawful use of technology to obtain data on the use of the fixation;

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

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

73. Section 272A amended (Moral rights conferred on certain performers)

- (1) Section 272A(4)—

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

- (2) Section 272A(5)—

Repeal

“cable programme service; and”

Substitute

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

- (3) Section 272A(9)—

Repeal

“, (3)”.

- (4) Section 272A(9)—

Repeal

“copies of” (wherever appearing).

74. Section 272B amended (Right to be identified as performer)

- (1) Section 272B(1)(a)—

Repeal

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

Substitute

“or communicated to the public live”.

- (2) Section 272B(1)—

Repeal paragraph (b)

Substitute

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

- (3) Section 272B(2)—

Repeal

“or making available”.

- (4) Section 272B(3)—

Repeal

“, broadcast or cable programme”

Substitute

“or communication”.

75. Section 272E amended (Right to object to derogatory treatment)

- (1) Section 272E(2)(a)—

Repeal

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

Substitute

“or communicated to the public live”.

- (2) Section 272E(2)(b)(i)—

Repeal

“, broadcasts or includes in a cable programme service”

Substitute

“or communicates to the public”.

- (3) Section 272E(2)(b)—

Repeal subparagraph (ii).

- (4) Section 272E(2)(c)(i)—

Repeal

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

Substitute

“or communicates to the public the sound recording.”.

- (5) Section 272E(2)(c)—

Repeal subparagraph (ii).

76. Section 273 amended (Interpretation of sections 273 to 273H)

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

Add

“or”.

- (2) Section 273(1)(c)—

Repeal subparagraph (ii)**Substitute**

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

- (3) Section 273(1)(c)—

Repeal subparagraph (iii).

77. Section 273A amended (Rights and remedies in respect of circumvention of effective technological measures)

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

Add

“or”.

- (2) Section 273A(2)(c)—

Repeal subparagraph (ii)**Substitute**

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

- (3) Section 273A(2)(c)—

Repeal subparagraph (iii).

78. Section 273B amended (Rights and remedies in respect of devices and services designed to circumvent effective technological measures)

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

Add

“or”.

- (2) Section 273B(3)(c)—

Repeal subparagraph (ii)**Substitute**

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

- (3) Section 273B(3)(c)—

Repeal subparagraph (iii).

79. Section 273D amended (Exceptions to section 273A)

Section 273D(8)(b)—

Repeal

“librarian or archivist of a specified library or archive”

Substitute

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

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

- (1) Section 274(2)(b)—

Repeal

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

Substitute

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

- (2) Section 274(3)—

Repeal

“making available”

Substitute

“communication”.

Explanatory Memorandum

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

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

Right of communication to the public

3. New sections 22(1)(fa) and 28A are added to the Ordinance to provide for an exclusive right of the owner of the copyright in a work to communicate the work to the public (clauses 9(3) and 13). The communication of a work to the public is the act of communicating the work to the public by electronic communication, including—
- (a) the broadcasting of the work;
 - (b) the inclusion of the work in a cable programme service; and
 - (c) the making available of the work to the public.
4. Consequential amendments are made to the Ordinance to delete or modify the references to the acts which are subsumed by the expression “communication to the public” as defined in the new section 28A added by clause 13 (the acts are mentioned in paragraph 3 above), and other similar references (clauses 6, 7, 8, 9(1) and (2), 10, 11, 12, 16, 20, 42, 46(1), (3), (6), (9), (10), (11) and (13), 47(1), (3), (6) and (7), 48(1) and (2), 50, 54, 55 and 56(2)).
5. Amendments are made to sections 8(1), 9(2)(b), 55(3), 56(3), 57(2) and (3), 89(2), (3), (4) and (7) and 92(3) and (4) of the Ordinance to delete the references to “copies of” contained in the expression “making available to the public of copies of works” and in similar expressions (clauses 4, 5, 38, 39, 40, 46(2), (4), (5), (7), (8) and (12) and 47(2), (4) and (5)). Given that a work may be made available to the public in different forms and no formal copy is required, the references to “copies” are unnecessary.

6. Similar amendments are made to the provisions of Parts III, IIIA and IV of the Ordinance in relation to the rights of a performer to communicate the performance to the public, circumvention of effective technological measures and rights management information (clauses 57, 58, 60, 61, 62, 63, 64, 67, 68, 73, 74, 75, 76, 77, 78 and 80).
7. A new subsection (8B) is added to section 118 of the Ordinance to impose criminal liability on a person who, without the licence of the copyright owner of a copyright work, communicates the work to the public in the circumstances specified in that subsection (clause 51(7)).
8. A new subsection (2CA) is added to section 121 of the Ordinance to enable the deponent of an affidavit to state that the person named in the affidavit does not have the licence of the copyright owner of a work to communicate the work to the public (clause 53(1)).

Limitations on liability of online service providers

9. A new Division IIIA (new sections 88A to 88I) is added to Part II of the Ordinance to provide for limitations on the liability of an online service provider relating to an alleged infringement of copyright in a work that has occurred on the service provider’s service platform (clause 45). In particular—
- (a) new section 88A provides for the meaning of the expressions (for example, *online service* and *service provider*) used in the new Division;
 - (b) new section 88B provides that, subject to the specified conditions, a service provider is not liable for damages or any other pecuniary remedy in respect of copyright infringement that has occurred on the service provider’s service platform;
 - (c) new section 88C provides for the procedures for giving a notice to a service provider in respect of an alleged infringement of copyright, requesting the service provider to remove the material to which the alleged

- infringement relates, or disable access to the material or activity to which the alleged infringement relates;
- (d) new section 88D provides for the actions that a service provider may take after the service provider receives a notice of alleged infringement or becomes aware that an infringement of copyright has occurred on the service provider's service platform or becomes aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred, and the procedures for giving a counter notice to dispute the alleged infringement;
 - (e) new section 88E imposes criminal liability on a person who knowingly or recklessly makes any false statement in a notice of alleged infringement or counter notice;
 - (f) new section 88F provides for the civil liability of a person who makes any false statement in a notice of alleged infringement or counter notice;
 - (g) new section 88G provides that, subject to the specified conditions, a service provider is not liable for any claim in respect of the service provider removing the material to which an alleged infringement relates, disabling access to the material or activity to which an alleged infringement relates, reinstating the material, or ceasing disabling access;
 - (h) new section 88H provides for a rebuttable presumption that a service provider has complied with the conditions specified in that section; and
 - (i) new section 88I empowers the Secretary for Commerce and Economic Development to publish a code of practice for providing practical guidance to service providers in respect of the new Division IIIA.

Permitted Acts

- 10. Section 39(1) of the Ordinance is substituted by a new provision to make clear that fair dealing with a work for the purpose of criticism or review does not infringe any copyright in the work if the work has been released or communicated to the public (clause 19(1)).
- 11. A new subsection (1A) is added to section 44 of the Ordinance to provide that, subject to the specified conditions, a person authorized by an educational establishment may, without infringing copyright, communicate a recording, or a copy of a recording, of a broadcast or cable programme that has been made in accordance with section 44(1) of the Ordinance (clause 26(2)).
- 12. A new subsection (1A) is added to section 45 of the Ordinance to provide that, subject to the specified conditions, a person authorized by an educational establishment may, without infringing copyright, communicate a copy of an artistic work, a passage from a published literary, dramatic or musical work, or an extract from a published sound recording or film, that has been made in accordance with section 45(1) of the Ordinance (clause 27(5)).
- 13. Section 48(1) of the Ordinance is amended to extend the scope of works that the librarian of a specified library may, without infringing copyright, copy so as to cover artistic works, sound recordings and films (clause 30).
- 14. Section 50(1)(b) of the Ordinance is amended to extend the scope of copies of works that the librarian of a specified library may, without infringing copyright, make and supply to another specified library so as to cover copies of artistic works (clause 31).
- 15. A new section 51A is added to the Ordinance to provide that, subject to the specified conditions, the librarian, curator or archivist of a specified library, museum or archive may, without infringing copyright, communicate a copy of a specified item made under section 51 of the Ordinance to the users or staff of the library, museum or archive (clause 33).

16. A new section 52A is added to the Ordinance to provide that, subject to the specified conditions, the librarian, curator or archivist of a specified library, museum or archive may, without infringing copyright, play or show any sound recording or film held in the permanent collection of the library, museum or archive to the public (clause 35).
17. Certain permitted acts under the Ordinance that are applicable to specified libraries and archives are extended to cover museums (clauses 32, 34 and 36).
18. A new section 65A is added to the Ordinance to provide that, subject to the specified conditions, an online service provider may, without infringing copyright, make and store a temporary copy of a work to enable more efficient transmission of the work through a network (clause 41).
19. A new section 76A is added to the Ordinance to provide that, subject to the specified conditions, the making of a private copy of a sound recording for private and domestic use does not infringe copyright in the sound recording or any literary, dramatic or musical work included in the sound recording (clause 44).
20. A new subsection (1A) is added to section 245 of the Ordinance to provide for a new permitted act in respect of the communication of a recording, or a copy of a recording, of a broadcast or cable programme by a person authorized by an educational establishment (clause 70(2)). The new permitted act is similar to that provided by the new section 44(1A) added by clause 26(2).
21. A new section 245A is added to the Ordinance to provide for a new permitted act in respect of the copying and communication of a sound recording or film by or on behalf of an educational establishment (clause 71).
22. A new section 245B is added to the Ordinance to provide that, under the specified circumstances, the communication, playing or showing of a sound recording or film does not infringe the

- performers' rights in the performance or fixation included in it (clause 71).
23. A new section 252A is added to the Ordinance to provide for a new permitted act in respect of the making and storage of a temporary copy of a fixation by an online service provider to enable more efficient transmission of the fixation through a network (clause 72). The new permitted act is similar to that provided by the new section 65A added by clause 41.

Additional damages

24. Sections 108(2) and 221(2) of the Ordinance are amended to add 2 factors to which the court may have regard in considering whether additional damages should be awarded in an action for infringement of copyright or infringement of the rights of a performer (clauses 49(3) and 65(3)).

Related amendments

25. A new subsection (5) is added to section 7 of the Ordinance to make clear that the copyright in a film sound-track that does not accompany the film but falls within the meaning given to "sound recording" in section 6(1) of the Ordinance is to be protected as a sound recording (clause 3).
26. A new subsection (2A) is added to section 22 of the Ordinance to set out a non-exhaustive list of factors for determining whether a person has authorized another to do any of the acts restricted by the copyright in a work (clause 9(4)).
27. New sections 31(3), 37(7) and 118(2AA) are added to the Ordinance to set out a non-exhaustive list of factors for determining whether any distribution of a copy of a work is made to such an extent as to affect prejudicially the owner of the copyright in the work (clauses 15(2), 18 and 51(1)).
28. New sections 37(6), 41(6), 44(4) and 45(4) are added to the Ordinance to define the meaning of the expression *dealt with* in the

relevant provisions of the Ordinance (clauses 18, 25(3), 26(6) and 27(9)).

29. Subsections (2E) and (2F) of section 118 of the Ordinance are amended to extend the scope of exemption under those subsections to specified libraries, museums and archives (clause 51(2), (3), (4), (5) and (6)).

Chapter 528	COPYRIGHT ORDINANCE	Gazette Number	Version Date
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Section 7	Films		30/06/1997
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(1) In this Part "film" (影片) means a recording on any medium from which a moving image may by any means be produced.

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

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

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

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

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

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

Section 8	Broadcasts	36 of 2000	16/06/2000
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(1) In this Part a "broadcast" (廣播) means a transmission by wireless telegraphy of sounds or of visual images and sounds or of representations thereof which-

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

(b) is transmitted for presentation to members of the public in Hong Kong or elsewhere, otherwise than through a service for making available to the public of copies of works or fixations of performances.

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

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

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

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

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

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

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

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

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

Section 9	Cable programmes	36 of 2000	16/06/2000
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(1) In this Part-

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

"cable programme service" (有線傳播節目服務) means a service which consists wholly or mainly in the lawful sending by any person, by means of a telecommunications system (whether run by

himself or by any other person), of sounds, visual images, other information or any combination of them either- (Amended 36 of 2000 s. 28)

- (a) for lawful reception, otherwise than by wireless telegraphy, at 2 or more places in Hong Kong or elsewhere, whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service; or
- (b) for lawful reception, by whatever means, at a place in Hong Kong or elsewhere for the purposes of their being presented there either to members of the public or to any group of persons,

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

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

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

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

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

- (a) a service (such as the services commonly known as video conferencing and video telephony) which consists wholly or mainly in the transmission of sounds or visual images or both by any person if it is an essential feature of the service that, while they are being transmitted, there will or may be transmitted from each place of reception, by means of the telecommunications system or (as the case may be) the part of it by means of which they are transmitted, sounds or visual images or both for reception by that person; (Amended 36 of 2000 s. 28)
- (b) a service for making available to the public of copies of works or fixations of performances, but excluding a service in which the transmission of moving visual representational images is an essential feature (such as the service commonly known as video-on-demand);
- (c) the running by a broadcaster of a telecommunications system in the case of which every transmission made by it is either- (Amended 36 of 2000 s. 28)
 - (i) a transmission, by wireless telegraphy, from a transmitting station for general reception of sounds, visual images or signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images; or
 - (ii) a transmission within a single set of premises of sounds, visual images or such signals which are to be or have been so transmitted;
- (d) the running of a telecommunications system in the case of which the only agency involved in the transmission of things thereby transmitted is light and the things thereby transmitted are so transmitted as to be capable of being received or perceived by the eye and without more; (Amended 36 of 2000 s. 28)
- (e) the running by a person of a telecommunications system which is not connected to another telecommunications system and in the case of which all the apparatus comprised therein is situated either- (Amended 36 of 2000 s. 28)
 - (i) on a single set of premises in single occupation (other than a service operated as part of the amenities provided for residents or inmates of premises run as a business); or
 - (ii) in a vehicle, vessel, aircraft or hovercraft or in 2 or more vehicles, vessels, aircraft or hovercraft mechanically coupled together;
- (f) the running by a single individual of a telecommunications system which is not connected to another telecommunications system and in the case of which- (Amended 36 of 2000 s. 28)
 - (i) all the apparatus comprised therein is under his control; and
 - (ii) everything transmitted by it that is speech, music and other sounds, visual images, signals serving for the impartation (whether as between persons and persons,

- things and things or persons and things) of any matter otherwise than in the form of sounds or visual images, or signals serving for the actuation or control of machinery or apparatus is transmitted solely for his domestic purposes, and references in paragraph (e) and this paragraph to another telecommunications system do not include references to such a system as is mentioned in paragraph (c) (whether run by a broadcaster or by any other person); or (Amended 36 of 2000 s. 28)
- (g) in the case of a business carried on by a person, the running, for the purposes of the business, of a telecommunications system which is not connected to another telecommunications system and with respect to which the following conditions are satisfied- (Amended 36 of 2000 s. 28)
- (i) that no person except the person carrying on the business is concerned in the control of the apparatus comprised in the system;
 - (ii) that nothing that is speech, music and other sounds, visual images, signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images, or signals serving for the actuation or control of machinery or apparatus is transmitted by the system by way of rendering a service to another;
 - (iii) that, in so far as sounds or visual images are transmitted by the system, they are not transmitted for the purpose of their being heard or seen by persons other than the person carrying on the business or any employees of his engaged in the conduct thereof;
 - (iv) that, in so far as signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images are transmitted by the system, they are not transmitted for the purpose of imparting matter otherwise than to the person carrying on the business, any employees of his engaged in the conduct thereof or things used in the course of the business and controlled by him; and
 - (v) that, in so far as signals of speech, music and other sounds are transmitted by the system, they are not transmitted for the purpose of actuating or controlling machinery or apparatus used otherwise than in the course of the business.

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

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

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

- (a) it is included in a cable programme service by reception and immediate re-transmission of a broadcast; or
- (b) it infringes, or to the extent that it infringes, the copyright in another cable programme or in a broadcast.

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

Section 17	Duration of copyright in literary, dramatic, musical or artistic works		30/06/1997
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Expanded Cross Reference:
182, 183, 184

Duration of copyright

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

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

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

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

subject as follows.

(4) Subsection (2) applies if the identity of the author becomes known before the end of the period specified in subsection (3)(a) or (b).

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

- (a) in the case of a literary, dramatic or musical work-
 - (i) performance in public; or
 - (ii) being broadcast or included in a cable programme service;
- (b) in the case of an artistic work-
 - (i) exhibition in public;
 - (ii) a film including the work being shown in public; or
 - (iii) being included in a broadcast or cable programme service;

(c) making available of copies of a work to the public within the meaning of section 26, but in determining generally for the purposes of that subsection whether a work has been made available to the public no account is to be taken of any unauthorized act.

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

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

- (a) the reference in subsection (2) to the death of the author is to be construed-
 - (i) if the identity of all the authors is known, as a reference to the death of the last of them to die; and
 - (ii) if the identity of one or more of the authors is known and the identity of one or more others is not, as a reference to the death of the last whose identity is known; and
- (b) the reference in subsection (4) to the identity of the author becoming known is to be construed as a reference to the identity of any of the authors becoming known.

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

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

Section 18	Duration of copyright in sound recordings		30/06/1997
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(1) The following provisions have effect with respect to the duration of copyright in a sound recording.

(2) Copyright expires-

- (a) at the end of the period of 50 years from the end of the calendar year in which it is made; or
- (b) if during that period it is released, 50 years from the end of the calendar year in which it is released,

subject as follows.

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

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

Section 19	Duration of copyright in films		30/06/1997
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(1) The following provisions have effect with respect to the duration of copyright in a film.

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

- (a) the principal director;

- (b) the author of the screenplay;
- (c) the author of the dialogue; or
- (d) the composer of music specially created for and used in the film,

subject as follows.

(3) If the identity of one or more of the persons referred to in subsection (2)(a) to (d) is known and the identity of one or more others is not, the reference in that subsection to the death of the last of them to die is to be construed as a reference to the death of the last whose identity is known.

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

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

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

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

- (a) showing in public;
- (b) making available of copies of a work to the public within the meaning of section 26; or
- (c) being broadcast or included in a cable programme service,

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

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

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

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

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

RIGHTS OF COPYRIGHT OWNER

The acts restricted by copyright

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

- (a) to copy the work (see section 23);
- (b) to issue copies of the work to the public (see section 24);
- (c) to rent copies of the work to the public (see section 25); (Replaced 15 of 2007 s. 5)
- (d) to make available copies of the work to the public (see section 26);
- (e) to perform, show or play the work in public (see section 27);
- (f) to broadcast the work or include it in a cable programme service (see section 28);
- (g) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 29),

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

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

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

- (a) in relation to the work as a whole or any substantial part of it; and
- (b) either directly or indirectly,

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

- (4) This Division has effect subject to-
- (a) the provisions of Division III (acts permitted in relation to copyright works); and
 - (b) the provisions of Division VIII (provisions with respect to copyright licensing).
- [cf. 1988 c. 48 s. 16 U.K.]

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

* Italicized parts are not yet in operation.

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

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

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

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

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

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

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

Section 26	Infringement by making available of copies to the public		30/06/1997
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(1) The making available of copies of the work to the public is an act restricted by copyright in every description of copyright work.

(2) References in this Part to the making available of copies of a work to the public are to the making available of copies of the work, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the work from a place and at a time individually chosen by them (such as the making available of copies of works through the service commonly known as the INTERNET).

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

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

Section 28	Infringement by broadcasting or inclusion in a cable programme service		30/06/1997
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The broadcasting of the work or its inclusion in a cable programme service is an act restricted by the copyright in-

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

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

Section 29	Infringement by making adaptation or act done in relation to adaptation		30/06/1997
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Expanded Cross Reference:
23, 24, 25, 26, 27, 28

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

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

(3) In this Part "adaptation" (改編本)-

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

(i) a translation of the work;

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

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

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

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

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

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

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

Section 31	Secondary infringement: possessing or dealing with infringing copy	15 of 2007	06/07/2007
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(1) The copyright in a work is infringed by a person who, without the licence of the copyright owner- (Amended 64 of 2000 s. 2)

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

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

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

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

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

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

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

Section 32	Secondary infringement: providing means for making infringing copies	15 of 2007	06/07/2007
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(1) Copyright in a work is infringed by a person who, without the licence of the copyright owner-

- (a) makes;
- (b) imports into Hong Kong or exports from Hong Kong;
- (c) possesses for the purpose of or in the course of any trade or business; or (Amended 64 of 2000 s. 3; 15 of 2007 s. 8)
- (d) sells or lets for hire, or offers or exposes for sale or hire,

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

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

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

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

Section 35	Meaning of "infringing copy"	15 of 2007	06/07/2007
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Expanded Cross Reference:

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

Infringing copy

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

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

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

- (a) it has been or is proposed to be imported into Hong Kong; and
- (b) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

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

- (a) that was lawfully made in the country, territory or area where it was made;
- (b) that has been or is proposed to be imported into Hong Kong at any time after the expiration of 15 months beginning on the first day of publication of the work in Hong Kong or elsewhere; and (Amended 15 of 2007 s. 9)
- (c) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work,

or a copy of an accessory work-

- (i) that was lawfully made in the country, territory or area where it was made;
- (ii) that has been or is proposed to be imported into Hong Kong; and
- (iii) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

(5) For the purposes of Division VII (proceedings relating to importation of infringing articles),

"infringing copy" (侵犯版權複製品) does not include a copy of a work or a copy of an accessory work-

- (a) that was lawfully made in the country, territory or area where it was made;
- (b) that has been or is proposed to be imported into Hong Kong; and
- (c) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

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

- (a) that it is a copy of the work; and
- (b) that copyright subsists in the work or has subsisted at any time,

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

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

- (a) in the case of a copy of a work that is stored in an optical disc, that the optical disc is not marked with a manufacturer's code as required under section 15 of the Prevention of Copyright Piracy Ordinance (Cap 544);
- (b) that a label or mark on the copy, the article in which the copy is embodied or the packaging or container in which the copy is packaged or contained indicates that the copy was made in a country, territory or area outside Hong Kong; or
- (c) that a label or mark on the copy, the article in which the copy is embodied or the packaging or container in which the copy is packaged or contained indicates that distribution, sale or supply of the copy is prohibited in Hong Kong or restricted to countries, territories or areas outside Hong Kong,

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

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

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

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

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

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

- (a) section 35B(5) (imported copy not an "infringing copy" for purposes of section 35(3));
- (b) section 40B(5) (accessible copies made for persons with a print disability);
- (c) section 40C(7) (accessible copies made by specified bodies for persons with a print disability);
- (d) section 40D(2) (intermediate copies possessed by specified bodies);
- (e) section 40D(7) (intermediate copies dealt with by specified bodies);
- (f) section 41A(7) (copies made for purposes of giving or receiving instruction);
- (g) section 41(5) (copies made for purposes of instruction or examination);
- (h) section 44(3) (recordings made by educational establishments for educational purposes);
- (i) section 45(3) (reprographic copying by educational establishments for purposes of instruction);
- (j) section 46(4)(b) (copies made by librarian or archivist in reliance on false declaration);
- (k) section 54A(3) (copies made for purposes of public administration);
- (l) section 64(2) (further copies, adaptations, etc. of work in electronic form retained on transfer of principal copy);
- (m) section 72(2) (copies made for purpose of advertising artistic work for sale); or

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

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

- (a) a label affixed to, or displayed on, an article;
- (b) the packaging or container in which an article is packaged or contained;
- (c) a label affixed to, or displayed on, the packaging or container in which an article is packaged or contained;
- (d) a written instruction, warranty or other information incidental to an article and provided with the article on its sale; or
- (e) an instructional sound recording or film incidental to an article and provided with the article on its sale,

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

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

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

Section 37	Introductory provisions		30/06/1997
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DIVISION III

ACTS PERMITTED IN RELATION TO COPYRIGHT WORKS

Introductory

(1) The provisions of this Division specify acts which may be done in relation to copyright works notwithstanding the subsistence of copyright; they relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts.

(2) Where it is provided by this Division that an act does not infringe copyright, or may be done without infringing copyright, and no particular description of copyright work is mentioned, the act in question does not infringe the copyright in a work of any description.

(3) In determining whether an act specified in this Division may be done in relation to a copyright work notwithstanding the subsistence of copyright, the primary consideration is that the act does not conflict with a normal exploitation of the work by the copyright owner and does not unreasonably prejudice the legitimate interests of the copyright owner.

(4) No inference is to be drawn from the description of any act which may by virtue of this Division be done without infringing copyright as to the scope of the acts restricted by the copyright in any description of work.

(5) The provisions of this Division are to be construed independently of each other, so that the fact that an act does not fall within one provision does not mean that it is not covered by another provision.

[cf. 1988 c. 48 s. 28 U.K.]

Section 39	Criticism, review and news reporting		30/06/1997
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(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, if it is accompanied by a sufficient acknowledgement, does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

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

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

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

Section 40	Incidental inclusion of copyright material		30/06/1997
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(1) Copyright in a work is not infringed by its incidental inclusion in an artistic work, sound recording, film, broadcast or cable programme.

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

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

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

Section 40B	Making a single accessible copy for a person with a print disability	15 of 2007	06/07/2007
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(1) If-

- (a) a person with a print disability possesses a copy of the whole or part of a literary, dramatic, musical or artistic work (referred to in this section as "master copy"); and
- (b) the master copy is not accessible to him because of the disability,

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

(2) Subsection (1) does not apply-

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

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

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

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

- (a) for the purpose of that dealing; and
- (b) if that dealing infringes copyright, for all subsequent purposes.

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

(Added 15 of 2007 s. 13)

Section 40C	Making multiple accessible copies by specified bodies for persons with a print disability	15 of 2007	06/07/2007
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(1) If-

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

it is not an infringement of copyright in the work or, in the case of a published edition, in the

typographical arrangement, for the specified body to make for those persons or supply to those persons accessible copies of the master copy for their personal use.

- (2) Subsection (1) does not apply-
 - (a) if the master copy is an infringing copy;
 - (b) if the master copy is of a musical work or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of the work; or
 - (c) if the master copy is of a dramatic work or part of a dramatic work, and the making of an accessible copy would involve recording a performance of the work or part of the work.

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

- (4) The specified body must-
 - (a) within a reasonable time before making or supplying the accessible copies, notify the relevant copyright owner of its intention to make or supply the accessible copies; or
 - (b) within a reasonable time after making or supplying the accessible copies, notify the relevant copyright owner of the fact that it has made or supplied the accessible copies.

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

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

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

- (a) for the purpose of that dealing; and
- (b) if that dealing infringes copyright, for all subsequent purposes.

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

(Added 15 of 2007 s. 13)

Section 40D	Intermediate copies	15 of 2007	06/07/2007
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(1) A specified body entitled to make accessible copies of a master copy under section 40C may possess an intermediate copy of the master copy which is necessarily created during the production of the accessible copies, but-

- (a) the specified body may possess the intermediate copy only for the purpose of the production of further accessible copies; and
- (b) the specified body must destroy the intermediate copy within 3 months after it is no longer required for that purpose.

(2) An intermediate copy possessed otherwise than in accordance with subsection (1) is to be treated as an infringing copy.

(3) A specified body may lend or transfer an intermediate copy possessed under subsection (1) to another specified body which is also entitled to make accessible copies of the relevant copyright work under section 40C.

- (4) The specified body must-
 - (a) within a reasonable time before lending or transferring the intermediate copy, notify the relevant copyright owner of its intention to lend or transfer the intermediate copy; or
 - (b) within a reasonable time after lending or transferring the intermediate copy, notify the relevant copyright owner of the fact that it has lent or transferred the intermediate copy.

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

(6) If the specified body charges for lending or transferring an intermediate copy under this section, the sum charged must not exceed the cost incurred in lending or transferring the copy.

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

- (a) for the purpose of that dealing; and
- (b) if that dealing infringes copyright, for all subsequent purposes.

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

(Added 15 of 2007 s. 13)

Section 41A	Fair dealing for purposes of giving or receiving instruction	15 of 2007	06/07/2007
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Education

(1) Fair dealing with a work by or on behalf of a teacher or by a pupil for the purposes of giving or receiving instruction in a specified course of study provided by an educational establishment does not infringe the copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) In determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular-

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

(3) Where any dealing with a work involves the inclusion of any passage or excerpt from a published literary or dramatic work in an anthology-

- (a) if the inclusion is not accompanied by a sufficient acknowledgement, the dealing is not fair dealing under subsection (1); and
- (b) if the inclusion is accompanied by a sufficient acknowledgement, subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

(4) Where any dealing with a work involves the making of a recording of a broadcast or cable programme or a copy of such a recording-

- (a) if an acknowledgement of authorship or other creative effort contained in the work recorded is not incorporated in the recording, the dealing is not fair dealing under subsection (1); and
- (b) if an acknowledgement of authorship or other creative effort contained in the work recorded is incorporated in the recording, subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

(5) Where any dealing with a work involves the making available of copies of the work through a wire or wireless network wholly or partly controlled by an educational establishment-

- (a) if the educational establishment fails to-
 - (i) adopt technological measures to restrict access to the copies of the work through the network so that the copies of the work are made available only to persons who need to use the copies of the work for the purposes of giving or receiving instruction in the specified course of study in question or for the purposes of maintaining or managing the network; or
 - (ii) ensure that the copies of the work are not stored in the network for a period longer than is necessary for the purposes of giving or receiving instruction in the specified course of study in question or, in any event, for a period longer than 12 consecutive months,
 the dealing is not fair dealing under subsection (1); and
- (b) if the educational establishment-
 - (i) adopts technological measures to restrict access to the copies of the work through the network so that the copies of the work are made available only to persons

who need to use the copies of the work for the purposes of giving or receiving instruction in the specified course of study in question or for the purposes of maintaining or managing the network; and

- (ii) ensures that the copies of the work are not stored in the network for a period longer than is necessary for the purposes of giving or receiving instruction in the specified course of study in question or, in any event, for a period longer than 12 consecutive months,

subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

(6) Without affecting the generality of section 37(5), where any dealing with a work involves the making of reprographic copies, the fact that the making of the copies does not fall within section 45 does not mean that it is not covered by this section, and subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

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

- (a) for the purpose of that dealing; and
- (b) if that dealing infringes copyright, for all subsequent purposes.

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

(Added 15 of 2007 s. 14)

Section 41	Things done for purposes of instruction or examination		30/06/1997
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(1) Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied, to a reasonable extent, in the course of instruction or of preparation for instruction, if the copying-

- (a) is done by a person giving or receiving instruction; and
- (b) is not by means of a reprographic process.

(2) Copyright in a sound recording, film, broadcast or cable programme is not infringed by its being copied by making a film or film sound-track in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, if the copying is done by a person giving or receiving instruction.

(3) Copyright is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions.

(4) Subsection (3) does not extend to the making of a reprographic copy of a musical work for use by an examination candidate in performing the work.

(5) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, the copy is treated as an infringing copy for the purpose of that dealing and if that dealing infringes copyright, for all subsequent purposes.

For this purpose "dealt with" (進行交易) means sold or let for hire or offered or exposed for sale or hire.

[cf. 1988 c. 48 s. 32 U.K.]

Section 44	Recording by educational establishments of broadcasts and cable programmes		30/06/1997
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(1) A recording of a broadcast or cable programme, or a copy of such a recording may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing the copyright in the broadcast or cable programme, or in any work included in it, if-

- (a) an acknowledgement of authorship or other creative effort contained in the work recorded is incorporated in the recording made by the establishment; and
- (b) it is not made for gain.

(2) Recording or copying is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the recording or copying in question and the person

making the recording or copies knew or ought to have been aware of that fact.

(3) Where a recording or copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, the copy is treated as an infringing copy for the purposes of that dealing and if that dealing infringes copyright, for all subsequent purposes.

For this purpose "dealt with" (進行交易) means sold or let for hire or offered or exposed for sale or hire.

[cf. 1988 c. 48 s. 35 U.K.]

Section 45	Reprographic copying made by educational establishments or pupils of passages from published works	15 of 2007	06/07/2007
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Reprographic copying made by educational establishments or pupils of passages from published works
(Amended 15 of 2007 s. 16)

(1) Reprographic copies of artistic works or of passages from published literary, dramatic or musical works may, to a reasonable extent, be made by or on behalf of an educational establishment for the purposes of giving instruction, or by a pupil for the purposes of receiving instruction in a specified course of study provided by an educational establishment, without infringing any copyright in the work, or in the typographical arrangement. (Amended 15 of 2007 s. 16)

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

(3) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, it is treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright, for all subsequent purposes.

For this purpose "dealt with" (進行交易) means sold or let for hire or offered or exposed for sale or hire.

[cf. 1988 c. 48 s. 36 U.K.]

Section 46	Libraries and archives: introductory	L.N. 130 of 2007	01/07/2007
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Expanded Cross Reference:
47, 48, 49, 50, 51, 52, 53

Remarks:

For the saving and transitional provisions relating to the amendments made by the Resolution of the Legislative Council (L.N. 130 of 2007), see paragraph (12) of that Resolution.

Libraries and archives

(1) The Secretary for Commerce and Economic Development may- (Amended L.N. 173 of 2000; L.N. 106 of 2002; L.N. 130 of 2007)

- (a) by regulations prescribe conditions; and
- (b) by notice in the Gazette specify libraries or archives,

for the purposes of any provision in sections 47 to 53 (copying by librarians and archivists). <* Note - Exp. X-Ref.: Sections 47, 48, 49, 50, 51, 52, 53 *>

(2) In sections 47 to 53- <* Note - Exp. X-Ref.: Sections 47, 48, 49, 50, 51, 52, 53 *>

- (a) references in any provision to the prescribed conditions are to the conditions prescribed for the purposes of that provision under subsection (1)(a); and
- (b) references in any provision to a specified library or archive are to a library or archive of a description specified for the purposes of that provision under subsection (1)(b).

(3) The regulations may-

- (a) provide that, where a librarian or archivist is required to be satisfied as to any matter before making or supplying a copy of a work-

- (i) he may rely on a signed declaration as to that matter by the person requesting the copy, unless he is aware that it is false in a material particular; and
- (ii) in such cases as may be prescribed, he shall not make or supply a copy in the absence of a signed declaration in such form as may be prescribed;
- (b) make different provisions for different descriptions of libraries or archives and for different purposes.
- (4) Where a person requesting a copy makes a declaration which is false in a material particular and is supplied with a copy which would have been an infringing copy if made by him-
 - (a) he is liable for infringement of copyright as if he had made the copy himself; and
 - (b) the copy is treated as an infringing copy.
- (5) References in this section, and in sections 47 to 53, to the librarian or archivist include a person acting on his behalf. <* Note - Exp. X-Ref.: Sections 47, 48, 49, 50, 51, 52, 53 *>
[cf. 1988 c. 48 s. 37 U.K.]

Section 48	Copying by librarians: parts of published works		30/06/1997
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- (1) The librarian of a specified library may, if the prescribed conditions are complied with, make and supply from a published edition a copy of part of a literary, dramatic or musical work (other than an article in a periodical) without infringing any copyright in the work, in any illustrations accompanying the work or in the typographical arrangement.
 - (2) The prescribed conditions must include the following-
 - (a) that copies are supplied only to persons satisfying the librarian that they require them for purposes of research or private study, and will not use them for any other purpose;
 - (b) that no person is furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work; and
 - (c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production.
- [cf. 1988 c. 48 s. 39 U.K.]

Section 50	Copying by librarians: supply of copies to other libraries		30/06/1997
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- (1) The librarian of a specified library may, if the prescribed conditions are complied with, make and supply to another specified library a copy of-
 - (a) an article in a periodical;
 - (b) the whole or part of a published edition of a literary, dramatic or musical work; or
 - (c) a sound recording or film,
 without infringing any copyright in the text of the article, in the work, in any illustration accompanying it, in the typographical arrangement, or in the sound recording or film, as the case may be.
 - (2) Subsection (1)(b) and (c) does not apply if at the time the copy is made the librarian making it knows, or could by reasonable inquiry ascertain, the name and address of a person entitled to authorize the making of the copy.
- [cf. 1988 c. 48 s. 41 U.K.]

Section 51	Copying by librarians or archivists: replacement copies of works		30/06/1997
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- (1) The librarian or archivist of a specified library or archive may, if the prescribed conditions are complied with, make a copy from any item in the permanent collection of the library or archive-
 - (a) in order to preserve or replace that item by placing the copy in its permanent collection in addition to or in place of it; or
 - (b) in order to replace in the permanent collection of another specified library or archive an item which has been lost, destroyed or damaged,
 without infringing the copyright in any literary, dramatic or musical work, in any illustrations

accompanying such a work or, in the case of a published edition, in the typographical arrangement or, in the case of a sound recording or a film, in the sound recording or film.

(2) The prescribed conditions must include provision for restricting the making of copies to cases where it is not reasonably practicable to purchase a copy of the item in question to fulfill that purpose.

[cf. 1988 c. 48 s. 42 U.K.]

Section 52	Copying by librarians or archivists: certain unpublished works		30/06/1997
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(1) The librarian or archivist of a specified library or archive may, if the prescribed conditions are complied with, make and supply a copy of the whole or part of-

(a) a literary, dramatic or musical work from a document (including a document in electronic form); or

(b) a sound recording or film,

in the library or archive without infringing any copyright in the work or any illustrations accompanying it or in the sound recording or film.

(2) This section does not apply if-

(a) the work had been published before it was deposited in the library or archive; or

(b) the copyright owner has prohibited copying of the work,

and at the time the copy is made the librarian or archivist making it is, or ought to be, aware of that fact.

(3) The prescribed conditions must include the following-

(a) that copies are supplied only to persons satisfying the librarian or archivist that they require them for purposes of research or private study and will not use them for any other purpose;

(b) that no person is furnished with more than one copy of the same material; and

(c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library or archive) attributable to their production.

[cf. 1988 c. 48 s. 43 U.K.]

Section 53	Copying by librarians or archivists: articles of cultural or historical importance		30/06/1997
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The librarian or archivist of a specified library or archive may make a copy of an article of cultural or historical importance or interest and deposit the copy at the specified library or archive without infringing any copyright in respect of the article if the article is likely to be lost to Hong Kong through sale or export.

[cf. 1988 c. 48 s. 44 U.K.]

Section 54A	Fair dealing for purposes of public administration	15 of 2007	06/07/2007
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Public administration

(1) Fair dealing with a work by the Government, the Executive Council, the Judiciary or any District Council for the purposes of efficient administration of urgent business does not infringe the copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) In determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular-

(a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;

(b) the nature of the work;

(c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and

(d) the effect of the dealing on the potential market for or value of the work.

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

- (a) for the purpose of that dealing; and
- (b) if that dealing infringes copyright, for all subsequent purposes.

(4) In subsection (3), "dealt with" (被用以進行交易) means sold, let for hire, or offered or exposed for sale or hire.

(Added 15 of 2007 s. 17)

Section 55	Statutory inquiries		30/06/1997
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(1) Copyright is not infringed by anything done for the purposes of the proceedings of a statutory inquiry.

(2) Copyright is not infringed by anything done for the purposes of reporting any such proceedings held in public; but this is not to be construed as authorizing the copying of a work which is itself a published report of the proceedings.

(3) Copyright in a work is not infringed by the issue or making available to the public of copies of the report of a statutory inquiry containing the work or material from it.

(4) In this section-

"statutory inquiry" (法定研訊) means an inquiry held or investigation conducted in pursuance of-

- (a) the Commissions of Inquiry Ordinance (Cap 86); or
- (b) a duty imposed or power conferred by or under an Ordinance.

[cf. 1988 c. 48 s. 46 U.K.]

Section 56	Material open to public inspection or on official register	22 of 1999	01/07/1997
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Remarks:

Adaptation amendments retroactively made - see 22 of 1999 s. 3

(1) Where material is open to public inspection pursuant to a statutory requirement, or is on a statutory register, copyright is not infringed by the copying of so much of the material as contains factual information of any description, by or with the authority of the appropriate person, for a purpose which does not involve the issuing or making available of copies to the public.

(2) Where material is open to public inspection pursuant to a statutory requirement, copyright is not infringed by the copying or issuing or making available to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of enabling the material to be inspected at a more convenient time or place or otherwise facilitating the exercise of any right for the purpose of which the requirement is imposed.

(3) Where material which is open to public inspection pursuant to a statutory requirement, or which is on a statutory register, contains information about matters of general scientific, technical, commercial or economic interest, copyright is not infringed by the copying or issuing or making available to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of disseminating that information.

(4) The Chief Executive may by regulation provide that subsection (1), (2) or (3) applies, in such cases as may be specified in the regulation, only to copies marked in such manner as may be so specified. (Amended 22 of 1999 s. 3)

(5) The Chief Executive may by regulation provide that subsections (1) to (3) apply, to such extent and with such modifications as may be specified in the regulation- (Amended 22 of 1999 s. 3)

- (a) to material made open to public inspection by-
 - (i) an international organization specified in the regulation; or
 - (ii) a person so specified who has functions in Hong Kong under an international agreement to which Hong Kong is a party; or
- (b) to a register maintained by an international organization specified in the regulation,

as they apply in relation to material open to public inspection pursuant to a statutory requirement or to a statutory register.

(6) In this section-

"appropriate person" (適當的人) means the person required to make the material open to public inspection or, as the case may be, the person maintaining the statutory register;

"statutory register" (法定登記冊) means a register maintained in pursuance of a requirement imposed by or under an Ordinance;

"statutory requirement" (法例規定) means a requirement imposed by or under an Ordinance.

[cf. 1988 c. 48 s. 47 U.K.]

Section 57	Material communicated to the Government in the course of public business		30/06/1997
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(1) This section applies where a work has in the course of public business been communicated to the Government for any purpose, by or with the licence of the copyright owner and a document or other material thing recording or embodying the work is owned by or in the custody or control of the Government.

(2) The Government may, for the purpose for which the work was communicated to it, or any related purpose which could reasonably have been anticipated by the copyright owner, copy the work, or issue or make available copies of the work to the public without infringing any copyright in the work.

(3) The Government may not copy a work, or issue or make available copies of a work to the public, by virtue of this section if the work has previously been published otherwise than by virtue of this section.

(4) In subsection (1) "public business" (公務) includes any activity carried on by the Government.

(5) This section has effect subject to any agreement to the contrary between the Government and the copyright owner.

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

Section 71	Representation of certain artistic works on public display		30/06/1997
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(1) This section applies to-

(a) buildings; and

(b) sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public.

(2) The copyright in such a work is not infringed by-

(a) making a graphic work representing it;

(b) making a photograph or film of it; or

(c) broadcasting or including in a cable programme service a visual image of it.

(3) Nor is the copyright infringed by the issue or making available to the public of copies, or the broadcasting or inclusion in a cable programme service, of anything whose making was, by virtue of this section, not an infringement of the copyright.

[cf. 1988 c. 48 s. 62 U.K.]

Section 72	Advertisement of sale of artistic work	15 of 2007	06/07/2007
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(1) It is not an infringement of copyright in an artistic work to copy it, or to issue or make available copies to the public, for the purpose of advertising the sale of the work.

(2) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, the copy is treated as an infringing copy for the purposes of that dealing and, if that dealing infringes copyright, for all subsequent purposes. (Amended 15 of 2007 s. 20)

For this purpose "dealt with" (進行交易) means sold or let for hire, offered or exposed for sale or hire, exhibited in public or distributed.

[cf. 1988 c. 48 s. 63 U.K.]

Section 89	Right to be identified as author or director		30/06/1997
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DIVISION IV

MORAL RIGHTS

Right to be identified as author or director

(1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work in the circumstances mentioned in this section; but the right is not infringed unless it has been asserted in accordance with section 90.

(2) The author of a literary work (other than words intended to be sung or spoken with music) or a dramatic work has the right to be identified whenever-

- (a) the work is published commercially, performed in public, broadcast or included in a cable programme service; or
- (b) copies of a film or sound recording including the work are issued or made available to the public,

and that right includes the right to be identified whenever any of those events occur in relation to an adaptation of the work as the author of the work from which the adaptation was made.

(3) The author of a musical work, or a literary work consisting of words intended to be sung or spoken with music, has the right to be identified whenever-

- (a) the work is published commercially, performed in public, broadcast or included in a cable programme service;
- (b) copies of a sound recording of the work are issued or made available to the public; or
- (c) a film of which the sound-track includes the work is shown in public or copies of such a film are issued or made available to the public,

and that right includes the right to be identified whenever any of those events occur in relation to an adaptation of the work as the author of the work from which the adaptation was made.

(4) The author of an artistic work has the right to be identified whenever-

- (a) the work is published commercially or exhibited in public, or a visual image of it is broadcast or included in a cable programme service;
- (b) a film including a visual image of the work is shown in public or copies of such a film are issued or made available to the public; or
- (c) in the case of a work of architecture in the form of a building or a model for a building, a sculpture or a work of artistic craftsmanship, copies of a graphic work representing it, or of a photograph of it, are issued or made available to the public.

(5) The author of a work of architecture in the form of a building also has the right to be identified on the building as constructed or, where more than one building is constructed to the design, on the first to be constructed.

(6) The director of a film has the right to be identified whenever the film is shown in public, broadcast or included in a cable programme service or copies of the film are issued or made available to the public.

(7) The right of the author or director under this section is-

- (a) in the case of commercial publication or the issue or making available to the public of copies of a film or sound recording, to be identified in or on each copy or, if that is not appropriate, in some other manner likely to bring his identity to the notice of a person acquiring a copy;
- (b) in the case of identification on a building, to be identified by appropriate means visible to persons entering or approaching the building; and
- (c) in any other case, to be identified in a manner likely to bring his identity to the notice of a person seeing or hearing the performance, exhibition, showing, broadcast or cable programme in question,

and the identification must in each case be clear and reasonably prominent.

(8) If the author or director in asserting his right to be identified specifies a pseudonym, initials or some other particular form of identification, that form must be used; otherwise any reasonable form

of identification may be used.

(9) This section has effect subject to section 91.

[cf. 1988 c. 48 s. 77 U.K.]

Section 92	Right to object to derogatory treatment of work		30/06/1997
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Right to object to derogatory treatment of work

(1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right in the circumstances mentioned in this section not to have his work subjected to derogatory treatment.

(2) For the purposes of this section-

(a) "treatment" (處理) of a work means any addition to, deletion from or alteration to or adaptation of the work, other than-

(i) a translation of a literary or dramatic work; or

(ii) an arrangement or transcription of a musical work involving no more than a change of key or register; and

(b) the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director, and in the following provisions of this section references to a derogatory treatment of a work are construed accordingly.

(3) In the case of a literary, dramatic or musical work the right is infringed by a person who-

(a) publishes commercially, performs in public, broadcasts or includes in a cable programme service a derogatory treatment of the work; or

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

(4) In the case of an artistic work the right is infringed by a person who-

(a) publishes commercially or exhibits in public a derogatory treatment of the work, or broadcasts or includes in a cable programme service a visual image of a derogatory treatment of the work;

(b) shows in public a film including a visual image of a derogatory treatment of the work or issues or makes available to the public copies of such a film; or

(c) in the case of-

(i) a work of architecture in the form of a model for a building;

(ii) a sculpture; or

(iii) a work of artistic craftsmanship,

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

(5) Subsection (4) does not apply to a work of architecture in the form of a building; but where the author of such a work is identified on the building and it is the subject of derogatory treatment he has the right to require the identification to be removed.

(6) In the case of a film, the right is infringed by a person who-

(a) shows in public, broadcasts or includes in a cable programme service a derogatory treatment of the film; or

(b) issues or makes available to the public copies of a derogatory treatment of the film.

(7) The right conferred by this section extends to the treatment of parts of a work resulting from a previous treatment by a person other than the author or director, if those parts are attributed to, or are likely to be regarded as the work of, the author or director.

(8) This section has effect subject to sections 93 and 94 (exceptions to and qualifications of right).

[cf. 1988 c. 48 s. 80 U.K.]

Section 96	False attribution of work	15 of 2007	06/07/2007
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False attribution of work

- (1) A person has the right in the circumstances mentioned in this section-
- (a) not to have a literary, dramatic, musical or artistic work falsely attributed to him as author; and
 - (b) not to have a film falsely attributed to him as director,
- and in this section an "attribution" (署名), in relation to such a work, means a statement (express or implied) as to who is the author or director.
- (2) The right is infringed by a person who-
- (a) issues or makes available to the public copies of a work of any of those descriptions in or on which there is a false attribution; or
 - (b) exhibits in public an artistic work, or a copy of an artistic work, in or on which there is a false attribution.
- (3) The right is also infringed by a person who-
- (a) in the case of a literary, dramatic or musical work, performs the work in public, broadcasts it or includes it in a cable programme service as being the work of a person; or
 - (b) in the case of a film, shows it in public, broadcasts it or includes it in a cable programme service as being directed by a person,
- knowing or having reason to believe that the attribution is false.
- (4) The right is also infringed by a person who issues or makes available to the public or displays in public material containing a false attribution in connection with any of the acts mentioned in subsection (2) or (3).
- (5) The right is also infringed by a person who for the purpose of or in the course of any trade or business- (Amended 64 of 2000 s. 5; 15 of 2007 s. 27)
- (a) possesses or deals with a copy of a work of any of the descriptions mentioned in subsection (1) in or on which there is a false attribution; or
 - (b) in the case of an artistic work, possesses or deals with the work itself when there is a false attribution in or on it,
- knowing or having reason to believe that there is such an attribution and that it is false.
- (6) In the case of an artistic work the right is also infringed by a person who for the purpose of or in the course of any trade or business- (Amended 64 of 2000 s. 5; 15 of 2007 s. 27)
- (a) deals with a work which has been altered after the author parted with possession of it as being the unaltered work of the author; or
 - (b) deals with a copy of such an altered work as being a copy of the unaltered work of the author,
- knowing or having reason to believe that that is not the case.
- (6A) It is immaterial for the purpose of subsections (5) and (6) whether or not the trade or business consists of dealing in-
- (a) works or copies of works in or on which there are false attributions; or
 - (b) altered works or copies of altered works. (Added 64 of 2000 s. 5)
- (7) References in this section to dealing are to selling or letting for hire, offering or exposing for sale or hire, exhibiting in public, or distributing.
- (8) This section applies where, contrary to the fact-
- (a) a literary, dramatic or musical work is falsely represented as being an adaptation of the work of a person; or
 - (b) a copy of an artistic work is falsely represented as being a copy made by the author of the artistic work,
- as it applies where the work is falsely attributed to a person as author.

[cf. 1988 c. 48 s. 84 U.K.]

Section 108	Provisions as to damages in infringement action		30/06/1997
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(1) Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.

(2) The court may in an action for infringement of copyright having regard to all the

circumstances, and in particular to-

- (a) the flagrancy of the infringement;
- (b) any benefit accruing to the defendant by reason of the infringement; and
- (c) the completeness, accuracy and reliability of the defendant's business accounts and records,

award such additional damages as the justice of the case may require.

[cf. 1988 c. 48 s. 97 U.K.]

Section 116	Presumptions relevant to sound recordings, films and computer programs		30/06/1997
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(1) In proceedings brought by virtue of this Division with respect to a sound recording, where copies of the recording as issued or made available to the public bear a label or other mark stating-

- (a) that a named person was the owner of copyright in the recording at the date of issue or making available of the copies; or
- (b) that the recording was first published in a specified year or in a specified country,

the label or mark is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved.

(2) In proceedings brought by virtue of this Division with respect to a film, where copies of the film as issued or made available to the public bear a statement-

- (a) that a named person was the director or producer of the film;
- (b) that a named person was the principal director, the author of the screenplay, the author of the dialogue or the composer of music specifically created for and used in the film;
- (c) that a named person was the owner of copyright in the film at the date of issue or making available of the copies; or
- (d) that the film was first published in a specified year or in a specified country,

the statement is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved.

(3) In proceedings brought by virtue of this Division with respect to a computer program, where copies of the program are issued to the public in electronic form or made available to the public bearing a statement-

- (a) that a named person was the owner of copyright in the program at the date of issue or making available of the copies; or
- (b) that the program was first published in a specified country or that copies of it were first issued to the public in electronic form or made available to the public in a specified year,

the statement is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved.

(4) The above presumptions apply equally in proceedings relating to an infringement alleged to have occurred before the date on which the copies were issued or made available to the public.

(5) In proceedings brought by virtue of this Division with respect to a film, where the film as shown in public, broadcast or included in a cable programme service bears a statement-

- (a) that a named person was the director or producer of the film;
- (b) that a named person was the principal director of the film, the author of the screenplay, the author of the dialogue or the composer of music specifically created for and used in the film; or
- (c) that a named person was the owner of copyright in the film immediately after it was made,

the statement is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved.

This presumption applies equally in proceedings relating to an infringement alleged to have occurred before the date on which the film was shown in public, broadcast or included in a cable programme service.

(6) For the purposes of this section, a statement that a person was the director of a film is to be taken, unless a contrary indication appears, as meaning that he was the principal director of the film.

[cf. 1988 c. 48 s. 105 U.K.]

Section 118	Offences in relation to making or dealing with infringing articles, etc.*	L.N. 142 of 2008	11/07/2008
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Expanded Cross Reference:
115, 116, 117

Offences

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

- (a) makes for sale or hire an infringing copy of the work;
- (b) imports an infringing copy of the work into Hong Kong otherwise than for his private and domestic use;
- (c) exports an infringing copy of the work from Hong Kong otherwise than for his private and domestic use;
- (d) sells, lets for hire, or offers or exposes for sale or hire an infringing copy of the work for the purpose of or in the course of any trade or business;
- (e) exhibits in public or distributes an infringing copy of the work for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works;
- (f) possesses an infringing copy of the work with a view to-
 - (i) its being sold or let for hire by any person for the purpose of or in the course of any trade or business; or
 - (ii) its being exhibited in public or distributed by any person for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works; or
- (g) distributes an infringing copy of the work (otherwise than for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works) to such an extent as to affect prejudicially the copyright owner. (Replaced 15 of 2007 s. 31)

(1A) Where-

- (a) a person exhibits in public or distributes an infringing copy of a copyright work for the purpose of or in the course of any trade or business; and
- (b) the circumstances in which the infringing copy is so exhibited or distributed give rise to a reasonable suspicion that the trade or business consists of dealing in infringing copies of copyright works,

then, unless there is evidence to the contrary, the trade or business is presumed, for the purposes of any proceedings instituted under subsection (1)(e), to be a trade or business which consists of dealing in infringing copies of copyright works. (Added 15 of 2007 s. 31)

(1B) Where-

- (a) a person possesses an infringing copy of a copyright work with a view to its being exhibited in public or distributed by any person for the purpose of or in the course of any trade or business; and
- (b) the circumstances in which the infringing copy is so possessed give rise to a reasonable suspicion that the trade or business consists of dealing in infringing copies of copyright works,

then, unless there is evidence to the contrary, the trade or business is presumed, for the purposes of any proceedings instituted under subsection (1)(f)(ii), to be a trade or business which consists of dealing in infringing copies of copyright works. (Added 15 of 2007 s. 31)

(2) Subsections (1)(b) and (c) and (4)(b) and (c) do not apply to an article in transit.

(2A) A person commits an offence if he, without the licence of the copyright owner of a copyright work to which this subsection applies, possesses an infringing copy of the work for the purpose of or in the course of any trade or business with a view to its being used by any person for the purpose of or in the course of that trade or business. (Added 15 of 2007 s. 31)

(2B) Subsection (2A) applies to a copyright work that is-

- (a) a computer program;
- (b) a movie;
- (c) a television drama;
- (d) a musical sound recording; or
- (e) a musical visual recording. (Added 15 of 2007 s. 31)

(2C) Subsection (2A) does not apply to an infringing copy of a computer program in a printed form. (Added 15 of 2007 s. 31)

(2D) Subsection (2A) does not apply to the possession of an infringing copy of a computer program if-

- (a) the computer program incorporates the whole or any part of a work that is not a computer program itself, and the computer program is technically required for the viewing or listening of the work by a member of the public to whom a copy of the work is made available; or
- (b) the computer program is incorporated in a work that is not a computer program itself, and the computer program is technically required for the viewing or listening of the work by a member of the public to whom a copy of the work is made available. (Added 15 of 2007 s. 31)

(2E) Subsection (2A) does not apply to the possession of an infringing copy of a movie, television drama, musical sound recording or musical visual recording by the Hong Kong Film Archive for the purpose of heritage conservation if-

- (a) the infringing copy was donated or given to the Hong Kong Film Archive by the public; or
- (b) the infringing copy was made by the Hong Kong Film Archive to preserve or replace the infringing copy referred to in paragraph (a) against loss, deterioration or damage. (Added 15 of 2007 s. 31)

(2F) Subsection (2A) does not apply to the possession of an infringing copy of a movie, television drama, musical sound recording or musical visual recording by the Hong Kong Film Archive for the purpose of doing any act in relation to the infringing copy (other than for the purpose referred to in subsection (2E)) if-

- (a) the infringing copy was-
 - (i) an infringing copy donated or given to the Hong Kong Film Archive by the public; or
 - (ii) an infringing copy made by the Hong Kong Film Archive to preserve or replace the infringing copy referred to in subparagraph (i) against loss, deterioration or damage;
- (b) it is not possible by reasonable enquiry to ascertain the identity and contact details of the copyright owner of the work in question; and
- (c) a copy (other than an infringing copy) of the work in question cannot be obtained on reasonable commercial terms. (Added 15 of 2007 s. 31)

(2G) Subsection (2A) does not apply if-

- (a) the person who possesses an infringing copy does so for the purpose of providing legal service in relation to the infringing copy, and-
 - (i) the person is enrolled on the roll of solicitors or the roll of barristers kept under the Legal Practitioners Ordinance (Cap 159); or
 - (ii) the person has been admitted as a legal practitioner in a jurisdiction other than Hong Kong;
- (b) the person who possesses an infringing copy is serving a pupillage under the Barristers (Qualification for Admission and Pupillage) Rules (Cap 159 sub. leg. AC) and he possesses the infringing copy for the purpose of assisting the barrister with whom he serves the pupillage in providing legal service in relation to the infringing copy;
- (c) the person who possesses an infringing copy does so for the purpose of providing investigation service in relation to the infringing copy to the copyright owner or exclusive licensee of the copyright work concerned; or
- (d) the person who possesses an infringing copy does so on his client's premises and the infringing copy is provided to him by his client. (Added 15 of 2007 s. 31)

(2H) Without prejudice to section 125, where a body corporate or a partnership has done an act

referred to in subsection (2A), the following person shall, unless there is evidence showing that he did not authorize the act to be done, be presumed also to have done the act-

- (a) in the case of the body corporate-
 - (i) any director of the body corporate who, at the time when the act was done, was responsible for the internal management of the body corporate; or
 - (ii) if there was no such director, any person who, at the time when the act was done, was responsible under the immediate authority of the directors of the body corporate for the internal management of the body corporate;
- (b) in the case of the partnership-
 - (i) any partner in the partnership who, at the time when the act was done, was responsible for the internal management of the partnership; or
 - (ii) if there was no such partner, any person who, at the time when the act was done, was responsible under the immediate authority of the partners in the partnership for the internal management of the partnership. (Added 15 of 2007 s. 31)

(2I) A defendant charged with an offence under subsection (2A) by virtue of subsection (2H) is taken not to have done the act in question if-

- (a) sufficient evidence is adduced to raise an issue that he did not authorize the act to be done; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt. (Added 15 of 2007 s. 31)

(2J) For the purposes of subsection (2I)(a)-

- (a) the defendant shall be taken to have adduced sufficient evidence if the court is satisfied that-
 - (i) the defendant has caused the body corporate or partnership concerned to set aside financial resources, and has directed the use of the resources, for the acquisition of a sufficient number of copies of the copyright work to which the proceedings relate, which are not infringing copies, for the use of the body corporate or partnership; or
 - (ii) the body corporate or partnership concerned has incurred expenditure for the acquisition of a sufficient number of copies of the copyright work to which the proceedings relate, which are not infringing copies, for the use of the body corporate or partnership;
- (b) subject to paragraph (a), in determining whether sufficient evidence is adduced, the court may have regard to, including but not limited to, the following-
 - (i) whether the defendant has introduced policies or practices against the use of infringing copies of copyright works by the body corporate or partnership;
 - (ii) whether the defendant has taken action to prevent the use of infringing copies of copyright works by the body corporate or partnership. (Added 15 of 2007 s. 31)

(3) It is a defence for the person charged with an offence under subsection (1) or (2A), to prove that he did not know and had no reason to believe that the copy in question was an infringing copy of the copyright work. (Amended 15 of 2007 s. 31)

(3A) It is a defence for the person charged with an offence under subsection (2A) to prove that-

- (a) he possessed the infringing copy in question in the course of his employment; and
- (b) the infringing copy in question was provided to him by or on behalf of his employer for use in the course of his employment. (Added 15 of 2007 s. 31)

(3B) Subsection (3A) does not apply to an employee-

- (a) who, at the time when the infringing copy in question was acquired, was in a position to make or influence a decision regarding the acquisition of the infringing copy; or
- (b) who, at the time when the offence in question was committed, was in a position to make or influence a decision regarding the use or removal of the infringing copy in question. (Added 15 of 2007 s. 31)

(4) A person commits an offence if he-

- (a) makes;
- (b) imports into Hong Kong;
- (c) exports from Hong Kong;
- (d) possesses; or

(e) sells or lets for hire, or offers or exposes for sale or hire, an article specifically designed or adapted for making copies of a particular copyright work which article is used or intended to be used to make infringing copies of the copyright work for sale or hire or for use for the purpose of or in the course of any trade or business. (Amended 64 of 2000 s. 7; 15 of 2007 s. 31)

(5) It is a defence for the person charged with an offence under subsection (4) to prove that he did not know and had no reason to believe that the article was used or was intended to be used to make the infringing copies for sale or hire or for use for the purpose of or in the course of any trade or business. (Amended 64 of 2000 s. 7; 15 of 2007 s. 31)

(6) For the purpose of subsections (1)(b) and (3), where a person is charged with an offence under subsection (1) in respect of a copy of a copyright work which is an infringing copy by virtue only of section 35(3) and not being excluded under section 35(4) and which was lawfully made in the country, territory or area where it was made, if he proves that- (Amended 15 of 2007 s. 31)

- (a) he had made reasonable enquiries sufficient to satisfy himself that the copy in question was not an infringing copy of the work;
- (b) he had reasonable grounds to be satisfied in the circumstances of the case that the copy was not an infringing copy;
- (c) there were no other circumstances which would have led him reasonably to suspect that the copy was an infringing copy,

he has proved that he had no reason to believe that the copy in question was an infringing copy of the copyright work.

(7) In determining whether the person charged has proved under subsection (6) that he had no reason to believe that the copy in question was an infringing copy of the work, the court may have regard to, including but not limited to, the following-

- (a) whether he had made enquiries with a relevant trade body in respect of that category of work;
- (b) whether he had given any notice drawing attention of the copyright owner or exclusive licensee to his interest to import and to sell the copy of the work;
- (c) whether he had complied with any code of practice that may exist in respect of the supply of that category of work;
- (d) whether the response, if any, to those enquiries made by the defendant was reasonable and timely;
- (e) whether he was provided with the name, address and contact details of the copyright owner or exclusive licensee (as the case may be);
- (f) whether he was provided with the date of first day of publication of the work;
- (g) whether he was provided with proof of any relevant exclusive licence.

(8) A person commits an offence if he has in his possession an article knowing or having reason to believe that it is used or is intended to be used to make infringing copies of any copyright work for sale or hire or for use for the purpose of or in the course of any trade or business. (Amended 64 of 2000 s. 7; 15 of 2007 s. 31)

(8A)(Repealed 15 of 2007 s. 31)

(9) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section. <* Note - Exp. X-Ref.: Sections 115, 116, 117 *>

(10) In this section, "dealing in" (經銷) means selling, letting for hire, or distributing for profit or reward. (Added 15 of 2007 s. 31)

[cf. 1988 c. 48 s. 107 U.K.]

Note:

* (Amended 15 of 2007 s. 31)

Section 119	Penalties for offences under section 118	15 of 2007	06/07/2007
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(1) A person who commits an offence under section 118(1) or (2A) is liable on conviction on indictment to a fine at level 5 in respect of each infringing copy and to imprisonment for 4 years. (Amended 64 of 2000 s. 8; 15 of 2007 s. 32)

(2) A person who commits an offence under section 118(4) or (8) is liable on conviction on indictment to a fine of \$500000 and to imprisonment for 8 years.

Section 121	Affidavit evidence	L.N. 68 of 2010	16/07/2010
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Expanded Cross Reference:

11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

Supplementary

(1) For the purpose of facilitating the proof of subsistence and ownership of copyright, and without prejudice to the operation of sections 11 to 16 (authorship and ownership of copyright) and sections 17 to 21 (duration of copyright), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which states- < * Note - Exp. X-Ref.: Sections 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 * > (Amended 15 of 2007 s. 36)

- (a) the date and place that the work was made or first published;
- (b) the name of the author of the work; (Replaced 15 of 2007 s. 36)
- (ba) where the author of the work is an individual-
 - (i) the place of domicile of the author;
 - (ii) the place of residence of the author; or
 - (iii) the place where the author has a right of abode; (Added 15 of 2007 s. 36)
- (bb) where the author of the work is a body corporate-
 - (i) the place of incorporation of the author; or
 - (ii) the principal place of business of the author; (Added 15 of 2007 s. 36)
- (c) the name of the copyright owner; (Amended 15 of 2007 s. 36)
- (d) that copyright subsists in the work; and
- (e) that a copy of the work exhibited to the affidavit is a true copy of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in any proceedings under this Ordinance.

(2) For the purpose of facilitating the proof of subsistence and ownership of copyright, and without prejudice to subsection (1) and the operation of sections 11 to 16 (authorship and ownership of copyright) and sections 17 to 21 (duration of copyright), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which- < * Note - Exp. X-Ref.: Sections 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 * > (Amended 15 of 2007 s. 36)

- (a) states-
 - (i) that the copyright work has been registered with a Copyright Register prescribed under subsection (16); and (Amended L.N. 29 of 2004)
 - (ii) that copyright subsists in the work; and
 - (iii) the name of the copyright owner; and (Amended 15 of 2007 s. 36)
- (b) has exhibited to it a copy of the certificate of registration of the work issued by the authority in charge of the Copyright Register certified to be a true copy by a person specified in subsection (4)(a),

shall, subject to the conditions contained in subsection (4), be admitted without further proof in any proceedings under this Ordinance.

(2A) For the purposes of facilitating the establishment of the matter referred to in section 35(3)(b), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which-

- (a) states the name of the copyright owner;
- (b) states that a copy of the work exhibited to the affidavit is a true copy of the work;
- (c) states-
 - (i) that the copy of the work exhibited to the affidavit was made in a place outside Hong Kong by the copyright owner; or
 - (ii) that the copy of the work exhibited to the affidavit was made in a place outside Hong Kong by a person who has the licence of the copyright owner to make copies of the work in that place, but does not have the licence of the copyright owner to make copies of the work in Hong Kong; and

(d) states the name and address of the person (if any) referred to in paragraph (c)(ii), shall, subject to the conditions contained in subsection (4), be admitted without further proof in any proceedings under this Ordinance. (Added 15 of 2007 s. 36)

(2B) For the purposes of any proceedings instituted under section 118(1), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which-

- (a) states the name of the copyright owner; and
- (b) states that the person named in the affidavit does not have the licence of the copyright owner to do an act referred to in section 118(1)(a), (b), (c), (d), (e), (f) or (g) in respect of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings. (Added 15 of 2007 s. 36)

(2C) For the purposes of any proceedings instituted under section 118(2A), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which-

- (a) states the name of the copyright owner; and
- (b) states that the person named in the affidavit does not have the licence of the copyright owner to do an act referred to in section 118(2A) in respect of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings. (Added 15 of 2007 s. 36)

(2D) For the purposes of any proceedings instituted under section 119B(1), an affidavit which purports to have been made by or on behalf of the copyright owner of a copyright work and which—

- (a) states the name of the copyright owner; and
- (b) states that the person named in the affidavit does not have the licence of the copyright owner to do an act referred to in section 119B(1) in respect of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings. (Added 15 of 2007 s. 36)

(3) The court before whom an affidavit which complies with the conditions in subsection (4) is produced under subsection (1), (2), (2A), (2B), (2C) or (2D) shall presume, in the absence of evidence to the contrary- (Amended 15 of 2007 s. 36)

- (a) that the statements made in the affidavit are true; and
- (b) that it was made and authenticated in accordance with subsection (4).

(4) An affidavit may be tendered in evidence under subsection (1), (2), (2A), (2B), (2C) or (2D) if-

- (a) it is made on oath-
 - (i) before a solicitor or a commissioner as defined in the Oaths and Declarations Ordinance (Cap. 11), if it is made in Hong Kong; or
 - (ii) before a notary public, if it is made outside Hong Kong;
- (b) it is authenticated, so far as relates to the making thereof, by the signature of the solicitor, commissioner or notary public before whom it is made;
- (c) it contains a declaration by the deponent to the effect that it is true to the best of his knowledge and belief; and
- (d) subject to subsection (6), not less than 10 days before the commencement of the hearing at which the affidavit is tendered in evidence, a copy of the affidavit is served, by or on behalf of the prosecution or plaintiff, on each of the defendants.

(5) Notwithstanding that an affidavit is admissible as evidence by virtue of this section, a defendant or his solicitor may, within 3 days from the service of the copy of the affidavit, serve a notice requiring the attendance of the deponent to the affidavit in court.

(6) The parties may agree before the hearing that the requirements of subsection (4)(d) may be dispensed with.

(7) If an affidavit tendered in evidence under subsection (1), (2), (2A), (2B), (2C) or (2D)- (Amended 15 of 2007 s. 36)

- (a) is made in a language other than English or Chinese, it must be accompanied by an English or Chinese translation thereof and, unless otherwise agreed by or on behalf of the prosecutor or plaintiff and defendant (or, if more than one, all the defendants), the translation must be certified by the court translator;
- (b) refers to any other document as an exhibit, the copy served on any other party to the proceedings under subsection (4)(d) must be accompanied by a copy of that document

or by such information as may be necessary in order to enable the party on whom it is served to inspect that document or a copy thereof.

(8) Without prejudice to subsection (5)-

- (a) the party by whom or on whose behalf the affidavit was served may call the deponent to give evidence; and
- (b) the court may of its own motion or, if the defendant who has served a notice under subsection (5) in relation to an affidavit satisfies the court-
 - (i) that the ownership or subsistence of the copyright in a work is, insofar as that matter is stated in the affidavit, genuinely in issue;
 - (ii) that whether a person has the licence of the copyright owner of a copyright work to do a particular act is, insofar as that matter is stated in the affidavit, genuinely in issue; or
 - (iii) where the affidavit is made under subsection (2A), that any matter stated in the affidavit, other than those referred to in subparagraphs (i) and (ii), is genuinely in issue,

either before or during the hearing, require the deponent to the affidavit to attend before the court and give evidence. (Replaced 15 of 2007 s. 36)

(9) Without prejudice to subsection (8)(a), a deponent of an affidavit which is admissible under this section shall attend before the court and give evidence if, and only if, the court so requires under subsection (8)(b).

(10) So much of an affidavit as is admitted in evidence by virtue of this section is, unless the court otherwise directs, to be read aloud at the hearing and where the court so directs an account is to be given orally of so much of any affidavit as is not read aloud.

(11) Any document or object referred to as an exhibit and identified in an affidavit admitted in evidence under this section is treated as if it had been produced as an exhibit and identified in court by the deponent.

(12) A document required by this section to be served on any person may be served-

- (a) by delivering it to him or to his solicitor; or
- (b) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or by sending it by registered post addressed to the secretary or clerk of that body at that office.

(13) Without prejudice to the powers of the court to award costs, the court may award costs against a defendant who-

- (a) was served with an affidavit described in subsection (1), (2), (2A), (2B), (2C) or (2D); (Amended 15 of 2007 s. 36)
- (b) by himself or through his solicitor served a notice under subsection (5); and
- (c) was subsequently convicted of the relevant offence or found liable for the infringement, as the case may be.

(14) In awarding awards under subsection (13), the court shall have regard to the actual costs incurred by the prosecution or plaintiff as a result of the notice under subsection (5) served by the defendant and the court may award costs under subsection (13) exceeding the limit of costs, if any, which that court may award.

(15) For the purpose of subsection (1)(e), where the work is a computer program, whether in source codes or object codes, a copy of the program only in the form of object codes is also regarded as a true copy of the program.

(16) The Secretary for Commerce and Economic Development may by regulation prescribe the Copyright Registers for the purpose of subsection (2). (Amended L.N. 173 of 2000; L.N. 106 of 2002; L.N. 130 of 2007)

(17) In this section, "court" (法院) includes a magistrate.

Section 154	Licensing schemes to which sections 155 to 160 apply	15 of 2007	06/07/2007
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Expanded Cross Reference:
155, 156, 157, 158, 159, 160

References and applications with respect to licensing schemes

Sections 155 to 160 (references and applications with respect to licensing schemes) apply to licensing schemes operated by licensing bodies which cover works of more than one author, so far as they relate to licences for- < * Note - Exp. X-Ref.: Sections 155, 156, 157, 158, 159, 160 * >

- (a) copying the work;
- (b) where the work is a work referred to in section 25(1)(a), (b), (c), (d), (e) or (f), the rental of copies of the work to the public; (Amended 15 of 2007 s. 40)
- (c) performing, playing or showing the work in public;
- (d) broadcasting the work or including it in a cable programme service;
- (e) issuing or making available copies of the work to the public;
- (f) making adaptations of the work; or
- (g) any other act restricted by the copyright in the work,

and references in those sections to a licensing scheme are to be construed accordingly.

[cf. 1988 c. 48 s. 117 U.K.]

Section 161	Licences to which sections 162 to 166 apply	15 of 2007	06/07/2007
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Expanded Cross Reference:
162, 163, 164, 165, 166

References and applications with respect to licensing by licensing bodies

Sections 162 to 166 (references and applications with respect to licensing by licensing bodies) apply to licences which are granted by a licensing body otherwise than in pursuance of a licensing scheme and which cover works of more than one author, so far as they authorize- < * Note - Exp. X-Ref.: Sections 162, 163, 164, 165, 166 * >

- (a) copying the work;
- (b) where the work is a work referred to in section 25(1)(a), (b), (c), (d), (e) or (f), the rental of copies of the work to the public; (Amended 15 of 2007 s. 41)
- (c) performing, playing or showing the work in public;
- (d) broadcasting the work or including it in a cable programme service;
- (e) issuing or making available copies of the work to the public;
- (f) making adaptations of the work; or
- (g) any other act restricted by the copyright in the work,

and references in those sections to a licence are to be construed accordingly.

[cf. 1988 c. 48 s. 124 U.K.]

Section 199	Index of defined expressions	15 of 2007	06/07/2007
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The following Table shows provisions defining or otherwise explaining expressions used in this Part (other than provisions defining or explaining an expression used only in the same section)-

acts restricted by copyright	section 22(1)
adaptation	section 29(3)
archivist (in sections 46 to 53)	section 46(5)
article (in a periodical)	section 198(1)
article in transit	section 198(1)
artistic work	section 5
author	sections 11 and 12(4)
authorized officer	section 198(1)
broadcast (and related expressions)	section 8
building	section 5
business	section 198(1)
cable programme, cable programme service (and related expressions)	section 9
collective work	section 198(1)
commencement (in Schedule 2)	paragraph 1(2) of that Schedule
commercial publication	section 196
Commissioner	section 198(1)
computer-generated	section 198(1)
copy and copying	section 23
copyright (generally)	section 2
copyright (in Schedule 2)	paragraph 2(2) of that Schedule
copyright owner	sections 112(2) and 194
Copyright Tribunal	section 169
copyright work	section 2(2)
dealing in (Added 64 of 2000 s. 11)	section 198(2)
detention order	section 135
dramatic work	section 4(1)
educational establishment	section 195(1)
electronic and electronic form	section 198(1)
employed, employee, employer and employment	section 198(1)
exclusive licence	section 103(1)
export	section 198(1)
facsimile copy	section 198(1)
film	section 7
future copyright	section 102(2)
Government copyright	sections 182(2) and 183(3)
graphic work	section 5
import	section 198(1)
infringing copy	section 35
international organization	section 198(1)
issue of copies to the public	section 24
joint authorship (work of)	section 12
judicial proceedings	section 198(1)
lawfully made (Added 27 of 2003 s. 6)	section 198(3)
Legislative Council copyright	sections 184(2) and 185(5)
librarian (in sections 45 to 52)	section 46(5)
licence (in sections 158 to 162)	section 161
licence of copyright owner	sections 101(4), 102(3) and 194
licensing body (in Division VIII)	section 145(2)
licensing scheme (generally)	section 145(1)
licensing scheme (in sections 151 to 156)	section 154
literary work	section 4(1)
made (in relation to a literary, dramatic or musical work)	section 4(2)
make available copies to the public	section 26
movie (Added 27 of 2003 s. 6)	section 198(1)

musical sound recording (Added 27 of 2003 s. 6)	section 198(1)
musical visual recording (Added 27 of 2003 s. 6)	section 198(1)
musical work	section 4(1)
on behalf of (in relation to an educational establishment)	section 195(3)
performance	section 27(2)
photograph	section 5
prescribed conditions (in sections 46 to 52)	section 46(2)(a)
producer (in relation to a sound recording or film)	section 198(1)
programme (in the context of broadcasting)	section 8(3)
prospective owner (of copyright)	section 102(2)
publication and related expressions	section 196
published edition (in the context of copyright in the typographical arrangement)	section 10
pupil	section 195(2)
rental right	section 198(1)
reprographic copies and reprographic copying	section 198(1)
reprographic process	section 198(1)
right holder	section 135
sculpture	section 5
signed	section 197
sound recording	section 6
specified course of study (Added 15 of 2007 s. 48)	section 198(1)
specified library or archive (in sections 46 to 52)	section 46(2)(b)
sufficient acknowledgement	section 198(1)
sufficient disclaimer	section 198(1)
teacher	section 195(2)
telecommunications system	section 198(1)
television drama (Added 27 of 2003 s. 6)	section 198(1)
typeface	section 198(1)
unauthorized (as regards things done in relation to a work)	section 198(1)
unknown (in relation to the author of a work)	section 11(5)
unknown authorship (work of)	section 11(4)
wireless telegraphy	section 198(1)
work (in Schedule 2)	paragraph 2(1) of that Schedule
work of more than one author (in Division VIII)	section 145(3)
writing and written	section 198(1)

(Amended 64 of 2000 s. 11)
[cf. 1988 c. 48 s. 179 U.K.]

Section 200	Rights conferred on performers and persons having fixation rights	L.N. 48 of 2008	25/04/2008
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Expanded Cross Reference:

201, 202, 203, 204, 205, 206, 207, 207A, 208, 209, 210, 211

PART III

RIGHTS IN PERFORMANCES

DIVISION I

THE RIGHTS, INFRINGEMENT OF THE RIGHTS AND REMEDIES FOR INFRINGEMENT

Introductory

- (1) This Part confers rights-
- (a) on a performer, by requiring his consent to the exploitation of his performances and thus enabling him to prohibit such exploitation without his consent (see sections 201 to 207A); and <* Note - Exp. X-Ref.: Sections 201, 202, 203, 204, 205, 206, 207, 207A *> (Amended 15 of 2007 s. 49)
 - (b) on a person having fixation rights in relation to a performance, in relation to fixations made without his consent or that of the performer (see sections 208 to 211). <* Note - Exp. X-Ref.: Sections 208, 209, 210, 211 *>

(2) In this Part-

"fixation" (錄製品、錄製), in relation to a performance, means a film or sound recording-

- (a) made directly from the unfixed performance;
- (b) made from a broadcast of, or cable programme including, the performance; or
- (c) made, directly or indirectly, from another fixation of the performance;

"performance" (表演) means-

- (a) a dramatic performance (which includes dance and mime);
- (b) a musical performance;
- (c) a reading or recitation of a literary work;
- (ca) a performance of an artistic work; (Added 15 of 2007 s. 49)
- (cb) an expression of folklore; or (Added 15 of 2007 s. 49)
- (d) a performance of a variety act or any similar presentation,

which is, or so far as it is, an unfixed performance given by one or more individuals;

"performer" (表演者) means an actor, singer, musician, dancer or any other person who acts, sings, delivers, declaims, plays in, interprets, or otherwise performs a performance.

(3) The rights conferred by this Part are independent of-

- (a) any copyright in, or moral rights relating to, any work performed or any film or sound recording of, or broadcast or cable programme including, the performance; and
- (b) any other right or obligation arising otherwise than under this Part.

[cf. 1988 c. 48 s. 180 U.K.]

Section 202	Consent required for fixation, etc. of unfixed performance		30/06/1997
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- (1) A performer's rights are infringed by a person who, without the performer's consent-
- (a) makes a fixation of the whole or any substantial part of a qualifying performance directly from the unfixed performance;
 - (b) broadcasts live, or includes live in a cable programme service, or makes available to the public live, the whole or any substantial part of a qualifying performance; or
 - (c) makes a fixation of the whole or any substantial part of a qualifying performance directly from a broadcast of, or cable programme including, the unfixed performance or directly from the unfixed performance which is made available to the public live.

(2) A performer's rights are not infringed by the making of any such fixation by a person for his private and domestic use.

(3) In an action for infringement of a performer's rights brought by virtue of this section damages shall not be awarded against a defendant who shows that at the time of the infringement he believed on reasonable grounds that consent had been given.

(4) In this section "makes available to the public live" (即場向公眾提供), in relation to a performance, means the making available of the unfixed performance, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the performance from a place individually chosen by them.

[cf. 1988 c. 48 s. 182 U.K.]

Section 203	Consent required for copying of fixation		30/06/1997
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(1) A performer's rights are infringed by a person who, without the performer's consent, makes, otherwise than for his private and domestic use, a copy of a fixation of the whole or any substantial part of a qualifying performance; and references in this Part to copying and copies are construed as follows.

(2) It is immaterial whether the copy is made directly or indirectly.

(3) Making of a copy of a fixation means reproducing the fixation in any material form. This includes storing the fixation in any medium by electronic means.

(4) The right of a performer under this section to authorize or prohibit the making of such copies is referred to in this Part as "the right of reproduction".

[cf. 1988 c. 48 s. 182A U.K.]

Section 205	Consent required for making available of copies to public		30/06/1997
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(1) A performer's rights are infringed by a person who, without the performer's consent, makes available to the public copies of a fixation of the whole or any substantial part of a qualifying performance.

(2) References in this Part to the making available to the public of copies of a fixation of a performance are to the making available of copies of the fixation, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the fixation from a place and at a time individually chosen by them (such as the making available of copies of works through the service commonly known as the INTERNET).

(3) References in this Part to the making available of copies of a fixation of a performance include the making available of the original fixation of the unfixed performance.

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

(5) The right of a performer under this section to authorize or prohibit the making available of copies of a fixation to the public is referred to in this Part as "the right of making available to the public".

Section 206	Infringement of performer's rights by use of fixation made without consent		30/06/1997
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(1) A performer's rights are infringed by a person who, without the performer's consent-

(a) shows or plays in public the whole or any substantial part of a qualifying performance; or

(b) broadcasts or includes in a cable programme service the whole or any substantial part of a qualifying performance,

by means of a fixation which was, and which that person knows or has reason to believe was, made without the performer's consent.

(2) A performer's rights are also infringed by a person who, without the performer's consent, shows or plays the whole or any substantial part of a qualifying performance in the course of making available to the public a fixation which was, and which that person knows or has reason to believe was, made without the performer's consent.

[cf. 1988 c. 48 s. 183 U.K.]

Section 207A	Infringement of performers' rights by renting copies to the public without consent	L.N. 48 of 2008	25/04/2008
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(1) A performer's rights are infringed by a person who, without the performer's consent, rents to the public copies of a sound recording in which the whole or any substantial part of a qualifying performance is fixed.

- (2) In this Part, "rent" (租賃), in relation to a sound recording-
- (a) subject to paragraph (b), means making a copy of the sound recording available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage;
 - (b) does not include-
 - (i) making a copy of the sound recording available for the purpose of public performance, playing or showing in public, broadcasting or inclusion in a cable programme service;
 - (ii) making a copy of the sound recording available for the purpose of exhibition in public; or
 - (iii) making a copy of the sound recording available for on-the-spot reference use.

(3) A reference in this Part to the renting of copies of a sound recording includes the renting of the original.

(4) The right of a performer under this section to rent copies of a sound recording to the public is referred to in this Part as "rental right".

(Added 15 of 2007 s. 51)

Section 210	Infringement of fixation rights by use of fixation made without consent		30/06/1997
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(1) A person infringes the rights of a person having fixation rights in relation to a performance who, without the latter's consent or, in the case of a qualifying performance, that of the performer-

- (a) shows or plays in public the whole or any substantial part of the performance; or
- (b) broadcasts or includes in a cable programme service the whole or any substantial part of the performance,

by means of a fixation which was, and which that person knows or has reason to believe was, made without the appropriate consent.

(2) A person infringes the rights of a person having fixation rights in relation to a performance who, without the latter's consent or, in the case of a qualifying performance, that of the performer, shows or plays the whole or any substantial part of the performance in the course of making available to the public a fixation which was, and which that person knows or has reason to believe was, made without the appropriate consent.

(3) The reference in subsection (1) or (2) to "the appropriate consent" is to the consent of-

- (a) the performer; or
- (b) the person who at the time the consent was given had fixation rights in relation to the performance (or, if there was more than one such person, of all of them).

[cf. 1988 c. 48 s. 187 U.K.]

Section 214	Duration of rights		30/06/1997
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Duration of rights

(1) The following provisions have effect with respect to the duration of the rights conferred by this Part.

(2) The rights conferred by this Part in relation to a performance expire-

- (a) at the end of the period of 50 years from the end of the calendar year in which the performance takes place; or
- (b) if during that period a fixation of the performance is released, 50 years from the end of the calendar year in which it is released,

subject as follows.

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

[cf. 1988 c. 48 s. 191 U.K.]

Section 221	Provisions as to damages in infringement action		30/06/1997
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(1) Where in an action for infringement of a performer's economic rights or of any right conferred by this Part on a person having fixation rights it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that the rights subsisted in the fixation to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.

(2) The court may in an action for infringement of a performer's economic rights or of any right conferred by this Part on a person having fixation rights having regard to all the circumstances, and in particular to-

- (a) the flagrancy of the infringement;
- (b) any benefit accruing to the defendant by reason of the infringement; and
- (c) the completeness, accuracy and reliability of the defendant's business accounts and records,

award such additional damages as the justice of the case may require.

[cf. 1988 c. 48 s. 191J U.K.]

Section 229	Meaning of "infringing fixation"	15 of 2007	06/07/2007
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(1) In this Part "infringing fixation" (侵犯權利的錄製品), in relation to a performance, is to be construed in accordance with this section.

(2) For the purposes of a performer's rights, a fixation of the whole or any substantial part of a performance of his is an infringing fixation if it is made, otherwise than for private purposes, without his consent.

(3) For the purposes of the rights of a person having fixation rights, a fixation of the whole or any substantial part of a performance subject to the exclusive fixation contract is an infringing fixation if it is made, otherwise than for private purposes, without his consent or that of the performer.

(4) Except as provided in section 229A, a fixation of a performance is also an infringing fixation if- (Amended 15 of 2007 s. 56)

- (a) it has been or is proposed to be imported into Hong Kong; and
- (b) its making in Hong Kong would have constituted an infringement of the rights conferred by this Part in the performance in question, or a breach of an exclusive licence agreement relating to that performance.

(5) For the purposes of Division III (proceedings relating to importation of infringing fixations) "infringing fixation" (侵犯權利的錄製品) does not include a fixation of a performance-

- (a) that was lawfully made in the country, territory or area where it was made;
- (b) that has been or is proposed to be imported into Hong Kong; and
- (c) its making in Hong Kong would have constituted an infringement of the rights conferred by this Part in the performance in question, or a breach of an exclusive licence agreement relating to that performance.

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

- (a) that the fixation is a fixation of the unfixed performance; and
- (b) that rights conferred by this Part subsist in the performance or have subsisted at any time,

it shall be presumed until the contrary is proved that the fixation was made at a time when rights conferred by this Part subsisted in the performance.

(7) In this Part, "infringing fixation" (侵犯權利的錄製品) includes a fixation which is to be treated as an infringing fixation by virtue of any of the following provisions-

- (a) section 229A(5) (imported fixation not an "infringing fixation" for purposes of section 229(4));
- (b) section 242A(3) (fixations made for purposes of giving or receiving instruction);
- (c) section 243(3) (fixations made for purposes of instruction or examination);
- (d) section 245(3) (fixations made by educational establishments for educational purposes);
- (e) section 246A(3) (fixations made for purposes of public administration);

- (f) section 251(2) (fixations of performance in electronic form retained on transfer of principal fixation); or
 - (g) section 256(3) (fixations made for purposes of broadcast or cable programme). (Replaced 15 of 2007 s. 56)
- (8) In subsection (5)(a), "lawfully made" (合法地製作), in relation to a fixation of a performance made in a country, territory or area-
- (a) means that the fixation was made by-
 - (i) the performer;
 - (ii) a person having fixation rights in relation to the performance in the country, territory or area, as the case may be; or
 - (iii) a person having the consent of the performer or the person referred to in subparagraph (ii) to make the fixation in the country, territory or area, as the case may be; but
 - (b) does not include a fixation that was made in a country, territory or area where there is no law protecting rights in performances in the performance or where the rights in performances in the performance has expired. (Replaced 15 of 2007 s. 56)
[cf. 1988 c. 48 s. 197 U.K.]

Section 238	Expressions having same meaning as in copyright provisions	15 of 2007	06/07/2007
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Interpretation

- (1) The following expressions have the same meaning in this Part as in Part II (copyright)-
- article in transit;
 - artistic work; (Added 15 of 2007 s. 59)
 - authorized officer;
 - broadcast;
 - business;
 - cable programme;
 - cable programme service;
 - Commissioner;
 - Copyright Tribunal;
 - export;
 - film;
 - import;
 - literary work;
 - published; and
 - sound recording.

(1A) In sections 207(1A), 211(1A) and 228(1A), "dealing in" (經營) includes buying, selling, letting for hire, importing, exporting and distributing. (Added 64 of 2000 s. 15)

(2) The provisions of section 8(3) to (5), sections 9(4) and 27(4) (supplementary provisions relating to broadcasting and cable programme services) apply for the purposes of this Part, and in relation to an infringement of the rights conferred by this Part, as they apply for the purposes of Part II and in relation to an infringement of copyright.

[cf. 1988 c. 48 s. 211 U.K.]

Section 239	Index of defined expressions	L.N. 48 of 2008	25/04/2008
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The following Table shows provisions defining or otherwise explaining expressions used in this Part (other than provisions defining or explaining an expression used only in the same section)-

artistic work (Added 15 of 2007 s. 60)	section 238(1) (and section 5)
broadcast (and related expressions)	section 238 (and section 8)
business (Amended 64 of 2000 s. 16)	section 238(1) (and section 198(1))
cable programme, cable programme service (and related expressions)	section 238 (and section 9)
consent of performer (in relation to performer's economic rights)	section 215(2)
copy and copying	section 203
dealing in (Added 64 of 2000 s. 16)	section 238(1A)
exclusive fixation contract	section 208(1)
exclusive licence	section 218
film	section 238(1) (and section 7)
fixation (of a performance)	section 200(2)
fixation rights (person having)	section 208(2) and (3)
infringing fixation	section 229
literary work	section 238(1) (and section 4(1))
performance	section 200(2)
performer	section 200(2)
performer's economic rights	section 215(1)
performer's non-economic rights	section 224(1)
published	section 238(1) (and section 196)
qualifying performance	section 201
qualifying person	section 234
rental right (Added 15 of 2007 s. 60)	section 207A(4)
right of distribution	section 204(5)
right of making available to the public	section 205(5)
right of reproduction	section 203(4)
rights owner (in relation to performer's economic rights)	section 215(3) and (4)
sound recording	section 238(1) (and section 6)

[cf. 1988 c. 48 s. 212 U.K.]

Section 243	Things done for purposes of instruction or examination		30/06/1997
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(1) The rights conferred by this Part are not infringed by the copying of a fixation of a performance, to a reasonable extent, in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, if the copying is done by a person giving or receiving instruction.

(2) The rights conferred by this Part are not infringed-

- (a) by the copying of a fixation of a performance for the purposes of setting or answering the questions in an examination; or
- (b) by anything done for the purposes of an examination by way of communicating the questions to the candidates.

(3) Where a fixation which would otherwise be an infringing fixation is made in accordance with this section but is subsequently dealt with, it is treated as an infringing fixation for the purposes of that dealing, and if that dealing infringes any right conferred by this Part, for all subsequent purposes.

For this purpose "dealt with" (進行交易) means sold or let for hire, or offered or exposed for sale or hire.

(4) Expressions used in this section have the same meaning as in section 41.

[cf. 1988 c. 48 Sch. 2 para. 4 U.K.]

Section 245	Recording of broadcasts and cable programmes by educational establishments		30/06/1997
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(1) A recording of a broadcast or cable programme, or a copy of such a recording, may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing any of the rights conferred by this Part in relation to any performance or fixation included in it.

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

(3) Where a recording or copy which would otherwise be an infringing fixation is made in accordance with this section but is subsequently dealt with, it is treated as an infringing fixation for the purposes of that dealing, and if that dealing infringes any right conferred by this Part, for all subsequent purposes.

For this purpose "dealt with" (進行交易) means sold or let for hire, or offered or exposed for sale or hire.

(4) Expressions used in this section have the same meaning as in section 44.

[cf. 1988 c. 48 Sch. 2 para. 6 U.K.]

Section 272A	Moral rights conferred on certain performers	L.N. 48 of 2008	25/04/2008
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PART IIIA

PERFORMERS' MORAL RIGHTS

Introductory

(1) This part confers the following moral rights on a performer of a live aural performance or a performer whose performance is fixed in a sound recording-

- (a) the right to be identified as a performer (section 272B); and
- (b) the right not to have his performance subjected to derogatory treatment (section 272F).

(2) The moral rights are conferred on the performer only if the performance is a qualifying performance.

(3) The moral rights conferred on the performer are in addition to any other rights in relation to the performance that the performer or any other person may have under this Ordinance.

(4) In this Part-

"aural performance" (聲藝表演)-

- (a) means a performance which may be perceived by the human ear; or
- (b) where part of a performance may be perceived by the human ear, means that part of the performance,

and includes a musical performance, a spoken performance and a performance in any intermediate forms between singing and speaking;

"make available to the public live" (即場向公眾提供), in relation to a performance, means to make available of the unfixed performance, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the performance from a place individually chosen by them;

"performership" (演出) means participation in a performance, as the performer or one of the performers;

"sound recording" (聲音紀錄)-

- (a) subject to paragraph (b), has the same meaning as in Part II (copyright);
- (b) does not include a film sound-track which accompanies a film within the meaning of Part II.

(5) The following expressions have the same meaning in this Part as in Part II (copyright)-
broadcast;
business;

cable programme;
 cable programme service; and
 published.

(6) The following expressions have the same meaning in this Part as in Part III (rights in performances)-

fixation;
 performance;
 performer; and
 qualifying performance.

(7) For the purposes of this Part, if a performance of a musical work is conducted by a conductor, the sounds of the performance are treated as having been made by the conductor and the person who actually made those sounds, and a reference to a performer includes a reference to the conductor.

(8) Section 204(2), (3) and (4) applies, with the necessary modifications, to references in this Part to the issue to the public of copies of a sound recording, as it applies to references in Part III to the issue to the public of copies of a fixation.

(9) Section 205(2), (3) and (4) applies, with the necessary modifications, to references in this Part to the making available to the public of copies of a sound recording, as it applies to references in Part III to the making available to the public of copies of a fixation.

(Part IIIA added 15 of 2007 s. 66)

Section 272B	Right to be identified as performer	L.N. 48 of 2008	25/04/2008
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Right to be identified as performer

(1) A performer of a live aural performance or a performer whose performance is fixed in a sound recording has the right to be identified as a performer in the performance whenever-

- (a) the performance is staged in public, made available to the public live, broadcast live or included live in a cable programme service; or
- (b) copies of the sound recording in which the performance is fixed are issued or made available to the public, broadcast or included in a cable programme service.

(2) The right of the performer under this section is, in the case of the issue or making available to the public of copies of a sound recording in which the performance is fixed, the right to be identified in or on each copy or, if that is not appropriate, in some other manner likely to bring his identity to the notice of a person acquiring a copy.

(3) The right of the performer under this section is, in any case other than the case referred to in subsection (2), the right to be identified in a manner likely to bring his identity to the notice of a person hearing the performance, broadcast or cable programme in question.

(4) The rights of the performer referred to in subsections (2) and (3) include the right to be identified in a clear and reasonably prominent or audible manner.

(5) If the performer in asserting his right to be identified specifies a pseudonym, initials or some other particular form of identification, that form must be used; otherwise any reasonable form of identification may be used.

(6) If a performance is presented by performers who use a group name, identification by using the group name is sufficient identification of the performers in the group.

(Part IIIA added 15 of 2007 s. 66)

Section 272E	Right to object to derogatory treatment	L.N. 48 of 2008	25/04/2008
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Right to object to derogatory treatment

(1) A performer of a live aural performance or a performer whose performance is fixed in a sound recording has the right not to have his performance subjected to derogatory treatment.

- (2) The right is infringed by a person who does any of the following acts-
 - (a) in relation to a live aural performance, subjects the performance, or causes the performance to be subjected, to derogatory treatment when the performance is caused

- to be heard in public, broadcasted, included in a cable programme service or made available to the public live;
- (b) in relation to a performance fixed in a sound recording-
 - (i) causes to be heard in public, broadcasts or includes in a cable programme service the performance by means of the sound recording in a manner which subjects the performance to derogatory treatment; or
 - (ii) makes available to the public copies of the sound recording in a manner which subjects the performance to derogatory treatment; or
 - (c) in relation to a performance which has been subjected to derogatory treatment and is fixed in a sound recording-
 - (i) causes to be heard in public, broadcasts or includes in a cable programme service the sounding recording; or
 - (ii) makes available to the public copies of the sound recording.
- (3) For the purposes of this section-
- (a) "treatment" (處理)-
 - (i) in relation to a live aural performance, means any addition to, deletion from, alteration to or adaptation of the performance; or
 - (ii) in relation to a performance fixed in a sound recording, means any addition to, deletion from, alteration to or adaptation of the sound recording; and
 - (b) the treatment of a live aural performance or a performance fixed in a sound recording is derogatory if it amounts to distortion, mutilation or other modification that is prejudicial to the reputation of the performer.

(Part IIIA added 15 of 2007 s. 66)

Section 273	Interpretation of sections 273 to 273H	L.N. 141 of 2008	11/07/2008
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Expanded Cross Reference:

273A, 273B, 273C, 273D, 273E, 273F, 273G, 273H

PART IV

TECHNOLOGICAL MEASURES AND GENERAL

Circumvention of effective technological measures

(Replaced 15 of 2007 s. 67)

(1) In sections 273A to 273H, "circumvent" (規避), in relation to an effective technological measure which has been applied in relation to a copyright work- < * Note - Exp. X-Ref.: Sections 273A, 273B, 273C, 273D, 273E, 273F, 273G, 273H * >

- (a) where the use of the work is controlled through the measure by the copyright owner of the work, means to circumvent the measure without the authority of the copyright owner;
- (b) where the use of the work is controlled through the measure by an exclusive licensee of the copyright owner of the work, means to circumvent the measure without the authority of the exclusive licensee; or
- (c) where the use of the work is controlled through the measure by any other person who, with the licence of the copyright owner of the copyright work-
 - (i) issues to the public copies of the work;
 - (ii) makes available to the public copies of the work; or
 - (iii) broadcasts the work, or includes the work in a cable programme service, means to circumvent the measure without the authority of that other person.

(2) For the purposes of this section and sections 273A to 273H, where a technological measure has been applied in relation to a copyright work, the measure is referred to as an effective technological measure if the use of the work is controlled by any person referred to in subsection (1)(a), (b) or (c) through- < * Note - Exp. X-Ref.: Sections 273A, 273B, 273C, 273D, 273E, 273F, 273G, 273H * >

- (a) an access control or protection process (including the encryption, scrambling and any other transformation of the work) which achieves the intended protection of the work in the normal course of its operation; or
 - (b) a copy control mechanism which achieves the intended protection of the work in the normal course of its operation.
- (3) In subsection (2)-
- (a) "technological measure" (科技措施) means any technology, device, component or means which is designed, in the normal course of its operation, to protect any description of copyright work;
 - (b) the reference to protection of a copyright work is to the prevention or restriction of acts which are done without the licence of the copyright owner of the work and are restricted by the copyright in the work;
 - (c) the reference to use of a copyright work does not extend to any use of the work which is outside the scope of the acts restricted by the copyright in the work.

(Replaced 15 of 2007 s. 68)

Section 273A	Rights and remedies in respect of circumvention of effective technological measures	L.N. 141 of 2008	11/07/2008
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(1) Subject to sections 273D and 273H, this section applies where an effective technological measure has been applied in relation to a copyright work, and a person does any act which circumvents the measure, knowing, or having reason to believe, that he is doing an act which circumvents the measure.

(2) The following persons have the same rights and remedies against the person referred to in subsection (1) as a copyright owner has in respect of an infringement of copyright-

- (a) the copyright owner of the work;
- (b) an exclusive licensee of the copyright owner of the work; and
- (c) any other person who, with the licence of the copyright owner of the work-
 - (i) issues to the public copies of the work;
 - (ii) makes available to the public copies of the work; or
 - (iii) broadcasts the work, or includes the work in a cable programme service.

(3) The rights and remedies conferred by subsection (2) on the copyright owner, the exclusive licensee and the person referred to in subsection (2)(c) are concurrent.

(4) Sections 112(3) and 113(1), (4), (5) and (6) apply, with the necessary modifications, in proceedings in relation to the copyright owner, the exclusive licensee and the person referred to in subsection (2)(c), as they apply in proceedings in relation to a copyright owner and an exclusive licensee with concurrent rights and remedies.

(5) Sections 115, 116 and 117 (presumptions as to certain matters relating to copyright) apply, with the necessary modifications, in proceedings instituted under this section, as they apply in proceedings instituted under Part II (copyright).

(Added 15 of 2007 s. 69)

Section 273B	Rights and remedies in respect of devices and services designed to circumvent effective technological measures	L.N. 48 of 2008	25/04/2008
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(1) Subject to sections 273E and 273H, this section applies where an effective technological measure has been applied in relation to a copyright work, and a person-

- (a) makes, imports, exports, sells or lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, any relevant device;
- (b) exhibits in public, possesses or distributes any relevant device for the purpose of or in the course of any trade or business;
- (c) distributes (otherwise than for the purpose of or in the course of any trade or business) any relevant device to such an extent as to affect prejudicially the owner of the copyright; or
- (d) provides any relevant service.

- (2) In subsection (1)-
 "relevant device" (有關器件), in relation to the effective technological measure referred to in that subsection, means any device, product, component or means-
- (a) which is promoted, advertised or marketed for the purpose of the circumvention of the measure;
 - (b) which has only a limited commercially significant purpose or use other than to circumvent the measure; or
 - (c) which is primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of the measure;
- "relevant service" (有關服務), in relation to the effective technological measure referred to in that subsection, means any service-
- (a) which is promoted, advertised or marketed for the purpose of the circumvention of the measure;
 - (b) which has only a limited commercially significant purpose or use other than to circumvent the measure; or
 - (c) which is performed for the purpose of enabling or facilitating the circumvention of the measure.
- (3) The following persons have the same rights and remedies against the person referred to in subsection (1) as a copyright owner has in respect of an infringement of copyright-
- (a) the copyright owner of the work;
 - (b) an exclusive licensee of the copyright owner of the work; and
 - (c) any other person who, with the licence of the copyright owner of the work-
 - (i) issues to the public copies of the work;
 - (ii) makes available to the public copies of the work; or
 - (iii) broadcasts the work, or includes the work in a cable programme service.
- (4) The rights and remedies conferred by subsection (3) on the copyright owner, the exclusive licensee and the person referred to in subsection (3)(c) are concurrent.
- (5) Sections 112(3) and 113(1), (4), (5) and (6) apply, with the necessary modifications, in proceedings in relation to the copyright owner, the exclusive licensee and the person referred to in subsection (3)(c), as they apply in proceedings in relation to a copyright owner and an exclusive licensee with concurrent rights and remedies.
- (6) The copyright owner, the exclusive licensee and the person referred to in subsection (3)(c) have the same rights and remedies under section 109 (order for delivery up) in relation to any device, product, component or means which a person has in his possession, custody or control with the intention that it is to be used to circumvent effective technological measures, as a copyright owner has in relation to an infringing copy.
- (7) The rights and remedies conferred by subsection (6) on the copyright owner, the exclusive licensee and the person referred to in subsection (3)(c) are concurrent.
- (8) Section 113(7) (order as to exercise of rights by copyright owner where exclusive licensee has concurrent rights) applies, with the necessary modifications, in respect of anything done under section 109 by virtue of subsection (6), in relation to the copyright owner, the exclusive licensee and the person referred to in subsection (3)(c), as it applies, in respect of anything done under section 109, in relation to a copyright owner and an exclusive licensee with concurrent rights and remedies.
- (9) Section 111 (order as to disposal of infringing copy or other article) applies, with the necessary modifications, in relation to the disposal of anything delivered up under section 109 by virtue of subsection (6).
- (10) Sections 115, 116 and 117 (presumptions as to certain matters relating to copyright) apply, with the necessary modifications, in proceedings instituted under this section, as they apply in proceedings instituted under Part II (copyright).

(Added 15 of 2007 s. 69)

Section 273D	Exceptions to section 273A	L.N. 141 of 2008	11/07/2008
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- (1) Section 273A does not apply to an act which circumvents an effective technological measure if-
- (a) the measure has been applied in relation to a computer program;

- (b) the act is done with respect to the identification or analysis of particular elements of the computer program that are not readily available to the person who does the act;
 - (c) the act is done for the sole purpose of achieving interoperability of an independently created computer program with the computer program or another computer program;
 - (d) the copy of computer program in relation to which the act is done is not an infringing copy; and
 - (e) the act of identification or analysis referred to in paragraph (b) does not constitute an infringement of copyright.
- (2) Section 273A does not apply to an act which circumvents an effective technological measure if-
- (a) the act is done by or under the authority of the owner or operator of a computer, computer system or computer network; and
 - (b) the act is done for the sole purpose of testing, investigating or correcting a security flaw or vulnerability of the computer, computer system or computer network, as the case may be.
- (3) Section 273A does not apply to an act which circumvents an effective technological measure if the act is done for the sole purpose of research into cryptography and-
- (a) where the research is conducted by or on behalf of a specified educational establishment, or for the purposes of giving or receiving instruction in a specified course of study in the field of cryptography provided by a specified educational establishment-
 - (i) the research does not constitute an infringement of copyright;
 - (ii) it is necessary for the act to be done in order to conduct the research; and
 - (iii) the information derived from the research is not disseminated to the public except in a specified manner; or
 - (b) in any other case-
 - (i) the research does not constitute an infringement of copyright;
 - (ii) it is necessary for the act to be done in order to conduct the research; and
 - (iii) the act or the dissemination to the public of information derived from the research does not affect prejudicially the copyright owner.
- (4) In subsection (3)-
- "specified educational establishment" (指明教育機構) means-
- (a) an educational establishment specified in section 4, 6, 7, 8, 9, 12, 14 or 15 of Schedule 1; or
 - (b) Hong Kong Shue Yan University registered under the Post Secondary Colleges Ordinance (Cap 320);
- "specified manner" (指明方式), in relation to the dissemination to the public of information derived from a research into cryptography-
- (a) means a manner which is reasonably calculated to advance the state of knowledge or development of cryptography or related technology; and
 - (b) includes dissemination of the information in a journal or at a conference the target readers or audiences of which are primarily persons engaged in, or pursuing a course of study in, the field of cryptography or related technology.
- (5) Section 273A does not apply to an act which circumvents an effective technological measure if-
- (a) the measure, or the copyright work in relation to which the measure has been applied, has the capability to collect or disseminate personally identifying information which tracks and records the manner of a person's use of a computer network without providing conspicuous notice of such collection or dissemination to the person;
 - (b) the act is done for the sole purpose of identifying or disabling the function of the measure or work, as the case may be, in collecting or disseminating personally identifying information; and
 - (c) the act does not affect the ability of any person to gain access to any work.
- (6) Section 273A does not apply to an act which circumvents an effective technological measure if-
- (a) a person does the act when using a technology, product or device; and

- (b) the sole purpose of the technology, product or device, as the case may be, is to prevent access of minors to harmful materials on the Internet.

(7) Section 273A does not apply to an act which circumvents an effective technological measure if-

- (a) the measure has been applied in relation to a copyright work of any description issued to the public in a physical article;
- (b) the measure contains regional coding or any other technology, device, component or means which has the effect of preventing or restricting access to the work for the purpose of controlling market segmentation on a geographical basis;
- (c) the act is done for the sole purpose of overcoming the regional coding, technology, device, component or means, as the case may be, contained in the measure so as to gain access to the work; and
- (d) the copy of the work in relation to which the act is done-
 - (i) is not an infringing copy; or
 - (ii) if it is an infringing copy, is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made.

(8) Section 273A does not apply to an act which circumvents an effective technological measure if-

- (a) the measure has been applied in relation to a copy of any description mentioned in section 50(1), 51(1) or 53;
- (b) the act of circumvention is done by the librarian or archivist of a specified library or archive; and
- (c) the act is done for the sole purpose of the doing of any of the acts permitted under sections 50, 51 and 53.

(9) Section 273A does not apply to an act which circumvents an effective technological measure if the act is done by, or on behalf of, law enforcement agencies for the purpose of the prevention, detection or investigation of an offence, or the conduct of a prosecution.

(Added 15 of 2007 s. 69)

Section 274	Rights and remedies in respect of unlawful acts to interfere with rights management information	L.N. 48 of 2008	25/04/2008
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Rights management information

(1) A person who provides rights management information is entitled to the following rights and remedies.

(2) He has the same rights and remedies against a person who-

- (a) removes or alters any electronic rights management information provided by him without his authority; or
- (b) issues or makes available to the public, sells or lets for hire, imports into or exports from Hong Kong, broadcasts or includes in a cable programme service, without his authority, works or copies of works, performances, fixations of performances to which the electronic rights management information is attached knowing that the electronic rights management information has been removed or altered without his authority,

as a copyright owner has in respect of an infringement of copyright.

(2A)The person who provides rights management information does not have the rights and remedies against the person referred to in subsection (2) unless the second-mentioned person, when doing an act referred to in subsection (2)(a) or (b), knows or has reason to believe that by doing the act he is inducing, enabling, facilitating or concealing an infringement of copyright or an infringement of rights conferred by Part III (rights in performances). (Added 15 of 2007 s. 70)

(2B)If the copyright owner of a work to which rights management information is attached, or the copyright owner's exclusive licensee, is not the person who provides the rights management information, the copyright owner or the exclusive licensee, as the case may be, has the same rights and remedies as the person who provides the rights management information has against the person referred to in subsection (2). (Added 15 of 2007 s. 70)

(2C)The rights and remedies conferred by subsection (1) on the person who provides rights

management information and the rights and remedies conferred by subsection (2B) on the copyright owner and his exclusive licensee are concurrent. (Added 15 of 2007 s. 70)

(2D) Sections 112(3) and 113(1), (4), (5) and (6) apply, with the necessary modifications, in proceedings in relation to the person who provides rights management information, the copyright owner and the exclusive licensee, as they apply in proceedings in relation to a copyright owner and an exclusive licensee with concurrent rights and remedies. (Added 15 of 2007 s. 70)

(2E) Sections 115, 116 and 117 (presumptions as to certain matters relating to copyright) apply, with the necessary modifications, in proceedings instituted under this section, as they apply in proceedings instituted under Part II (copyright). (Added 15 of 2007 s. 70)

(2F) This section, except subsection (2E), applies, with the necessary modifications, in relation to-

- (a) a fixation of a performance;
 - (b) a performer or a person having fixation rights in relation to a performance; and
 - (c) the rights conferred by Part III on a performer or a person having fixation rights in relation to a performance. (Added 15 of 2007 s. 70)
- (3) References in this section to rights management information means-
- (a) information which identifies the work, the author of the work, the owner of any right in the work, the performer, or the performance of the performer;
 - (b) information about the terms and conditions of use of the work, the person having fixation rights in relation to the performance, or the performance; or
 - (c) any numbers or codes that represent such information,

when any of these items of information is attached to a copy of a work or a fixed performance or appears in connection with the making available of a work or a fixed performance to the public.

Implications of the proposals

Economic Implications

Protection of intellectual properties, including copyright, is one of the cornerstones for maintaining Hong Kong's competitiveness in the international arena. Strengthening our copyright regime in the digital environment helps the environment for creativity to flourish, and would generally bring a positive impact on the economy, particularly the development of the film, music, software and other creative industries.

2. Specifically, the proposed introduction of criminal sanctions against unauthorised communication of copyright works provides more comprehensive protection to copyright owners to exploit their works in the digital environment amidst increasingly diverse channels for the use and transmission of copyright works. Nevertheless, free flow of information which facilitates the diffusion of new ideas and knowledge is crucial to long-term economic development. Thus, appropriate exceptions will be given to educational establishments and specified libraries, archives and museums to facilitate the development of modes of content uses and transmissions such as e-learning, distance education, as well as research, heritage preservation and promotion of culture.

3. In addition, providing a legal framework and incentives to OSPs in fighting online piracy helps promote the protection of copyright in the digital environment, which helps ensure the healthy and sustainable development of the information technology sector in the longer term.

Financial and Staffing Implications

4. The proposed new criminal offence concerning unauthorised communication and making a false declaration may increase the workload of the Customs and Excise Department ("C&ED") and the Department of Justice ("DoJ"). In line with the existing strategy in combating counterfeiting and pirate activities on the Internet, C&ED will carry out enforcement actions mainly based on complaints and intelligence. C&ED and DoJ will strive to absorb the additional financial and manpower requirements from within their existing resources. Additional resources may be sought through the established mechanism where necessary.

Sustainability Implications

5. As far as sustainability implications are concerned, the proposal helps enhance copyright protection in the digital environment, enlists industry cooperation in combating online piracy, and facilitates new modes of content uses and transmissions such as e-learning. This would to some extent contribute to the vibrancy of Hong Kong's economy by facilitating the development of creative industries.