UPDATING HONG KONG'S COPYRIGHT REGIME

PUBLIC CONSULTATION PAPER

Commerce and Economic Development Bureau

Contents

Chapter 1 Introduction

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

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

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

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

[2] The Copyright (Amendment) Bill 2011.

[3] The Copyright (Amendment) Bill 2014.

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

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

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

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

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

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

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

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

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

Chapter 2 Key Legislative Proposals of the 2014 Bill

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

2011 Bill

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

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

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

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

2014 Bill

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

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

(A) Communication Right

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

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

(B) Criminal Liability

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

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

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

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

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

……

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

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

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

……

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

(C) Revised and New Copyright Exceptions

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

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

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

(a) to provide greater flexibility to the education sector in communicating copyright works when giving instructions (especially for distance learning), and to facilitate libraries, archives and museums in their daily operations and in preserving valuable works;

(b) to allow OSPs to cache data[9], which technically involves copying and is a restricted act in the CO. Such caching is transient or incidental in nature and technically required for the process of data transmission to function efficiently; and

(c) to allow media shifting of sound recordings for private and domestic use (i.e. the making of an additional copy of a sound recording from one media or format into another, usually for the purpose of listening to the work in a more convenient manner[10]), which technically is an act of copying and is restricted by copyright.

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

9 This includes the storing or caching of web content by OSPs on their proxy servers so that the content can be quickly retrieved in response to future requests.

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

New fair dealing exceptions

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

(a) **use for the purposes of parody, satire, caricature and pastiche**[11], which are common means for the public to express views or comment on current events, and such use is usually critical and transformative in nature and should unlikely compete with or substitute the original works;

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

(c) **use of a quotation the extent of which is no more than is required by the specific purpose for which it is used**, so as to facilitate expression of opinions or discussions in the online and traditional environment.

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

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[11] The Concise Oxford English Dictionary (12th Edition, 2011) defines the terms as follows –

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

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

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

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

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

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

(D) Safe Harbour

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

(E) Additional Damages in Civil Cases

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

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

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

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

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

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

Chapter 3 Exhaustive Approach to Exceptions

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

Exhaustive Approach

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

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

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

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

Non-exhaustive Approach

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

International Development

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

Local Discussion

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

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

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

Arguments Relating to Maintaining an Exhaustive Exception Approach

3.6 Arguments for maintaining an exhaustive approach include –

(a) *Provide legal certainty*

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

(b) *In line with international practices*

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

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

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

(d) *Compatible with international agreements*

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

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

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

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

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

3.7 Arguments for not maintaining an exhaustive approach include –

(a) *More flexibility*

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

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

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

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

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

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

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

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

Question

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

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

Chapter 4 Contract Override

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

Overseas Practices

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

Local Discussion

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

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

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

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

Arguments Relating to Introducing Statutory Restrictions on Contract Override

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

(a) *Freedom of contract*

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

(b) *Privity of contract*

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

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

(c) *Lack of empirical evidence*

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

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

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

(e) *No internationally consistent and unified approach*

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

4.5 Arguments for introducing statutory restrictions on contract override include –

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

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

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

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

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

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

(c) *Provide legal certainty for users*

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

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

Question

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

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

Chapter 5 Illicit Streaming Devices

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

Overseas Practices

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

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

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

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

Local Discussion

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

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

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

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

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

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

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

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

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

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

[30] Section 275 of the CO.

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

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

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

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

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

(a) *No genuine need*

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

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

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

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

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

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

(a) *Provide legal certainty*

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

(b) *Facilitate enforcement*

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

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

Question

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

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

Chapter 6 Judicial Site Blocking

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

Overseas Practices

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

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

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

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

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

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

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

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

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

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

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

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

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

[40] Section 21L of the HCO.

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

Local Discussion

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

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

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

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

42 Section 107(2) of the CO.

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

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

(a) *Lack of evidence*

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

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

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

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

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

6.10 Arguments for introducing copyright-specific statutory provisions include –

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

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

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

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

(b) *Provide clarity to OSPs*

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

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

Question

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

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

Chapter 7 Possible New Issues for Further Studies

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

(a) *Extension of copyright term of protection*

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

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

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

(c) *AI and copyright*

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

related matters in their copyright laws to date.

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

Chapter 8 Invitation of Views

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

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

Fax: 2147 3065

Email: co_consultation@cedb.gov.hk

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

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

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