

## **Copyright (Amendment) Bill 2022 Submission**

1. Since the implementation of the Copyright Ordinance in 1997, the Law Society has been proposing and commenting on amendments to improve the copyright law of Hong Kong to tackle challenges of the ever-changing operation environment and developments in technology and international trends.

2. Although we believe the Bills Committee of the Legislative Council has already read the Law Society's Position Paper on Copyright (Amendment) Bill 2014 (29 December 2015) and Submissions on the Public Consultation Paper on Updating Hong Kong's Copyright Regime (22 February 2022), these two papers are attached for ease of reference.

3. It is unfortunate that our laws lag behind the development of technology. As early as November 1993, in its *Report on Reform of the Law Relating to Copyright*, when the Law Reform Commission of Hong Kong considered the future of broadcasting technology and its impact on copyright law, the Commission observed:

*"If the last ten years are a pointer to the future, Hong Kong can expect to see a proliferation of technologies that further facilitate communications or provide avenues for education or entertainment. Unfortunately, copyright law cannot always keep pace. The law attempts to provide a balance between the owners of property in information (literature, film, etc), the providers of the technology, and the public in general. Finding a just and workable balance takes time. The results of our consultation, ..., pointed to a system that had worked reasonably well, but which was inadequate to accommodate rapid development in the field."* (paragraph 11.21 thereof)

4. The above observation was of course before the computer, the Internet, and social media become indispensable in our daily and social lives. And now artificial intelligence (AI) has a fast growing impact on our everyday lives.

5. Going back in time, in the mid-1990s, when the Internet was relatively new but growing exponentially, the World Intellectual Property Organization (“WIPO”) and its member states began to discuss how to ensure that copyright law could be applied effectively to the new medium. That led to two WIPO Internet Treaties - the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”). Among other obligations, the WCT requires member states to recognize authors’ exclusive right to authorize *“any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”* The WPPT extends the right to performers and phonogram producers. Many member states implemented the right of communication into their copyright laws.

6. In 1998, the United States implemented the WIPO Internet Treaties via the Digital Millennium Copyright Act and represented that its copyright includes a “making available right” which covers all formats in which a work may be digitally communicated, such as downloads, stream and any other existing or future methods of online transmissions.

7. In 2001, Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society specifies a right of communication in Article 3(1) which requires *“Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”*

8. In the People’s Republic of China, it was considered that the first amendment of the Copyright Law in 2001 already included the right of communication via the right of broadcast, the right of network communication and an all- embracing provision covering all other rights of the copyright owner. That remained the same in the second amendment in 2010. In its recent third amendment effective as of 1 June 2021, the definitions of the right of broadcast and the right of network communication are revised. Commentators compliment that rather than relying on the all-embracing provision when an ambiguity arises, the revised definitions are self-sufficient to reflect the right of communication to the public under the WIPO Internet Treaties.

9. In 2004, the right of communication to the public was introduced into Singapore’s Copyright Act 1987 and this is retained and expanded in its revamped Copyright Act 2021.

10. Hong Kong is seriously and embarrassingly behind in that respect. Our 1997 Copyright Ordinance borrowed most of its sections from the UK Copyright, Designs and Patents Act 1988 which did not have the “communication to the public” language then (the UK amended and introduced “infringement by communication to the public” to its 1988 Act in 2003).

11. It is imperative that we must adopt a technology-neutral right of communication forthwith to catch up with what most other modern economies have adopted for 20 years. Besides the right of communication, most of what the Copyright (Amendment) Bill 2022 contains are first proposed in the Copyright Amendment Bill 2011 which began with a consultation in 2006 when the Government already saw the need to review the efficacy of our copyright regime in the digital environment. The Amendment Bill 2014 was a refinement after more than two years of further discussions with different stakeholders. The current Copyright (Amendment) Bill 2022 picks up from the Amendment Bill 2014 with some stylistic changes and corresponding changes made to accessible copies of work for persons with a print disability the provisions for which were introduced between the Amendment Bill 2014 and the current bill as a result of the Marrakesh Treaty. Additions are also made to provide for investigation, seizure, disposal and other powers for certain offences in relation to the circumvention of effective technological measures that protect copyright works from infringement which we believe are uncontroversial.

12. Hence what we hope to achieve now by passing the Copyright (Amendment) Bill 2022 is already more than 10 years old, and more than 15 years if one counts from the first relevant consultation in 2006. This is grossly unsatisfactory. In the 62 written submissions received (including one made by us) during the three-month copyright consultation period from November 2021 to February 2022, the majority of respondents agree that there is an imminent need to update our copyright regime and generally support using the 2014 Bill as the basis for amending the law. Like us, they call for an early passage of the amendment bill to keep Hong Kong’s copyright regime abreast with times and in line with international developments.

13. We strongly urge for the expeditious passing of the amendment bill to close the old issues so that we can move on to discuss more contemporary issues, such as:

- (1) Feasibility and merits of establishing a copyright registration system
- (2) Use of new technology, such as blockchain, to prove ownership and authenticity of copyright works and to provide proof or preserve evidence for commercial transactions and contentious disputes

- (3) Review of copyright ownership and protection issues relating to Artificial Intelligence (computer-generated) works and consideration of exceptions to copyright for text and data mining
- (4) Review of duration of copyright protection
- (5) Treatment of “orphan works”.

14. We also submit that there are other complex policy issues which require careful consideration, such as:

- (1) Review of the jurisdiction and powers of the Copyright Tribunal
- (2) Whether to maintain the current dual protection of copyright and registered design or to introduce unregistered design rights
- (3) Fair use vs fair dealing exceptions or a hybrid
- (4) Merits of introducing statutory damages for copyright infringement
- (5) Merits of a US copyright termination/rights reversion mechanism.

15. Copyright is one of three most common types of intellectual property rights together with patents and trade marks. Copyright is a key asset of our cultural and creative industries and has a vital role in realising 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 to build Hong Kong SAR as the premier IP trading hub in Asia.

16. We urge proper and immediate attention be given to keep our copyright law timely and relevant.

**The Law Society of Hong Kong  
10 August 2022**



## POSITION PAPER ON COPYRIGHT (AMENDMENT) BILL 2014

### Background

1. Copyright legislation requires a careful balance between the interests of copyright users and those of creators/owners. It needs to be updated at suitable intervals to meet international trends, changing environment and expectations of stakeholders.
2. The consultations and discussions to update our Copyright Ordinance to enhance copyright protection in the digital environment and help combat large scale online piracy began in 2006. As a result, the Copyright (Amendment) Bill 2011 was introduced to include a technology-neutral right in relation to communicating a copyright protected work to the public, 'safe harbour' provisions for online service providers, and new exceptions such as media shifting of sound recordings.
3. It should be noted at the outset that there is nothing fundamentally new in the concept of communicating a work to the public as it is (by definition) based upon existing rights in relation to such communications by broadcasting, cablecasting and "making available of the work to the public" (by wire or wireless means), the latter being introduced into our law as long ago as 1997 in response to infringements over the internet.
4. In June 2012, due to the controversies over whether to include a parody exception and concerns over the threshold of criminal liability associated with unauthorized communication of copyright works, the Copyright (Amendment) Bill 2011 was not proceeded with.
5. By including the previous amendment proposals with some refinement, the Copyright (Amendment) Bill 2014 not only addresses the previous controversies, but also includes new exceptions.
6. Yet, further controversies arise and they fall into three topics:-
  - (a) Adoption of an open-ended fair use exception instead of our current

specific fair dealing exceptions

(b) Addition of a user-generated content ("UGC") exception

(c) Express provision to disallow contract override.

7. All those three topics are controversial topics with ongoing discussions and debates. We take the view that it would not be right to hastily adopt or dismiss them without thorough research and consultation. We have expressed our views on those topics in the past but for the sake of completeness of this paper, we will summarize below our previous submissions with additional information.

### **Fair dealing vs Fair use**

8. Hong Kong, following the UK, has always adopted a fair dealing approach where specific exceptions to infringement are allowed. Some groups advocate the adoption of the US fair use defence and claim that it is an international trend with many Asian countries adopting such an approach.
9. Those who argue for a fair use approach consider it broad, flexible and adaptive as compared to the prescriptive fair dealing approach. Those who argue against query if there is an international trend to move towards fair use and are concerned about the lack of certainty and the desirability of transplanting a US concept which has developed in a different legal environment.
10. Our research shows that although certain types of use have been given as examples which may qualify as fair use, there is no statutory definition of fair use in the US. The courts have to evaluate the specific facts of the case against the factors suggested by the law. These factors include the purpose and character of the use, the nature of the copyrighted work, amount and substantiality of the portion used, and the effect of the use on the potential market for or value of the copyrighted work. The courts can consider other factors as well. The US court decisions are sometimes inconsistent and demonstrate shifts in emphasis over time. Recent cases focus on whether there is a transformation of the original work. Since 2005, over 65 cases involving fair use disputes have been decided by the US courts. There are about the same number of cases in which the courts found fair use or not fair use and in some cases, the results were mixed. Each case is decided on its own facts and the judicial interpretation at the time.
11. In Asia, a number of countries have an exception for fair use or extended fair dealings, including - Korea, Philippines, Singapore, Sri Lanka and Taiwan. Notably, these Asian countries, like the US, have statutory damages as a remedy for infringement. Statutory damages are actually not common. According to a research paper published in November 2013, including the US, only 24 out the 179 WIPO member states surveyed allow recovery of statutory

damages for copyright infringement. Statutory damages allow successful plaintiffs to recover monetary damages without any proof that defendant profited from the infringement. In the US, such damages can be awarded in whatever amount the judge or jury deems "just" in a range between US\$750 and US\$30,000 (~HK\$ 5,850 – HK\$234,000) per infringed work, and up to US\$150,000 (~HK\$1,170,000) per work if infringement is willful. In Singapore, the courts can grant not more than S\$10,000 (~HK\$ 55,200) for each work or subject matter in respect of which the copyright has been infringed but not more than S\$200,000 (~HK\$ 1,104,000) in the aggregate, unless the owner proves that his actual loss from such infringement exceeds \$200,000 (~HK\$ 1,104,000).

12. It does not appear a mere coincidence that the above countries which adopt fair use or extended fair dealings have balanced this with an element of statutory damages for copyright infringement. This possibility should be looked into further in deciding whether or not to change to a fair use system.

### **User Generated Content**

13. So far only Canada has introduced a User Generated Content exception in its Copyright Act in 2012. In Canada, there are now discussions whether the exception should be tied with non-commercial use. Distinguishing between amateur non-commercial use and professional commercial use is considered arbitrary since amateur UGC is becoming more and more sophisticated and may have many indirect commercial benefits. In Australia, where a more robust approach to revision of the copyright law is adopted, the Australian Law Reform Commission opines that UGC should not automatically qualify for protection and does not propose that "social use" of copyright material be an illustrative purpose in the fair use exception, or otherwise be given any special stature in copyright exceptions. The European Commission launched its Public Consultation on the Review of the EU Copyright Rules in December 2013. More than 9,500 responses were received (58% from end users, 25% from authors and 8% from publishers). One of the concerns highlighted is the lack of an agreed definition of UGC. The said three distinct groups of respondents are said to differ substantially in the way they define UGC and characterize "users". Clearly, international consideration of a UGC exception is at a very early stage and much has yet to be discussed.
14. It should be noted that Canada is also one of the few places where there are statutory damages for copyright infringement. In Canada, the court may award statutory damages in a sum of not less than C\$500 (~HK\$ 2,800) or more than C\$20,000 (~HK\$ 112,000) in respect of infringement of a copyright work for commercial purposes and not less than C\$100 (~HK\$560) and not more than C\$5,000 (~HK\$28,000) for non-commercial infringement.

15. Naturally the question is whether the availability of statutory damages balances a wider fair use or UGC exception? For information, China is also amongst the few countries which have statutory damages. Currently, China has a defined list of fair use exceptions (more like fair dealing) and the court may award compensation of not more than RMB 500,000 where the actual loss of the copyright owner or the unlawful gains of the infringer cannot be determined. In the proposed amendments to the PRC Copyright Law, it is proposed that the fair use exceptions will include a catch-all exception of other circumstances which would constitute fair use and that the ceiling of statutory damages be increased to RMB 1,000,000.

### **Contract Override**

16. Unless there is strong justification, the freedom of parties to negotiate their contracts should not be interfered with lightly. Although the UK had since June 2014 disallowed 'contract override' for copyright exceptions, it was not without controversies. The UK government has undertaken to monitor the impact so as to respond effectively if it becomes clear that any negative potential is realized. The UK government will also evaluate the change and publish the results by 2019. So far, there is no empirical study or data about the effects of disallowing contract override or about the differences between countries having imperative exceptions and countries where freedom of contract prevails.
17. Overseas commentators and academics have expressed divergent views whether contract override is justified or not. Some try to distinguish between exceptions which have a public policy character, those which are based on the general interest or regulatory practices and those which are founded on market failure as a basis for deciding whether or not to interfere with the freedom to contract. Studies have to be made into the interplay between contract and copyright, local and international impact, economic theories, legal rationale and practical implications.
18. Hence, it remains to be reviewed and examined whether any contract override provisions should be made and to what extent, whether across the board or on case by case basis in respect of each exception, as well as the conditions and extent to which prohibition against contract override is necessary to achieve policy objectives.

### **Urgency**

19. We take the view that the Bill has adequately addressed all the issues of controversy raised in 2012 and allows Hong Kong to meet its international treaty obligations on copyright protection while introducing new exceptions.



As explained above, the three topics are far from settled and require serious and thorough consultation and evaluation and we also expect to draw on the researches and experiences of other countries.

20. It is not in the interests of Hong Kong to delay the passing of the Bill. Our copyright law lags seriously behind international developments, especially in the protection in the digital environment. For that reason, it has even been suggested that Hong Kong should be placed on a list of "Deserving Special Mention" and "Watch List" in the US Special 301 Report which identifies countries which do not provide "adequate and effective" protection of intellectual property rights. If that happens, it will not only embarrass Hong Kong and create a negative impression but will also undermine the efforts both government and private institutions have made to develop Hong Kong as an intellectual property trading hub in intense competition with Singapore and Korea.
21. We urge the passing of the Bill without further delay and the setting of a timetable to continue the discussions of the topics of fair use, UGC and 'contract override' with all stakeholders for any possible new changes to the law. We also repeat our previous observation that the UK Hargreaves Review advocates that policy decisions should be based on economic evidence. The Government should ensure that development of the IP system is driven as far as possible by objective evidence and that policy should balance measurable economic objectives against social goals and potential benefits for right holders against impacts on consumers and other interests.

**The Law Society of Hong Kong**  
29 December 2015



## Public Consultation Paper on Updating Hong Kong's Copyright Regime

### The Law Society's Submissions

#### A. The Copyright Challenge

1. Copyright is an important property right which impacts our daily lives. We create and use copyright works every day - from blogs we write, movies we watch, music we listen to, digital games we play, to selfies we take. According to the October 2021 issue of the *Hong Kong Monthly Digest of Statistics*, the cultural and creative industries (CCI) are among the most dynamic economic sectors in Hong Kong, contributing to both economic growth and job creation. CCI refer to a set of knowledge-based activities that deploy creativity and intellectual capital as primary inputs and deliver goods and services with cultural, artistic and creative contents. In 2019, CCI's contribution to Gross Domestic Product and total employment of Hong Kong was respectively 4.7% and 6.2%. In that year, total exports and imports of selected cultural and creative goods and services amounted to 17.6% and 17.5% of Hong Kong's total export and imports respectively representing hundreds of billions of dollars.

2. Copyright is dynamic and poses a constant challenge to lawmakers to balance the interests of creators, owners and users. If the right to make free or non-infringing use is too broad, that may disincentivise authors to create and owners to invest. If it is too narrow, that may stifle creativity, innovation and the sharing of knowledge. The challenge to strike a careful balance is exemplified by modern technology which extends exponentially the reach of a copyright work while making it very easy, cheap and fast to copy.

3. Besides catching up with the ever-accelerating pace of technology advancement, copyright law needs to be updated regularly to meet international trends, changing operation environment and expectations of stakeholders. Disappointingly, there has been little impactful amendments to our copyright law since 2006.

#### B. 2006 – When This All Began

4. The current copyright consultation exercise can be traced back to December 2006 when the government sought public views on how best to strengthen copyright protection in the digital environment. At that time, Hong Kong was a forerunner in copyright protection as we successfully brought the world's first ever enforcement action to convict 'Big Crook' who distributed infringing copies of movies using the Bit-Torrent technology.

### **C. Copyright (Amendment) Bill 2011**

5. Following the consultation in 2006, preliminary proposals were announced in April 2008. After further public engagement to refine the proposals, the Copyright (Amendment) Bill 2011 was introduced to include a technology-neutral right to communicate, 'safe harbour' provisions for online service providers, and new exceptions to infringement such as media shifting of sound recordings.

6. Shortly after that bill was published, some members of the public became very vocal about their concerns that the right to communicate might restrict freedom of expression, particularly for parody. Political satirists feared that after the bill was passed, they might face criminal sanctions if they adapted other people's posters, photos or lyrics over social media and the internet.

7. Those who opposed the bill dubbed it "Cyberspace Article 23". That title instigated fear for criminal liability and led to an outcry for an exception for all so-called "secondary works" claiming that those works were also creations. Yet, no definition was offered as to what secondary works were. It was unclear whether secondary works were adaptations or derivative works which might infringe copyright or whether they were works which were inspired by earlier works and did not infringe.

8. Besides secondary works, some academics and activists advocated the replacement of our fair dealing exceptions by the US open-ended fair use exceptions. In Hong Kong, we followed the UK fair dealing approach which exhaustively listed out the exceptions to infringement. In the US, fair use of other's copyright work is allowed but there is no statutory definition of fair use. The US courts have to evaluate the specific facts of the case against the factors suggested by the law. These factors include the purpose and character of the use, the nature of the copyrighted work, amount and substantiality of the portion used, and the effect of the value or use on the potential market for the copyright work. The courts can consider other factors as well.

9. Heated discussions ensued over the amendment proposals. More than 1700 artists signed a petition to urge the government to withdraw the bill and some Legislative Councillors devised a filibuster campaign proposing over 1,400 amendments to the bill to delay its passage.

10. In June 2012, in light of the controversies and divide in views, the Copyright (Amendment) Bill 2011 was not proceeded with.

### **D. Copyright (Amendment) Bill 2014**

11. After two years of further discussions with different stakeholders and procuring understanding and compromises between them, the government refined the amendment proposals and introduced the Copyright (Amendment) Bill 2014 into the Legislative Council in June 2014. That Bill included the proposals in the 2011 Bill but put forward a higher threshold to prove criminal liability for unauthorized communication of copyright works to the public. In addition to the parody exceptions, a few other exceptions such as commenting on current events and quotations were included.

12. Still, the bill led to another round of heated and hostile political wrestling. Although it seemed that most legislators were initially happy with the draft bill, some started to shift after detecting strong public disfavour, especially from very vocal internet concern groups who

claimed that the bill had a political agenda to stifle freedom of speech and to prosecute those who mocked politicians by using third party copyright materials. A number of legislators began to propose amendments to the bill and advocate for new issues to be considered. The copyright amendment exercise became once again very politicised.

13. Despite many ensuing meetings and discussions, outspoken user and internet groups maintained their skepticism and distrust and pressed for further exceptions and amendments to be introduced or they would otherwise block the bill. Copyright owners refused to accept any further amendments as they felt they had already made more than enough concessions. Caught in the middle, the government was criticized for failing to mediate between the right owners and users.

14. We considered that the 2014 bill had already adequately addressed the issues of controversy in the 2011 Bill and the passing of the amendments could restore Hong Kong in meeting international expectations on copyright protection while introducing new exceptions. In January 2016, we published a Position Paper to support the passing of the 2014 Bill.

15. Regrettably, filibustering continued and this second attempt to amend the copyright law also ended miserably.

#### **E. Law Society's Position**

16. We were disappointed with the outcome of the 2014 Bill. Many of our specialist committee members had followed the development and discussions of the amendment proposals since 2006, and attended many meetings and forums. We were particularly upset about the misinformation, misinterpretation and poor understanding of the copyright law.

17. As explained in the current consultation paper, the government proposes to pick up from where they left off with the ill-fated 2014 Bill. We maintain our position to support a bill which is in line with the 2014 Bill and we urge for the expeditious passing of the amendments.

#### **F. Answers to Specific Questions Raised**

18. We respond below to the specific questions in the consultation paper.

19. Question 1 - Whether Hong Kong should continue to maintain the current exhaustive approach by setting out all copyright exceptions based on specific purposes or circumstances in the Copyright Ordinance?

(1) For the purpose of the present consultation and amendment exercise, particularly in hopes of achieving an expeditious passage, we favour the maintenance of the current exhaustive approach for its certainty.

(2) We however do not dismiss that there are merits in looking into a broader, more flexible and adaptive approach in deciding on exceptions, including the US open-ended fair use approach. Yet, this will require extensive discussions with all stakeholders and careful studies whether such approach may contravene the three-step test of the Berne Convention for the Protection of Literary and Artistic Works, how to resolve the controversies and inconsistencies of the US fair use case law, how it may impact upon our precedents and whether statutory damages should be introduced to balance the extended exceptions.

20. Question 2 - Whether Hong Kong should introduce provisions to restrict the use of contracts to exclude or limit the application of statutory copyright exceptions.

(1) There is no universal approach. Freedom of contract plays a vital role in Hong Kong's free-market economy. Unless there is strong justification, the parties' freedom to negotiate their contracts should not be interfered with lightly. According to the International Institute for Unification of Private Law, freedom of contract is a basic principle in the context of international trade.

(2) Commentators and academics have expressed divergent views whether contract override is justified or not. Some try to distinguish between exceptions which have a public policy character, those which are based on the general interest or regulatory practices and those which are founded on market failure to determine their overridability by contract law. While the UK has adopted a restriction of contract override since June 2014 in respect of certain specific exceptions, in other major jurisdictions including the US, contractual provisions can set aside copyright exceptions. In the US, Article 1(10) of its Constitution forbids the passing of legislation impairing the obligation of contract without the consent of Congress. Case law has also interpreted the 14<sup>th</sup> Amendment of the US Constitution as protecting freedom of contract.

(3) If contract override restriction is to apply to all or certain specific exceptions, one would question why not generally. In our current Copyright Ordinance, freedom to contract is respected. For example, the provisions in these statutory sections are subject to an agreement (contract) to the contrary: (i) section 14 concerning the ownership of an employee's copyright work and further award to employee; (ii) section 60 a lawful user's right to make a back-up copy of a computer program, and (iii) section 57 the government rights in dealings with copyright materials or works communicated to it.

(4) As we do not see an urgent need nor practical justification for an amendment to exclude contract override, we favour the preservation of the parties' freedom to negotiate their contracts.

21. Question 3 - Whether Hong Kong should not introduce specific provisions to govern devices used for accessing unauthorized contents on the Internet, including set-top boxes and Apps ("ISDs").

(1) According to the consultation paper, some copyright owners suggested that the Government should impose liability on manufacturers and dealers of ISDs. In the history of copyright litigation, controversies pertaining to the provision of devices such as photocopying machines and dual-cassette recorders, have shown that unless the device can only be used for unlawful purposes, the manufacture, provision or dealing with such devices per se does not constitute infringement.

(2) Although it is said that Singapore is the only common law jurisdiction that has enacted ISD specific provisions, it should be noted that such provisions do not penalize dealing with such ISDs per se. The prosecution must prove that the manufacturer or dealer or provider of such device or service knows or ought to reasonably know that such device or service is capable of facilitating access to works communicated to the public without the authority of their copyright owners and has only a limited commercially significant purpose or use other than that capability. As Singapore only introduced her new Copyright Act with such provisions in November 2021, the effectiveness of those provisions are yet to be seen.

(3) We agree with the Government that the successful criminal prosecutions handled by the Customs and Excise Department, and the current provisions against circumvention of technological measures coupled with the communication right which can hopefully be introduced are sufficient to deal with ISDs.

(4) We also note that last August in a copyright infringement action in Canada, although sellers of pre-programmed set-top boxes and internet protocol television services for streaming pirated content were already found liable for infringement on a number of grounds specified in the copyright legislation, the Federal Court extended the common law for inducing patent infringement to copyright and found infringement. Both the UK and Hong Kong have the common law cause for inducing or procuring someone else to infringe a patent and may follow Canada's extension of such inducement to copyright and other intellectual property right infringement.

22. Question 4 - Whether Hong Kong should introduce a copyright-specific judicial site blocking mechanism.

(1) The law is clear that the courts have power to order an injunction unconditionally or on such terms and conditions as the courts think just.

(2) Norwich Pharmacal and Anton Piller orders are examples of reliefs that are developed from IP cases within the inherent jurisdiction of the court without the need for specific express provisions to empower the courts to grant them. We do not see any need to specify the court's powers.

## **G. Conclusion**

23. Members of the Law Society represent the full spectrum of stakeholders which include authors, rights owners, users and intermediaries. We do not have a political or biased agenda to advance the interests of any particular group. We only hope to contribute our knowledge, experience and expertise to help strike a proper balance between creativity, freedom of expression, dissemination of knowledge, investment interests and commercial exploitation for the greater good of Hong Kong. In this relation, we wish to stress that copyright prohibits unauthorized copying and does not and cannot prevent people acquiring knowledge and expressing it in their own words.

24. We take a strong view that it was not and it remains not in the interests of Hong Kong to procrastinate amending her outdated copyright law which lags seriously behind in copyright protection in the digital environment. For such reason, it has been threatened that the US Trade Representatives may place Hong Kong on a list of "Deserving Special Mention" and "Watch List" in the US Special 301 Report which identifies regions which do not provide adequate and effective protection of intellectual property rights. If such threat materialises, it will not only embarrass Hong Kong and create a negative impression but will also undermine the goal to develop Hong Kong as an IP trading hub.

25. Since 2013, Hong Kong has aspired to become the premier IP trading hub in Asia. It is of great assurance that the Central Government supports and includes this in 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. This necessitates not only the updating of our IP laws, particularly our copyright law, but also the implementation of other IP-related incentives to help Hong Kong fortify her position and excel.

26. There is fierce competition in the region to be the regional IP trading hub and Singapore is competing with Hong Kong neck-to-neck. Recently, Singapore has undergone a major overhaul of her copyright law and her new Copyright Act took effect in November 2021 last year. The recital of that Act says *“The Act will update and enhance our copyright regime to take into account technological developments which have immensely impacted how copyright works are created, distributed, accessed, and used. It also seeks to future-proof our regime to cater for future technological developments. The changes implemented by the Act ensure that our copyright regime continues to provide an environment that benefits both creators and users. The Act introduces new rights and remedies to provide more recognition for creators to further incentivise the creation of works. It also creates new exceptions for users, allowing copyright works to remain reasonably available for the benefit of society.”* Those were exactly the same goals we wanted to achieve with amendments to the Copyright Ordinance since 2006.

27. We therefore urge the expeditious passing of a bill modelled on the 2014 Bill. At the same time, to achieve the Government’s goal to maintain a robust and competitive copyright regime, bringing our copyright law closer in line with the international norms by passing amendments which were first initiated more than ten years ago is clearly not enough.

28. We further urge for a timetable to continue the discussions to update and perhaps even reform our copyright law. Besides those issues outlined in Chapter 7 of the consultation paper, we propose that the following issues should be considered:

- (1) Feasibility and merits of establishing a copyright registration system
- (2) Use of new technology, such a blockchain, to prove ownership and authenticity of copyright works and to provide proof or preserve evidence for commercial transactions and contentious disputes
- (3) Review of the jurisdiction and powers of the Copyright Tribunal
- (4) Whether to maintain the current dual protection of copyright and registered design or to introduce unregistered design rights.

29. We also wish to repeat our previous observation that the UK Hargreaves Review advocates that policy decisions should be based on economic evidence. The Government should ensure that development of the IP system is driven as far as possible by objective evidence and that policy should balance measurable economic objections against social goals and potential benefits for right holders against impacts on consumers and other interests.

**The Law Society of Hong Kong  
22 February 2022**