

Issue 10 : Others

	Organisations/Individuals	Views/Concerns	Administration's Response
10.1	<ul style="list-style-type: none"> • Hong Kong Library Association • Hong Kong Public Relations Professionals' Association • Hong Kong News Clipping Industry Working Committee • Heads of Universities Committee Inter-Institutional Task Force on Reprographic Rights Licensing (HUCOM) and Joint University Librarians Advisory Committee (JULAC) • A Sai Kung District Council Member 	<p><u>Adopting the open-ended US model of fair use</u></p> <p>The Library Association pointed out that issues related to the scope of fair dealing, such as adopting the open-ended US model of fair use and allowing reprographic copying for classroom use regardless of whether there are licensing schemes, are not addressed in the Bill. The HUCOM and JULAC echoed the view.</p> <p><u>Licensing bodies</u></p> <p>The Library Association and the Public Relations Professionals' Association consider that licensing bodies are not regulated. Reliance upon licensing bodies is a great disservice to education sector. The Public Relation Professionals' Association adds that it is unreasonable that some licensing societies can fix the charges one-sided.</p>	<p>Subsequent to the public consultation in late 2001, we submitted a LegCo Brief in March 2002 putting forward a number of proposals to improve the Copyright Ordinance, including the proposed extension of the scope of our fair dealing exemption provisions along the line of the open-ended approach adopted by the US. Having regard to legislative priority, the proposal has not been included in the current Bill. We will prepare legislative proposals on this for the consideration of LegCo in due course.</p> <p>Under the Copyright Ordinance, if there is a dispute between a licensing body and user over licensing fee, the case can be brought to the Copyright Tribunal, a quasi-judicial body established under the Copyright Ordinance to determine the reasonableness of licensing royalties for licences of licensing schemes.</p> <p>We encourage all major licensing bodies to be</p>

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		<p>The News Clipping Industry Working Committee raised concern on the lack of bargaining power on end-users in negotiating with licensing bodies on the fees charged for copying newspaper articles, books, periodicals and printed materials, etc.</p> <p><u>Guidelines</u></p> <p>HUCOM and JULAC urged the Government to revise the "Guidelines for photocopying of printed works by not-for-profit education establishments" (Guidelines) to cover newspaper or to legislate the extent of free permissible copying in relation to newspaper. They also suggested devising clear guidelines for fair dealing under section 38 (concerning research and private study) in the Copyright Ordinance whether or not the US model of fair use is adopted.</p>	<p>registered under the existing voluntary scheme of the Copyright Ordinance and to develop voluntary codes of practice. So far, three licensing bodies, namely Hong Kong Copyright Licensing Association, Hong Kong Reprographic Rights Licensing Society, and Composers and Authors Society of Hong Kong (CASH), have registered. As for codes of practice, we understand some existing licensing bodies, such as the CASH and IFPI, already have codes of practice in place.</p> <p>In consultation with schools and copyright owners, we issued the Guidelines in September 2002. The Guidelines, which set down conditions for schools to determine the extent of permissible photocopying of printed works for instruction purposes, were developed on a consensus basis among the copyright owners and school users with the Director of Intellectual Property as the convenor of the meetings between the parties. We note the suggestion of HUCOM and JULAC to revise the Guidelines to cover newspaper. When the Guidelines were first developed, the intention</p>

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		<p><u>Others</u></p> <p>The Library Association considers that fast changing areas in teaching and learning, such as electronic copying within the ambit of web-based education, distant leaning & IT for education, and the provision of information services are not addressed in the Bill.</p> <p>A Sai Kung District Council Member</p>	<p>was to cover newspaper. Towards the end of the discussion, the newspaper proprietors did not support the Guidelines and did not want permissible copying of articles in newspapers to be included in the Guidelines. In view of the comments of HUCOM and JULAC, we shall convey their request to the newspaper proprietors. The Intellectual Property Department is pleased to be the contact point to bring the relevant parties together. We also note the suggestion of HUCOM and JULAC on developing guidelines for section 38 in the Copyright Ordinance, we will consider the matter.</p> <p>We welcome the Library Association to put forward detailed proposals so that we can study them further.</p> <p>As mentioned above, the Guidelines have been</p>

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		suggests that schools should be allowed to make a one-off payment for photocopying of copyright works.	developed for schools to determine the extent of permissible photocopying of printed works for instruction purposes. Where the quantity of photocopying exceeds the permissible extent in the Guidelines, it is more appropriate for the schools to negotiate with copyright owners to work out the appropriate fees.
10.2	<ul style="list-style-type: none"> • Motion Picture Association 	Raised concern on “made-to-order” reproduction of filmed entertainment, suggested that the copyshop offence should be expanded to combat against other kinds of reproduction, such as duplication of filmed entertainment.	The concern is already addressed in the Bill. Under the proposed section 118(1)(a), the making of infringing copies of copyright works for profit or financial reward, such as the make-to-order reproduction, will attract criminal liability. The section covers all kinds of copyright works, including films.
10.3	<ul style="list-style-type: none"> • The Hong Kong Institute of Architects 	There is no mechanism to provide the copyright or charging system for others to use architect's design of their buildings. Requests that credit should be given to the architects of building projects that are used for advertising or commercial purposes.	<p>A building as a work of architecture is regarded as a kind of artistic work and protected by copyright under section 5 of the Copyright Ordinance.</p> <p>A building as a copyright work is subject to some permitted acts, e.g., making a graphic work representing a building (section 71(2)(a)), making a photograph or film of a building (section 71(2)(b)), broadcasting or including in a cable programme service a visual image of a</p>

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			building (section 71(2)(c)), all these are not considered infringement of the copyright in a building. Similar provisions also exist in the UK legislation. Whether the use of the copyright in a building is subject to the permission of the relevant copyright owner has to be decided on a case-by-case basis.
10.4	<ul style="list-style-type: none"> The Hong Kong Institute of Trade Mark Practitioners 	<p>Considers that the Copyright Ordinance will benefit from a definition of “lawfully make”, and suggests following wording to be inserted to section 198(1) –</p> <p>“Lawfully made” () means, in relation to the copyright works in question, the work was made by or with the consent of the copyright owner in the country, territory or area in which the work is made, irrespective of whether the actual sale or other disposal of the copyright work is in contravention of any restriction or prohibition relating to the sale or other disposal of the copyright work, as between the copyright owner and the actual maker of the copyright work.”</p>	<p>The explanation of the meaning of the term “lawfully made” is provided under section 35(9) of the Copyright Ordinance, to be repealed and replaced by a new section 198(3) when the Copyright (Amendment) Ordinance 2003 (“2003 Ordinance”) comes into operation. While we agree that existing provision gives a non-exhaustive definition for “lawfully made”, as far as we are aware the definition has not given rise to any practical difficulties.</p>

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10.5	<ul style="list-style-type: none"> The Hong Kong Institute of Trade Mark Practitioners 	The proposed amendments to sections 30 and 31 would appear to prevent wholesaler/retailer from importing and selling computer software, which was the whole purpose of the Copyright (Amendment) Bill 2001	The Copyright (Amendment) Bill 2001 was enacted by the LegCo in July 2003 and has become the 2003 Ordinance, which came into effect on 28 November 2003. Under the 2003 Ordinance, a parallel imported computer software product will not be an infringing copy under section 35(3) of the Copyright Ordinance. Importing or selling parallel imported copies of computer software products is allowed under the 2003 Ordinance.
10.6	<ul style="list-style-type: none"> Consumer Council 	Points out a clerical error under the proposed section 31(5): on line 2, "subsection (1)(c)" should be amended to read "subsection (1)(d)".	We do not see that this is an error. The term "distribution" under the proposed section 31(5) refers to the word "distributes" in the phrase "distributes for the purpose of, in the course of, or in connection with, any trade or business" in section 31(1)(c).
10.7	<ul style="list-style-type: none"> IFPI Motion Picture Industry Association (MPIA) 	IFPI considers that musical visual recordings should be regarded as sound recording and therefore enjoy protection of rental rights. MPIA suggests that protection for rental rights should be introduced for movies.	We will study the proposal. We need to consult all concerned parties on the proposal and this will take some time. It may be more appropriate to pursue the proposal in a separate exercise.
10.8	<ul style="list-style-type: none"> IFPI 	Suggest that certain guidelines be included to make the meaning of "affect	We are not aware of the existence of such proposed guidelines in other jurisdictions. In our view, there is no need to formulate the

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		prejudicially" clearer.	proposed guidelines as the current provisions provide the court with flexibility when considering relevant cases according to their specific circumstances.
10.9	<ul style="list-style-type: none"> The Law Society of Hong Kong 	Section 187 is headed "Groundless threat of proceedings in relation to parallel import" but refers to "proceedings for infringement of copyright under sections 30 and 31 in respect of copy of a work which is alleged to be an infringing copy by virtue only of section 35(3)". There is no reference to section 35(4) and it is therefore equally applicable to parallel imports and pirated imports. The legislation should be amended by adding "and was lawfully made in the country, territory or area where it was made".	As in the case of item 4.2, we will amend the section to clarify that it only applies to parallel imports.
10.10	<ul style="list-style-type: none"> Business Software Alliance (BSA) 	Suggests refining the law in a manner that would facilitate prosecutions, such as amending the law to clarify the circumstances under which the failure to prove ownership of licenses can result in criminal sanctions.	Under existing criminal provisions on end user liability, the prosecution need to prove, among other things, that the copy of the work involved is an infringing copy, before an offence can be established. Absence of a license in itself may not be sufficient to establish the infringing status of the copy, and other factors need to be

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			<p>taken into account.</p> <p>As we understand, BSA proposes that existing provisions should be amended to the effect that if a person is found to have possessed a copy of a copyright work in business and that he cannot show the relevant licence relating to such copyright work, then such copy work should be presumed to be an infringing copy. This will in effect shift the burden of proof in criminal proceedings on whether or not a copy is infringing to the accused and in doing so requires very strong justification under the common law principles. We are not aware that in other common law jurisdictions (such as Australia, UK and US), the burden of proving ownership of licence falls on the defendant.</p> <p>We need to rely primarily upon copyright owners in assisting the prosecution to prove to the court beyond reasonable doubt that an infringement of its copyright has occurred. In this connection, we have met the representatives from the BSA and understand that it might be possible to use the serial number of software installed on computer to prove that the copies installed in the computers of the corporate end-user are pirated copies. We are prepared to</p>

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			take cases forward based on this where appropriate.
10.11	<ul style="list-style-type: none"> BSA 	<p>Considers that section 65 of the Ordinance is contrary to its apparent intent, and has the potential to dramatically reduce the scope of protection for any copyright work available in digital format. The law should make it clear that the exceptions under section 65 apply only to those cases where the work has been made available with the consent of the right holder. BSA further considers that, even with this amendment, section 65 may still allow for end-user piracy on a commercial scale. For example, a software company licensed a program to a single user and allowed the user to access a transient copy online by running the copy dynamically in his computer's RAM. That does not mean the single licensed user would then be allowed to provide others with access – for instance, by downloading a transient copy from the program to a server and enabling multiple users to access it. BSA argues that this would be permitted</p>	<p>The objective of section 65 is to provide an exemption (from infringement) for browsing the Internet which necessarily involves the making of transient and incidental copies. If section 65 were to apply to works “made available to the public by or with the consent of the copyright owners” only, as suggested by BSA, the effect will be that the making of a transient and incidental copy for the purpose of viewing infringing copies of works on the Internet will also attract liability.</p> <p>Normally, when using a web browser, it is impossible for the users to find out what material will be viewed when there is connection to a webpage, and the users cannot know in advance whether the material from which a transient and incidental copy is made might be infringing. It is therefore necessary to provide a permitted act in relation to the making of transient and incidental copies for the purpose of viewing in the manner as provided in section 65.</p> <p>It is however important to note that the one who</p>

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		under section 65.	<p>makes available the infringing copies on the Internet for downloading may still be liable under the civil (for the act of making available) and the criminal (for the act of distribution) provisions.</p> <p>Regarding the example of BSA, if the user downloads the program to a server, that copy could not be regarded as a transient copy and therefore is not covered by section 65.</p>
10.12	<ul style="list-style-type: none"> Hong Kong Blind Union 	Appreciated the Government's proposal to provide exemptions to enable voluntary agencies to produce reading materials for the blinds, but expressed the wish that the exemptions should be extended to government bodies & private organisations. Also, the Union hoped that the Government would impose a legal requirement on the publishers to produce electronic copies of their publications to facilitate the production of reading materials for the blind.	In a LegCo Brief that we submitted last March on review of certain provisions of the Copyright Ordinance, we propose to introduce a statutory exemption for the making of specialised formats of printed works by non-profit-making bodies exclusively for the blind. We did not include the proposal in the Bill in view of legislative priority. We will thoroughly study the matter in detail in consultation with parties concerned before introducing related legislative proposal in due course.
10.13	<ul style="list-style-type: none"> Hong Kong Christian Council 	Suggests that the Bill be shelved and the Government should promote the importance of intellectual property rights	While we agree that promotion and public education play an important role in the protection of IPR, we consider legislation is

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		(IPR).	necessary to set out in clear terms the rights of copyright owners. Also, legislation is necessary to provide a long term solution to address the issue of end-user criminal liability and such legislation should be introduced sooner rather than later to remove any uncertainty.