Issues 1: Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
1.1	<u>Trade organisations</u> • The Chinese General Chamber of Commerce • The Chinese Manufacturers' Association of Hong Kong • Federation of Hong Kong Industries • Hong Kong General Chamber of Commerce • Hong Kong Association of Banks <u>Professional organisations</u> • Hong Kong Bar Association • Hong Kong Society of Accountants <u>Education organisations/ training institutes</u> • Vocational Training Council • Hong Kong Library Association • The Hong Kong Academy for Performing Art	Support the proposal	To summarise, we note that views are divided on the scope of criminal liability for business end-user. Some, notably trade organisations, professional organisations, and educational sector are in support of the proposals whilst copyright owners would like the scope to be expanded to cover more works. The publication industry would like the scope be expanded to cover printed works. TV broadcasters and a radio broadcaster respectively suggest non-dramatic TV and radio broadcast be covered. **<u>Latest Progress</u>** **In the last two months or so, we have arranged a number of meetings between the newspaper industry, book publishing industry and the copyright users (tertiary education sector, secondary and primary school sector and different chambers of commerce). At a meeting between the newspaper industry and the representatives of the universities, both sides agreed that the possibility of expanding the scope of end-user liability to cover printed works could be explored provided the following three conditions are met:**

Issues 1: Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
	• HUCOM Inter-Institutional Task Force on Reprographic Rights Licensing • Joint University Librarians Advisory Committee <u>Others</u> • Consumer Council		**(a) fair use provisions, similar to those found in the US, are included in the Copyright Ordinance;** **(b) detailed guidelines on fair use in certain circumstances are laid down to supplement the fair use provisions in law; and** **(c) the scope of the proposed criminal end-user offence in respect of printed works will be well defined in the Copyright Ordinance so that, for example, only wilful copying that causes substantial loss to the copyright owner will be caught. The exact scope and wording used can be considered later.** **The book publishing industry also agrees that the above conditions can serve as the basis for further discussion.** **On the part of users in the commercial sector, the Hong Kong General Chamber of Commerce (HKGCC) considers that the case for expanding the scope of end-user liability to cover printed works has yet to be established. They also pointed**

Issues 1: Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
			out the need for a fair and reasonable licensing scheme under government monitoring. The Chinese General Chamber of Commerce (CGCC) considers that confining the scope of end-user liability to the four categories of work is appropriate. Since Copyright Ordinance covers a wide range of subject matters, any decision to amend the law should not be made lightly. The Council of Public Relations Firms of Hong Kong considers that the scope of end-user liability should not be expanded without the establishment of an adequate licensing scheme. According to them, many publications are not included in any existing licensing schemes and if the scope of end-user liability is expanded, it would render many PR companies in breach of the law because no practical or workable means is in place for them to secure copyright licences. They suggested that a central licensing authority be established in Hong Kong and that all publishers should work with this authority. The fee charged by the licensing body should be fair and reasonable and there should be an ombudsman or impartial adjudicator who would handle disputes and appeals against unfair licensing. The Hong Kong Public Relations

Issues 1: Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
			Professionals Association considers that expanding the scope of end-user criminal liability to cover reproduction of news clippings would create adverse effect on free flow of information, unfairness to people and organisations making copies for fair usage, and great impacts on operations of the organisations. **The representatives of secondary and primary schools have indicated that in general they still have reservations about expanding the scope of end-user liability, but if criminalization had to be considered, then they would accept that the above three conditions could serve as the basis for further discussion. The Professional Teachers' Union has specifically pointed out that the scope of end-user liability should not be expanded to cover printed works before a thorough discussion of the fair use proposal.** **Judging from the above discussion between copyright users and owners in the publication sector, a consensus on the scope of end-user liability is unlikely to be reached in the near future.**

Issues 1: Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
			Hence we consider that any change to the existing scope as proposed in the Bill is not appropriate at this stage.
1.2	<u>Publication industry</u> • Anglo-Chinese Textbook Publishers Organizations • EastWest Productions • Hong Kong International Publishers' Alliance • Hong Kong Educational Publishers' Association • Hong Kong Publishing Federation Ltd. • Hong Kong Reprographic Rights Licensing Society • McGraw-Hill International Enterprise, Inc. • Pearson Education (parent	The proposal should be extended to cover printed works. The Association of American Publishers specifically points out that the proposal is inconsistent with Article 61 of TRIPS. EastWest Productions is of the view that Hong Kong must make the unauthorised copying and use of books, periodicals and other printed works subject to the same criminal sanctions that exist for all other copyright "thief". The International Publishers Association considers that it is not	We would like to point out that there is no standard international practice as far as the criminal liability for the use of infringing copies in business is concerned. TRIPS Agreement (Article 61) only requires members to provide for criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. The possession of an infringing copy of a copyright work for use in business is not wilful copyright piracy on a commercial scale. Our current proposal is therefore already above the standard required under Article 61 of TRIPS. Regarding the practice in other countries, as far as we understand it, Australia and Singapore do not provide for a similar offence for business end-user. The relevant provision in the UK law[1] is couched in

[1] The relevant provision is section 107(1)(c) of the Copyright, Designs and Patents Act 1988, which is reproduced below.

(1) A person commits an offence who, without the licence of the copyright owner –

(c) possesses in the course of a business with a view to committing any act infringing the copyright,

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

Issues 1: **Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings**			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
	company of Longman Hong Kong Education) • Association of American Publishers • Canotta Publishing Co. Ltd • Chung Tai Educational Press • The Commercial Press (HK) Ltd • Hon Wing Book Co. Ltd. • Hong Kong Educational Publishing Co. • Hong Kong Music Publisher • Modern Education Network Ltd • Oxford University Press (China) Ltd • Pilot Publishers Services Ltd • Pilot Publishing Co. Ltd • The Publishers Association • SNC Panpac (HK) Ltd • Witman Publishing Co. (HK) Ltd • Ying Lee Music Co. Ltd	acceptable to provide less protection to literary work than computer program as Article 10(1) of TRIPS requires computer program to be protected as literary works. The Hong Kong Copyright Licensing Association and the Newspaper Society of Hong Kong specifically suggest the Administration to refer to the US Copyright Act (Section 506).	wide term and can be interpreted to cover end-user liability but our understanding is that in practice it has only been used against those who are in possession of a large number of pirated copies, almost certainly with the intention of selling them or distributing them. It appears the scope of the US law is wider than our current proposal in certain aspects but narrower in other aspects. The offence in the US law (section 506(a) of title 17) provides as follows: "Any person who infringes a copyright wilfully either - (1) for purposes of commercial advantage or private financial gain, or (2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000, shall be punished as provided under section 2319 of title 18, United States Code." The scope of the US law appears to be wider than our

Issues 1: Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
	• International Publishers Association • The Hong Kong Copyright Licensing Association Ltd. • The Newspaper Society of Hong Kong <u>Trade organisations</u> • American Chamber of Commerce		proposed provision, in the sense that the elements under (a) and (b) above do not appear to be confined to a business context. However, two points should be noted. First, the US law targets the person who has committed the infringing act (e.g. reproduction of a work) rather than the user. If the user of a pirated copy of work has not committed an infringing act, he will not be held criminally liable. For example, the playing of a pirated DVD by a company for training purpose would not attract criminal liability if the pirated copy was not made by the user but purchased from the market instead. Second, the scope of "fair use" provisions under the US law is potentially much wider than that of the "fair dealing" provisions under laws in HK, UK and Australia. The divided views received and the diversified practice in different countries suggest that we should be cautious in defining the scope of end-user liability, taking into account both the interest of copyright owners and users, and try to achieve a balance between both. We believe that the current proposal has struck the right balance between the protection of

Issues 1: Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
			intellectual property rights and the practical needs of teaching and for information dissemination. We have sought the views of the LegCo Commerce and Industry Panel on the key proposals in the Bill before introducing it to LegCo and they are generally content with the proposals. We note that quite a number of organisations of the publishing industry have demanded for expanding the scope of business end-user criminal liability to cover printed works, pointing out that the use of infringing copies of printed works by students is rampant. We consider that the problem of making infringing copies of printed works and using them in business should be tackled at the supply end. This is why we have proposed to tighten up the criminal sanctions against making infringing copies by copy shops. We would also like to point out that even if the scope of business end-user criminal liability were to be expanded to cover printed works, the use of infringing copies by students should not be covered as they are not engaged in any business as defined in the Bill. Some publishing industry organisations suggest that our current proposal of confining business end-user

Issues 1: Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
			liability to four categories is in breach of our international obligations under TRIPS, specifically Articles 61 and 10 of TRIPS. We do not agree. As mentioned above, the proposed offence for business end-users is already above the standard under Article 61 of TRIPS. As such, there is no non-compliance issue due to the scope of the offence. Regarding Article 10, it only stipulates that computer programs should be regarded as a kind of literary work. It does not dictate that the protection for computer programs and other types of literary works must be the same.
	• Association of American Publishers	Considers that the term "commercial scale" in Article 61 of the TRIPS not only covers resale scenario, it also catches a company that makes infringing copies of a book for use by its employees. While proposed section 118A may cover some activities beyond what is required under TRIPS, it is also essential to capture end-user piracy which falls	As pointed out above, TRIPS (Article 61) only requires members to provide for criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Our view remains that the possession of an infringing copy of a copyright work for use in business is not copyright piracy on a commercial scale, and therefore is not covered by Article 61 of TRIPS. The current practice as reflected in our legislative provisions and our proposal to confine end-user liability to certain kinds of copyright

Issues 1: Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
		squarely under the category of "piracy on a commercial scale". Points out that many countries' government authorities carry out criminal raids against unauthorized use of copyright materials in a business setting, e.g., Taiwan, Poland, Korea, Kuwait, etc.	work are above the requirement of TRIPS. Regarding the practice in other countries, whilst we do not have information about the situation in Poland and Kuwait, as far as we are aware, the end-user liability as provided in the legislation relating to copyright in Taiwan and Korea is confined to a specific infringing act (that is, copying) and to a specific category of work (that is, computer program) respectively. It should be noted that Korea and Taiwan run a different legal system when compared with the common law system of Hong Kong. Furthermore, as we have pointed out on page 2 of this table, the legislation in Australia and Singapore (which are common law countries) does not provide for a business end-user offence.
1.3	• Asia Television Ltd. (ATV) • Television Broadcasts Ltd. (TVB) • Hong Kong Commercial Broadcasting Co. Ltd.	ATV and TVB suggest non-dramatic TV programmes be covered. The Commercial Broadcasting Co. Ltd suggests that radio programming be covered which can be defined as a program	With the enactment of the Copyright (Suspension of Amendments) Ordinance 2001 in June 2001, end user liability exists in only four categories of work, namely, computer programs, movies, television dramas and musical recordings. This is widely accepted by the community. We believe that our proposal has struck

Issues 1: Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
		or portion of a program originally transmitted by means of radio waves by a sound broadcasting corporation licensed in Hong Kong.	the right balance between the protection of intellectual property rights and the practical needs of teaching and for information dissemination. We see no strong case for non-dramatic TV programmes and radio programme be covered by end user criminal liability.
1.4	• The Law Society of Hong Kong	Suggest e-books be covered.	E-books are covered under proposed section 118A(1) by virtue of the computer programs included in them. However, as in other cases of computer programs, if the computer program in an e-book meets the condition in proposed section 118A(5), it will be excluded from the scope of end-user liability. (see also item 2.5 below.)
	• Association of American Publishers	Considers that since e-books are covered by proposed section 118A(1) to the extent that they contain computer programs, it would be incongruous to exclude from coverage an e-book that was downloaded from the Internet with the software accompanying it under proposed section 118A(5).	The target of the business end-user offence is the four categories of works (computer programs, movie, TV drama, and musical recording) not e-book per se. Any exemption that applies to computer program in proposed section 118A(5) should therefore equally apply to computer program incorporated in an e-book. (See item 2.5 below for the reason of the proposed section 118A(5)). We would however like to point out that if an e-book contains an infringing copy of movie,

Issues 1: Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
		Downloading the e-book without authorization should attract criminal liability under proposed section 118A(1).	TV drama, musical recording, or a computer program that does not meet the condition in the proposed section 118A(5)(b), the possession of it will attract criminal liability under proposed section 118A(1).
1.5	• The Australian Chamber of Commerce (Austcham)	It is unclear as to why certain types of copyright works attract more protection than other types, as this type of genre based differentiation is inconsistent with the underlying principles of the Copyright Ordinance. On the other hand, Austcham accepts that it may not be appropriate to apply criminal sanctions to all forms of copyright works (e.g. photocopies).	See our response in 1.2 above. Also, end user criminal liability does not apply to photocopies.
1.6	• Hong Kong Small and Medium Enterprises Association Ltd.	Criminal sanctions should not be introduced at all. If civil remedies are considered not to be effective enough to provide protection, the solution should be to streamline the civil litigation procedures.	We believe that the current proposal has struck the right balance between the protection of intellectual property rights and the practical needs of teaching and for information dissemination. We have sought the views of the LegCo Commerce and Industry Panel on the key proposals in the Bill before introducing it to LegCo and they are generally content with the

Issues 1:	**Proposed section 118A – making permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) whereby criminal liability for the use of pirated copies of copyright works in business is confined to four categories of works, namely, computer programs, movies, television dramas and musical recordings**		
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
			proposals.
1.7	• **HK Public Relations Professionals' Association**	**The Association would like to clarify the legal implications on the possession of reprographic copy of newspapers, magazines or periodicals by business other than copy-shops.**	**News clippings may contain copyright works like literary works, photographs. Except in cases where the reproduction is for acts permitted in the Ordinance, reproduction of copyright works without authorisation of the copyright owner infringes the right of the copyright owner who is entitled to take civil proceedings against the infringer. Where a business organization has assumed an obligation to provide copies of news articles to its clients (whether expressed or implied by course of dealings), such organization could be criminally liable under the existing section 118(1)(a) (where making of infringing copies of news articles by the organization for sale to its clients is involved) or section 118(1)(d) (where possession of infringing copies of news articles by the organization for the trade or business (i.e. dealing in) with a view to distributing them to its client is involved) of the Copyright Ordinance. The revised section 118 under the Bill preserves the scope of such civil and criminal liability.**

Issues 2: Detailed comments on proposed section 118A (End-user liability)			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
2.1	• The Hong Kong Bar Association	The basis for attracting criminal liability under proposed section 118A(1) should be "use" instead of "possession". Legal practitioners and other professionals should not be held liable for possessing infringing copies provided by their clients for the purpose of or in the course of their practice, e.g., for the purpose of advising their clients or otherwise acting for them in judicial proceedings.	**When working out a possible amendment to address the concern of Bar Association, we find that it is very difficult to avoid at the same time creating a loophole in the end-user offence. We discussed again on 13 January 2004 with the representatives of the Bar Association who shared our concern and have undertaken to give further thought to the issue and see if they could come up with any suggestion.**
2.2	• The Hong Kong Group Asian Patent Attorney Association • Business Software Alliance • American Chamber of Commerce • Motion Picture Industry Association	When read together with proposed section 196A (which provides for the meaning of "for the purpose of or in the course of trade or business"), proposed section 118A(1) seems to suggest that a person only be held criminally liable for possession of an infringing copy belonging to the four categories of works if it is used in the course of the specific trade or business in which the person is engaged. This may cause difficulty in prosecution. The Hong Kong Group Asian Patent Attorney Association suggests that reference to trade or business in proposed section 118A(1)(b) be amended to read "for the purpose of or in the course of trade or business". BSA	We have considered further the "same trade or business" nexus between the possession of an infringing copy by a person and the intended use of such infringing copy and have further discussed with the BSA. Our current view is that removal of the "same trade or business" nexus would not make a difference to the practical effect in the scope of the end-user possession offence in business. We are considering making amendments to specify that if a person possesses an infringing copy of the four categories of works with a view to its being used in doing any act for the purpose of or in the course of any trade or business, he should be held liable. The draft Committee Stage Amendments (CSAs) relating to proposed section 118A(1) are at Annex to Table 2.

Issues 2: Detailed comments on proposed section 118A (End-user liability)			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
		suggests the same but also considers that the definition in section 196A should be removed.	There may also be consequential changes to section 196A. We will submit the relevant CSAs in due course. (see also item 2.7 below.)
2.3	• The Australian Chamber of Commerce	Proposed section 118A creates a significant risk in relation to the use of infringing copies of computer software by businesses. Propose that a six-month moratorium be instituted to give businesses the opportunity to audit their software usage and take such steps as are necessary to avoid criminal liability.	Criminal liability for the use of pirated copies of computer programs already came into effect under the Copyright Ordinance as read together with the Copyright (Suspension of Amendments) Ordinance 2001 ("Suspension Ordinance") in April 2001. The proposed section 118A does not create a new offence but simply maintains the status quo.
2.4	• The Society of Accountants • Movie Producers and Distributors Association	The Society of Accountants considers that criminal sanction should not apply to the possession of an infringing copy in business activities of a non-profit making nature. The Movie Producers and Distributors Association is of the view that criminal liability should be waived for non-profit-making organisations but they should prepare guidelines and inform copyright owners of the usage of the copyright works.	As explained in the LegCo Brief on the Bill, we propose to amend the definition of the term "business" in section 198 of the Copyright Ordinance to put it beyond doubt that the term includes business conducted other than for profit. This is consistent with our policy that non-profit-making businesses such as charitable organizations or government should generally be treated on a par with profit-making businesses for the purposes of the Copyright Ordinance. For example, criminal liability for the use of pirated copies of copyright works should apply to both profit-making and non-profit-making businesses.

Issues 2: Detailed comments on proposed section 118A (End-user liability)			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
2.5	• The Law Society of Hong Kong • Business Software Alliance (BSA) • American Chamber of Commerce (Amcham)	The Law Society considers that the exclusion in proposed section 118A(5) should not apply to pirated copies. BSA and Amcham are of the view that proposed section 118A(5)(b) would inadvertently eliminate the end-user criminal liability for an enormous range of computer software available over the Internet. The relevant language should be refined or eliminated to avoid unintentionally creating a huge gap in IPR protection. Members of the Bills Committee asked about the rationale for section 118A(5)(a) at the meeting on 8 September.	Proposed section 118A(5)(a) is required because we have proposed to confine end-user criminal liability to only four categories of works and works in printed form are not intended to be covered. Copies of computer programs in printed form are in fact printed works the possession of which should not therefore attract criminal liability. Regarding proposed section 118A(5)(b), when a person downloads information/works from the Internet and saves it into his hardisk for future reference in business, it may also save the computer program that is technically required to view or listen to the information/works. The copy of computer program so saved may become a pirated copy (because of the act of copying). This in effect means that the downloading will attract criminal liability even if the information/works downloaded does not fall into the four categories of works that attract criminal liability under proposed section 118A. Hence, proposed section 118A(5)(b) is required to avoid this situation. It is important to note that where the downloading involves works that fall into the four categories of works (including computer program that does not fit the description in section 118A(5)(b)), the possession of pirated copies of such works with a view to their being used in business will continue to attract criminal

Issues 2: Detailed comments on proposed section 118A (End-user liability)			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
			liability under section 118A. In fact, provisions similar to proposed section 118A(5) are currently provided under section 2(b) of the Suspension Ordinance. **After having discussed with BSA and considered the matter further, we agree that there is room for refining the scope of exemption in section 118A(5)(b) and we propose to amend it to form a new section 118A(6). The relevant CSAs are at <u>Annex to Table 2</u>.** **Relating to section 118A(5)(a), we consider that there is no strong reason to narrow down its scope. We have informed BSA of our views and are awaiting their comments.**
2.6	• The Hong Kong Bar Association • The Law Society of Hong Kong	Both the Bar Association and the Law Society suggest the word "feature film" be replaced by "movie". The Bar Association also suggests the following technical amendments • To remove the reference "in doing any act" in section 118A(1)(b) • To remove the reference "a copyright	Our responses are as follows- <u>The word "feature film" be replaced by "movie"</u> The word "feature film" wherever appearing will be replaced by the word "movie", as part of the measures to bring the Bill into conformity with the amendments effected by the Copyright (Amendment) Ordinance 2003.

Issues 2: Detailed comments on proposed section 118A (End-user liability)			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
		work that is" in the first line of section 118A(5)	<u>To remove the reference "in doing any act" in section 118A(1)(b)</u> The present wording makes it clear that it is the act done with the use of the infringing copy (for example, the keeping of accounts) and not the use of the infringing coy per se (e.g. making arithmetic calculations) that is to be subject to the test of "for the purpose of or in the course of a trade or business". We believe that the wording proposed by the Bar Association would give a narrower scope to the offence provision. <u>To remove the reference "copyright work that is" in the first line of section 118A(5)</u> The wording "a copyright work that is a computer program" in subsection (5) replicates the wording used in subsection (1)(a).
2.7	ALA of LegCo	Suggest to add the word "any" before the word "trade" to the heading of section 196A as well as in the provision so that it can reflect the reference "for the purpose of or in the course of <u>any</u> trade or business" now being adopted in the Ordinance.	There may be further changes to this proposed section as a result of the changes proposed in item 2.2 above because the proposed section 196A and the proposed section 118A are linked. We shall take into account the views of ALA in revising the proposed section 196A.

Annex to Table 2

Copyright (Amendment) Bill 2003

Draft

Clause 4, proposed section 118A

118A. Offences in relation to possession of infringing copies of certain categories of works for use in any trade or business

(1) A person commits an offence if he possesses an infringing copy of a copyright work that is a computer program, movie, musical sound recording, musical visual recording or television drama with a view to the copyright work being used, without the licence of the copyright owner, in doing any act for the purpose of or in the course of any trade or business.

(2) Subsection (1) does not apply in relation to an infringing copy that is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made.

(3) In proceedings for an offence under subsection (1), it is a defence for a defendant who is an employee to prove that his possession of the infringing copy occurred in the course of his employment and that the infringing copy in question was provided to him by or on behalf of his employer for use for the purpose of or in the course of the trade or business in question.

(4) Subsection (3) does not apply in the case of an employee who –

(a) where the employer is a body corporate, is a director,

manager, secretary or other similar officer of the body corporate or is a person purporting to act in any such capacity or, where the affairs of a body corporate are managed by its members, is a member with functions of management as if he were a director of the body corporate;

(b) where the employer is a partnership, is concerned in the management of the partnership;

(c) where the employer is a sole proprietorship, is concerned in the management of the proprietorship; or

(d) in any other case, is concerned in the management of the employer's business.

(5) Subsection (1) does not apply to a copy of a computer program that is in printed form.

(6) Subsection (1) does not apply to the possession of a copy of a computer program in the case where –

(a) the computer program has been made available to the public for the purposes of section 26(1) and was so made available together with another work (not being a computer program itself) that requires the use of a computer program to be viewed or listened to; and

(b) the person possessing the computer program does so with a view to the computer program being used for viewing or listening to the other work mentioned in paragraph (a).

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
3.1	• Consumer Council • The Chinese General Chamber of Commerce • The Hong Kong General Chamber of Commerce • International Publishers Association	Support the proposal	We note the support.
3.2	• Australian Chamber of Commerce	The ambit of section 118C is too broad and places unnecessary burden on copying service providers. If the section is to be maintained, the burden of proof should be placed with the prosecution side to prove that the copying service knew or should have known that the work was illegitimate.	Proposed section 118C(3) has already provided a defence for the person charged to prove that he did not know and had no reason to believe that the copies in question were infringing copies of the copyright work. This is in line with the arrangements in other criminal offence provisions in the Copyright Ordinance where the burden of proving the absence of knowledge of the copies in question being infringing ones also rests with the defendant. We believe that with the defence, section 118C has struck the right balance between facilitating enforcement and protection against unfair prosecution.
3.3	• Anglo-Chinese Textbook Publishers Organizations • Association of American Publishers	Support the proposal but the Association of American Publishers considers that section 118C should not be confined to books, magazine or periodicals but should apply to	<u>For suggestion (a)</u> We would like to point out that it is already an offence under proposed section 118(1)(a) for any person to make infringing copies of any

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
	• Hong Kong and International Publishers' Alliance • Hong Kong Educational Publishers' Association • Hong Kong Publishing Federation Ltd. • Hong Kong Reprographic Rights Licensing Society • McGraw-Hill International Enterprise, Inc. • Pearson Education (parent company of Longman Hong Kong Education) • Canotta Publishing Co. Ltd • Chung Tai Educational Press • The Commercial Press (HK) Ltd • Hon Wing Book Co. Ltd. • Hong Kong Educational Publishing Co. • Hong Kong Music Publisher • Modern Education Network Ltd • Oxford University Press (China) Ltd • Pilot Publishers Services Ltd • Pilot Publishing Co. Ltd • The Publishers Association • SNC Panpac (HK) Ltd • Witman Publishing Co. (HK) Ltd • Ying Lee Music Co. Ltd	literary, artistic, or dramatic work capable of reprographic copying. The Hong Kong International Publishers' Alliance holds a similar view (any literary, artistic, or dramatic or printed musical work). The rest of the publishing industry organisations have suggested more specific amendments to section 118C as follows: (a) the copyright work under the section should be broadened to cover the one published in any literary, artistic, or dramatic work or printed musical work; (b) the term "a copying service" should cover business located within an educational establishment that offers reprographic copying services; (c) the term "principal work" should refer to work for research or private study and non-commercial use.	kinds of copyright work for profit or financial reward. This covers photocopying service. The offence provided under proposed section 118C is an extra measure to tighten criminal sanctions against illicit photocopying service. In simple terms, under this section if a profit making copyshop possesses two substantially identical reprographic copies of a copyright work as published in a book, magazine or periodical, being copies that are infringing copies, the copyshop commits an offence. In other words, mere possession of infringing copies of such copyright works constitutes an offence. This is aimed at facilitating enforcement action against illicit copying services. We consider that the scope of such an offence should be specifically defined in order not to cast the criminal net too wide. Books, magazines and periodicals represent the majority of copyright works being illicitly reproduced by copyshops. We consider it appropriate to confine the scope of the offence to works in these publications. <u>For suggestion (b)</u> The offence under proposed section 118C(2) covers all profit-making copying service, regardless of the location of the business.

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			For suggestion (c) The policy intent behind the defence under section 118C(4) is to address the concern of some copyshop operators that student customers may ask copyshops to make photocopies of their school project report which represents principal work containing extracts from a book, magazine or periodical. It may become too restrictive if scope of the defence is further reduced by limiting the purpose which the principal work can be used for. Our meetings and discussions with representatives of the publishing industry and copyshops subsequent to the Bills Committee meeting on 8 September suggested that the copyshop offence as currently drafted has caused some confusions – (a) Since proposed section 118C(2) provides that the possession of two infringing copies of copyright works as published in books, magazines and periodicals is a criminal offence, affected parties have the impression that the making of one copy is legal. However, this is not our intention. Under proposed section 118(1)(a), the making of one infringing copy for profit or

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			financial reward can attract criminal liability. (b) While the defences under proposed sections 118C(4) and (5) apply to the possession offence under proposed section 118C(2), they are <u>not</u> applicable to the proposed section 118(1)(a) (making for profit or financial reward). Hence, where relevant evidence is available, a copyshop may still be prosecuted under the proposed section 118(1)(a) even if the infringing copies in question fall within the scope of the defences referred to in the proposed section 118C(4) and (5). **To address such confusions, we propose to revise section 118C along the following line:** **(a) a person commits an offence if, for the purpose of or in the course of a copying service business, he possesses a reprographic copy of a copyright work as published in a book, magazine or periodical, being a copy that is an infringing copy of the copyright work. Here, "copying service business" means a business, conducted for profit, that includes the offering of reprographic copying services to the public and, in the**

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			case of a business that includes the offering of reprographic copying services to the public at more than one place, means any part of the business carried on at such a place; (b) **it is a defence for the person charged to prove that the infringing copy of a copyright work in question was not made for the purpose of and was not made in the course of the copying service business;** **(c) it is a defence for the person charged to prove that the infringing copy of a copyright work in question was not made for profit and was not made for reward; and** **(d) it is a defence for the person charged to prove that he did not know and had no reason to believe that the copy of a copyright work in question was an infringing copy of the copyright work.** **Under the offence mentioned in (a) above, the mere possession of a reprographic copy of a copyright work as published in a book, magazine or periodical attracts criminal liability. The prosecution is not required to**

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			prove any element relating to the making of the infringing copy. **However, we take the view that a person should not be caught for possessing an infringing copy which was not made for the purpose of and was not made in the course of the copying service business, for example, a source copy left by a customer for copying service. Therefore, we propose to add the defence in (b) above.** **Also, the offence under (a) may catch end users. To illustrate, if a bookstore provides copying service, a staff member (who is responsible for keeping the account of the bookstore) in the back office may be caught if he possesses an infringing copy of an accounting book for the purpose of or in the course of the copying service business, being a copy made in the bookstore. To avoid unintentionally expanding the net of end-user criminal liability, the defence in (c) above is provided.** **We have passed a copy of the relevant draft Committee Stage Amendments (CSAs) to copyshops and the publishing industry. Both did not have further comment. But copyshops indicated that they would like to**

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			discuss with the licensing body of the publishing industry to ensure that the copying service they provide is properly licensed and will not be illegal. We will make arrangement for both sides to meet. **The latest proposed section 118C, incorporating some slight technical changes in wordings as compared to the last version submitted to the Bills Committee, is at Annex to Table 3.**
	• Association of American Publishers	**Considers that the commercial harm to publishers is not diminished depending on whether the copying service is "profit making" or not, and therefore it would be far more preferable to cover copying services regardless of whether they are profit making.**	**The policy intent behind the new offence under proposed section 118C is to tighten up criminal sanctions against illicit photocopying services. Since mere possession will attract criminal liability under the offence, we need to carefully define its scope. As most illicit photocopying services are operated on a commercial scale, we consider that our objective can be achieved through the current proposal.** **Under the definition of "copying service business" (see (a) above), the business**

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			concerned is one that is "conducted for profit". Therefore, whether the business is really profit-making is irrelevant.
	• ALA of LegCo	**Requested the Administration to clarify whether proposed section 118(2)(c) in the draft CSA we presented at the meeting (i.e. for the purpose of or in the course of any trade or business possess with a view to storing for profit or reward) may overlap with the copyshop offence (possession for the purpose of or in the course of a copying service business) in that one can argue that a copy-shop which is subject to a charge under proposed section 118C may also be prosecutable under revised section 118(2)(c) for possessing an infringing copy with a view to storing for profit or reward.**	**There is no overlap in the scope of the two offences because the proposed section 118(2)(c) will catch those situations where the profit or reward arises directly from the act of storage or transportation whereas in the case of copyshops, profit or rewards does not arise from those acts.**
	• ALA of LegCo	**The offence in relation to a copying service business under proposed section 118C(2) was based on possession whilst**	**The offence under section 118C(2) criminalise the possession of infringing**

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		the defence in proposed sections 118C(3) and (4) concerned the act of making of infringing copies of copyright work. Would this cause any problem?	**copies of copyright work published in books, magazines or periodicals by a copying service business and the two defences specified under sections 118C(3) and (4) provide that under certain circumstances (i.e. where the infringing copies were not made by the business and where they were not made for profit or reward) the defendant would have a defence against the offence. We do not see any problem with the proposed arrangement.**
	• **The Bills Committee**	**Invites the Administration to review the scope of "copying service business" under proposed section 118C(1).**	**The effect of the definition in the Bill is as follows:** **(a) the copying service may either itself constitute a discrete business entity or form part of a larger business entity; and** **(b) the business entity in question must be a business that is conducted for profit.** **Thus, where the copying service itself**

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			constitutes a discrete business entity, the copying service must be conducted for profit. **Where the copying service forms part of a larger business entity (for example, a copying service offered as part of a bookstore business), it is not a required element of the offence that the copying service itself be conducted for profit but the larger business entity as a whole must be conducted for profit.** **A copying service that is operated in conjunction with another business may either be operated as part of that other business or it may be operated so as to constitute a separate business. The question of whether the copying service forms part of another business, or whether it constitutes a separate business in itself, is a question of fact to be determined in each case.**
3.4	• ALA of LegCo	What if a copy shop possesses only 1 infringing copy and he has the intention to	The copyshop will not be liable under the proposed section 118(1)(e)(ii) because the

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		make profit out of that infringing copy some day in future? Would it be liable under the new section 118(1)(e)(ii), i.e. for possessing an infringing copy of a copyright work with a view to storing for profit or financial reward or any other section?	profit or financial reward does not arise from the act of storage. However, if there is sufficient evidence, the shop may be caught for making an infringing copy for profit or reward under proposed section 118(1)(a). The shop may also be liable under the newly proposed amendment in item 3.3 above.
3.5	• See above for organisation of publishing industry	The publishing industry consider that under the defence in proposed section 118C(4), a copy-shop would be able to claim the defence if it copied an entire book (e.g. a book of 100 pages that appear in a compendium totalling 550 pages). The International Publishers Association considers that the defence should therefore be reformulated such that it is based on the percentage taken of the work otherwise infringed, not the percentage of the principal work. The Association of American Publishers and the Hong Kong International Publishers' Alliance share the same view and propose section 118C(4)(b) be amended to read as follows- • the infringement copy included in the principal copyright work contains no more than 10% of the work infringed. The rest of the publishing industry	The defence in proposed section 118C(4) aims to address the concern of some copy-shop operators that student customers may ask copy shops to make photocopies of their school project reports which contains extracts from a book, magazine or periodical. The "20%" threshold is proposed to render it difficult for an illicit copy shop to exploit the defence by alleging that the infringing copy concerned forms part of another work being substantially identical to the infringing copy. Some publishing industry organisations are concerned that the defence might be abused in cases where, for example, a copy shop seeks to copy without authorization an entire 100 page book by inserting 450 pages to make a compendium totalling 550 pages. We consider that it is unlikely that the defence would be abused in such a way in practice, as the copy shop will have to insert 450 pages of other materials into each and every

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		organisations have proposed more detailed amendments to section 118C(4)(b) as follows- (a) works as published in any literary, artistic or dramatic work, or printed musical work constitute not more than 10% of the contents of each of the reprographic copies of the principal work; (b) the reprographic copy of a copyright work as published in any literary, artistic, or dramatic work, or printed musical work included in the principal work contains no more than 5% of the copyright work; and (c) the reprographic copy of a copyright work as published in any literary, artistic, or dramatic work, or printed musical work included in the principal work is not copied from more than one copyright work.	reprographic copy made in order to exploit the defence. In the unlikely event that such abuse arises after the introduction of the new law, we would consider tightening up the relevant provisions. Regarding the suggestion that the 20% threshold be lowered to 10%, we need to strike a balance between protecting the rights of copyright owners and facilitating the studies of students. We consider 20% to be a more acceptable threshold for a criminal offence. Some suggest that the threshold should be based on the percentage taken of the work otherwise infringed, not the percentage of the principal work. We consider that this will pose practical difficulties to copy shops. A school project report may contain extracts from different books, magazines or periodicals. It will be difficult for the copy shops to ascertain the percentage share of these extracts in the original works. Same problem will be encountered by enforcement agencies and prosecution. As for the suggestion that the extracts included in the principal work must come from a single copyright work. We consider that this is too

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			restrictive and will in effect make copying of school project reports not possible as it is not unusual for a school project report to contain extracts from different sources. As stated in item 3.3, we are considering to revise proposed section 118C and to remove the two defences as presently set out in proposed section 118C(4) and (5). The relevant draft CSAs are at Annex to Table 3.
3.6	• Hong Kong Group Asian Patent Attorneys Association • American Chamber of Commerce	It will be easy for copy shops to abuse the defence by breaking an order to copy the entire book into independent orders, each constituting not more than 20% of the book's contents.	The defence in proposed section 118C(4)(b) is to compare, in percentage terms, the content of the extracts of the book, magazine, or periodical against the total content of the copy of the principal work, not against the book, magazine or periodical in question. As stated in item 3.5 above, we are considering to remove the defence. The relevant draft CSAs are at Annex to Table 3.
3.7	• ALA of LegCo	Please clarify the effect of 118C(4)(a) and (b) with illustrations	The effect of the defence is that if a copyshop is found to be possessing infringing copies of works as published in a book, magazine or periodical but the works in question form part of another work, for example a student report, and constitute not more than 20% of the student report, the copyshop may invoke the defence and therefore may not be liable to the

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			possession offence under proposed section 118C(2). However, the defence does not apply to proposed section 118(1)(a). As stated in item 3.5 above, we are considering to remove the defence. The relevant draft CSAs are at Annex to Table 3.
3.8	• The Hong Kong Bar Association • The Hong Kong Group Asian Patent Attorneys Association • American Chamber of Commerce (AmCham)	The Hong Kong Bar Association does not understand the logic behind the defence in proposed section 118C(5) because copyright work still subsists in books, magazines or periodicals even if they are made available free of charge to members. The Hong Kong Group Asian Patent Attorneys Association shares a similar concern and further suggests the defence be removed. The Amcham consider that it is common for the business to distribute their publication to members of public free of charge (or over the Internet) but requiring the recipients to provide something other than money in return, for example contact details for future marketing opportunities. The defence dilutes the copyright holders' interest and should be removed.	As pointed out in our response under item 3.3, the new section will make it an offence for the mere possession of two substantially identical reprographic copies of a copyright work as published in a book, magazine or periodical (being copies that are infringing copies). If the copies of a copyright work are available free of charge to members of the public in the first place, it would be too harsh to make mere possession of two such copies a criminal offence. As for Amcham's concern, copyright owners' interests are still protected under proposed sections 118(1)(a) (i.e. making copies for profit or financial reward) and (1)(f) (i.e. prejudicial distribution). As stated in item 3.5 above, we are considering to remove the defence. The relevant draft CSAs are at Annex to Table 3.

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	• The Bills Committee	To consider the issue of liability (including end-user liability) arising from copying and distributing government publications such as consultation papers by members of the public.	We are preparing guidelines with the intention to give the public a general permission to copy Government's works provided that the copy is not made for commercial sale.
3.9	• The Hong Kong Group Asian Patent Attorneys Association	Not clear if proposed section 118C(5) will apply where an electronic version of the book is freely distributed but the hard copies are not.	Whether the defence under proposed section 118C(5) is available will depend on whether the original copy from which the reprographic copies were made is freely available to the general public. The defence will not apply if the original copy passed to the copyshop for photocopy is not freely available to the public even if the corresponding electronic version is free. As mentioned in item 3.5 above, we are considering to remove the two defences under proposed section 118C. The relevant draft CSAs are at Annex to Table 3.
3.10	• All publishing industry organisations mentioned above except Association of American Publishers, the International Publishers Association, and the HK and International Publishers Alliance.	Most of the publishing industry organisations consider that proposed section 118C would give an impression that it was legal to possess one reprographic copy of an entire copyright work.	Under proposed section 118C(2), it is an offence for a copy-shop to possess two or more copies of a copyright work as published in a book, magazine or periodical, being copies that are infringing copies of the copyright work. The possession of one copy does not attract criminal liability under this section because the

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			making of one copy of copyright work may not necessarily be an infringing act. Under section 38, it is a permitted act to deal with (which includes the act of copying) a work for research and private study, having regard to the purpose and nature of the dealing, the nature of the work; and the amount and substantiality of the portion dealt with in relation to the work as a whole. The making of one copy of a copyright work may be a permitted act, subject to the considerations mentioned above and the primary consideration under section 37(3) of the Copyright Ordinance. If the copying is a permitted act, the copy so made will not be an infringing copy. It is however difficult for the enforcement agency and the copyshops to ascertain on the spot whether a copy being possessed by the copy-shop falls within the scope of permitted act. Where the copyshop is possessing two copies, it is more difficult to argue that the copies are covered by permitted act because section 38(2)(b) stipulates that it is <u>not</u> a permitted act if the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			same time and for substantially the same purpose. In order not to adversely affect normal businesses providing a convenient and legitimate copying service and having considered the practical enforcement situation on the ground, we consider that the offence in proposed section 118C should apply to possession of 2 or more infringing copies. We would however like to stress that it does not mean it is always legal for copy-shop to make one copy of copyright work. Where the making is not authorised by the copyright owner and does not fall within the scope of permitted act in section 38, it remains an offence for the shop to make the copy for sale or profit under proposed section 118(1)(a). As mentioned in item 3.3, we are considering to revise proposed section 118C to the effect that possession of one infringing reprographic copy by a copyshop should attract criminal liability. The relevant draft CSAs are at Annex to Table 3.
3.11	• The Hong Kong Bar Association	Does not understand the reason for using the term "substantially identical reprographic copies" as a copy reproduced by reprographic means should be identical	The wording seeks to avoid a situation where a copy-shop tries to circumvent the criminal provision by slightly modifying the reprographic copies (by inserting a few pages for example) and claim that the reprographic

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		to the original work.	copies are not entirely identical with the copyright work.
3.12	• Hong Kong Bar Association	Against the above comments and those in relation to proposed section 118(C)(5), the Bar Association propose the following amendments to proposed section 118C: "(2) A person commits an offence if, for the purpose of or in the course of a business that includes the ~~providing~~ provision of a copying service, he possesses 2 or more ~~substantially identical reprographic~~ infringing copies of the same ~~a~~ copyright work as published in a book, magazine or periodical~~, being copies that are infringing copies of the copyright work~~." "~~(5)~~ (3) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that ~~copies of~~ the book, magazine or periodical in question ~~(not being infringing copies) are~~ is available free of charge to members of the public who wish to acquire their own copy." (The original subsection 3 will become subsection 4)	While it takes time to study in detail the suggested wording, our preliminary views are set out below. The proposed amendments to the proposed section 118C(2) may widen the scope of that section. For example, if a copyshop possesses an infringing copy of chapter 1 of book A and an infringing copy of chapter 2 of book A, and if book A is a copyright work, then the copyshop will not be caught under the existing provision but may be caught under the proposed revised wording. We consider the current draft more in line with our policy intent. We do not agree to the proposed amendments to section 118C(5) that the reference "not being infringing copies" can be deleted. The defence should not be available if the copies delivered free of charge to the public are infringing copies in the first place. As for the proposed amendments to section 118C(4), we will further study and revert in due course.

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		"~~(4)~~ (5) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that – (a) ~~he possessed~~ the infringing copies formed part of ~~by virtue only of the fact that he possessed reprographic~~ copies of another work ("principal work"), which he possessed ~~in which reprographic copies the copyright work to which the charge relates forms part of the principal work~~; and (b) the infringing copies ~~works as published in a book, magazine or periodical~~ constitute not more than 20% of the contents of ~~each of the reprographic copies of~~ the principal work."	As mentioned in item 3.3, we are considering to revise proposed section 118C. The relevant draft CSAs are at Annex to Table 3.

Annex to Table 3

Copyright (Amendment) Bill 2003

Draft

Clause 4, proposed section 118C

118C. Offence in relation to possession of infringing copies by a copying service business

(1) In this section –

"copying service business " ( ) means a business, conducted for profit, that includes the offering of reprographic copying services to the public and, in the case of a business that includes the offering of reprographic copying services to the public at more than one place, means any part of the business carried on at such a place.

(2) A person commits an offence if, for the purpose of or in the course of a copying service business, he possesses a reprographic copy of a copyright work as published in a book, magazine or periodical, being a copy that is an infringing copy of the copyright work.

(3) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that the infringing copy of a copyright work in question was not made for the purpose of and was not made in the course of the copying service business.

(4) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that the infringing copy of a copyright work in question was not made for profit and was not made for reward.

(5) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that he did not know and had no reason to believe that the copy of a copyright work in question was an infringing copy of the copyright work.

(6) In this section, "reward" means reward other than reward of a nominal value.

Issues 4: Defence under proposed section 118B			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
4.1	• Hong Kong Group Asian Patent Attorneys Association • The Law Society of Hong Kong	Proposed sections 118(1)(d)(iii) and 118(1)(e)(ii) will catch legitimate traders who may not be aware that they were transporting or storing infringing copies. The current defence under proposed section 118B is not appropriate, especially when the infringing copies in question relate to parallel imports. The Hong Kong Group Asian Patent Attorneys Association considers that the offences under the two sub-sections should only arise if the person transporting, storing or possessing infringing copies knew or had reason to believe that he was dealing with infringing copies of copyright works. The Law Society of Hong Kong considers that the defence involves extensive enquiries under proposed sections 118B(2) and (3) and suggests that a defence be provided for a person charged to prove that he honestly did not know and had no reason to believe that he was or would be transporting or storing an infringing copy.	We consider that storage and transportation, being part of the supply chain for infringing copies, are equally culpable as other relevant acts. As such, the standard of proof for these offences should be on par with that for offences involving acts conveniently described as "dealings in" of infringing copies. Also, so far as proving offences on "dealing in" of infringing copies is concerned, we see no reason to put down different treatments for copies the infringing status of which is acquired by parallel importation, and copies the infringing status of which is acquired by piracy. The proposal from the Hong Kong Group Asian Patent Attorneys Association would place extra burden on the prosecution to prove, as an element of the offence, knowledge of infringement on the part of the defendant. As argued above, there seems to be no reason to make it more difficult for prosecution to establish offences on storage and transportation than others. Also, in practice it would be very difficult to prove beyond reasonable doubt that a defendant

Issues 4: Defence under proposed section 118B			
			knew or had a reason to know that copies he stores or transports are infringing copies. Instead of imposing undue burdens on the prosecution, we consider it more appropriate for the defendant to rely on the defence under proposed section 118B by proving that he did not know or had no reason to believe the copies in question are infringing copies. The standard of proof for the defence is lower than the standard of proof for the offence: 'balance of probabilities' as opposed to 'beyond reasonable doubt'. As for the concern of the Law Society that the defence involves extensive enquiries under proposed sections 118B(2) and (3), we would like to clarify that the two subsections are intended to serve as pointers for the defence under proposed section 118B(1) only. They are relevant points the court can take into account when determining whether the defence under section 118B(1) has been established. If a defendant proves the elements under proposed section 118B(2), he succeeds in establishing the defence. But a defendant can still submit factors other than those under proposed sections 118B(2) and (3) to prove the defence. In other words, it is not a mandatory requirement that the defendant must conduct the extensive

Issues 4: Defence under proposed section 118B			
			enquiries in order to prove the defence under proposed section 118B(1). We do not share the view that the addition of the "honesty" element in the defence would provide extra protection for the defendant. According to case law, although honesty may have a connotation of subjectivity, it does not mean that individuals are free to set their own standards of honesty in particular circumstances and that the standard of what constitutes honest conduct is not subjective. Therefore, the proposed addition of "honesty" element may in effect place a further hurdle of objectivity for one who transports or stores infringing copies to overcome before he can make use of the defence.
4.2	• The Law Society of Hong Kong	As currently drafted, proposed sections 118(B)(2) and (3) apply to parallel imports during the first 18 month period and to pirated imported goods. For section 36, the reference is only to imported infringing copies under section 35(3) and there is no distinction between parallel and pirated imports. The threshold for proving lack of knowledge in the case of parallel and pirated imported copies is therefore much higher than for other dealings in pirated copies. It	Our intention is that proposed sections 118B(2) and (3) should apply to parallel imported copies only. **We agree that proposed section 118B(2) and (3) in the Bill, and section 36 and section 187 in the Ordinance need to be revised to make it clear that the provisions apply to parallel imports only. We will submit Committee Stage Amendments (CSAs) for consideration in due course.**

Issues 4: Defence under proposed section 118B			
		is not clear if proposed sections 118B(2) and (3) are intended to relate only to parallel imports. If so, the relevant sections must be amended. The same also applies to the defence in section 36.	
4.3	• Australian Chamber of Commerce	It is not clear why the threshold for proving lack of knowledge in the case of parallel imported copies is intended to be higher under proposed sections 118B(2) and (3).	As explained in our response 4.1 above, proposed sections 118B(2) and (3) serve as pointers for the defence under section 118B(1) only. A defendant can submit factors other than those under these two subsections for the court to consider whether the defence is available to him. The threshold for proving lack of knowledge in the case of parallel imported copies is not higher. Also, as explained in our response 4.2, we will study whether proposed sections 118B(2) and (3) can clearly reflect our policy intention that they are applicable to parallel imported copies only, and make amendments to the Bill if considered necessary.

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
5.1	• Australian Chamber of Commerce	The new wording will provide for increased certainty for both copyright owners and copyright users in identifying the types of activities that will constitute an offence.	We note the support.
5.2	• Hong Kong Group Asian Patent Attorneys Association • American Chamber of Commerce • Business Software Alliance (BSA) • The Law Society of Hong Kong • Motion Picture Industry Association	In the new section 118(1)(d), (1)(e) and elsewhere in the Bill, the notion of "trade or business" is replaced by the concept "for profit or financial reward". This change has reduced the scope of protection for copyright owners as infringing acts may not necessarily be done for "profit or financial reward". Law Society opines that it is not clear why the expression "for the purpose of or in the course of any trade or business" is retained in section 118A but not section 118. Hong Kong Group Asian Patent Attorneys Association considers that the notion "for profit or financial reward" is also inconsistent with the definition of "business" under the proposed section 198(1), which includes business conducted otherwise than for profit.	The offences under existing section 118(1)(d) and (e) of the Ordinance can be described for convenience as offences relating to *end user liability* and offences relating to *dealing in* infringing copies. In the redrafted provisions in the Bill these two broad categories can be found in proposed section 118(1)(d) and (e) (the "dealing in" provisions), and proposed section 118A(1) (the "end-user liability" provision). In the provisions relating to the "dealing in" category offences, we have replaced the expression "for the purpose of, in the course of, or in connection with, any trade or business" with the expression "for profit or financial reward" in the proposed section 118 because we consider that the latter reflects more accurately the nature of the offence of dealing in. We do not agree that the notion "for profit or financial reward" is

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
		They suggest keeping the reference "for the purpose of or in the course of any trade or business". BSA suggest adding "or any other material advantage" to the reference "for profit or financial reward". Motion Picture Industry Association (MPIA) suggested that more objective elements like "allowing access to copyright by customers for profit in a systematic manner" should be adopted. The Association considered that otherwise the following example would not be covered: a shop that operates the business of charging their customers on an hourly basis for reading of comics also installed PC & Internet facilities and their customers can make use of these facilities for playing pirated copies of VCDs & TV games provided by the comic shop.	inconsistent with the revised definition of "business" under proposed section 198(1). We are considering to revise proposed section 118(1)(d) and (e) to include the expression "for the purpose of or in the course of any trade or business". For details, please see item 5.7 below. The relevant draft Committee Stage Amendments (CSAs) are at Annex to Table 5. We note the view that infringing act done for significant advantage but which may not be of a monetary or financial nature should also be covered by proposed section 118. We are considering to remove the word "financial" from the expression so as to catch also reward of a non-financial nature. The draft CSAs are at Annex to Table 5. Regarding MPIA's view, so far as the four categories of works are concerned, if a person possesses a pirated copy of such works with a view to its being used for the purpose of or in the course business, he commits an offence under the proposed section 118A(1). In the example quoted,

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
			the use of VCD (i.e. movies), and TV games (which contain computer programs) can be regarded as being done for the purpose of or in the course of business, therefore the relevant person may be caught under the proposed section 118A(1).
5.3	• Hong Kong Group Asian Patent Attorneys Association • American Chamber of Commerce • The Law Society of Hong Kong	Hong Kong Group Asian Patent Attorneys Association considers that the new section 118(1)(e) only lists out certain specific acts that are done for profit or financial reward. No justification has been provided as to why other infringing acts done without the authorisation of copyright owners in section 22 and other parts of the Ordinance have not been included. Law Society and the American Chamber of Commerce hold a similar view, pointing out that this may reduce the scope of offence.	Proposed section 118(1)(e) replaces existing section 118(1)(d). Under existing section 118(1)(d) relating to the four categories of works, it is an offence to possess an infringing copy for the purpose of, or in the course of, any trade or business <u>with a view to committing an act infringing the copyright</u>. Such acts are those set out in sections 23 to 34 of the Copyright Ordinance, some of which, for example, performing, playing or showing a work in public, currently do not attract criminal liability. We think that it is not appropriate to attach criminal liability to the possession of an infringing copy with a view to doing an act while the act *per se* does not attract criminal liability. There are also certain acts in section 23 to 34 of the Ordinance which, when read together with section 118(1)(d) in the existing Ordinance, have no meaningful application, for example,

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
			possessing an infringing copy of a work with a view to permitting use of premises for infringing performance. Therefore, we have suitably drafted the proposed new section 118(1)(e) to increase transparency and clarity, and to address such anomalies. Those acts which we consider should attract liability are now explicitly set out in proposed new section 118(1)(e). We consider this approach clearer and more transparent.
5.4	• The Law Society of Hong Kong	The proposal to impose liability for dealings with infringing copies under sections 30 and 31 and section 118 where done for the purpose of "distributing for profit or financial reward" is unnecessarily narrow, since it could be argued that there was no such purpose or that there was no profit or financial reward. Accordingly, the relevant provisions in sections 30, 31 and 118 should be amended to impose liability for acts done "for the purpose of or in the course of any trade or business or to such an extent as would affect prejudicially the owner of the	The said amendments to proposed sections 30, 31, 118(2)(b) and 118A(2)(b) seek to specify the circumstances in which parallel imports will attract liability. Our intention is that commercial dealing in these copies should attract liability. It is therefore appropriate to use the phrase "for profit or financial reward" as it reflects more accurately the nature of the act conveniently described as dealing in. As mentioned in item 5.2 above, we are considering to revise the proposed section 118(1)(d) and (e) to include the expression "for the purpose of or in the course of any trade or business" and to remove the word

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
		copyright".	"financial" from the expression "for profit or financial reward. The relevant draft CSAs are at Annex to Table 5. We will consider if similar amendments need to be made to proposed sections 30, 31, 118D and 120(2).
5.5	• The Law Society of Hong Kong	Proposed section 118(1)(d)(iii) and the presumption in proposed section 118(4) and 118(5) should be amended to cover making, transporting or storing an infringing copy in the course of any trade or business or to such an extent as would affect prejudicially the owner of the copyright.	We consider that the offences under proposed section 118(1) in relation to making an infringing copy (subsection (1)(a)) and transporting or storing an infringing copy (subsections (1)(d)(iii) and e(ii)) and distribution to such an extent as to affect prejudicially the copyright owner (subsection (1)(f)) is sufficient to protect the interests of the copyright owners and that there is no need to extend liability further in the manner proposed.
5.6	• ALA of LegCo	It appears that there is no need for the prosecution to prove any mens rea (i.e. whether the defendant knows that the copy in question is an infringing one) under section 118. This is a departure from the recommendation of LRC. Why is it? Apart from Hong Kong, which country has shifted the burden of proof to the defendant? The burden of proof under section 118 is different from	Proposed section 118(1) is to a large extent modelled on the existing section 118(1), under which the prosecution does not need to prove whether the defendant knows that the copy in question is an infringing one. The same arrangement was adopted in the copyright law previously in force before the existing Copyright Ordinance came into effect in June 1997. The burden of proof arrangement has been in operation for many

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
		that in the new section 118D(2). Why is there a different approach?	years and effective in tackling copyright offences in Hong Kong. We consider it appropriate to continue to adopt the current approach. The offence under proposed section 118D(2) is different. Under other offences, the presence of an infringing copy of a copyright work is required before one can be convicted. However, the article mentioned in proposed section 118D(2) is not an infringing copy of a copyright work itself. While the article can be used to make an infringing copy, it may also be used for other purposes. For this reason, it would be too harsh to make a person liable under proposed section 118D(2) without first establishing that the person who possesses the article knows or has a reason to believe that the article is used or is intended to be used to make infringing copies of any copyright works for sale or hire or for profit or financial reward.
5.7	• ALA of LegCo	If a person is found to have a collection of infringing copies and on questioning, he says that he may sell the collection for a good price, would he be charged under	The person will not be liable under proposed section 118(1)(d)(iii) (store for profit or financial reward) or 118(1)(e)(ii) (possesses with a view to storing for profit or financial

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
		section 118(1)(d)(iii) for storing for profit or financial reward or under section 118(1)(e)(ii) for possessing infringing copies of a copyright work with a view to storing for profit or financial reward?	reward) as the profit or financial reward (provided he eventually sells his collection) does not arise from the act of storage.
		If a teacher imports into Hong Kong over 100 parallel-imported textbooks for his students, will the teacher be held liable for distributing infringing copies to such an extent as to affect prejudicially the owner of the copyright?	Whether the act amounts to prejudicial distribution depends on the circumstances of the case. But if the act is proved to be prejudicial distribution, the teacher will be criminally liable under section 118(1)(f).
		If after acquiring one of the books, student A then sells it to a second-hand bookshop which sells it in turn to student B without any knowledge that it is parallel-imported copy, will student A and the bookshop be held liable under proposed section 118(1)(d)(i)? Under the existing section 118(1)(d) and (e), a person will only be criminally liable if he sells, exhibits, distributes an infringing copy of a copyright work for the purpose of or in the course of any trade or business. Is it the administration's intention to hold a	Student A in this case will be caught under proposed section 118(1)(d)(i) unless he can invoke the defence under proposed section 118B(1) that he did not know and had no reason to believe that that the copy in question is an infringing copy. The same also applies to the bookshop. In the light of this example, we have given further thought to the scope of the offences under proposed section 118(1)(d) and (e). We consider that the criminal net under these proposed provisions may be wider than that of the existing Ordinance, as it covers

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
		person criminally liable (such as student A) even though he is not in the course of trade or business.	also casual sale in a non-business context. Hence, we are considering to add the expression "for the purpose of or in the course of any trade of business" to provisions under proposed section 118(1)(d) and (e) as appropriate in order to confine the criminal offences under proposed section 118(1)(d) and (e) to activities carried out in a business context only. The relevant draft CSAs are at Annex to Table 5. With the suggested expression added, the student in the example will not be caught as he did not sell the book in a business context.
	• MPIA **• Hong Kong Video Development Foundation (HKVDF)**	**MPIA and HKVDF object to the proposal to add the phrase "for the purpose of or in the course of any trade or business" under section 118(1)(e)(i) to (iv), 118(1)(f) and 118(2)(a) to (c) as the proposal would allow flagrant infringing acts to escape criminal liability so long as they were not done for the purpose of or in the course of any trade or business. The following examples are raised –** **(a) A movie star fan club sells a**	**We would like to point out that the phrase "for the purpose of or in the course of any trade or business" already exists in the Ordinance. The restoration of the phrase in the Bill helps ensure that the scope of the criminal provisions is not wider than the existing one. We would also like to clarify that the scope of the phrase covers a wide range of activities, including those conducted by both profit and non-profit making organisations. Clause 9(1) under the Bill provides that**

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
		million infringing copies of a movie to raise funds to build a monument for a movie star. **(b) A non-profit organisation sells 1,000 copies of a movie to raise funds for a building project.** **(c) Big-scale infringers break their operations down into separate smaller segments and recruit young students or part-timers to engage in purported non-commercial infringing acts, such as selling infringing copies to their friends in schools or the workplace.** **The two organisations also consider that the prosecution may find it difficult to prove that an infringing act was done "for the purpose of or in the course of any trade or business", since a potential infringer is unlikely to incorporate a company or register a business for engaging with infringing act.**	**"business" includes business conducted otherwise than for profit. This puts it beyond doubt that under the Bill, a business conducted otherwise than for profit would also constitute a business. Also, to determine whether an act is covered by the phrase, one has to consider the circumstances of a given case. It is important to note that the term "business" refers to the nature of the activity carried out by the organisation, rather than the legal form of the organisation itself. The mere fact that an organisation is not incorporated does not preclude it from carrying on an activity for the purpose or in the course of trade or business.** **Against the above background, our responses to the examples given are as follows –** **(a) The sale of infringing copies can be regarded as activities done for the purpose of or in the course of the business of the fan club. Therefore the fan club may be caught under revised section 118(1)(e)(i) under the**

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
			Bill. Whether the club is profit-making or incorporated or is a registered business is irrelevant. **(b) As aforementioned, a non-profit making organisation can carry on activities for the purpose or in the course of trade or business. The sale may be covered by the phrase and be caught under revised 118(1)(e)(i) under the Bill.** **(c) The fact that the operations of large-scale infringers are broken down into separate smaller segments does not mean that it does not constitute a business. Depending on the circumstances of the case, the students and part-timers participating in the activities may be caught under revised section 118(1)(e)(i).**
5.8	• ALA of LegCo	Is there any authority for the term "for financial reward" to be translated as "經濟報酬"?	There are terms similar to the expression "for financial reward" in other domestic laws, and their Chinese translations are set out below -

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
			• "financial advantage" is rendered as "經濟利益" in section 70 of Cap. 200. • "financially interested " is rendered as "經濟上的利害關係" in section 101 of sub. leg. E in Cap.139. • "financial benefit " is rendered as "經濟利益" in the definition of " strike benefit" in section 2 of Cap. 332. We are of the view that the Chinese term reflects the policy intention. As stated in item 5.2, we are considering to remove the word "financial" from the expression "for profit or financial reward". The relevant draft CSAs are at Annex to Table 5.
5.9	• ALA of LegCo	Proposed subsection (1)(b) [imports], (c) [exports], d(iii) [transports or stores] and e(ii) (possesses with a view to transporting or storing) does not apply to an article in transit. How about an article that is being transhipped?	Our intention is that the proposed subsection should apply to articles in transshipments, but not to those in transit. This is in line with the provisions in the existing Ordinance. (Section 118(2) of existing Ordinance refers).

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
5.10	• **Bills Committee**	**Seek clarification on the reasons for replacing the term "financial reward" by "reward", instead of adding the expression "or any other material advantage" as proposed by BSA.**	**According to our research, the meaning of "material advantage" is unclear and can be subject to different interpretations. In Hong Kong, we found the term in the Employment Ordinance but no elaboration on the meaning of the term is provided. Dictionary suggests that the word "material" can refer to some physical matter or substance, or it can be used in the sense of importance or significance.** **Our policy intent is to catch people who did certain infringement acts in the business context in return for profit or reward. The term "material advantage", when interpreted to mean either reward of significant value or reward of a physical nature, cannot achieve our objective. We however agreed with the Bills Committee that token reward, such as a cup of tea, should not be caught. Hence we propose to exclude reward of a nominal value under section 118 and 118C. The draft CSAs are at Annex to Table 5.**

Issues 6 : The presumption for the offence of transportation and storing in proposed sections 118(4) and (5)			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
6.1	• Hong Kong Society of Accountants • Australian Chamber of Commerce in Hong Kong	The Hong Kong Society of Accountants opposes the introduction of the presumption, considering that the proposal could cause serious problems for ordinary transport and godown. The Australian Chamber of Commerce in Hong Kong considers that the purpose of the presumption is understandable but on balance, the burden of proof should remain on the prosecution to prove that the defendant has the requisite intent.	We consider the presumption necessary to facilitate effective enforcement and prosecution, as in practice it will be extremely difficult in many cases to prove beyond reasonable doubt the element of "for profit or financial reward" in the offence. The prosecution must prove to the satisfaction of the court two elements before it can make use of the presumption, namely – (a) a person transports or stores an infringing copy of a copyright work; and (b) in circumstances that give rise to a reasonable suspicion that the person is transporting or storing the infringing copy for profit or financial reward. In other words, unless the reasonable suspicion is established, the presumption cannot be used. As such, it is unlikely that the introduction of the presumption will cause serious problems for ordinary transport and godown. On the other hand, if the circumstances of certain storing or transportation activities do give rise to the reasonable suspicion, we consider it

Issues 6 : The presumption for the offence of transportation and storing in proposed sections 118(4) and (5)			
			appropriate to provide the prosecution with the presumption as a tool to facilitate the conviction of the culpable taking part in the supplying of infringing products. Moreover, the defence under proposed section 118B(1) provides further protection for people who are involved in the storing or transportation activities but did not know or had no reason to believe that the copies he stored or transported were infringing copies.
6.2	• Consumer Council	Suggest to remove the presumption as far as parallel imported goods is concerned as the culpability of dealing in parallel imports is different from that of dealing in pirated goods.	Under proposed sections 118(1)(d)(iii) and 118(1)(e)(ii) to which the presumption relates, the transportation and storage of infringing copies for profit or financial reward will attract criminal liability, regardless of whether the infringing nature of the copies is the result of piracy or parallel importation. It would not be appropriate to set different standards of proof for the same offence. Therefore the presumption should not be provided only for cases involving pirated copies.

Issues 7: Removal of the phrase "in connection with" from the expression "for the purpose of, in the course of, or in connection with" (Proposed section 1 of Schedule 1 to the Bill)			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
7.1	• Consumer Council • The Chinese General Chamber of Commerce • The Chinese Manufacturers' Association of Hong Kong	Support the proposal	We note the support.
7.2	• Hong Kong Small and Medium Enterprises Association Ltd.	Suggest removing the whole phrase because of its far-reaching consequences on business activities.	During the drafting of the Copyright (Suspension of Amendments) Ordinance 2001 (Suspension Ordinance), we have explained in writing to the Bills Committee with regard to the expression "for the purpose of, in the course of and in connection with any trade or business". With the phrase "in connection with" removed, activities only incidental or marginally related to business should not be covered. We consider that the proposal can balance the interests of copyright owners and business end users.
7.3	• The Hong Kong Society of Accountants	Welcomes the removal but remains concerned that the expression "in the course	See our response under 7.2.

Issues 7: Removal of the phrase "in connection with" from the expression "for the purpose of, in the course of, or in connection with" (Proposed section 1 of Schedule 1 to the Bill)			
		of" could be capable of a fairly wide interpretation and therefore casting the net too wide.	
7.4	• International Publishers Association	The use of infringing copies without offering for sale or external distribution still prejudices the normal exploitation of a copyright work. The phrase should therefore be retained.	During the discussion of the Suspension Ordinance, quite a number of Members considered that the expression had cast the criminal net too wide. This led to the suspension of the expression under the Ordinance so far as criminal offences are concerned. Also, in our public consultation conducted in late 2001, among those who responded to the proposed deletion of "in connection with", most supported the proposal. Hence our proposal to remove the expression so that activities only incidental or marginally related to business will not be covered. IPA seems to suggest that following the removal of the expression the use of infringing copies without involving the act of sale or external distribution will not be caught. In fact, under the proposed section 118A, a business may still be caught even if the use of infringing copies is not for sale or external distribution so far as the four categories of works are concerned. The

Issues 7: Removal of the phrase “in connection with” from the expression “for the purpose of, in the course of, or in connection with” (Proposed section 1 of Schedule 1 to the Bill)			
			expression “in the course of” generally covers activities that form an integral part of the business. When an activity is only incidental to the business, it may still be covered by the expression if a degree of regularity can be established.

Issue 8 : Removal of criminal and civil liabilities of non-commercial dealings in relation to parallel imports (Clauses 2, 3 and 4 of the Bill)			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
8.1	• Consumer Council • The Chinese General Chamber of Commerce • The Chinese Manufacturers' Association of Hong Kong • Hong Kong Bar Association • Hong Kong Society of Accountants • Federation of Hong Kong Industries • Hong Kong General Chamber of Commerce • Heads of Universities Committee (HUCOM) Inter-Institutional Task Force on Reprographic Rights Licensing • Joint University Librarians Advisory Committee • Hong Kong Library Association • The Hong Kong Academy of Performing Arts • Association of American Publishers • International Publishers Association • The Australian Chamber of Commerce (AustCham) • Motion Picture Industry Association (MPIA) • IFPI	Apart from the last six organisations at the left column, the rest support the proposal in principle. Consumer Council considers that the liability in relation to commercial dealing in parallel-imported copies should be removed as well. Hong Kong Society of Accountants has a similar view. Hong Kong General Chamber of Commerce remains open on whether the removal should apply to films and musical recordings. For those which object to the proposal, the Association of American Publishers considers that it may have negative impact on the business and employment of the local authorized distributor and local publishing industry. International Publishers Association considers that business importers must be presumed to have greater actual knowledge of trading standards and regulations and have a higher responsibility than consumers to	We note that there continues to be disagreement in the community about this subject. The proposed removal of criminal and civil liability of non-commercial dealings with parallel imported copies of copyright works is in step with the growing popularity of purchases through the Internet, and encourages enterprises, in particular small and medium enterprises (SMEs) in using genuine products by paying at a lower price. On the other hand, when liberalizing the parallel imported products, we should take into account the interests of copyright owners, exclusive licensees and sole distributors. Hence our proposal to maintain the existing restrictions on commercial dealing in parallel-imported copies. We believe our proposal has struck a right balance between these considerations. As regards the worries of the AustCham, we wish to point out that with timely and

Issue 8 : Removal of criminal and civil liabilities of non-commercial dealings in relation to parallel imports (Clauses 2, 3 and 4 of the Bill)			
	• **HK Video Development Foundation Ltd. (HKVDF)**	understand and obey relevant laws. AustCham expresses concern about the practical difficulty to differentiate legitimate parallel imports from pirated copies or illegitimate used parallel import copies, and worries that as a result the proposed liberalisation could create confusion and may actually reduce the ability of enforcement bodies to tackle the ever increasing problem of end user piracy. MPIA considered that extending liberalisation to movies will greatly affect the film industry since business enterprises (e.g. hair saloon) can play parallel-imported movies on show in the cinema. **HKVDF echoed MPIA's views, adding that the proposed liberalisation will destroy the "window system" of the industry under which a movie can be released in different media and formats to capitalise the uniqueness of different markets. It also took the view that the public performance rights may not be available to its**	sufficient information provided by the copyright owners, our enforcement team should have no difficulty in identifying parallel imported products and pirated products. On the other hand, if a business end user is charged with the use of an infringing copy of copyright work which he knows or has reason to believe to be a parallel imported copy, he can invoke the defence under proposed section 118B(1). For MPIA's concern, if a business plays or shows a film (parallel imported or otherwise) in public without the authorization of the copyright owner, he may be civilly liable under section 27 which provides that the playing or showing of a work in public is an act restricted by the copyright in a sound recording, film, broadcast or cable programme. The copyright owner can bring civil action against the business. The proposed removal of end user liability relating to parallel imported copyright works does not affect the rights of owners under section 27. Subsequent to the Bills Committee meeting on 8 September, we met the representatives

Issue 8 : Removal of criminal and civil liabilities of non-commercial dealings in relation to parallel imports (Clauses 2, 3 and 4 of the Bill)			
		members who are mainly exclusive licensees for the manufacturing, sale and distribution of the movies and may not enjoy the public performance rights. **HKVDF proposed that corporate end users using the parallel imported copy for their business be criminalised or at least subject to civil remedy. It also suggested that if public performance right was considered to be the protection for the industry against the public playing or showing of a film or sound recording by a business after the proposed relaxation, we should consider following the UK laws to criminalise playing or showing in public of a film or sound recording.** IFPI took the view that criminal and civil liabilities should remain unchanged in the case of the use of parallel imported copy of musical recordings by corporate end users. **In its subsequent submissions in January 2004, IFPI pointed out that the use of a parallel imported copy of a copyright work by a corporate end user (other than for its**	from MPIA and IFPI who further expressed their concerns as follows. <u>IFPI</u> The proposed liberalisation will adversely affect their business. According to IFPI, the music industry nowadays generates quite a substantial amount of income from selling new songs (usually in digital format) to karaoke. If the restrictions are removed, karaoke may parallel import musical products lawfully released to karaoke in places outside Hong Kong. The music industry is aware that they will continue to enjoy the right of public performance under section 27 of the Copyright Ordinance even after the liberalisation. Playing songs in karaoke which is an act of public performance therefore still needs their permission. This is however not sufficient from their point of view because licence fee generated from the act of public performance and income generated from selling the songs are two separate sources of income. For the former, IFPI is collecting the licence fee on behalf of all its members through general licensing agreement which is not

Issue 8 : Removal of criminal and civil liabilities of non-commercial dealings in relation to parallel imports (Clauses 2, 3 and 4 of the Bill)			
		own private use) such as making available or supplying such copy to and/or at the request by any member of the public for such public member's own enjoyment would unreasonably prejudice the legitimate interests of copyright owner or exclusive licensees and such activity must amount to infringement. It also commented that the scope of the term "affects prejudicially" in the civil and criminal provisions relating to parallel importation is not precise. (Please see item 10.8 for IFPI's previous suggestion regarding the meaning of "affect prejudicially".) IFPI also commented that where electronic copies are concerned, the proposed relaxation would mean that the end-users could freely swap the copies, thereby affecting the interest of copyright owners significantly.	song specific. They consider that it is not possible to rely on the public performance licence agreement to recover potential income loss arising from the example cited bove. <u>MPIA</u> MPIA holds the view that the proposed liberalisation will have a significant impact on the interest of the film industry. They worry that local businesses, such as coffee shops and restaurants, will parallel import the VCD or DVD version of a movie (which may be released in the Mainland at the same time as such movie is shown in the theatres in Hong Kong) following the liberalisation and plays the parallel-imported copies of such movies in the course of their business. This will discourage people from seeing the movie in cinemas, thereby reducing the incomes generated from the box office which in turn may affect the income that can subsequently be generated from other sources such as issuing the DVD version of the movie in overseas markets. Whilst acknowledging that the public

Issue 8 : Removal of criminal and civil liabilities of non-commercial dealings in relation to parallel imports (Clauses 2, 3 and 4 of the Bill)			
			showing of the movie in VCD and DVD versions in the above example will remain an infringement act because of the public performance right under section 27 of the Copyright Ordinance, MPIA consider that it would be difficult for a film company to enforce the right. For instance, it would be difficult for a film company to identify all the businesses showing the parallel-imported copies of the relevant movie. Also damages will already have been done before the film company can get injunctions from the court to prohibit the showing of parallel-imported copies of the movie by other businesses. **<u>Response to the latest submission of HKVDF and IFPI</u>** **We note HKVDF's and IFPI's reservation on the proposed liberalisation. As we mentioned previously (see our comments in response to MPIA above), if a business plays a film or sound recording (parallel imported or otherwise) in public without the authorization of the copyright owner, he may be civilly liable under section 27 which provides that the**

Issue 8 : Removal of criminal and civil liabilities of non-commercial dealings in relation to parallel imports (Clauses 2, 3 and 4 of the Bill)			
			playing or showing of a work in public is an act restricted by the copyright in a sound recording, film, broadcast or cable programme. It appears to us that both organisations consider this inadequate and would like to maintain criminal end-user liability. **As we have pointed out in our previous responses, during the public consultation on the Copyright Ordinance in late 2001, a majority of the respondents support the proposed removal of criminal and civil liabilities of business end-users in relation to parallel imports. Users generally consider that with the restriction removed, they will have more choices in purchasing products from overseas at more competitive prices. In particular, the Library Association considers that, with the restriction removed, libraries will have more choices in purchasing products at more competitive prices. Also, timely acquisitions of some copyright works will not be possible should the restriction be maintained. The Academy of Performing Art takes the view that the**

Issue 8 : Removal of criminal and civil liabilities of non-commercial dealings in relation to parallel imports (Clauses 2, 3 and 4 of the Bill)			
			proposed liberalisation will enable educational institutions to acquire foreign copyright materials faster from overseas for teaching and study purposes. **Liberalising parallel importation is a sensitive area and requires a fine balancing between the interest of copyright owners and users. Our proposal has been drawn up after wide public consultation and is in line with our free market principle that free flow of genuine goods should be encouraged. We would like to hear Members' views on this particular area.** **As regards IFPI comments that the term "affects prejudicially" in the civil and criminal provisions relating to parallel importation is not precise, as we have indicated earlier under item 10.8, we consider it unnecessary to further define the term "prejudicial distribution" as the court will consider relevant cases with flexibility according to their specific circumstances.** **Regarding IFPI's comments on**

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			electronic copy, we would further discuss with IFPI to understand their concerns in this aspect.
8.2	• Association of American Publishers • International Publishers Association	Considers that exhibition of parallel imported copies of works for promotion of culture or distribution of parallel imported copies of works in classroom teaching are not associated with end uses.	Our proposal will remove civil and criminal liability for exhibiting in public parallel-imported copies other than for the sale or hire of those copies, and for distributing such copies other than for profit or financial reward or to such an extent as to affect prejudicially the copyright owner. For example, exhibiting in public a parallel-imported book for the promotion of culture, or distributing a limited number of parallel-imported copies for classroom use, would not attract any civil or criminal liability. This is consistent with our objective to remove civil and criminal liability for the use of parallel-imported copies of works in a business context.
	• Association of American Publishers	**Worries that the drafter's intent appears to be to remove liability for**	**To the extent that the exhibition is done for the purpose of sale or hire, and that the distribution is done for profit or**

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		infringing activities that are not associated with end-use and impinge on exhibition or distribution rights.	**reward, or to such an extent as to affect prejudicially the owner of copyright, these acts still attract both civil and criminal liability when infringing copies are involved.**
8.3	• Motion Picture Association	The removal of end-user liability should in no way compromise the protection against public performance of films, broadcasts, and cable under section 27 of the Copyright Ordinance. At the every least, would like to seek a statement in the final explanatory material accompanying the 2003 Bill clarifying that the amendments do nothing to detract from the protections under section 27.	The removal of criminal and civil liabilities of non-commercial dealings (including use by end-users) in relation to parallel imports under sections 30, 31, 118 and 118A will not affect the operation of section 27. In other words, the performance, playing or showing of the parallel imported copies of relevant copyright works is still an infringing act (civil) under section 27.
8.4	• **ALA of LegCo**	**Under the proposed section 30(2)(b), how can a person's purpose of importing parallel-imported copy be ascertained? Is a person required to declare his purpose when he imports a parallel-imported work into Hong Kong?**	**A person is not and will not be required to declare his purpose of importing.** **For a civil action under proposed section 30(2)(b), it is the plaintiff who needs to collect relevant evidence before taking up civil proceedings.** **With respect to the criminal side, the current enforcement practice against**

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			parallel importation is largely based on complaints. However, Customs may raise suspicion about the purpose of an import based on the evidence available, including circumstantial evidence such as the quantity of the infringing goods that have been imported and the identity of the importer, and carry out investigation to ascertain if an import offence has been committed. This is similar to the situation regarding import of infringing copies under existing section 118(1)(b). In any event, the importer and other relevant offenders may be caught under other proposed provisions if they deal in the parallel-imported copies after their importation.

Issue 9 : Provision of a new defence against the end-user criminal liability of employees in proposed section 118A(3)			
	Organisations/Individuals	**Views/Concerns**	**Administration's Response**
9.1	• Consumer Council • The Australian Chamber of Commerce • The Chinese General Chamber of Commerce • The Chinese Manufacturers' Association of Hong Kong • Hong Kong Small and Medium Enterprises Association Ltd • The Hong Kong Society of Accountant	Support the proposal	We note the support.
9.2	• The Bills Committee	To clarify whether a company could be regarded as an employee and be eligible for the defence under proposed section 118A(3).	While it is difficult to envisage a practical situation in which a company is employed by another as an employee under a contract of employment, we are considering amending proposed section 118A(3) in the Bill to put it beyond doubt that the defence is only available to a natural person. **The existing defence reads "…it is a defence for the <u>person</u> charged to prove that his possession of the infringing copy occurred in the course of his employment and that the infringing copy was provided to him by or on behalf of his employer <u>for use in the course of</u>**

Issue 9 : Provision of a new defence against the end-user criminal liability of employees in proposed section 118A(3)			
			<u>his employment</u>." **Since the word "person" may include a company, we have amended the wording to read: ….it is a defence for a defendant who is <u>an employee</u>……" We consider that this is sufficiently clear and there is no need to further specify that the employee must be a natural person as one can hardly argue that a company is an employee of another. A company is a separate entity. It may enter into contract to supply goods or services but it can hardly be argued as an employment.** **In addition, we have amended the second reference to "in the course of his employment" to read "for the purpose of or in the course of the trade or business in question" to better align the scope and wordings of the defence with those of the offence.** **The revised defence is at <u>Annex to Table 9</u> for reference and we will consult interested parties.**
9.3	• Business Software Alliance (BSA) • Hong Kong General Chamber of Commerce • Hong Kong Group Asian Patent	BSA considers that employees who knowingly use pirate software should be held responsible. The General Chamber of Commerce holds the	The employee defence is drawn in response to the outcome of a public consultation exercise. The public is concerned that criminal sanction is too harsh for employees, who may not be able to

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	Attorneys Association • American Chamber of Commerce (AmCham) • Business Software Alliance (BSA)	view that unlawful coercion by employers should not be a ground for breaking the law. The Hong Kong Group Asian Patent Attorneys Association, AmCham and BSA are concerned that the defence may be abused by management and employees. The Asian Patent Attorneys Association and the AmCham are concerned that employees designated with the responsibility to procure infringing copies of the four categories of work may rely on this defence, whereas BSA is concerned that the defence might allow decision-makers in businesses to insulate themselves from liability.	reject the use of pirated products for fear of losing their jobs. To address this concern, we propose to provide a defence against criminal liability for employees who use pirated copies of works which have been supplied by their employers. The Legislative Council had been briefed before we proposed the defence in the Bill. We do not agree that the defence would be abused by management and employees. Using the example of an employee responsible for procuring infringing copies, first he needs to prove that the infringing copy was provided to him by or on behalf of his employer. He will be liable if he cannot prove the defence. If the employee proves the defence successfully, his employer will then be criminally liable under section 118A(1), for the employer has constructively possessed the copies through his employees with a view to the copies being used in his business. In addition, the company, as a body corporate, is also subject to prosecution in the above scenario. Under section 118A(1), the company as a body corporate can be liable if infringing copies are used in its business, because – (a) the infringing copies are the asset of the company. The company exercises control

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			over the infringing software through the board of directors; and (b) it is the intention of the company that the infringing copies should be used by the company through its employees. Where the company is ruled to have committed an offence, under section 125 of the existing Ordinance, members of senior management of the company would commit the same offence as the company does if they are involved in the decision to use the infringing copies in business. Therefore, the decision makers of a company may not find it easy to escape their liability. If the concern is that members of management can claim ignorance of the infringing copies being used in business, we would like to point out that it is already a defence under the existing law for any person (whether employee or not) to prove that he did not know and had no reason to believe that the copy in question was an infringing copy. Even without the proposed employee defence, the management can still claim that they had no knowledge and had no reason to believe that the copy in question was an infringing copy. However, in so doing, they must give proof as

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			required by the law.

Annex to Table 9

Copyright (Amendment) Bill 2003

Draft

Clause 4, proposed section 118A

118A. Offences in relation to possession of infringing copies of certain categories of works for use in any trade or business

(1) A person commits an offence if he possesses an infringing copy of a copyright work that is a computer program, movie, musical sound recording, musical visual recording or television drama with a view to the copyright work being used, without the licence of the copyright owner, in doing any act for the purpose of or in the course of any trade or business.

(2) Subsection (1) does not apply in relation to an infringing copy that is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made.

(3) In proceedings for an offence under subsection (1), it is a defence for a defendant who is an employee to prove that his possession of the infringing copy occurred in the course of his employment and that the infringing copy in question was provided to him by or on behalf of his employer for use for the purpose of or in the course of the trade or business in question.

(4) Subsection (3) does not apply in the case of an employee who –

(a) where the employer is a body corporate, is a director,

manager, secretary or other similar officer of the body corporate or is a person purporting to act in any such capacity or, where the affairs of a body corporate are managed by its members, is a member with functions of management as if he were a director of the body corporate;

(b) where the employer is a partnership, is concerned in the management of the partnership;

(c) where the employer is a sole proprietorship, is concerned in the management of the proprietorship; or

(d) in any other case, is concerned in the management of the employer's business.

(5) Subsection (1) does not apply to a copy of a computer program that is in printed form.

(6) Subsection (1) does not apply to the possession of a copy of a computer program in the case where –

(a) the computer program has been made available to the public for the purposes of section 26(1) and was so made available together with another work (not being a computer program itself) that requires the use of a computer program to be viewed or listened to; and

(b) the person possessing the computer program does so with a view to the computer program being used for viewing or listening to the other work mentioned in paragraph (a).