

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	<p><u>Trade organisations</u></p> <ul style="list-style-type: none"> • 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 <p><u>Professional organisations</u></p> <ul style="list-style-type: none"> • Hong Kong Bar Association • Hong Kong Society of Accountants <p><u>Education organisations/ training institutes</u></p> <ul style="list-style-type: none"> • 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.

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	<ul style="list-style-type: none"> • HUCOM Inter-Institutional Task Force on Reprographic Rights Licensing • Joint University Librarians Advisory Committee <p><u>Others</u></p> <ul style="list-style-type: none"> • Consumer Council 		
1.2	<p><u>Publication industry</u></p> <ul style="list-style-type: none"> • 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 	<p>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</p>	<p>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</p>

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	<p>Enterprise, Inc.</p> <ul style="list-style-type: none"> • Pearson Education (parent 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 	<p>International Publishers Association considers that it is not 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).</p>	<p>provide for a similar offence for business end-user. The relevant provision in the UK law¹ is couched in 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:</p> <p>“Any person who infringes a copyright wilfully either</p> <p>-</p> <p>(1) for purposes of commercial advantage or private financial gain, or</p> <p>(2) by the reproduction or distribution, including by</p>

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.

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	<p>(China) Ltd</p> <ul style="list-style-type: none"> • 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 • International Publishers Association • The Hong Kong Copyright Licensing Association Ltd. • The Newspaper Society of Hong Kong <p><u>Trade organisations</u></p> <ul style="list-style-type: none"> • American Chamber of Commerce 		<p>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.”</p> <p>The scope of the US law appears to be wider than our proposed provision, in the sense that the elements under (a) and (b) above do not appear to be confined to a business context.</p> <p>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.</p>

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			<p>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 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.</p> <p>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</p>

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	<ul style="list-style-type: none"> • Association of American Publishers 	<p>Considers that the term “commercial scale” in Article 61 of the TRIPS not only covers resale scenario, it also catches a</p>	<p>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.</p> <p>Some publishing industry organisations suggest that our current proposal of confining business end-user 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.</p> <p>As pointed out above, TRIPS (Article 61) only requires members to provide for criminal procedures and penalties to be applied in cases of</p>

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		<p>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 squarely under the category of “piracy on a commercial scale”.</p> <p>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.</p>	<p>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 work are above the requirement of TRIPS.</p> <p>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 Korea and Taiwan 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</p>

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			Australia and Singapore (which are common law countries) does not provide for a business end-user offence.
1.3	<ul style="list-style-type: none"> • 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 or portion of a program originally transmitted by means of radio waves by a sound broadcasting corporation licensed in Hong Kong.	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 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	<ul style="list-style-type: none"> • 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.)

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	<ul style="list-style-type: none"> • Association of American Publishers 	<p>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). Downloading the e-book without authorization should attract criminal liability under proposed section 118A(1).</p>	<p>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, 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).</p>
1.5	<ul style="list-style-type: none"> • The Australian Chamber of Commerce (Austcham) 	<p>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</p>	<p>See our response in 1.2 above. Also, end user criminal liability does not apply to photocopies.</p>

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		be appropriate to apply criminal sanctions to all forms of copyright works (e.g. photocopies).	
1.6	<ul style="list-style-type: none"> 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 proposals.

Issues 2: Detailed comments on proposed section 118A (End-user liability)			
	Organisations/Individuals	Views/Concerns	Administration's Response
2.1	<ul style="list-style-type: none"> • The Hong Kong Bar Association 	<p>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.</p>	<p>We met the Bar Association on 24 October 2003 to clarify their concern. We agree to consider making the necessary changes so that the scenarios such as those mentioned by the Bar Association will not be caught.</p>
2.2	<ul style="list-style-type: none"> • The Hong Kong Group Asian Patent Attorney Association • Business Software Alliance • American Chamber of Commerce • Motion Picture Industry Association 	<p>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 <u>the specific trade or business</u> 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</p>	<p>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</p>

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		suggests the same but also considers that the definition in section 196A should be removed.	section 118A(1) are at <u>Annex to Table 2</u>. 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • The Society of Accountants • Movie Producers and Distributors Association 	<p>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.</p> <p>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.</p>	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

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			works should apply to both profit-making and non-profit-making businesses.
2.5	<ul style="list-style-type: none"> • The Law Society of Hong Kong • Business Software Alliance (BSA) • American Chamber of Commerce (Amcham) 	<p>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.</p> <p>Members of the Bills Committee asked about the rationale for section 118A(5)(a) at the meeting on 8 September.</p>	<p>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</p>

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			<p>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 liability under section 118A.</p> <p>In fact, provisions similar to proposed section 118A(5) are currently provided under section 2(b) of the Suspension Ordinance.</p> <p>After having discussed with BSA and considered the matter further, we agree that there is room for further refinement of the scope of exemption in section 118A(5). Relating to proposed section 118A(5)(b), we are considering to further restrict the exemption to computer programs which are possessed for the purpose of viewing or listening to other works embodied in them more so than for other purpose. Relating to section 118A(5)(a), we will give further thoughts to appropriate amendments.</p>
2.6	<ul style="list-style-type: none"> • 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	<p>Our responses are as follows-</p> <p><u>The word “feature film” be replaced by “movie”</u></p> <p>The word “feature film” wherever appearing will</p>

Issues 2: Detailed comments on proposed section 118A (End-user liability)			
	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>technical amendments</p> <ul style="list-style-type: none"> • To remove the reference “in doing any act” in section 118A(1)(b) • To remove the reference “a copyright work that is” in the first line of section 118A(5) 	<p>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.</p> <p><u>To remove the reference “in doing any act” in section 118A(1)(b)</u></p> <p>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 copy 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.</p> <p><u>To remove the reference “copyright work that is” in the first line of section 118A(5)</u></p> <p>The wording “a copyright work that is a computer program” in subsection (5) replicates the wording used in subsection (1)(a).</p>
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	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

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		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.	196A and the proposed section 118A are linked. We shall take into account the views of ALA in revising the proposed section 196A.

Copyright (Amendment) Bill 2003

Redraft of section 118A(1)

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.

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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<p><u>For suggestion (a)</u></p> <p>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</p>

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<ul style="list-style-type: none"> • 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 	<p>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:</p> <p>(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;</p> <p>(b) the term "a copying service" should cover business located within an educational establishment that offers reprographic copying services;</p> <p>(c) the term "principal work" should refer to work for research or private study and non-commercial use.</p>	<p>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.</p> <p><u>For suggestion (b)</u></p> <p>The offence under proposed section 118C(2) covers all profit-making copying service, regardless of the location of the business.</p>

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			<p><u>For suggestion (c)</u></p> <p>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.</p> <p>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 –</p> <p>(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</p>

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			<p>financial reward can attract criminal liability.</p> <p>(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).</p> <p>To address such confusions, we are considering to revise proposed section 118C along the following line:</p> <p>(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</p>

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			<p>copying services to the public and, where such a business is carried on at more than one place, means each such part of the business carried on at a different place;</p> <p>(b) it is a defence for the person charged to prove that the infringing copy was made otherwise than for the purpose of or in the course of the copying service business;</p> <p>(c) it is a defence for the person charged to prove that the infringing copy was made otherwise than for profit or reward; and</p> <p>(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 was an infringing copy of the copyright work.</p> <p>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 prove any element relating to the making of the infringing copy.</p> <p>However, we take the view that a person</p>

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service		
		<p>should not be caught for possessing an infringing copy which was made otherwise than for the purpose of or 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.</p> <p>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.</p> <p>The relevant draft Committee Stage Amendments (CSAs) are at <u>Annex A to Table 3</u>. A scenario table explaining the effect of the new proposal is at <u>Annex B to Table 3</u>.</p>

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
	<ul style="list-style-type: none"> • Association of American Publishers 	<p>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 preferable to cover copying services regardless of whether they are profit making.</p>	<p>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.</p> <p>Under the definition of “copying service business” (see (a) above), the business concerned is one that is “conducted for profit”. Therefore, whether the business is really profit- making is irrelevant.</p>
3.4	<ul style="list-style-type: none"> • ALA of LegCo 	<p>What if a copy shop possesses only 1 infringing copy and he has the intention to 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?</p>	<p>The copyshop will not be liable under the proposed section 118(1)(e)(ii) because the 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.</p>

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service		
3.5	<ul style="list-style-type: none">• See above for organisation of publishing industry	<p>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-</p> <ul style="list-style-type: none">• the infringement copy included in the principal copyright work contains no more than 10% of the work infringed. <p>The rest of the publishing industry organisations have proposed more detailed amendments to section 118C(4)(b) as follows-</p> <p>(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</p> <p>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.</p> <p>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 reprographic copy made in order to exploit the defence.</p> <p>In the unlikely event that such abuse arises after the introduction of the new law, we would consider tightening up the relevant provisions.</p> <p>Regarding the suggestion that the 20%</p>

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service		
	<p>reprographic copies of the principal work;</p> <p>(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</p> <p>(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.</p>	<p>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.</p> <p>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.</p> <p>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 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.</p> <p>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</p>

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			proposed section 118C(4) and (5). The relevant draft CSAs are at <u>Annex A to Table 3</u>.
3.6	<ul style="list-style-type: none"> • 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.	<p>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.</p> <p>As stated in item 3.5 above, we are considering to remove the defence. The relevant draft CSAs are at <u>Annex A to Table 3</u>.</p>
3.7	<ul style="list-style-type: none"> • 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 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

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			CSAs are at <u>Annex A to Table 3</u>.
3.8	<ul style="list-style-type: none"> • The Hong Kong Bar Association • The Hong Kong Group Asian Patent Attorneys Association • American Chamber of Commerce (AmCham) 	<p>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.</p>	<p>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.</p> <p>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).</p> <p>As stated in item 3.5 above, we are considering to remove the defence. The relevant draft CSAs are at <u>Annex A to Table 3</u>.</p>
	<ul style="list-style-type: none"> • The Bills Committee 	<p>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.</p>	<p>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.</p>

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
3.9	<ul style="list-style-type: none">• 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.	<p>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.</p> <p>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 <u>Annex A to Table 3</u>.</p>
3.10	<ul style="list-style-type: none">• 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.	<p>Under proposed section 118C(2), it is an offence for a copy-shop to possess <u>two or more copies</u> 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 making of one copy of copyright work may not necessarily be an infringing act.</p> <p>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</p>

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			<p>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.</p> <p>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 copyshop 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 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</p>

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
			<p>possession of 2 or more infringing copies.</p> <p>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).</p> <p>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 A to Table 3.</p>
3.11	<ul style="list-style-type: none"> • The Hong Kong Bar Association 	<p>Does not understand the reason for using the term “substantially identical reprographic copies” as a copy reproduced by reprographic means should be identical to the original work.</p>	<p>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 copies are not entirely identical with the copyright work.</p>
3.12	<ul style="list-style-type: none"> • Hong Kong Bar Association 	<p>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:</p>	<p>While it takes time to study in detail the suggested wording, our preliminary views are set out below.</p>

Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service

		<p>“(2) A person commits an offence if, for the purpose of or in the course of a business that includes the providing <u>provision</u> of a copying service, he possesses 2 or more substantially identical reprographic <u>infringing</u> copies of <u>the same</u> a copyright work as published in a book, magazine or periodical, being copies that are infringing <u>copies of the copyright work.</u>”</p> <p>“(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 <u>is</u> available free of charge to members of the public who wish to acquire their own copy.”</p> <p>(The original subsection 3 will become subsection 4)</p> <p>“(4) (5) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that –</p> <p>(a) he possessed the infringing copies <u>formed part of</u> by virtue only of the fact that he possessed reprographic copies of another work (“principal work”), <u>which he possessed</u> in which reprographic</p>	<p>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.</p> <p>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.</p> <p>As for the proposed amendments to section 118C(4), we will further study and revert in due course.</p> <p>As mentioned in item 3.3, we are considering to revise proposed section 118C. The relevant draft CSAs are at <u>Annex A to Table 3.</u></p>
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Issues 3: Proposed section 118C - Proposal to introduce a specific offence for possession of infringing copies by a copying service			
		<p>copies the copyright work to which the charge relates forms part of the principal work; and</p> <p>(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.”</p>	

Copyright (Amendment) Bill 2003

Section 118C

118C. Offence in relation to possession of infringing

copies by a copying service

(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, where such a business is carried on at more than one place, means each such part of the business carried on at a different 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 was made otherwise than for the purpose of or 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 was made otherwise than for profit or 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 was an infringing copy of the copyright work.

Likely Scenarios under the Administration’s revised proposal for the offence in proposed section 118C of the Copyright (Amendment) Bill 2003

Under the revised proposed section 118C(2), a person commits an offence if, for the purpose of or in the course of a copying service business¹, 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.. The following defences are available to the person charged under this revised proposed offence:

- (1) Proof that the infringing copy was made otherwise than for the purpose of or in the course of the copying service business.
- (2) Proof that the infringing copy was made otherwise than for profit or reward.
- (3) Proof that he did not know and had no reason to believe that the copy was an infringing copy of the copyright work.

Circumstances under which a person (one who operates/is employed in a copyshop) is charged and in whose possession an infringing copy of a copyright work (as published in a book, magazine or periodical) is found	Defence available	Outcome if the person charged can prove the defence to the court on balance of probability
<ul style="list-style-type: none"> • The person charged knew that the copy was an infringing copy • The copy was left by a customer for copying service 	(1)	Not guilty

¹ “Copying service business” means a business, conducted for profit, that includes the offering of reprographic copying services to the public and, where such a business is carried on at more than one place, means each such part of the business carried on at a different place.

Circumstances under which a person (one who operates/is employed in a copyshop) is charged and in whose possession an infringing copy of a copyright work (as published in a book, magazine or periodical) is found	Defence available	Outcome if the person charged can prove the defence to the court on balance of probability
<ul style="list-style-type: none"> • The person charged knew that the copy was an infringing copy • The copy was made by another shop of the same group and not for the purpose of or in the course of the copying service business of the shop at which the offence under proposed section 118C occurred 	(1)	Not guilty
<ul style="list-style-type: none"> • The copy was made for the purpose of or in the course of the copying service business • The person charged knew that the copy was an infringing copy • The copy was made for business end use (for example, accounting purpose of the business), not for profit or reward 	(2)	Not guilty
<ul style="list-style-type: none"> • The copy was made for the purpose of or in the course of the copying service business • The person charged did not know and had no reason to believe that it was an infringing copy 	(3)	Not guilty

Issues 4: Defence under proposed section 118B

	Organisations/Individuals	Views/Concerns	Administration's Response
4.1	<ul style="list-style-type: none"> • Hong Kong Group Asian Patent Attorneys Association • The Law Society of Hong Kong 	<p>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.</p> <p>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.</p> <p>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.</p>	<p>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.</p> <p>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.</p> <p>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</p>

Issues 4: Defence under proposed section 118B			
			<p>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’.</p> <p>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</p>

Issues 4: Defence under proposed section 118B			
			<p>enquiries in order to prove the defence under proposed section 118B(1).</p> <p>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.</p>
4.2	<ul style="list-style-type: none">The Law Society of Hong Kong	<p>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</p>	<p>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.</p>

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	<ul style="list-style-type: none">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).	<p>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.</p> <p>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.</p>

Issues 5: Specifying a profit making motive in proposed section 118

	Organisations/Individuals	Views/Concerns	Administration's Response
5.1	<ul style="list-style-type: none"> • Australian Chamber of Commerce 	<p>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.</p>	<p>We note the support.</p>
5.2	<ul style="list-style-type: none"> • 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 	<p>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”.</p> <p>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.</p> <p>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.</p>	<p>The offences under existing section 118(1)(d) and (e) of the Ordinance can be described for convenience as offences relating to <i>end user liability</i> and offences relating to <i>dealing in</i> 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).</p> <p>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</p>

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>They suggest keeping the reference “for the purpose of or in the course of any trade or business”.</p> <p>BSA suggest adding “or any other material advantage” to the reference “for profit or financial reward”.</p> <p>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.</p>	<p>inconsistent with the revised definition of “business” under proposed section 198(1).</p> <p>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 <u>Annex to Table 5</u>.</p> <p>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 <u>Annex to Table 5</u>.</p> <p>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</p>

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	Views/Concerns	Administration's Response
			section 118A(1). In the example quoted, 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	<ul style="list-style-type: none"> • Hong Kong Group Asian Patent Attorneys Association • American Chamber of Commerce • The Law Society of Hong Kong 	<p>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.</p>	<p>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 <i>per se</i> 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</p>

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	Views/Concerns	Administration's Response
			<p>meaningful application, for example, 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.</p>
5.4	<ul style="list-style-type: none"> • The Law Society of Hong Kong 	<p>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</p>	<p>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.</p> <p>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</p>

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	Views/Concerns	Administration's Response
		copyright”.	trade or business” and to remove the word “financial” from the expression “for profit or financial reward. The relevant draft CSAs are at <u>Annex to Table 5</u>. We will consider if similar amendments need to be made to proposed sections 30, 31, 118D and 120(2).
5.5	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	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

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>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 that in the new section 118D(2). Why is there a different approach?</p>	<p>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 years and effective in tackling copyright offences in Hong Kong. We consider it appropriate to continue to adopt the current approach.</p> <p>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</p>

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	Views/Concerns	Administration's Response
			financial reward.
5.7	<ul style="list-style-type: none"> • ALA of LegCo 	<p>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 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?</p> <p>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?</p> <p>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</p>	<p>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 reward) as the profit or financial reward (provided he eventually sells his collection) does not arise from the act of storage.</p> <p>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).</p> <p>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</p>

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>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 person criminally liable (such as student A) even though he is not in the course of trade or business.</p>	<p>same also applies to the bookshop.</p> <p>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 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 <u>Annex to Table 5</u>. 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.</p>
5.8	<ul style="list-style-type: none"> • ALA of LegCo 	<p>Is there any authority for the term "for financial reward" to be translated as "經濟報酬" ?</p>	<p>There are terms similar to the expression "for financial reward" in other domestic laws, and their Chinese translations are set out below -</p>

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	Views/Concerns	Administration's Response
			<ul style="list-style-type: none"> • "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. <p>We are of the view that the Chinese term reflects the policy intention.</p> <p>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 <u>Annex to Table 5</u>.</p>
5.9	<ul style="list-style-type: none"> • ALA of LegCo 	<p>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</p>	<p>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.</p>

Issues 5: Specifying a profit making motive in proposed section 118			
	Organisations/Individuals	Views/Concerns	Administration's Response
		about an article that is being transhipped?	(Section 118(2) of existing Ordinance refers).

Copyright (Amendment) Bill 2003

Redraft of section 118

118. Offences in relation to infringing copies generally

- (1) A person commits an offence if, without the licence of the copyright owner –
- (a) he makes for sale or hire an infringing copy of a copyright work;
 - (b) he makes for profit or reward an infringing copy of a copyright work;
 - (c) he imports an infringing copy of a copyright work into Hong Kong otherwise than for his private and domestic use;
 - (d) he exports an infringing copy of a copyright work from Hong Kong otherwise than for his private and domestic use;
 - (e) for the purpose of or in the course of any trade or business, he –
 - (i) sells or lets for hire;
 - (ii) offers or exposes for sale or hire;
 - (iii) exhibits in public with a view to effecting the sale or letting for hire of infringing copies of a copyright work; or

- (iv) distributes for profit or reward,
an infringing copy of a copyright work;
- (f) for the purpose of or in the course of any trade or business,
he transports or stores an infringing copy of a copyright
work for profit or reward;
- (g) he distributes (otherwise than in circumstances to which
paragraph (e)(iv) applies) an infringing copy of a
copyright work to such an extent as to affect prejudicially
the owner of the copyright.

(2) A person commits an offence if he possesses an infringing copy
of a copyright work with a view to, without the licence of the copyright owner,
and for the purpose of or in the course of any trade or business –

- (a) selling or letting for hire;
- (b) distributing for profit or reward; or
- (c) transporting or storing for profit or reward,

the infringing copy.

(3) A person does not commit an offence under subsection (1)(c) if –

- (a) the infringing copy is an infringing copy by virtue only of
section 35(3), and was lawfully made in the country,
territory or area where it was made; and
- (b) he imports the infringing copy other than for the purpose
of –
 - (i) selling or letting for hire the infringing copy; or
 - (ii) distributing for profit or reward, or to such an
extent as would affect prejudicially the owner of
the copyright,

the infringing copy.

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

(5) For the purposes of any proceedings for an offence under subsection (1)(f), where a person transports or stores an infringing copy of a copyright work in circumstances that give rise to a reasonable suspicion that the person is transporting or storing the infringing copy for profit or reward, the person is presumed in the absence of evidence to the contrary to be transporting or storing the infringing copy for profit or reward.

(6) For the purposes of any proceedings for an offence under subsection (2)(c), where a person possesses an infringing copy of a copyright work with a view to transporting or storing the infringing copy in circumstances that give rise to a reasonable suspicion that the person is possessing the infringing copy with a view to transporting or storing the infringing copy for profit or reward, the person is presumed in the absence of evidence to the contrary to be possessing the infringing copy with a view to transporting or storing the infringing copy for profit or reward.

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	<ul style="list-style-type: none"> • Hong Kong Society of Accountants • Australian Chamber of Commerce in Hong Kong 	<p>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.</p> <p>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.</p>	<p>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.</p> <p>The prosecution must prove to the satisfaction of the court two elements before it can make use of the presumption, namely –</p> <ul style="list-style-type: none"> (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. <p>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</p>

Issues 6 : The presumption for the offence of transportation and storing in proposed sections 118(4) and (5)			
			<p>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.</p> <p>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.</p>
6.2	<ul style="list-style-type: none">• Consumer Council	<p>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.</p>	<p>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.</p>

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	<ul style="list-style-type: none"> • Consumer Council • The Chinese General Chamber of Commerce • The Chinese Manufacturers' Association of Hong Kong 	Support the proposal	We note the support.
7.2	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> International Publishers Association 	<p>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.</p>	<p>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.</p> <p>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</p>

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.
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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	<ul style="list-style-type: none"> • 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 	<p>Apart from the last five 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.</p> <p>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.</p> <p>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</p>	<p>We note that there continues to be disagreement in the community about this subject.</p> <p>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.</p> <p>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.</p> <p>As regards the worries of the AustCham, we wish to point out that with timely and</p>

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)

		<p>understand and obey relevant laws.</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p>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).</p> <p>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.</p> <p>Subsequent to the Bills Committee meeting on 8 September, we met the representatives</p>
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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)

from MPIA and IFPI who further expressed their concerns as follows.

IFPI

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

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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 above.

MPIA

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.

In considering the proposed liberalization, Members may wish to note that during the public consultation on the Copyright Ordinance in late 2001, a majority of the respondents support the proposal. Users generally consider that with the restriction removed, they will have more choices in purchasing products 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

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)			
			<p>acquisitions of some copyright works will not be possible should the restriction be maintained. The Academy of Performing Art takes the view that the proposed liberalisation will enable educational institutions to acquire foreign copyright materials faster from overseas for teaching and study purposes.</p> <p>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.</p>
8.2	<ul style="list-style-type: none"> • Association of American Publishers • International Publishers Association 	<p>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.</p>	<p>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</p>

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)			
	<ul style="list-style-type: none"> • Association of American Publishers 	<p>Worries that the drafter’s intent appears to be to remove liability for infringing activities that is not associated with end-use, which impinges on exhibition or distribution rights.</p>	<p>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.</p> <p>To the extent that the exhibition is done for the purpose of sale or hire, and that the distribution is done for profit or 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.</p>
8.3	<ul style="list-style-type: none"> • Motion Picture Association 	<p>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</p>	<p>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</p>

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)			
		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.	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	<ul style="list-style-type: none">• 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 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

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)			
			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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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.
9.3	<ul style="list-style-type: none"> • Business Software Alliance (BSA) • Hong Kong General Chamber of Commerce • Hong Kong Group Asian Patent Attorneys Association • American Chamber of Commerce (AmCham) 	BSA considers that employees who knowingly use pirate software should be held responsible. The General Chamber of Commerce holds the view that unlawful coercion by employers should not be a ground for	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 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

Issue 9 : Provision of a new defence against the end-user criminal liability of employees in proposed section 118A(3)

- Business Software Alliance (BSA)

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.

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 over the infringing software through the board of directors; and

Issue 9 : Provision of a new defence against the end-user criminal liability of employees in proposed section 118A(3)

(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 required by the law.

Issue 10 : Others

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

Issue 10 : Others			
	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>The News Clipping Industry Working Committee raised concern on the lack of bargaining power on end-users in negotiating with licensing bodies on the fees charged for copying newspaper articles, books, periodicals and printed materials, etc.</p> <p><u>Guidelines</u></p> <p>HUCOM and JULAC urged the Government to revise the "Guidelines for photocopying of printed works by not-for-profit education establishments" (Guidelines) to cover newspaper or to legislate the extent of free permissible copying in relation to newspaper. They also suggested devising clear guidelines for fair dealing under section 38 (concerning research and private study) in the Copyright Ordinance whether or not the US model of fair use is adopted.</p>	<p>of the Copyright Ordinance and to develop voluntary codes of practice. So far, three licensing bodies, namely Hong Kong Copyright Licensing Association, Hong Kong Reprographic Rights Licensing Society, and Composers and Authors Society of Hong Kong (CASH), have registered. As for codes of practice, we understand some existing licensing bodies, such as the CASH and IFPI, already have codes of practice in place.</p> <p>In consultation with schools and copyright owners, we issued the Guidelines last September. The Guidelines, which set down conditions for schools to determine the extent of permissible photocopying of printed works for instruction purposes, were developed on a consensus basis among the copyright owners and school users with the Director of Intellectual Property as the convenor of the meetings between the parties. We note the suggestion of HUCOM and JULAC to revise the Guidelines to cover newspaper. When the Guidelines were first developed, the intention was to cover newspaper. Towards the end of the discussion, the newspaper proprietors did</p>

Issue 10 : Others			
	Organisations/Individuals	Views/Concerns	Administration's Response
		<p><u>Others</u></p> <p>The Library Association considers that fast changing areas in teaching and learning, such as electronic copying within the ambit of web-based education, distant leaning & IT for education, and the provision of information services are not addressed in the Bill.</p> <p>A Sai Kung District Council Member suggests that schools should be allowed to make a one-off payment for photocopying of copyright works.</p>	<p>not support the Guidelines and did not want permissible copying of articles in newspapers to be included in the Guidelines. In view of the comments of HUCOM and JULAC, we shall convey their request to the newspaper proprietors. The Intellectual Property Department is pleased to be the contact point to bring the relevant parties together. We also note the suggestion of HUCOM and JULAC on developing guidelines for section 38 in the Copyright Ordinance, we will consider the matter.</p> <p>We welcome the Library Association to put forward detailed proposals so that we can study them further.</p> <p>As mentioned above, the Guidelines have been developed for schools to determine the extent of permissible photocopying of printed works for instruction purposes. Where the quantity of</p>

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			photocopying exceeds the permissible extent in the Guidelines, it is more appropriate for the schools to negotiate with copyright owners to work out the appropriate fees.
10.2	<ul style="list-style-type: none"> • Motion Picture Association 	Raised concern on “made-to-order” reproduction of filmed entertainment, suggested that the copyshop offence should be expanded to combat against other kinds of reproduction, such as duplication of filmed entertainment.	The concern is already addressed in the Bill. Under the proposed section 118(1)(a), the making of infringing copies of copyright works for profit or financial reward, such as the make-to-order reproduction, will attract criminal liability. The section covers all kinds of copyright works, including films.
10.3	<ul style="list-style-type: none"> • The Hong Kong Institute of Architects 	There is no mechanism to provide the copyright or charging system for others to use architect's design of their buildings. Requests that credit should be given to the architects of building projects that are used for advertising or commercial purposes.	<p>A building as a work of architecture is regarded as a kind of artistic work and protected by copyright under section 5 of the Copyright Ordinance.</p> <p>A building as a copyright work is subject to some permitted acts, e.g., making a graphic work representing a building (section 71(2)(a)), making a photograph or film of a building (section 71(2)(b)), broadcasting or including in a cable programme service a visual image of a building (section 71(2)(c)), all these are not considered infringement of the copyright in a building. Similar provisions also exist in the</p>

Issue 10 : Others			
	Organisations/Individuals	Views/Concerns	Administration's Response
			UK legislation. Whether the use of the copyright in a building is subject to the permission of the relevant copyright owner has to be decided on a case-by-case basis.
10.4	<ul style="list-style-type: none"> The Hong Kong Institute of Trade Mark Practitioners 	<p>Considers that the Copyright Ordinance will benefit from a definition of "lawfully made", and suggests following wording to be inserted to section 198(1) –</p> <p>"Lawfully made" () means, in relation to the copyright works in question, the work was made by or with the consent of the copyright owner in the country, territory or area in which the work is made, irrespective of whether the actual sale or other disposal of the copyright work is in contravention of any restriction or prohibition relating to the sale or other disposal of the copyright work, as between the copyright owner and the actual maker of the copyright work."</p>	<p>The explanation of the meaning of the term "lawfully made" is provided under section 35(9) of the Copyright Ordinance, to be repealed and replaced by a new section 198(3) when the Copyright (Amendment) Ordinance 2003 ("2003 Ordinance") comes into operation. While we agree that existing provision gives a non-exhaustive definition for "lawfully made", as far as we are aware the definition has not given rise to any practical difficulties.</p>
10.5	<ul style="list-style-type: none"> The Hong Kong Institute of Trade Mark Practitioners 	<p>The proposed amendments to sections 30 and 31 would appear to prevent wholesaler/retailer from importing and</p>	<p>The Copyright (Amendment) Bill 2001 was enacted by the LegCo in July this year and has become the 2003 Ordinance. It is expected to</p>

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	Organisations/Individuals	Views/Concerns	Administration's Response
		selling computer software, which was the whole purpose of the Copyright (Amendment) Bill 2001	be commenced later this year. Upon the commencement, a parallel imported computer software product will not be an infringing copy under section 35(3) of the Copyright Ordinance. Importing or selling parallel imported copies of computer software products will be allowed upon the commencement of the 2003 Ordinance.
10.6	<ul style="list-style-type: none"> Consumer Council 	Points out a clerical error under the proposed section 31(5): on line 2, "subsection (1)(c)" should be amended to read "subsection (1)(d)".	We do not see that this is an error. The term "distribution" under the proposed section 31(5) refers to the word "distributes" in the phrase "distributes for the purpose of, in the course of, or in connection with, any trade or business" in section 31(1)(c).
10.7	<ul style="list-style-type: none"> IFPI Motion Picture Industry Association (MPIA) 	IFPI considers that musical visual recordings should be regarded as sound recording and therefore enjoy protection of rental rights. MPIA suggests that protection for rental rights should be introduced for movies.	We will study the proposal. We need to consult all concerned parties on the proposal and this will take some time. It may be more appropriate to pursue the proposal in a separate exercise.
10.8	<ul style="list-style-type: none"> IFPI 	Suggest that certain guidelines be included to make the meaning of "affect prejudicially" clearer.	We are not aware of the existence of such proposed guidelines in other jurisdictions. In our view, there is no need to formulate the proposed guidelines as the current provisions provide the court with flexibility when

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

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

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

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

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			necessary to provide a long term solution to address the issue of end-user criminal liability and such legislation should be introduced sooner rather than later to remove any uncertainty.