MOTION PICTURE ASSOCIATION – INTERNATIONAL
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Under license from Motion Picture Association

MOTION PICTURE ASSOCIATION
Audiovisual Entertainment
For Global Audiences

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Commerce, Industry and Technology Bureau
Attn: Division 3
Level 29, One Pacific Place
88 Queensway
Hong Kong

Re: Consultation Document – Review of Certain Provisions of Copyright Ordinance

To Whom It May Concern:

We have taken note of the above-referenced paper released by the Commerce, Industry and Technology Bureau on December 9, 2004 and are pleased to offer herewith our views and comments in response to the subject matter under consideration.

The Motion Picture Association (MPA) is a trade association representing seven international producers and distributors of theatrical motion pictures, home video entertainment, and television programming, MPA Member Companies include:

Buena Vista International, Inc.
Metro-Goldwyn-Mayer Studios Inc.
Paramount Pictures Corporation
Sony Pictures Releasing International
Twentieth Century Fox International Corporation
Universal International Films, Inc.
Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

As we have previously noted to the Bureau, MPA works to eliminate unfair and restrictive trade practices and non-tariff barriers in the international marketplace. The MPA also directs active anti-piracy programs to protect its Member Companies' copyrighted content through the enforcement of copyright and other laws in 68 territories throughout the world, including Hong Kong. We therefore appreciate the Bureau's

initiative to ensure that Hong Kong's Copyright Ordinance will continue to provide an effective legislative infrastructure within which our Member Companies can operate.

Some of the issues included in the Bureau's consultation paper would directly impact upon those operations, whereas certain other issues appear to be less germane. However, there are a number of other considerations, particularly with respect to so-called "digital" or "Internet" issues that are likewise relevant to MPA and its Member Companies but that unfortunately have not been included in the consultation paper. We have therefore structured our comments accordingly within the attached annex, the contents of which may be summarized as follows:

Chapter 1 – Copyright Exemption
MPA respectfully declines to comment on the proposed introduction of a quantitative test regarding the act of copying for research or private study purposes. The introduction of a non-exhaustive regime of copyright exemptions may be too drastic at this time and we therefore favor the retention of the current approach. Although we do not see the need to introduce any further such exemptions at this time, we believe the Legislative Council should be guided in its deliberations by international standards and accepted principles

Chapter 2 – Scope of Provisions Related to End-User Piracy
MPA respectfully declines to comment on these provisions of the consultation paper.

Chapter 3 – End-User Liability with Parallel Imported Copies
MPA strongly supports the maintenance of the status quo without the introduction of any further relaxation of liability exemptions.

Chapter 4 – Defence for Employees against End-user Criminal Liability
MPA respectfully declines to comment on these provisions of the consultation paper.

Chapter 5 – Proof of Infringing Copies of Computer Programs in End-user Piracy Cases
MPA respectfully declines to comment on these provisions of the consultation paper.

Chapter 6 – Circumvention of Technological Measures for Copyright Protection
MPA strongly supports the introduction of criminal sanctions against activities under section 273 of the Copyright Ordinance, as well as the further extension of civil and criminal remedies against the act of circumventing access control measures.

Chapter 7 – Rental Rights for Films
MPA respectfully declines to comment on these provisions of the consultation paper.

Chapter 9 – Issues Relating to World Intellectual Property Organization Internet Treaties
Although the subject matter under consideration does not appear to be directly applicable to MPA Member Companies, we agree in principle that Hong Kong should strive to meet or exceed accepted international standards of protection for all categories of copyrighted works.

Non-paper Issues Relating to the Protection and Enforcement of rights on the Internet

MPA believes that the Copyright Ordinance would benefit from further clarification in order to more effectively address acts of infringement occurring over the Internet, primarily in the context of so-called "Peer-to-Peer" transmissions. For example, Internet Service Providers should bear explicit liability in certain circumstances and should be required to take more active steps to prevent the unauthorized distribution of copyrighted works over their networks in such instances. The introduction of statutory damages may also be especially appropriate, given the possible difficulties faced by civil plaintiffs in recovering compensation for their losses from defendants.

Further comments detailing these positions are included within the attached annex and we remain available for any further questions that the Bureau or the Legislative Council may have. Thank you, once again, for the opportunity of having participated in the legislative process and for your continued vigilance and support for the protection and enhancement of intellectual property rights in Hong Kong.

Sincerely,

Frank S. Rittman
Vice President, Asia-Pacific Region

attach.

Annexure to the submission by the Motion Picture Association (MPA) in response to the Consultation Document - Review of Certain Provisions of Copyright Ordinance released by the Commerce, Information, and Technology Bureau on December 9, 2004

Chapter 1 – Copyright Exemption

1. Copyright Exemption

(a) whether a quantitative test should be introduced in the Hong Kong Copyright Ordinance to determine if the act of copying for research or private study purposes is fair dealing;
MPA Response: In determining whether any particular act of copying constitutes a "permitted act" under Section 37(3) of the Ordinance, both the Bureau and the Legislative Council should be guided by the traditional, internationally-accepted 'tripartite" test set forth in Article 9(2) of the Berne Convention; namely that the reproduction be allowed only "in certain special cases" that do not conflict with the normal exploitation of a work and that do not unreasonably prejudice the legitimate interests of the work's author.

Given this prescript, however, we therefore suggest that the proposed introduction of a quantitative test in Sections 38 and 39 of the Copyright Ordinance should be limited in both its scope and application. For example and as noted by the Bureau's examination of the law in Australia and Singapore, the copying of certain types of works (e.g., Films, Broadcasts, and Cable programmes) in a published edition or electronic format for research or private study purposes, regardless of the quantity of the original work(s) copied, would not ordinarily be considered fair dealing and we favor the retention of this principle.

(b) whether a non-exhaustive regime of copyright exemption based on the principles of fair dealing should be introduced in Hong Kong or whether we should maintain the current approach of exhaustively listing all the copyright exempted acts;
MPA Response: As noted in paragraphs 1.9 of the Bureau's consultation paper, the abandonment of Hong Kong's fair dealing provisions in favor of adopting a non-exhaustive "fair use" criteria would represent a drastic departure from Hong Kong's judicial tradition and we agree that this could result in a great deal of legal uncertainty. Given the lack of any established jurisprudence in Hong Kong regarding the application of fair use principles, MPA queries whether such an important shift is appropriate within the context of this particular legislative exercise. Although we understand the Bureau's interest to "float the idea" as referenced in paragraph 1.8 of the consultation paper, we believe there is no pressing need to undertake such a sweeping revision and this particular juncture.

(c) if it is considered that a non-exhaustive regime based on the principles of fair dealing should be adopted, what the essential elements should be; and
MPA Response: We do not advocate the introduction of a non-exhaustive regime based at this time. Legal uncertainty resulting from any change from an exhaustive to a non-exhaustive framework could provide an additional obstacle for aggrieved parties to initiate legal action, since there are increased legal costs as well as the adverse risk of establishing a bad legal precedent. Furthermore, MPA's experience in a number of regional jurisdictions has been that on-the-ground enforcement officials are often more reluctant to take action without clear and specific directives.

(d) if it is considered that the current approach of exhaustively listing all the exemptions should be maintained, whether and how the current list of exemptions should be expanded bearing in mind a possible expansion in the scope of end-user criminal liability (see Chapter 2).
MPA Response: We do not see the need to introduce any further liability exemptions at this time and favor the maintenance of the status quo. Future possible exemptions should be considered by the Legislative Council only in situations that would not run afoul of the aforementioned tripartite test referenced in Article 9(2) of the Berne Convention.

For example, fair dealing limitations against the rights of copyright owners are particularly questionable in a digital environment, given the ease with which unlimited distributions of perfect-quality copies may be effected.

In all instances, it should be remembered that neither 'fair dealing' nor 'fair use' principles constitute rights extended to consumers, per se, but that each serve merely as limitations on the rights of copyright owners. While mindful of the need to strike an appropriate balance of interests, MPA believes the Legislative Council is best equipped to determine that balance on a case-by-case basis in response to particular new phenomena and consumer behaviours.

That said, MPA does not agree with previous proposals now repeated in Appendix II of the consultation paper relating to free public showings or the playing of Broadcasts or Cable Programs.

2. <u>Scope of Criminal Provisions Related to End-user Piracy</u>

Whether and how the scope of end-user criminal liability should be expanded to cover more types of copyright work in addition to computer programs, movies, television dramas and musical recordings.
MPA Response: We respectfully withhold comments on these proposals given that MPA's Member Company products already receive the benefit of criminal protection against certain end-users of pirated works.

3. End-user Liability Associated with Parallel Imported Copies

(a) whether the existing criminal and civil liability pertaining to parallel imported copies should be relaxed;

MPA Response: We strongly favor the retention of the status quo and recommend that the Legislative Council not contemplate any further relaxation of the existing criminal and civil liability provisions

We have previously communicated our views on this issue both to the Bureau and to the Legislative Council on a number of occasions and those views have not changed since then. We see no compelling reason at this point to upset the balance for MPA Member Company products through further legislative amendment.

The case for protection against parallel imports of audiovisual entertainment is grounded in four broad principles. First, the legal nature of copyright law and a comparison with international precedent favors Hong Kong's retention of the present system of protection. Second, market factors specific and unique to the motion picture industry merit particular consideration and protection against parallel imports. Third, parallel import protection conforms with the HKSAR Government's overall social and economic policy and helps ensure Hong Kong's status as a regional hub for creative development and consumption. Finally, protection against parallel imports of audiovisual entertainment reflects this administration's commitment to the eradication piracy and the protection of legitimate markets.

Copyright owners should be afforded the opportunity to maximize the return from their creative endeavors on an international level. Because copyright law is not supranational, it follows that the exercise of rights in one jurisdiction should not result in the exhaustion of rights in another, unrelated jurisdiction. The exclusive right to authorize or prohibit parallel imports is thus in accordance with the international copyright principle of territoriality. As we have previously indicated in prior submissions, a strong majority of countries surveyed by MPA, including the world's major motion picture markets, have various provisions in their copyright laws that provide protection against unauthorized parallel imports[1] *Indeed, MPA believes a clear international precedent in favor of parallel import protection instead is evident.*

[1] 38 of the top 50 film markets for MPA Member Company products retain some degree of protection against the unauthorized parallel importation of audiovisual works. Jurisdictions within the Asia-Pacific region enjoying such protection include Australia, China, Hong Kong, India, Indonesia, Japan, Malaysia, New Zealand, the Philippines, South Korea, Taiwan, and Thailand..

Throughout the world, motion picture release takes place in a series of media and in a staged process, known as "windows", which provides for motion pictures to be released in different formats in sequential order. The process starts with theatrical release, which is followed by a hold back period, called a window, before the motion picture is released on home video (videocassette, laser disc, VCD and DVD). After home video, there is typically another window before release on Pay TV. This is followed by another window before exhibition on free-to-air TV. The window period between the conclusion of the release of a motion picture in one medium and its release in another medium varies from motion picture to motion picture and from territory to territory. The order of distribution to these media also can vary in the business judgment of the distributor, if, for example, an early release of the motion picture on free-to-air television is more valuable than the immediate release of that title on Pay TV.

This sequential pattern has been established as a flexible industry practice, providing each media with an exclusive window in which to maximize revenues from that form of distribution and bringing order to the market. The windows system promotes the development of theaters, video outlets, Pay TV operations and broadcasters, while maximizing returns in each medium. As distributors rely on revenue from each of these sequential media to ensure the profitability of each motion picture, the disruption of distribution in one medium by unauthorized distribution in another medium can have a significant negative impact on the overall profitability of the picture.

The sequential release system for films in cinema and video format is a time-tested international strategy in orderly marketing that does not unreasonably prolong the availability of films in video format for the Hong Kong market. Although theatrical cinema exhibition, as a matter of public policy, should be preserved, MPA acknowledges that individuals should have the right to rent or buy films in video format. We believe the current provisions of the Copyright Ordinance strike a proper balance of interests.

Effective protection against unauthorized parallel imports also benefits the local economy by encouraging the growth of businesses related to the distribution of motion pictures, such as local advertising companies and promotional merchandise suppliers, local video duplicators, dubbing studios, and packaging. Not only does this offer consumers wider availability of choices, it adds value to the local economy. Growth of these businesses encourages further investment, provides numerous employment opportunities, and generates tax revenues.

MPA member companies have thus invested heavily in the Hong Kong market by setting up their own offices or appointing exclusive territorial licensees to service the market. This commitment to the market creates jobs in related organizations, including

-Local distributors and wholesalers
-Local merchandising companies
-Local video duplication facilities
-Local advertising executives, including creative and account executives
-Local printers and other promotional suppliers

Parallel importers essentially obtain a "free ride" on promotional activities undertaken by the authorized distributor, including advertising, posters and point of sale promotional materials. Parallel importers typically do not make similar investments in promotion. Instead, they "cherry pick" the top grossing motion pictures and concentrate all of their efforts on those high volume titles, ignoring the broader selection of motion pictures that may appeal to the Hong Kong consumer, without supporting the growth of the local industry in any way. In response to parallel importation, authorized video distributors may be forced to forego less profitable movies – making them unavailable to the Hong Kong consumer.

Unauthorized parallel imports thus tarnish long established relationships between retailers committed to sourcing authorized product through local distributors. Whether a film company has established a local subsidiary or contracted an exclusive licensee to distribute video product, retailers depend on local distributors for their inventories. This includes access to a wide variety of titles – the latest releases, special interest videos and catalog product. Parallel imports compromise this important business relationship and may serve as a disincentive for video distributors to provide the wide variety of titles that video retailers currently have available to them.

Protection against parallel imports also addresses consumer concerns as to product integrity and supply; unauthorized distributors generally provide product support such as warranties and updated versions of sales support software, which rarely are available from parallel importers.

Because parallel imports are sold as imported (limiting choice to the consumer by offering titles only in the language of origin) they have no value-added impact on the local economy. They effectively cannibalize the retail industry in the long term by stealing jobs from the local production industry and by chipping away at the economies of scale associated with providing local businesses sufficient volume of retailer orders. The opportunity costs of decreasing local volume, employment and community patronage far exceed the cost savings retailers may realize through parallel imports.

Finally, parallel import protection also significantly assists copyright enforcement in Hong Kong. With the advent of new digital technologies, video products are even more susceptible than was previously the case to large-scale illicit manufacture. Illicit copyright pirates have already released hundreds of film titles on DVD and the packaging on some makes it difficult to detect that the product is pirate without close inspection. A lack of control over parallel importation increases the risk of covert import

of counterfeit goods. Without such protection, piracy is likely to increase as copies of motion pictures from a wide variety of countries are freely imported into Hong Kong, making it difficult to differentiate legitimate from unauthorized copies. Pirates do use the parallel import channel to bring in clandestine product.

The potential for counterfeit DVDs to slip through Customs will be far greater if there are no controls on parallel imports. In particular, the absence of restrictions on parallel importing leaves open the possibility that counterfeiters may disguise inauthentic imports. Unsuspecting retailers are likely to be duped into believing that the counterfeit product is a cheaper parallel import, when in fact it is a counterfeit.

(b) the extent to which the liability should be relaxed; and
MPA Response: We do not support the relaxation of present liability standards for the reasons given above.

(c) whether the existing period during which parallel imported copies will attract criminal and civil liability should be shortened, and if so, for how long.
MPA Response: We believe that, as far as MPA Member Company products are concerned, the existing period during which parallel imported copies will attract criminal and civil liability represent an appropriate balance and should not be shortened

4. <u>Defence for Employees against End-user Criminal Liability</u>

(a) whether specific defence should be provided to employees found in possession of infringing copies provided by their employers for use in the course of their employment;
MPA Response: We respectfully withhold comments on this proposal given that the subject matter of works under consideration would not extend to MPA Member Company products.

(b) the proposed employee defence as described in paragraph 4.2 of Chapter 4;
MPA Response: No comment, as above.

(c) the suggestion of some copyright owners in the software industry as described in paragraph 4.4 of Chapter 4; and
MPA Response: No comment, as above.

(d) other means to address the concerns about the impact of the end-user criminal liability on employees required by their employers to use infringing copies.
MPA Response: No comment, as above.

5. Proof of Infringing Copies of Computer Programs in End-user Piracy Cases

How the proof of infringing copies of computer programs may be facilitated in order to enhance effective enforcement of the end-user criminal liability provisions.
MPA Response: We respectfully withhold comments on this proposal given that the subject matter of works under consideration would not extend to MPA Member Company products.

6. Circumvention of Technological Measures for Copyright Protection

(a) whether criminal sanctions against activities under section 273 of the Copyright Ordinance as set out in paragraph 6.2 of Chapter 6 should be introduced;
MPA Response: We strongly favor the introduction of criminal sanctions against activities under section 273 of the Copyright Ordinance.

The 1996 WIPO Treaties require the provision of "adequate legal protection and effective legal remedies against the circumvention of effective technological measures" that copyright owners use to "restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law." This means that in order to be 'adequate and effective,' anti-circumvention provisions must prohibit the business of providing circumvention tools, as well as outlawing the act of defeating a technological protection measure. Meaningful sanctions, including criminal penalties, should therefore be available. Trafficking in circumvention devices or services can be a big and profitable business and curbing the future growth of such 'enterprises' requires tough sanctions that will eliminate profitability and impose painful restrictions on the finances and personal freedoms of such pirates. Criminal penalties must be available in such instances, since civil penalties alone will prove to be ineffective in deterring serious cases of infringement. For example, in cases where offending devices are widely available at the retail level, instituting criminal litigation against a large number of retailers is a significant challenge and obstacle for private plaintiffs. Generally speaking, criminal sanctions offer a more efficient and practical means of enforcement in such cases. We believe the Legislative Council can adequately determine the extent of activity and the class of violators to which such criminal sanctions might apply.

(b) whether the scope of section 273 should be expanded to cover devices or means designed to circumvent access control measures, and whether criminal sanctions should be introduced for the expanded section 273; and
MPA Response: We strongly support the expansion of section 273 to cover devices or means designed to circumvent access control measures and the corresponding introduction of criminal penalties against such acts of infringement.

As noted above, the 1996 WIPO Treaties require protections for technological measures "that restrict acts in respect of" copyrighted materials, whether or not those acts themselves constitute an infringement of copyright. It should not be necessary to prove that a prohibited act of circumvention constitutes, or specifically furthers copyright infringement. Similarly, someone who provides the tools which allows another to decrypt, without authorization, an encrypted work in digital form should not escape responsibility by pleading that what the recipient of the tools did with the improperly decrypted work has not proven to be a violation of an exclusive right of the copyright owner.

The United States Copyright Act, for example, contains specific provisions dealing with the circumvention of technological protection measures that effectively control access to works. U.S. law is not limited to circumvention of copy controls, recognizing that technologies to control the public performance or public display of works deserves the same protection as technologies to control their unauthorized reproduction or distribution.

(c) whether civil remedies and criminal sanctions against the act of circumventing copy-protection measures and access control measures should be introduced.
MPA Response: We further support the introduction of civil and criminal sanctions, where appropriate, against the act of circumventing both copy-protection measures and access control measures.

7. Rental Rights for Films

Whether the Copyright Ordinance should be amended to provide rental rights for copyright owners of films which include musical visual recordings and whether such rights should attract criminal sanctions.
MPA Response: We respectfully decline to comment on this aspect of the consultation paper at this time.

8. Issues Relating to the World Intellectual Property Organization Internet Treaties

(a) whether we should grant commercial rental rights to authors of underlying works in phonograms;
MPA Response: Because the category of works contemplated within these provisions do not extend to MPA Member Company products, per se, we respectfully withhold comment on the possible introduction of commercial rental rights to authors of underlying works in phonograms. However, we do support, generally, Hong Kong's accession to internationally-accepted standards of protection for all categories of copyrighted works and note that the subject matter and degree of protection herein under consideration represents one such international standard.

(b) whether we should grant moral rights to performers with regard to their live aural performances or performances fixed in phonograms;
MPA Response: No comment, as above.

(c) whether we should grant commercial rental rights to performers over their performances fixed in phonograms; and
MPA Response: No comment, as above.

(d) whether we should amend the definitions of "performer" and "performance" in the Copyright Ordinance to make certain that they cover artistic works and expressions of folklore.
MPA Response: No comment, as above.

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9. Issues Relating to the Protection and Enforcement of Copyrighted Works over the Internet. (note: there were no specific provisions in this regard contained within the consultation paper)
MPA Comments: The Internet and modern telecommunication technologies offer growth and opportunity for creative industries and benefits to consumers on a global scale. Technological developments and market changes have brought people throughout the world to the threshold of an exciting future in which their access to entertainment, information, education and productivity tools will be more extensive, less expensive, and more convenient than ever before.

However, these benefits will only accrue if intellectual property rights are properly protected. Digital piracy threatens to severely curtail the growth of this new marketplace. Modern legislation must therefore restrain persons from making copyrighted products available via electronic means (e.g., via the Internet) without authorization from the copyright owner. Such restrictions should be without regard to any minimum 'commercial scale' or 'for profit' test, but should focus instead on the injury and potential injury to rightsowners.

The unauthorized "file sharing" of music, movies, and other media is particularly appropriate for consideration in this context. In such situations, rightsholders are injured regardless of whether an infringing copy is made available for a commercial purpose. Where infringing copies of audiovisual works are given away or made available (for free or for profit) via the Internet, injury has been sustained by rightsholders, distributors, and retailers the same as if such works were distributed by means of an optical disk or otherwise. In addition, when copyrighted materials are widely available for free, governments forego the collection of reasonable customs duties, value-added taxes, or sales taxes.

Modern legislation should seek to provide a means of encouraging Internet Service Providers (ISPs) to cooperate with copyright owners in the fight against copyright infringement taking place on their networks, or through the use of their services. Creating blanket immunities for ISPs must be avoided. Laws should require that once an ISP has notice of infringing content that is available via its service, it should be required to act promptly to remove that content or at least disable access to it. "Infringing content" should be defined to include content that manifests traditional copyright infringement (e.g., Internet download of copyrighted movies without authorization), as well as the content that provides the means to circumvent technological protection measures. Notice" should be imputed upon delivery of notice by a rightsholder (or those acting on its behalf) of the existence of infringing material. Failure of an ISP to respond in accordance with such laws should subject the ISP to civil liabilities.

It is vital that procedures for "notice and takedown" of infringing content provide for an expeditious response. The damage caused by infringing content that is available online is closely related to the length of time it is available. Any requirement of lengthy legal proceedings or intervention by third parties prior to takedown of infringing content is problematic.

A prompt notice and takedown procedure includes the risk that some non-infringing content may be affected, to be sure. Some ISPs request indemnity from a rightsholder before the takedown of any content. For rightsholders dealing with Internet piracy on a massive scale, such a requirement is untenable in the new digital world. To the extent that ISPs cannot insulate themselves by contract against liability to their subscribers in such situations, a statutory safe harbor for service providers responding to notices from rightsholders may be appropriate. In sum, the notice and takedown procedure should be streamlined, easy for rightsholders to invoke, and capable of handling a high volume of notices.

Presently, the Copyright Ordinance is devoid of any formalized "notice and takedown" provisions. Hong Kong law does not provide any automatic right for an ISP to take action against any person using the ISPs services to facilitate copyright infringement by means of a peer-to-peer file distribution utility. An ISP cannot be required to forward a copyright infringement notification to an end user. In the event an ISP does not remove infringing material, the only means in Hong Kong by which to determine the identity of the infringer would be to obtain a so-called Norwich Phamacal disclosure.[2] *However, this procedure is slow, cumbersome, and cost ineffective.*[3]

[2] An application for a Norwich Pharmacal order can be made against any person who is not himself a wrongdoer by has been involved with the tortious acts of another and who knows the identity of that infringer. ISPs constitute such persons and, if provided with an IP address, should be able to identify the infringer.

[3] Usually the applicant is required to pay the innocent party's costs incurred in identifying the wrongdoers (including the innocent party's costs incurred in entering an appearance in court).

There is likewise no concept in Hong Kong law of "statutory damages," or damages that are otherwise fixed by reference to a scale. Although Hong Kong legislation provides that an award of additional damages may be awarded once liability for infringement has been established, it is unclear whether such additional damages would be available against individuals involved with peer-to-peer infringement. Even making an application for normal damages bears some concern in this context, as it would invariably require revealing sensitive information (such as profit margins, etc.) which may be necessary to obtain an award of damages. The recovery of compensation for infringement in this context is therefore questionable.

Although these issues are not addressed in the Bureau's consultation document, MPA nonetheless believes that they should be properly considered by both the Bureau and the Legislative Council as an important aspect of any future revision of the Copyright Ordinance.