

**Submissions by various organizations on the Copyright (Amendment) Bill 2006  
after the Administration's introduction of the proposed Committee Stage Amendments  
(as of 12 March 2007)**

<b>(I) Business end-user liability</b>			
	<b>Organizations</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
1.1	<p><b><u>Trade organizations/ Professional bodies</u></b></p> <ul style="list-style-type: none"> <li>• Federation of Hong Kong Industry (FHKI)</li> <li>• Hong Kong Retail Management Association (HKRMA)</li> <li>• Hong Kong General Chamber of Commerce (HKGCC)</li> <li>• Hong Kong Institute of Certified Public Accountants (HKICPA)</li> </ul>	<p><b><u>Business end-user possession offence</u></b> HKRMA supports the Government's proposal of maintaining the scope of the business end-user possession offence (i.e., it only applies to the following four categories of works : computer programs, movies, television dramas, and musical recordings).</p> <p><b><u>Business end-user copying/distribution offence</u></b> FHKI opines that photocopying newspaper/magazine articles for internal circulation, discussion or reference do not involve wilful intent to prejudice the legitimate interests of the copyright owners or profit-making motives. There is no justification for criminalizing such acts so long as no direct financial gain is involved. Besides, the existing legislation already provides adequate channels for copyright owners of printed works to safeguard their interests by seeking legal redress for any economic loss due to copyright infringement. It strongly urges the Government to remove from the Bill the business end-user copying/distribution offence. The HKRMA expresses similar views and considers that the new offence would deter free flow of information and delay the business</p>	<p><b><u>Business end-user possession offence</u></b> Noted.</p> <p><b><u>Business end-user copying/distribution offence</u></b> The proposed business end-user copying/distribution offence is intended to combat significant infringements involving printed works in business. We note the concern of the business community. In formulating the proposed criminal provisions, we have taken great care to address the concern in the community about the impact that the offence may have on dissemination of information. Only infringements that occurred on a frequent or regular basis and exceeded the numerical perimeters to be laid down in the law (i.e., the "safe harbour") would attract criminal liability.</p> <p>The copying and distribution of newspaper/magazine articles for internal circulation in business could constitute significant infringements if the infringing acts are</p>

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		<p>decision-making process. FHKI further opines that the “safe harbour” provision will require very complicated calculations to determine whether an offence has not been committed. Hence the inclusion of such provision cannot address their main concern, namely the scenario of business end-users breaking the law unknowingly.</p> <p>HKICPA is not convinced of the need to introduce the new offence. It makes the following comments –</p> <p>(a) the infringing act must be proved to have resulted in “real and substantial losses”, instead of just “financial loss”;</p> <p>(b) the mechanism of applying “safe harbour” provisions should be spelled out more clearly in the main legislation;</p> <p>(c) the numerical threshold should be high enough to ensure that distribution of newspaper articles for internal purposes is allowed. HKICPA considers that the numerical threshold proposed by the Administration may not be adequate for meeting the operational needs of a sizable professional body (such as HKICPA);</p>	<p>conducted on a regular or frequent basis, and where the extent of copying or distribution exceeds the “safe harbour”. We do not consider it appropriate to exempt such infringing activities from the proposed offence. Business end-users should acquire appropriate licences from the concerned copyright owners if they need to copy for distribution/distribute newspaper or magazine articles for their business use on a regular or frequent basis.</p> <p>The numerical threshold of the “safe harbour” provision seeks to reflect the intention that only significant infringement is to be criminalized. In formulating the proposed numerical threshold, we need to strike a balance between the need for timely information flow and the serious harms that regular or frequent infringements of a significant nature could bring to the concerned copyright owners.</p> <p>We hope that the “safe harbour” can provide certainty to the public while avoiding the creation of loopholes that allow wilful infringers to get away easily. We note FHKI’s concerns that business end-users may still fall into the criminal net inadvertently since the proposed “safe harbour” may not be easy to understand. We will conduct public education activities to publicize, to the business community, the numerical perimeters of the safe harbour</p>

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		<p>(d) it supports the suggestion that distribution for purposes of in-house dissemination of information and sharing of learning resources should be exempted from the provision;</p> <p>(e) it urges the Administration to clarify the treatment of copyright works reproduced on private networks under the new offence and opines that new measures should be introduced only after going through public debate and making reference to overseas practices.</p>	<p>provisions after the Bill is enacted and before commencement of the relevant provisions.</p> <p>On the specific comments raised by the HKICPA, our response is as follows –</p> <p>(a) we will make Committee Stage Amendments (CSAs) to set out more clearly the scope of the empowering provision, i.e. section 119B(14), for the proposed “safe harbour”;</p> <p>(b) under the existing Copyright Ordinance, copying of a work includes storing the work in any medium by electronic means. Distribution of copies under the new offence is not limited to distribution of physical copies. It also covers distribution of digital copies via electronic means. Examples of electronic distribution include distributing scanned copies of news articles by email or uploading the scanned copies onto the company’s intranet for access by its staff. We will consider a separate formulation for the “safe harbour” for distribution over private networks as such a means of distribution is very different from distribution of physical copies or distribution via emails. Besides, appropriate licensing schemes to enable users to upload copies of printed works onto</p>

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		<p><u>Directors'/partners' liability</u>            FHKI strongly objects to shifting the burden of producing evidence to company directors. It emphasizes that criminal sanctions should not be lightly imposed on minor, non-profit motivated copyright infringements and that the proposal is likely to deter investors from investing in Hong Kong. HKRMA expresses similar views and adds that small and medium enterprises (SMEs) have limited resources and expertise about copyright infringement and hence they will be legally vulnerable in cases of unwilful, minor, non-revenue related copyright infringements. While considering the proposed CSAs an improvement for they lessen the burden of proof on directors/ partners, HKGCC remains of the view that it is objectionable to shift the burden of proof to the defendant.</p>	<p>private networks including intranets must be available before the proposed offence could take effect in relation to such means of distribution. Hence, the application of the proposed offence to the private network situation will be deferred until the above-mentioned issues have been sorted out. We will specify this deferred application arrangement in the regulations to be made by SCIT under section 119B(14).</p> <p><u>Directors'/partners' liability</u>            The proposed directors'/partners' liability aims to promote corporate accountability and responsible governance against business end-user piracy. We would like to reiterate that the burden imposed on the defendant is only an evidential burden. If the defendant has adduced sufficient evidence to raise an issue, the prosecution would need to prove beyond reasonable doubt that he has authorized the infringing acts to be done. Furthermore, we will propose CSAs to specify clearly the actions that directors or partners may take to discharge the evidential burden imposed on them. We believe the concerned provisions, as revised, help strike a reasonable balance.</p> <p>We are conducting public education and publicity activities to assist the business community, especially SMEs, to understand</p>

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		<p><u>Defence for employees</u>                      HKICPA raised a scenario whereby an employee may generally have some ability to influence decisions concerning the acquisition, removal or use of infringing copy but he was overruled by others when he sought to use such influence. HKICAP questions whether the employees' defence would still be available to this employee in such scenario. HKICPA suggests that the defence provision should not apply to an employee only when such an employee is a decision-maker. Hence, the words "or influence" should be deleted.</p>	<p>what measures they may put in place in their business against business end-user piracy. For instance, the Administration launched, in collaboration with right owners, the "Business Software Certification Programme" in Oct 2006 to promote best practices in software asset management to SMEs and to encourage compliance with the copyright law. The Programme, pilot in nature, will end in mid-March 2007. We will review the efficacy of the Programme and consider if and when the next phase should be introduced. We will also roll out suitable public education and publicity activities to get the business community, especially SMEs, prepared before the new criminal provisions come into operation.</p> <p><u>Defence for employees</u>                      Whether an employee was in a position to make or influence a decision regarding the acquisition or removal or use of the infringing copy is a matter of fact depending on the circumstances of each case. Where an employee's objection to use infringing copy was overruled by persons of a higher authority, it is our policy intent that he should be entitled to use the "employee's defence" as he should not be regarded as being "in a position to make or influence a decision" in relation to that infringing copy.</p>

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1.2	<p><b><u>Publication industry</u></b></p> <ul style="list-style-type: none"> <li>• The Anglo-Chinese Textbook Publishers Organisation</li> <li>• Chung Tai Educational Press</li> <li>• Enrich Publishing</li> <li>• Happy Mind Ltd</li> <li>• Hong Kong Educational Publishers Association</li> <li>• HK Educational Publishing Co.</li> <li>• Hong Kong and International Publishers' Alliance (HKIPA)</li> <li>• HK Publishing Federation Ltd</li> <li>• Jing Kung Education Press</li> <li>• Precise Publications Ltd</li> <li>• Hong Kong Reprographic Rights Licensing Society (HKRRLS)</li> <li>• Modern Education Network Ltd</li> <li>• Modern Educational Research Society Ltd</li> <li>• Oxford University Press (China) Ltd</li> <li>• Sino United Publishing (Holdings) Ltd</li> </ul>	<p><u>Business end-user copying/distribution offence</u> The book publishers suggest the following amendments –</p> <p>(a) to revise the phrase “a copyright work” in section 119B(1)(a)&amp;(b) to read as “any copyright work” so as to clarify that the offence applies to one who does the relevant infringing act, <i>whether or not in relation to the same copyright work</i>, on a regular or frequent basis;</p> <p>(b) to strike out the new section 119B(5) which excludes the application of the offence to the Internet environment;</p> <p>(c) if the defence provision at section 119B(9) is to be introduced (though they object to such a provision), the defences provided should be based on proof of what occurred prior to the time of the infringement but not based on evidence that is produced afterwards. Besides, the defence should not be operative when it applies only to a few such works while the defendant regularly or frequently infringed copyright in other works.</p>	<p><u>Business end-user copying/distribution offence</u> Our response to the publishers' suggestion is as follows –</p> <p>(a) we will make CSAs to section 119B(a)&amp;(b) to clarify that the infringing acts need not be done in relation to the same copyright work, albeit in a formulation different from the publishers' suggestion. The revised section 119B(1) refers to the act as described in section 119B(1)(a) or section 119B(1)(b) that is done on a regular or frequent basis, and not the copying/distribution of the same copyright work on a regular or frequent basis;</p> <p>(b) it is already an offence under the existing section 118(1)(f) of the Copyright Ordinance (revised as section 118(1)(g) after the enactment of the Bill) if any person distributes an infringing copy of a copyright work to the extent that prejudicially affects the copyright owner. Distribution of infringing copies of copyright works over the Internet platform to which any person can access is likely to be prejudicial to the relevant copyright owners. Hence, we do not consider it necessary for applying the proposed copying/distribution offence to such a mode of distribution; and</p>

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		<p><u>Safe harbour</u> The publishers consider that the Bills Committee should consider the offence provision together with the detailed legislative provisions providing the numerical perimeters within which the infringing acts will not be criminalized (i.e. the "safe harbour" provisions). On the safe harbour, the publishers suggest to</p>	<p>(c) when invoking the defence under the new section 119B(9)(a) or (b), the defendant should produce evidence to the court's satisfaction that prior to the time of the concerned infringement, he has taken adequate and reasonable steps to obtain a licence from the copyright owner but failed to get a timely response from the copyright owner; or has made reasonable efforts to obtain commercially available copies but in vain and the copyright owner has refused to grant him a licence on reasonable commercial terms. The liability of the defendant would not be absolved in a situation where the defence provisions at 119(9)(a)&amp;(b) apply to some of the copyright works in relation to which the concerned infringing acts relate, but taken as a whole, the defendant's acts of making for distribution or distributing infringing copies of other copyright works constitute regular or frequent infringements.</p> <p><u>Safe harbour</u> The Administration's proposed perimeters for the "safe harbour" in relation to books (including academic journals) are as follows –</p> <p>The proposed business end-user copying/distribution offence will not apply if the total retail value of the infringing copies made for</p>

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		<p>clarify that “academic journals” should include all professional, technical and medical journals. They also submit a revised proposal on the numerical perimeters, i.e. the retail value of the total number of infringing copies of books made for distribution or distributed within a 180-day period does not exceed <b>\$3000</b>. Infringing copies made or distributed on a single occasion not exceeding 15% of the books, or cumulatively not exceeding 30% of the books within a 180-day period would not be counted for the calculation of the retail value.</p> <p>(Note: The book publishers’ original proposal was to apply the proposed offence to the infringing acts which were committed regularly or frequently, <b>or</b> if the retail value of the total number of infringing copies made for distribution or distributed within a 180-day period exceeded <b>\$2,000</b>. Infringing copies made or distributed on a single occasion not exceeding <b>15%</b> of the books, or cumulatively not exceeding <b>30%</b> of the books within a 180-day period would not be counted for the calculation of the retail value.)</p>	<p>distribution or distributed within a 180-day period does not exceed <b>\$8,000</b>. Infringing copies made or distributed on a single occasion not exceeding <b>15%</b> of the books, or cumulatively not exceeding <b>50%</b> of the books within a 180-day period would not be counted for the calculation of the retail value.</p> <p>We understand that the book publishers consider the Administration’s proposed safe harbour too lax for fear that significant infringements would be excluded from the criminal net. On the other hand, the business community continues to express reservations against the proposed offence for fear that it would seriously affect dissemination of information in the community. We note the numerical perimeters recently counter-proposed by the publishers. We will further discuss with them as well as the business users, with a view to reaching common grounds on the safe harbour formulation as far as practicable. At the end of the day, a reasonable balance needs to be struck. Since the Bill contains a host of other proposals that help strengthen copyright protection and make copyright exemption more flexible to users, we see merits for early enactment and commencement of the Bill. As more time would be required to discuss with the copyright owners and business users the perimeters of the “safe harbour” provisions and to consider other</p>



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			fine details of the "safe harbour" formulation, the "safe harbour" should be prescribed by way of regulations which will be prepared after the passage of the Bill.

<b>(II) Rental rights for film and comic books</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
2.1	<b><u>Hong Kong Comics and Animation Federation</u></b>	<p>The Federation welcomes the Government's proposal to make amendments so that rental rights for comic books will cover the provision of comic books for on-the-spot reference subject to direct and indirect payment.</p> <p>On the proposed provision, it suggests deleting the test of "substantial attributability" as it will lead to arguments on the threshold for deciding whether a certain price charged is substantially attributable to the provision of comic books for on-the-spot reference. It considers that the test of "direct or indirect payment" sufficient to restrict the operation of comic cafes and tea houses.</p>	<p>The concerned CSA submitted to the Bills Committee has already accommodated the Federation's suggestion.</p>

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3.1	<p><b><u>Publication industry</u></b></p> <ul style="list-style-type: none"> <li>• The Anglo-Chinese Textbook Publishers Organisation</li> <li>• Chung Tai Educational Press</li> <li>• Enrich Publishing</li> <li>• Happy Mind Ltd</li> <li>• Hong Kong Educational Publishers Association</li> <li>• HK Educational Publishing Co.</li> <li>• Hong Kong and International Publishers' Alliance (HKIPA)</li> <li>• HK Publishing Federation Ltd</li> <li>• Jing Kung Education Press</li> <li>• Precise Publications Ltd</li> <li>• Hong Kong Reprographic Rights Licensing Society (HKRRLS)</li> <li>• Modern Education Network Ltd</li> <li>• Modern Educational Research Society Ltd</li> </ul>	<p><u>Fair dealing for education</u></p> <p>The book publishers welcome the Administration's proposed CSAs to restrict the use of the fair dealing provision when applied to the online environment. However, they consider that the technological measures required of educational establishments (especially tertiary institutions) should also cover copy-control measures to restrict "the downloading, printing, forwarding or other subsequent use of the work beyond those uses necessary for giving or receiving instruction in the specified course of study in question or for the purpose of maintaining or managing the network". They suggest imposing this additional condition on tertiary institutions in the Bill and to review the availability or otherwise of such technologies to primary and secondary institutions in one or two years.</p> <p>On the two proposed conditions, the book publishers comment that the copies stored in the school network systems should not, in any event, be kept longer than "the end of the academic year during which a copy of the work was first stored in the network."</p>	<p><u>Fair dealing for education</u></p> <p>The proposed CSAs (that restrict the use of the fair dealing provision when applied to the online environment) are intended to address copyright owners' worries about possible abusive use of their works in school networks. We are wary that the conditions so imposed should not be too stringent. Otherwise, they would unreasonably impair the operation of the fair dealing provision in the school network environment. We believe that the two proposed conditions have helped us to strike the right balance.</p> <p>We have considered using the term "academic year" in the relevant provision. It is noted that this term may not give a clear meaning in respect of some courses provided by certain educational establishments (e.g. certain short-term courses run by tutorial schools) which are not tied to academic year. We are of the view that our proposed formulation of "no longer than 12 consecutive</p>

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	<ul style="list-style-type: none"> <li>• Oxford University Press (China) Ltd</li> <li>• Sino United Publishing (Holdings) Ltd</li> </ul>	<p>The book publishers reiterate their earlier suggestion that the fair dealing provision should not apply to works that are marketed primarily to education institutions, or at a minimum, to make a presumption that, where the work is a textbook or similar product that is primarily marketed in Hong Kong to educational establishments, it should be presumed that the dealing of the work will have a significant detrimental effect on the potential market for or value of the work.</p>	<p>months” provides more certainty and clarity to schools as well as copyright owners. The condition requires that a copy of a work should not be stored in the school network for a period longer than is necessary for the purposes of giving or receiving instruction in the specified course of study and in any case no longer than 12 consecutive months. The determining factor is whether it is necessary to retain the copy in the network for instruction purposes. The 12-month period only sets out the maximum period for the purpose of certainty.</p> <p>We do not agree that the fair dealing provision should not apply to textbooks. This would unduly limit the scope of the fair dealing provision. Moreover, we do not consider it appropriate to expressly set out what activities are presumed to have detrimental effect on the potential market for or value of the work. Under the proposed provisions, the court would take into account all the circumstances of the cases (including the four factors set out in the new section 41A(2)) when determining whether any dealing with a work is fair dealing. The effect of the dealing on the potential market for or value of the work is one of the factors to be taken into account. It should be up to the court to determine whether certain dealing with a work has detrimental effect on the potential market for or value of the work, having regard to the specific circumstances of individual cases.</p>

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		<p>They also opine that “fair dealing by or on behalf of a teacher” can potentially cover commercial activities of copyshops. They suggest limiting the scope of coverage to a clerk or other school employee working under the supervision of a teacher.</p> <p><u>Retention of section 45(2) and related amendments to section 41A</u></p> <p>The book publishers welcome the Administration’s proposed CSA to retain section 45(2) (this section provides that reprographic copying to a reasonable extent will not be a permitted act if there is a licensing scheme available authorizing the copying in question). They, however, object to the proposed CSA to section 41A (the fair dealing provision) which stipulates that the making of</p>	<p>As regards the book publishers’ suggestion to confine the scope of coverage of “persons on behalf of a teacher” to clerks or other school employees working under the supervision of a teacher, we consider that our proposed formulation provides more flexibility as to who may act on behalf of the teacher. We do not wish to limit the persons who could act on behalf of teachers to school employees. We do not consider it reasonable to exclude copyshops altogether from the fair dealing provision where they are acting on the instructions of a teacher to facilitate his/her teaching activities. It is noted from previous enforcement experience that illegal copying of copyright works by copyshops usually involved copying of the entire works in a massive volume. We believe that such kinds of activities would not be considered as fair dealing even if the copyshops claim that they made the copies on behalf of a teacher.</p> <p><u>Retention of section 45(2) and related amendments to section 41A</u></p> <p>The proposed CSA to section 41A will clarify that educational establishments may still rely on the fair dealing provision to make a small number of reprographic copies to facilitate teaching, even if a licensing scheme is available authorizing the copying in question. Ultimately, it is for the court to determine whether the fair dealing provision should apply. We consider that the proposed</p>

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		<p>copies which does not fall within section 45 does not mean that it is not covered by section 41A. They suggest that section 41A should not apply if there is a licensing scheme available authorizing the copying in question, or that at a minimum the court should be instructed to presume that such copying will have a significant detrimental effect on the potential market for the work in question.</p> <p><u>Fair dealing for public administration</u> The book publishers suggest elaborating the factors under section 54A(2), in the interest of preventing the fair dealing provision from adversely affecting the current or future licensing arrangements between publishers and governmental bodies. They suggest adding –</p> <p>(a) “including whether the work is primarily marketed in Hong Kong to the Government, the Executive Council, the Judiciary or to District Councils” after “the nature of the work”;</p>	<p>retention of section 45(2) and the related amendments to section 41A have helped strike a reasonable balance.</p> <p>We do not favor the suggestion of introducing a presumption. As pointed out above, we take the view that it is for the court to consider all the circumstances of the case and take into account the four factors set out at the new section 41A(2)(the effect of the dealing on the potential market for or value of the work being merely one of the factors)when determining whether any dealing with a work is fair dealing. It should be up to the court to determine whether certain dealing with a work has detrimental effect on the potential market for or value of the work, having regard to the specific circumstances of individual cases.</p> <p><u>Fair dealing for public administration</u> As with other fair dealing provisions, the court will consider the facts and circumstances of each individual case when determining whether certain dealing with a work is fair. The four factors (modeled on the fair use provision in the US Copyright Act) merely set out matters that are important and of general application for the court's consideration.</p> <p>In the Bills Committee paper no. CB(1)1913/05-06(01), we have set out the outcome of our research into the relevant US case law as to</p>

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		(b) "including whether and to what extent licences are available authorizing the dealing in question and the person making the dealing knew or ought to have been aware of that fact" after " the effect of the dealing on the potential market for or value of the work".	<p>what constitutes fair dealing. As illustrated by cases in the US, one way of proving market harm is for the plaintiff to show that should the challenged use become widespread, it would adversely affect the potential market for the copyright work. The court will look at the traditional, reasonable, or likely to be developed markets for this purpose. The approach taken by the US courts in interpreting the fair use provision under the US Copyright Act will be of persuasive value to the Hong Kong courts in considering the proposed fair dealing provisions in Hong Kong. We take the view that the market for licensing agreements is likely to be a relevant issue when considering the fourth factor (i.e., the effect of the dealing on the potential market for or value of the work).</p> <p>In view of the above, we do not consider it appropriate to further elaborate the factors as suggested by the book publishers.</p>
3.2	<b><u>International Federation of the Phonographic Industry (HK Group) Ltd.</u></b>	<p><u>Proposal to expand the composition of audience under Section 43</u></p> <p>IFPI disagrees with the Administration's view that the proposed amendment to section 43 is in compliance with the three-step test under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO). It reiterates that the WTO panel might find the amendments not in line with the TRIPS and Berne Convention.</p>	<p><u>Proposal to expand the composition of audience under Section 43</u></p> <p>The proposal to expand the composition of the audience to include the near relatives of pupils is to address the concern raised by the education sector. They consider the existing scope too restrictive and out of step with the practical needs of educational establishments in present-day circumstances.</p>

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			<p>We are satisfied that the proposed amendments would comply with the three-step test.</p> <p>Separately, in light of the comments made by Bills Committee members on the scope of the “near relatives” proposed in the revised section 43, we are considering an alternative drafting approach that does not require defining “near relatives” in the law. The revised formulation should give flexibility to educational establishments in a reasonable way when carrying out this permitted act, without at the same time expanding the scope of the permitted act excessively. We will submit the proposed CSA for the Bills Committee’s consideration.</p>
3.3	<b><u>Hong Kong Institute of Certified Public Accountants (HKICPA)</u></b>	<p><u>Fair dealing provisions</u> HKICPA comments that the fair dealing provisions should be able to achieve a reasonable degree of certainty without introducing an arrangement that is overly rigid and unable to deal effectively with real practical circumstances.</p> <p>It also suggests introducing a fair dealing provision for regulatory and professional bodies in carrying out their statutory or regulatory functions.</p>	<p><u>Fair dealing provisions</u> Noted.</p> <p>In the public consultation exercise which ended in early 2005, copyright owners raised objections against the introduction of a fair dealing provision, whereas views from users were divided. Having carefully considered the views received, we proposed in the Bill that specific fair dealing provisions for education and public administration purposes should be introduced to accommodate the</p>



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		<p><u>Permitted act for persons with a print disability</u>            HKICPA comments that the proposed section 40B(5) would prohibit a person with a print disability from selling an accessible copy at cost after he finished using it. It considers this condition too restrictive, especially in comparison with section 40D(6) which allows a specified body to charge for lending or transferring an intermediate copy at cost.</p>	<p>needs for use of copyright works in these two sectors. It should be noted that there is already a permitted act under the existing Copyright Ordinance (section 59) which provides a copyright exemption for the doing of particular acts specifically authorized by Ordinances unless the Ordinances provide otherwise. Hence, regulatory or professional bodies which do any acts specifically authorized by Ordinances already enjoy copyright exemption under the existing copyright law.</p> <p><u>Permitted act for persons with a print disability</u>            Generally speaking, subsequent dealing (including selling, letting for hire, offering or exposing for sale or hire) of copies made under a permitted act (e.g. sections 41, 44 and 45) is not allowed so that the legitimate interests of the copyright owners would not be unreasonably prejudiced. Copies made under permitted acts, if dealt with subsequently, are to be treated as an infringing copy for the purpose of that dealing and, if that dealing infringes copyright, for all subsequent purposes. It is our starting position that this should equally apply to the making of accessible copies by persons with a print disability and "specified bodies".</p> <p>Organizations which look after the welfare of persons with a print disability reflect to us that they are required to produce accessible copies (such as</p>

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			<p>Braille version) on a regular basis to the beneficiaries of their organizations and the production of accessible copies can be expensive. Having examined the practical needs of such organizations and educational establishments (which may have persons with a print disability as students), we consider it reasonable to make specific provision so that such bodies will be allowed to recover the costs for making and supplying accessible copies. On the other hand, it is considered not unreasonable for individual persons with a print disability to bear the costs of making accessible copies for their own personal use.</p>

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<b>(IV) Anti-circumvention provisions</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
4.1	<p><b><u>Joint Industry Response</u></b></p> <ul style="list-style-type: none"> <li>● Hong Kong Cable TV Ltd.</li> <li>● Television Broadcasts Ltd.</li> <li>● International Federation of the Phonographic Industry (HK Group) Ltd.</li> </ul> <p><b><u>Cable and Satellite Broadcasting Association of Asia (CASBAA)</u></b></p>	<p><u>Defence provision under section 273A</u></p> <p>The Administration proposed to make CSAs to delete reference to “knowledge of copyright infringement” under sections 273A and 273B. Instead, a defence provision under section 273A is proposed so that a user may absolve his liability if he can establish to the court's satisfaction that the act of circumvention is done for the purpose of carrying out a non-infringing act.</p> <p>The Joint Industry Response objects to the proposed defence provision which in its view would create loophole for hackers' activities.</p>	<p><u>Defence provision under section 273A</u></p> <p>Our proposal to remove the “knowledge” requirement is made in response to concerns articulated by copyright owners about the difficulties to prove the mental state of the defendants. With the removal of the “knowledge” requirement, the proposed defence provisions are necessary to ensure that users' legitimate interests to use copyright works under the permitted acts would not be jeopardized.</p> <p>The proposed defence provisions have been carefully crafted to deal with hackers' activities which are of concern to copyright owners. A defendant can only make use of the defence if the act is done for the <i>sole</i> purpose of the doing (<i>whether by the defendant or another person</i>) of another act which does not infringe the copyright in that work or other copyright work. It should be noted that the burden lies on the defendant to prove the defence on a balance of probabilities. It would be difficult for a hacker to prove that the defence is available to him where he conducts an act of circumvention and subsequently disseminates information on method of circumvention to the public over the Internet.</p>

<b>(IV) Anti-circumvention provisions</b>		
<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
	<p><u>Rights of the creators of technological protection measures</u></p> <p>The Joint Industry Response comments that the Administration fails to provide protection for the rights of the creators of technological protection measures (TPMs) as reflected by the proposed amendments to the new section 273(1), section 273D(1) and 273D(3). It considers that their rights must also be included for the proper protection of TPMs.</p>	<p>This is especially the case if the TPM concerned is generally applied in relation to different copyright works. Furthermore, if a hacker distributes, on the Internet, means or devices to circumvent (e.g. software application) he may be held liable for distributing a circumvention device to such an extent as to affect prejudicially the copyright owner under the new section 273B(1)(c). In this context, the plaintiff needs not prove "knowledge of copyright infringement". Nor could the defendant raise this as a defence.</p> <p><u>Rights of the creators of technological protection measures</u></p> <p>The anti-circumvention provisions aim to protect copyright rather than TPMs <i>per se</i>. In line with this objective, persons having the rights to seek remedies under section 273A and 273B are the copyright owner, the exclusive licensee of the copyright owner, and any other person who, with the concerned copyright owner's authority, issues or makes available copies of the copyright work to the public, or broadcasts or includes the work in a cable programme service. As regards the exceptions at section 273D(1) (achieving interoperability of independently created computer programs) and section 273D(3) (research into cryptography), they seek to ensure that legitimate activities which do not infringe copyright should not be impaired by the new provisions. Similar exceptions are also found in the copyright laws of</p>

<b>(IV) Anti-circumvention provisions</b>		
<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
	<p><u>Exception to section 273C for time-shifting purpose</u></p> <p>The Joint Industry Response is of the view that broadcast stations should be allowed to employ TPMs which allow one-time viewing only for the purpose of time-shifting. Any further copying and distribution of the recordings will be prohibited by the TPMs. In this way, the purposes of time-shifting will not be defeated while safeguards against unauthorized copying or distribution are provided.</p>	<p>the US and Singapore. Indeed, our proposed amendments to section 273D(1) and (3) are proposed in response to some owners' suggestion to tighten up the exception provisions.</p> <p><u>Exception to section 273C for time-shifting purpose</u></p> <p>The proposed exception aims to ensure that users' legitimate interests in recording broadcast and cable programmes for private time-shifting purposes would not be jeopardized.</p> <p>In response to the Joint Industry Response, we wish to point out that the new section 273F(12) only excludes TPMs which prohibit recording upon its reception or which prohibits <i>in all circumstances</i> the subsequent viewing or listening of a recording made upon its reception. In other words, TPMs that allow copying and one-time viewing (but which prohibit further copying or distribution of the recordings) will remain protected by the criminal provision against circumvention.</p> <p>The broadcasting industry earlier questioned the justifications for applying the exception to TPMs applied in relation to programmes provided via video-on-demand/pay-per-view services since users could choose to view these programmes at a time convenient to them. In response, the Administration proposes to make a CSA so that the exception would not apply if the TPM in question</p>

<b>(IV) Anti-circumvention provisions</b>		
<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
	<p>CASBAA strongly objects to the exception for time-shifting. CASBAA comments that the proposed CSA (i.e. the exception will not apply if the TPM in question is applicable solely to a broadcast or cable programme provided via a video-on-demand service) will not address the industry's concerns for the following reasons –</p> <p>(a) the same TPM may be applied across a variety of products and services. Hence the hacking of a TPM ostensibly for time-shifting purposes could destroy protection for a variety of services;</p> <p>(b) the global content industry is moving towards adoption of common TPMs that may be used across all transmission platforms. The loophole created by the exception would allow piracy syndicates to develop and sell circumvention systems in Hong Kong. Should that happen, developers of DRM systems and sellers of premium content will avoid distributing their products in Hong Kong;</p> <p>(c) once an individual broadcaster chooses to restrict recording of a TV programme (i.e. denying private time-shifting altogether), it</p>	<p>was applied solely to a broadcast or cable programme provided via a video-on-demand service.</p> <p>We understand that, despite the CSA, the industry still has grave concern over the exception. Having re-considered the new information available to us, including the industry's practices of using TPMs to protect broadcast and cable programmes and the underlying works (e.g. films), we agree that the exception may indeed pose problems given the practical situation facing the industry. At the same time, in our meetings with the broadcasters, we were assured that the broadcasting industry generally appreciated users' legitimate interests in recording broadcast and cable programmes for private time-shifting purposes. TPMs might likely be used to control the use of their digital programmes in a way which allowed recording upon reception by viewers, but controlled the subsequent copying and distribution of the recorded programmes by digital means. In view of the above, we propose to remove the entire exception and delete section 273F(12) in the Bill (and section 273F(12A) proposed in the CSAs).</p> <p>We would like to point out that the proposed section 273H provides a mechanism under which SCIT may (by way of notice published in the Gazette) exclude from the anti-circumvention provisions any work, device or service if the use of</p>

<b>(IV) Anti-circumvention provisions</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
		<p>would give hackers an open invitation to circumvent the TPM protecting it. Under the exception provision, commercial dealing of the concerned circumvention device would not attract criminal liability. The piracy syndicates would exploit this loophole, rendering the entire DRM system no longer usable for protecting digital content delivered by other means. This would have the effect of penalizing the entire industry for the decision of a single broadcaster.</p> <p>CASBAA suggests that, instead of providing an exception provision now, the Administration could follow the approach adopted by Singapore, i.e. to take action only if a problem arises in future. Singapore has a mechanism in place to provide new exemptions in relation to the act of circumvention when the need arises. Another alternative is to require broadcasters not to use digital rights management (DRM) systems to interfere with time-shifting.</p>	<p>such work, device or service has been seriously impaired as a result of the anti-circumvention provisions although their use does not lead to copyright infringement. If users' legitimate interests in recording broadcast and cable programmes for private time-shifting purposes are seriously impaired in future, we hope that the industry could come up with suitable voluntary arrangements to address users' concerns. Failing that the mechanism under section 273H may be invoked. Any TPM that is so excluded would no longer be protected by the criminal provisions against circumvention.</p>
4.2	<b><u>Hong Kong Institute of Certified Public Accountants (HKICPA)</u></b>	<p>HKICPA considers that criminalizing commercial dealers of circumvention tools or providers of associated services a more acceptable approach than criminalizing unauthorized domestic reception of subscription television programmes. It therefore finds the proposals in clause 56 broadly acceptable, given the various exceptions to the offences that are provided for.</p>	Noted.

<b>(V) Parallel Importation</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
5.1	<p><b><u>Trade organizations</u></b></p> <ul style="list-style-type: none"> <li>● Federation of Hong Kong Industry (FHKI)</li> <li>● Hong Kong Retail Management Association (HKRMA)</li> </ul> <p><b><u>Hong Kong Institute of Certified Public Accountants (HKICPA)</u></b></p>	<p>FHKI expresses regrets over the Administration's proposal to put the criminal sanction period for parallel importation at 12-15 months, rather than reducing it to 9 months as originally proposed. It was concerned that such a lengthy ban would overly protect the interests of exclusive licensees at the expense of local consumers' interests. It recommended that the ban be gradually phased out in 18 months.</p> <p>HKRMA supports shortening of the ban on parallel imports of copyright works. In its view, the phasing out of the criminal sanction will encourage competition, demolish trade barriers, and increase consumers' choices.</p> <p>HKICPA supports complete liberalization of parallel importation. It comments that the liberalization measures in the Bill are moving in the right direction towards liberalization but do not go far enough.</p>	<p>We note users' request for further liberalization of parallel importation. In considering the extent of liberalization, we also need to take into account the interests of copyright owners.</p>
5.2	<p><b><u>Heads of Universities Committee (HUCOM)</u></b></p>	<p>HUCOM stresses that it is important and necessary to liberalize parallel importation for use by educational establishments and libraries. It explains that the universities in Hong Kong have to purchase library items through major international academic library book vendors and cannot afford to check with local agents on the availability of exclusive licensees for supplying</p>	<p>We note the concerns of the libraries of universities in Hong Kong. We fully recognize the importance of giving greater flexibility and wider choices for educational establishments and libraries in sourcing materials for educational and library purposes. We do not intend to make any CSA to alter our original proposal to remove the civil and criminal liability pertaining to the</p>



<b>(V) Parallel Importation</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
		<p>the required items before placing orders with vendors because –</p> <p>(a) unlike international academic book vendors who specialise in dealing with academic materials, local book publishers do not have the capacity to sell materials from publishers worldwide and provide the extensive range of value-added professional specialist services such as pre-processing of the books and provision of out-of-print or obscure foreign titles. Besides, many local sellers are not interested in supplying scholarly books to university libraries as they find it non-profitable;</p> <p>(b) many items are purchased via “approval plans”, i.e. universities convey its academic requirements to the vendor who would then air-freight books immediately upon publication to the library on a sale or return basis. Such services are vital to secure valuable, relevant academic research titles the soonest possible;</p> <p>(c) scholarly books are very limited in supply and seldom reprinted. Prior enquiry with local agents will cause undue delay to the procurement of the needed items which may be out of print and unavailable anywhere by the time universities receive, from the local sellers, notification that they do not supply the items;</p>	<p>educational and library use of parallel imports of copyright works by libraries and educational establishments.</p>

<b>(V) Parallel Importation</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
		(d) universities need to import copies of multimedia products from overseas suppliers since the contents of the imported copies may be different from local editions. Some of the overseas editions may not be available from local suppliers and could only be imported from overseas.	
5.3	<p><b><u>Publication industry</u></b></p> <ul style="list-style-type: none"> <li>• Hong Kong and International Publishers' Alliance (HKIPA)</li> </ul> <p><b><u>Joint Industry Response</u></b></p> <ul style="list-style-type: none"> <li>• Hong Kong Cable TV Ltd.</li> <li>• Television Broadcasts Ltd.</li> <li>• International Federation of the Phonographic Industry (HK Group) Ltd.</li> </ul> <p><b><u>Hong Kong Comics and Animation Federation</u></b></p>	<p>HKIPA opines that there is no need to change the law in this area and suggests the Government to withdraw the proposal to shorten the criminal sanction period.</p> <p>The Joint Industry Response considers the reduction of the criminal sanction period from the existing 18 months to 12-15 months unacceptable. In its view, such a proposal is highly detrimental to the legitimate interest of the right owners. It suggests maintaining the existing period as 18 months, if not extending it to 24 months.</p> <p>The Hong Kong Comics and Animation Federation reiterates the need to retain the 18-month criminal sanction period, taking into account the lead time needed to obtain licence from the Japanese licensors and to arrange translated comic titles. The Federation opines that 15-month period is only acceptable if the Administration is determined to relax the existing restriction against parallel importation and in view of the Administration's proposal to facilitate enforcement against parallel imports.</p>	<p>We understand copyright owners' grave concerns about the proposed shortening of the criminal sanction period for parallel importation. The revised proposal of a criminal sanction period ranging from 12 to 15 months (as opposed to reducing it to 9 months) seeks to address the concern while meeting the community's aspirations for free circulation of parallel imported copyright works. A delicate balance needs to be struck between the interests of copyright owners and the demands from our business sectors and consumers group for complete decriminalization. We welcome Members' views on the matter.</p>

<b>(V) Parallel Importation</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
		<p>One of the proposed enforcement facilitation measures is the introduction of a presumption, namely that any optical disc which does not bear a licensed manufacturer's code will be presumed to be an imported copy. The Joint Industry Response is concerned that this presumption might be in breach of the national treatment and most favoured nation treatment of the World Trade Organization as the right owners always have the right to have their products made anywhere in the world.</p> <p>On the facilitating measures, the Hong Kong Comics and Animation Federation agrees with the wordings of the proposed facilitating provisions. It however suggests clarifying that the presumption should also apply to the place of publication or printing, in such a way that it shall be presumed to be imported copy if the copy contains a description of the manufacturer, publisher or printer whose address is not located in Hong Kong.</p>	<p>The effect of the proposed CSA is that the absence of a Hong Kong SID code on an optical disc will give rise to a presumption that the copy of copyright work stored in the disc concerned is imported. The purpose is to facilitate proof of importation. It does not have the effect of conferring differential treatment on copyright owners from different jurisdictions. Hence, we believe there is no question of inconsistency with the national treatment and most favoured nation treatment requirements under the WTO TRIPS Agreement.</p> <p>On the Comics and Animation Federation's specific comments on the presumption provisions, we wish to point out that the presumption will apply where a label or marking on a book indicates that it was printed in a place outside Hong Kong. The address of the printer or manufacturer will be a piece of relevant information that the court will consider in determining whether the description satisfies the elements of the presumption provisions. Whether a particular description is an indication sufficiently clear for the presumption to apply is a matter for the court to determine having regards to the facts of the specific case.</p>

<b>(VI) Others</b>		
<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
<p><b><u>Hong Kong Institute of Certified Public Accountants (HKICPA)</u></b></p>	<p><u>Incorporation of requirements of the World Intellectual Property Organisation (WIPO) Internet Treaties</u>                      HKICPA suggests clarifying that the protection of moral rights of a performer in relation to “derogatory treatment” of his performance would not undermine freedom of expression through parody, satire, etc.</p>	<p><u>Incorporation of requirements of the World Intellectual Property Organisation (WIPO) Internet Treaties</u>                      The main purposes of introducing performers’ right to object to “derogatory treatment” is to bring the Copyright Ordinance in line with the latest international standards as contained in the WIPO Internet Treaties.</p> <p>Under the proposed section 272E, a performer would only be entitled to object to any addition to, deletion from, alteration to or adaptation of his performance if such acts amount to distortion, mutilation or other modification that is prejudicial to the reputation of the performer. Only aural performances are covered by the section. Furthermore, where the treatment made is consistent with normal editorial purpose or for the purpose of reporting current events, the performer would have no right to object to such treatment (proposed section 272G). Accordingly, the mere fact that a person parodies or satirises a performance does not necessarily mean that the performer has a right to object to the parody or satire. We consider that the addition of the performer’s right to object to “derogatory treatment” of his performance would not undermine freedom of expression through parody, satire, etc.</p>

<b>(VI) Others</b>		
<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
	<p><u>Time limit for prosecutions</u> HKICPA is not convinced of the need to extend the time limit for prosecution and suggests retaining the existing limit.</p> <p><u>Proof of absence of licence from copyright owner</u> HKICPA opines that there must be strong evidence to support the use of affidavits to prove elements of the offence. It asks whether affidavits are generally accepted as proof by courts in similar circumstances overseas.</p>	<p><u>Time limit for prosecutions</u> The proposal to pitch the time limitation period at three years from the date of commission of the offence is predicated on the basis of enforcement experience. With the frequent need to obtain evidence from overseas right-owners, the growing complexity of copyright-related offences and possible involvement of triad and syndicate elements, the Customs and Excise Department (C&amp;ED) found it increasingly difficult to complete investigation into these offences to enable prosecution actions to proceed within the existing time limit.</p> <p><u>Proof of absence of licence from copyright owner</u> When prosecuting a criminal act under section 118 (e.g. making, selling or distribution of infringing copy) of the Copyright Ordinance, the prosecution has to prove, among other things, that the offending acts were done without the licence of the copyright owner. Although we understand from copyright owners that they do not license selling or distribution of infringing copies in general, they may need to give evidence personally in court if this element of the offence is challenged by the defendant. Where the concerned copyright owners are residing overseas, it may not be easy to obtain the owners' undertaking to fly to Hong Kong to appear before the court to testify.</p> <p>In view of the above, we propose to introduce new provisions to section 121 of the Copyright Ordinance so that an affidavit may be sworn stating on behalf of</p>

<b>(VI) Others</b>		
<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
		<p>the copyright owner that the copyright owner has not licensed the defendant to do the infringing acts. Such a statement, subject to certain specified conditions, would be admitted in court without further proof in the proceedings under section 118. This facilitation measure obviates the need to require the copyright owner to give evidence personally in court to establish that the defendant's act was not done with the licence of the copyright owners. We would like to point out that if the court (whether on its own motion or upon the application of the defendant) considers that there is a genuine dispute on whether a licence has been granted, it may require the deponent to attend before the court and give evidence. We are not aware of other jurisdictions providing for the use of affidavit to prove the absence of licence from copyright owner.</p>