

**Bills Committee on
Copyright (Amendment) Bill 2006**

Purpose

The paper provides a summary of the major views gathered during the preparation of the Bill, the Administration's responses to the views and overseas practices.

Summary table

2. Five main areas of the proposals in the Bill have been the subjects of extensive discussions with copyright owners and users of copyright works. These are -

- ◆ Business end-user liability
- ◆ Circumvention and rights management information
- ◆ Rental rights for films and comic books and Incorporation of the World Intellectual Property Organization (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty (Internet Treaties) requirements
- ◆ Copyright exemptions
- ◆ Parallel importation

A summary table setting out the major views gathered in these five areas, the Administration's responses and oversea practices is at Annex.

Commerce and Industry Branch
Commerce, Industry and Technology Bureau
April 2006

Summary Table

Proposals in the Bill	Views gathered during the preparation of the Bill	The Administration's response	Overseas practices
Business end-user liability			
<i>(a) Business end-user criminal liability</i>			
<p><u>Existing criminal liability</u></p> <p>To maintain the existing scope of the business end-user possession criminal offence i.e., only covers computer programs, movies, TV dramas, and musical recordings, and to incorporate this arrangement into the Copyright Ordinance.</p> <p><u>New criminal liability</u></p> <p>To partially meet the demands of the copyright owners of printed works, to introduce a new criminal offence against making for distribution or distributing infringing copies of four kinds of printed works by business end-users ("business end-user copying/distribution criminal offence"). These four kinds of printed works are books, magazines, periodicals and newspapers.</p> <p>This offence will not apply to non-profit making or Government subvented educational establishments in order not to impede classroom teaching.</p> <p>This offence will not apply if the extent of infringement does not exceed a limit to be prescribed under regulations to be made by SCIT later ("safe harbour").</p>	<ul style="list-style-type: none"> ● The community generally are against extending the existing scope of the business end-user possession criminal offence. ● The education sector welcomes our proposal to exempt non-profit making educational establishments from the proposed copying/distribution offence. ● Some book publishers still raise concern that it is unfair to exclude their works from the business end-user possession criminal offence; but the local newspaper industry accepts this. ● Some user groups demand that the proposed exemption for the business end-user copying/distribution criminal offence should extend to all profit-making schools, charitable and welfare organizations, chambers of commerce and other non-profit making organizations. Copyright owners however do not agree to these demands. ● Book publishers demand that the proposed exemption for non-profit making educational establishments should not cover textbooks and materials marketed primarily for instructional uses. The education sector 	<p><u>Business end-user possession criminal offence</u></p> <ul style="list-style-type: none"> ● Because of the intrinsic nature of printed works (including books and newspapers), criminalizing the possession of a photocopy of any printed works in the course of business (which already attracts civil liability under the existing law) is impracticable and we are not aware of any jurisdiction which has done this. ● Our current proposal to maintain the existing scope of the business end-user possession criminal liability to cover four categories of works only (i.e. computer programs, movies, TV dramas and musical recordings) is therefore appropriate having regard to the community's grave concern over possible hindrance to free flow of information and classroom teaching. <p><u>Business end-user copying/distribution criminal offence</u></p> <ul style="list-style-type: none"> ● The proposed offence confers additional protection for printed works and is meant to target significant infringement. ● Because of the intrinsic nature of printed works, the community has grave concern that the proposed offence will hamper information dissemination. The proposed safe harbor is to address the community's concern in 	<p>Korea, Taiwan, Japan and India have business end-user criminal liability in respect of the use of infringing copies of computer programs in business.</p> <p>The US copyright law provides criminal liability for – (a) wilful infringement of copyright by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copyright works, which have a total retail value of more than USD1,000, and (b) wilful infringement of copyright for purposes of commercial advantage or private financial gain.</p>

Proposals in the Bill	Views gathered during the preparation of the Bill	The Administration's response	Overseas practices
	<p>however opposes such requests.</p> <ul style="list-style-type: none"> ● Book publishers and the newspaper industry consider our proposed safe harbour too lax. 	<p>this regard and to ensure that the offence only catches infringement activities which are significant. We have considered the perimeters of the "safe harbour" suggested by the publication industry and consider them on the low side.</p> <ul style="list-style-type: none"> ● The proposed exemption of non-profit-making or government subvented educational establishments from the proposed offence is to address the community's grave concern that the offence will hinder classroom teaching. These institutions will still attract the existing civil liability for copyright infringements. We encourage these institutions to continue acquiring licenses from copyright owners so as to absolve themselves from possible civil liability arising from the making and distribution of copies of copyright works. ● Although there are also requests from the community for exemption of other non-profit-making organizations (e.g. trade associations and welfare organizations) and profit-making educational establishments, we have not acceded to these requests having balanced the interests of copyright owners. The proposal will apply to other non-profit making institutions and profit-making educational establishments. 	

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<i>(b) Directors'/Partners' criminal liability</i>			
<p><u>New criminal liability</u></p> <p>To introduce a new criminal offence so that in case a body corporate or partnership has done any act attracting business end-user criminal liability, the directors/partners responsible for the internal management of the body corporate or partnership should be liable unless they can prove that they have not authorized the infringing act to be done.</p> <p>If there is no such director or partner, the liability will apply to any person responsible for internal management of the body corporate or partnership under the immediate authority of the directors or partners.</p> <p>The burden of proof on the defendant is an evidential burden which only requires the defendant to adduce sufficient evidence to raise a doubt to absolve his liability. We have also clarified the type of evidence that the defendant may adduce by including in the provision a list of non-exhaustive factors for the Court to consider.</p>	<ul style="list-style-type: none"> ● The software and IT industries welcome the proposed offence. ● User groups consider that directors and partners of a body corporate or partnership should not be criminally liable unless they have been proven to have given consent or connivance to the infringing acts done by the body corporate or partnership. They express objection to the implied shift in the burden of proof. A copyright owner association representing the video distribution sector has also written in to express objection to the shift in the burden of proof. 	<ul style="list-style-type: none"> ● The proposal aims to promote corporate accountability and responsible governance. We expect that with the introduction of the proposed offence, businesses should put in place policies and practices to ensure that genuine copies of copyright works are used in business, and infringing copies of printed works should not be made for distribution or distributed to staff or participants of the business's activities. The burden imposed on the defendant is only an evidential burden. 	<p>In the copyright law of Singapore, where a partnership is guilty of certain offences, every partner, other than a partner who is proved to have been ignorant of or to have attempted to prevent the commission of the offences, is also guilty of the offences. Similar provisions also appear in their patent and trademark laws.</p> <p>In the trade mark law of the UK, where a partnership is guilty of certain offences, every partner, other than a partner who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is also guilty of the offences.</p>

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<i>(c) Defence for employees and exemptions for certain professionals in respect of business end-user criminal liability</i>			
<p><u>Exemptions from criminal liability</u></p> <p>To introduce a statutory defence for employees for the business end-user possession criminal offence. This defence however will not be available if the employee was in a position to make or influence a decision regarding the acquisition of the infringing copy in question when it was acquired or the removal or use of the infringing copy when the offence was committed.</p> <p>A similar employee defence would be provided for the business end-user copying/distribution offence.</p> <p><u>Exemptions from criminal liability</u></p> <p>To introduce exemptions under specific circumstances for certain professionals such as lawyers and auditors who might be required in the normal course of their work to possess infringing copies of copyright works.</p>	<ul style="list-style-type: none"> ● The community and labour groups are likely to welcome this proposal. ● The software and IT industries are strongly against the proposed employees' defence for fear that it will create unacceptable legal loopholes. They claim that there would be major setback of the copyright protection regime in Hong Kong if this employees' defence is pursued, whereas the proposed directors'/partners' liability in item (b) is dropped. 	<ul style="list-style-type: none"> ● We propose to introduce a specific employees' defence having regard to public concern that criminal sanction may be too harsh for employees under certain circumstances as they are in a weak position to bargain with their employers to reject the use of infringing copies of copyright works in business for fear of losing their jobs. Whether an employee can invoke the defence would depend on whether he/ she is in a position to influence or decide on the acquisition removal, or use of the infringing copies for use in business, not the specific post he/ she is holding. 	<p>We are not aware of other jurisdictions which have similar defence and exemption provisions.</p>

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Circumvention and Rights Management Information			
<p>(d) <i>Civil remedies for circumvention of technological measures</i> (e) <i>Criminal liability relating to circumvention activities</i> (f) <i>Exceptions to the civil and criminal provisions</i></p>			
<p><u>New civil liability</u></p> <p>To introduce new civil liability against any person who makes or deals in devices which circumvent access control measures (copy control measures already attracts civil law protection) and who performs the acts of circumvention of access control measures or copy-protection measures. To ensure that our proposal would not affect users' legitimate use of copyright works, the civil liability will only arise if the person charged has knowledge that the circumvention would lead to copyright infringements.</p> <p><u>New criminal liability</u></p> <p>To introduce a new criminal offence against commercial dealing of circumvention devices and the commercial provision of circumvention services. The devices or services refer to those which circumvent access control measures as well as copy-protection measures.</p> <p>Measures controlling market segmentation or preventing users from performing "time-shifting" (which is a permitted act) will not get criminal protection.</p> <p>Exceptions to civil and <u>criminal liability</u></p> <p>To introduce various exceptions to address public concerns that such extra-copyright protection measures might hinder</p>	<p><u>Overall</u></p> <ul style="list-style-type: none"> Copyright owners consider that the scope of the existing provisions against circumvention of technological measures inadequate. They demand the introduction of criminal sanctions and to cover more types of circumvention activities and devices. User groups caution against extending the scope of protection for fear that it would go beyond copyright protection, hinder scientific research and technological development or affect consumers' interest. <p><u>New civil liability</u></p> <ul style="list-style-type: none"> Copyright owners are against the proposal to require knowledge of infringement for the civil liability associated with circumvention activities. They claim that this would significantly undermine the effectiveness of the protection. <p><u>New criminal liability</u></p> <ul style="list-style-type: none"> The game industry is against our proposal to carve out from the criminal provision those technological measures that may affect consumers' legitimate access to parallel imported 	<ul style="list-style-type: none"> The proposed civil and criminal provisions against circumvention of technological measures used to protect copyright works represent our efforts to update Hong Kong's copyright protection regime in the light of latest technological developments. We need to be cautious not to extend the protection beyond copyright protection, hinder the development of technology or prohibit users' legitimate uses of copyright works. We understand that other economies shared similar concerns when they introduced their anti-circumvention provisions. All the exemptions are designed with these concerns in mind. To address the community's grave concern that the provisions should not lead to abuse in market position which may affect consumers' legitimate interest in using copyright works, we consider it important to include in the provisions the requirement for the defendant's intention and knowledge of circumvention purpose and infringement. As regards the proposed exclusion of technological measures which have the effect of controlling market segmentation from the new criminal offence, we 	<p>UK, Singapore, US, and Australia have both civil and criminal law provisions against dealing in circumvention tools and provision of circumvention services. The scope of protection covers both access control and copy-protection measures.</p> <p>In Singapore and US, the act of circumventing an access control measure may attract civil liability. If the act is done wilfully and for commercial advantage or for private financial gain, it will attract criminal liability as well.</p> <p>In UK, the act of circumventing an access control or copy- protection measure only attracts civil liability.</p> <p>Australia does not have any provision against the act of circumvention.</p>

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<p>scientific advancement and users' legitimate access to copyright works.</p>	<p>items of copyright works.</p> <ul style="list-style-type: none"> ● The broadcasting industry has reservation on our proposal to exempt those circumvention devices which might prohibit users' legitimate recording of broadcast and cable programmes for viewing at a time convenient to the users in a private and domestic setting. <p><u>Exceptions to civil and criminal liability</u></p> <ul style="list-style-type: none"> ● The community and the education sector are likely to welcome the proposed exceptions, but will continue to express concerns about such extra-copyright protection measures. ● Copyright owners are concerned about the proposals to introduce broad exemptions for fear that this would undermine the adequacy and effectiveness of the protection. 	<p>consider it appropriate having balanced users' concern about the need to gain legitimate access to and use parallel imported copyright works. This is particularly important for parallel imports of computer games as they have been fully liberalized in Hong Kong and criminalization of the circumvention devices in relation to such measures would seriously impair users' legitimate access to parallel imported computer games.</p> <ul style="list-style-type: none"> ● The proposed exemption of measures that prevent recording of broadcast programmes for later viewing for private and domestic purposes aims to meet users' expectation of legitimate use of copyright works. 	
<p>(g) <i>Rights management information and allowing copyright owners and exclusive licensees to seek civil remedy</i></p>			
<p><u>New civil liability</u></p> <p>To give copyright owners and their exclusive licensees the same right as persons who provide RMI to seek civil remedies against those persons who tamper with RMI.</p>	<ul style="list-style-type: none"> ● Copyright owners welcome this proposal. 		<p>Singapore, US, UK and Australia have civil provisions against persons who tamper with RMI. Criminal sanctions may also apply in Singapore, US and Australia under certain circumstances.</p>

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Rental rights for films and comic books and Incorporation of WIPO Internet Treatment Requirements			
<i>(h) Rental rights for films and comic books and providing civil remedy against infringement</i>			
<p><u>New civil liability</u></p> <p>To give rental rights to the copyright owners of films and comic books. In other words, they can restrict commercial rental activities and infringement of their rights would attract civil liability.</p>	<ul style="list-style-type: none"> ● Copyright owners in the film, music and comic book industries welcome this proposal. ● The comic book industry demands that tea houses or comic cafes providing comic books for on-the-spot reading and charging for this should also be treated as commercial rental and be covered under the rental rights provision. ● There are concerns that the proposal will drive rental shops out of business as copyright owners may charge unreasonably high rental fees and impose unreasonable terms and conditions. Some suggest that copyright owners should develop reasonable and user-friendly rental licensing schemes. 	<ul style="list-style-type: none"> ● Under the existing provisions on rental rights for sound recordings and computer programs, rental activities do not cover making available the works for on-the-spot reference use. We have developed the provisions on rental rights for films and comic books along the same line. ● We have taken note of the comic industry's suggestion to extend the application of the rental rights to the provision of comic books for on-the-spot reference in return for a charge. We will consider if there is a case for special treatment for this type of operation. ● To address the concerns about disputes over rental licensing terms and fees, we have proposed to extend the jurisdiction of the Copyright Tribunal to adjudicate disputes over these licensing schemes. 	<p>UK provides rental rights for all copyright works.</p> <p>France provides rental rights for films.</p> <p>Japan provides rental rights for both films and comic books.</p>

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<i>(i) Incorporation of WIPO Internet Treaties requirements</i>			
<p><u>New Civil Liability</u></p> <p>To incorporate the following remaining requirements of the WIPO Internet Treaties into the Copyright Ordinance –</p> <p>(i) grant rental rights to authors of the musical or literary works included in sound recordings;</p> <p>(ii) grant moral rights to performers with regard to their live aural performances or performances fixed in sound recordings;</p> <p>(iii) grant rental rights to performers over their performances fixed in sound recordings; and</p> <p>(iv) amend the definition of “performance” to make clear that it covers artistic works and expressions of folklore.</p>	<ul style="list-style-type: none"> ● Performers and copyright owners of musical or literary works will welcome our proposals. ● There may be technical comments on the details of the proposals. 	<p>.</p>	<p>The US and Singapore are already a party to the WIPO Internet Treaties.</p>

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Copyright Exemptions			
<i>(j) Fair dealing for education and public administration and improvements to the permitted acts for education</i>			
<p>Removal of criminal and <u>civil liability</u></p> <p>To introduce a new copyright exemption for fair dealing with a copyright work for giving and receiving instruction in a specified course of study. We also propose to improve some permitted acts for educational purposes to meet the needs of the education sector.</p>	<ul style="list-style-type: none"> ● The education sector demands a more flexible copyright exemption regime to cope with their educational needs in the 21st century. It welcomes the fair dealing provision for education purposes and the improvements to the existing permitted acts for education. ● It also supports the Administration's position not to lay down in the law the implementation of technological measures by schools as requested by some copyright owners as a pre-requisite for the application of the fair dealing provision to the digital environment. ● Copyright owners are concerned that any proposals to extend the existing copyright exemption regime may lead to abuse in the use of their works by teachers and students. They are particularly opposed to such uses in the digital environment e.g. uploading copies of their work on the school intranet. They request the Administration to lay down in the law the implementation of technological measures by schools as a pre-requisite for the application of the fair dealing provision in the digital 	<ul style="list-style-type: none"> ● We have strong reservations about copyright owners' request that schools should put in place technological measures before the proposed fair dealing provision for education purposes can apply to copyright works in the digital environment as the measures requested by book publishers are complicated, not readily available in the market and very expensive. The inclusion of such a condition may render the fair dealing provision not applicable to the fair use of digital works by secondary and primary schools as they are unlikely to have the resources and technical support to adopt the technological measures so required. ● The proposed amendment to delete section 45(2) of the Copyright Ordinance aims to address the concern of copyright work users that this licensing condition would disallow copying of a reasonable part of a work for educational purposes, which should be a permitted act. We have looked at the relevant permitted act provisions in the copyright laws in other jurisdictions and found that whilst such a condition exists in the copyright law in the UK, it does not feature in many other places including Singapore and Australia. The US also has a general fair use provision covering teaching purpose (including multiple copies 	<p>The US has a general "fair use" exemption similar to that in our proposals but this exemption is not confined to specific purposes of use of copyright work.</p> <p>Singapore has both specific permitted acts and fair dealing provisions covering virtually any purposes of use of copyright works.</p>

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	<p>environment.</p> <ul style="list-style-type: none"> Book publishers are against our proposal to delete section 45(2) of the Copyright Ordinance to remove the restriction that the permitted act of reasonable reprographic copying of passages from published works by educational establishments cannot apply if there are relevant licensing schemes covering the works concerned. They claim that it would remove the prime incentive for educational institutions to obtain licences from them. 	<p>for classroom use) and this provision is not subject to an absence of licensing scheme.</p>	
<p><u>Removal of criminal and civil liability</u></p> <p>To introduce a new exemption so that fair dealing with a work by the Government, the Executive Council, the Legislative Council, any District Council or the Judiciary and for the purposes of their efficient administration of urgent business.</p>	<ul style="list-style-type: none"> The book publishing industry is concerned that the proposal would lead to abuse in the use of their reference books and journals by public bodies. There is suggestion that the fair dealing provision for public administration should also apply to subvented statutory bodies. Copyright owners however would not agree to this given the large number of statutory bodies in Hong Kong and that some statutory bodies undertake many commercial related activities. 	<ul style="list-style-type: none"> The proposed fair dealing provision for public administration will only apply if the stated public bodies need to use the concerned copyright works for efficient administration of urgent business. Public bodies are still required to acquire licences for use of copyright works for their daily operation. We do not consider it appropriate to apply this proposed fair dealing provision to all subvented statutory bodies having balanced the interest of copyright owners. 	<p>Ditto</p>

Proposals in the Bill	Views gathered during the preparation of the Bill	The Administration's response	Overseas practices
<i>(k) New permitted act for persons with a print disability</i>			
<p><u>Removal of criminal and civil liability</u></p> <p>To introduce a new permitted act for the making of specialized formats of copyright works accessible to persons with a print disability</p>	<ul style="list-style-type: none"> The welfare sector welcomes this proposal. 		<p>Australia, US, UK and Singapore have specific exemptions for persons with a print disability.</p>
<i>(l) New permitted act for playing sound broadcast in vehicles</i>			
<p><u>Removal of civil liability</u></p> <p>To introduce a new permitted act for playing a sound broadcast inside a vehicle for the purpose of affording the driver of the vehicle access to public information.</p>	<ul style="list-style-type: none"> We expect the community will welcome this proposal 	<ul style="list-style-type: none"> We have carefully formulated the scope of the permitted act whilst balancing the interests of copyright owners. 	<p>We are not aware of other jurisdictions which have a similar exemption provision.</p>

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Parallel importation			
<i>(m) Liberalization in the use of parallel imports</i>			
<p><u>Removal of criminal liability</u></p> <p>To shorten the period of criminal liability for parallel importation from 18 months to nine months.</p> <p><u>Removal of civil and criminal liability</u></p> <p>To liberalize business end use of parallel imported copies of copyright works, except for commercial dealing purposes or public showing of movies, TV dramas and musical recordings by entities other than educational establishments and libraries.</p>	<ul style="list-style-type: none"> • User groups strongly demand removal or shortening of the existing period of 18 months during which parallel imports may attract criminal liability. Some user groups even demand complete removal of civil and criminal liability. • We expect the community would welcome this proposal, though some user groups would continue to ask for complete liberalization. • Copyright owners are strongly against shortening the existing criminal liability period for parallel imports. The music and film industry request lengthening the criminal liability period to 24 months. They claim that any liberalization would seriously affect their income from exclusive licensing arrangement and affect the development of local creative industries. Some claim that pirated copies are often disguised as parallel imports and relaxation would encourage piracy activities. • The music, film and publication industry will raise concerns about possible abuse by the education sector of the liberalization of 	<ul style="list-style-type: none"> • Parallel imports are not covered by the Agreement on Trade-related Aspects of Intellectual Property Rights of the World Trade Organization does not contain any required standard for their treatment. Hence, treatment of parallel imports of copyright works varies in different economies, ranging from no restriction to full restriction. • When formulating the proposals, we have balanced the widespread demands from our business sectors and consumer groups for complete liberalization of parallel imports against the interests of copyright work owners. We have proposed to maintain a criminal liability period (albeit shortened from 18 to 9 months) and to exclude public performance of certain categories of copyright works from the scope of liberalization for business end-users. • We note copyright owners' grave concern about the proposed shortening of the criminal sanction period from 18 months to 9 months and will maintain dialogue with them on this proposal. 	<p>The treatment of parallel imports of copyright works varies in different economies. Criminal and civil provisions exist in the US, the UK in respect of parallel importation from non-EU countries and Australia in respect of parallel imports of certain types of copyright works. However, Singapore generally does not restrict parallel importation of copyright works and New Zealand only imposes civil liability on parallel importation for films under limited circumstances.</p>

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	business end-use. They are afraid that schools will source parallel imports and distribute them to students.		