

**Marked-up Copy of the Outstanding Committee Stage Amendments**

**7. Meaning of "infringing copy"**

~~(1) Section 35(3) is amended by repealing "section 35A" and substituting "sections 35A and 35B".~~

(1) Section 35(3) is amended by repealing "Except as provided in section 35A," and substituting "Except as otherwise provided in section 35A or 35B,".

(2) Section 35(4)(b) is amended by repealing "18 months" and substituting "~~9 months~~15th months".

(2A) Section 35 is amended by adding -

"(6A) Where, in any proceedings, a question arises as to whether a copy of a work that was lawfully made in the country, territory or area where it was made is an infringing copy by virtue only of subsection (3), and it is shown -

(a) in the case of a copy of a work that is stored in an optical disc, that the optical disc is not marked with a manufacturer's code as required under section 15 of the Prevention of Copyright Piracy Ordinance (Cap. 544);

(b) that a label or mark on the copy, the article in which the copy is embodied or the packaging or

container in which the copy is  
packaged or contained indicates  
that the copy was made in a country,  
territory or area outside Hong  
Kong; or

(c) that a label or mark on the copy,  
the article in which the copy is  
embodied or the packaging or  
container in which the copy is  
packaged or contained indicates  
that distribution, sale or supply  
of the copy is prohibited in Hong  
Kong or restricted to countries,  
territories or areas outside Hong  
Kong,

then, unless there is evidence to the contrary, the  
copy shall be presumed to have been imported into  
Hong Kong.

(6B) In subsection (6A)(a) -

"manufacturer's code" (製造者代碼) has the meaning  
assigned to it by section 2(1) of the  
Prevention of Copyright Piracy Ordinance  
(Cap. 544);

"marked" (標上) has the meaning assigned to it by  
section 15(3) of the Prevention of Copyright

Piracy Ordinance (Cap. 544);

"optical disc" (光碟) has the meaning assigned to it by section 2(1) of the Prevention of Copyright Piracy Ordinance (Cap. 544).".

(3) Section 35(7) is repealed and the following substituted -

"(7) In this Part, "infringing copy" (侵犯版權複製品) includes a copy which is to be treated as an infringing copy by virtue of any of the following provisions -

- (a) section 35B(5) (imported copy not an "infringing copy" for purposes of section 35(3));
- (b) section 40B(5) (accessible copies made for persons with a print disability);
- (c) section 40C(7) (accessible copies made by specified bodies for persons with a print disability);
- (d) section 40D(2) (intermediate copies possessed by specified bodies);
- (e) section 40D(7) (intermediate copies dealt with by specified bodies);
- (f) section 41A(5) (copies made for purposes of giving or receiving instruction);
- (g) section 41(5) (copies made for purposes of instruction or examination);

- (h) section 44(3) (recordings made by educational establishments for educational purposes);
- (i) section 45(3) (reprographic copying by educational establishments for purposes of instruction);
- (j) section 46(4)(b) (copies made by librarian or archivist in reliance on false declaration);
- (k) section 54A(3) (copies made for purposes of public administration);
- (l) section 64(2) (further copies, adaptations, etc. of work in electronic form retained on transfer of principal copy);
- (m) section 72(2) (copies made for purpose of advertising artistic work for sale);  
or
- (n) section 77(4) (copies made for purposes of broadcast or cable programme).".

8. Section added

The following is added immediately after section 35A -

**"35B. Imported copy not an "infringing copy"  
for the purposes of section 35(3)**

~~(1) A copy of a work to which this subsection applies is not, in relation to the person who imports it into Hong Kong or acquires it after it is imported into Hong Kong, an infringing copy for the purposes of section 35(3) if -~~

- ~~(a) it was lawfully made in the country, territory or area where it was made; and~~
- ~~(b) it is not imported or acquired with a view to its being dealt in by any person for the purpose of or in the course of any trade or business.~~

(1) A copy of a work to which this subsection applies is not -

- (a) in relation to the person who imports it into Hong Kong, an infringing copy for the purposes of section 35(3) if -
  - (i) it was lawfully made in the country, territory or area where it was made; and
  - (ii) it is not imported with a view to its being dealt in by any person for the purpose of or

in the course of any trade or  
business; or

(b) in relation to the person who possesses  
it, an infringing copy for the purposes  
of section 35(3) if -

(i) it was lawfully made in the  
country, territory or area  
where it was made; and

(ii) it is not possessed with a view  
to its being dealt in by any  
person for the purpose of or  
in the course of any trade or  
business.

(2) Subsection (1) applies to a copy of a work of  
any description except a copy of a work -

(a) that is -

(i) a musical sound recording;

(ii) a musical visual recording;

(iii) a television drama; or

(iv) a movie; and

(b) that is, or is intended to be, played or  
shown in public.

(3) Notwithstanding the exception in subsection  
(2), subsection (1) applies to a copy of a work that is  
referred to in subsection (2)(a) and that is, or is  
intended to be, played or shown in public -

- (a) by an educational establishment for the educational purposes of the establishment; or
- (b) by a specified library for use of the library.

(4) For the purposes of subsection (3)(b), a library is regarded as a specified library if it falls within the description of any library specified under section 46(1)(b).

~~(5) Where a copy of a work is not, in relation to the person referred to in subsection (1), an infringing copy by virtue of that subsection but is subsequently dealt in for the purpose of or in the course of any trade or business—~~

- ~~(a) if that dealing takes place within the period of 9 months referred to in section 35(4)(b), it is, for the purposes of sections 118 to 133 (criminal provisions), to be treated, in relation to that dealing and the person who deals in it, as an infringing copy; and~~
- ~~(b) irrespective of the time at which that dealing takes place, it is, for the purposes of any provision of this Ordinance except sections 118 to 133, to be treated, in relation to that dealing~~

~~and the person who deals in it, as an  
infringing copy.~~

(5) Where a copy of a work is not an infringing copy  
by virtue of subsection (1) but is subsequently dealt  
in for the purpose of or in the course of any trade or  
business -

(a) if that dealing takes place within the  
period of 15 months referred to in  
section 35(4)(b), it is, for the purposes  
of sections 118 to 133 (criminal  
provisions), to be treated, in relation  
to that dealing and the person who deals  
in it, as an infringing copy; and

(b) irrespective of the time at which that  
dealing takes place, it is, for the  
purposes of any provision of this  
Ordinance except sections 118 to 133, to  
be treated, in relation to that dealing  
and the person who deals in it, as an  
infringing copy.

(6) In this section, "deal in" (經銷) means sell, let for hire, offer or expose for sale or hire, or distribute for profit or reward."



22. Criminal liability for Offences in relation to making or dealing with infringing articles, etc.

(1) Section 118(1) is repealed and the following substituted -

"(1) A person commits an offence if he, without the licence of the copyright owner of a copyright work -

- (a) makes for sale or hire an infringing copy of the work;
- (b) imports an infringing copy of the work into Hong Kong otherwise than for his private and domestic use;
- (c) exports an infringing copy of the work from Hong Kong otherwise than for his private and domestic use;
- (d) sells, lets for hire, or offers or exposes for sale or hire an infringing copy of the work for the purpose of or in the course of any trade or business;
- (e) exhibits in public or distributes an infringing copy of the work for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works;
- (f) possesses an infringing copy of the work with a view to -
  - (i) its being sold or let for hire by

any person for the purpose of or  
in the course of any trade or  
business; or

(ii) its being exhibited in public or  
distributed by any person for the  
purpose of or in the course of any  
trade or business which consists  
of dealing in infringing copies  
of copyright works; or

(g) distributes an infringing copy of the  
work (otherwise than for the purpose of  
or in the course of any trade or business  
which consists of dealing in infringing  
copies of copyright works) to such an  
extent as to affect prejudicially the  
copyright owner."

(2) Section 118 is amended by adding -

"(1A) Where -

(a) a person exhibits in public or  
distributes an infringing copy of a  
copyright work for the purpose of or in  
the course of any trade or business; and

(b) the circumstances in which the  
infringing copy is so exhibited or  
distributed give rise to a reasonable  
suspicion that the trade or business

consists of dealing in infringing copies of copyright works,  
then, unless there is evidence to the contrary, the trade or business is presumed, for the purposes of any proceedings instituted under subsection (1)(e), to be a trade or business which consists of dealing in infringing copies of copyright works.

(1B) Where -

(a) a person possesses an infringing copy of a copyright work with a view to its being exhibited in public or distributed by any person for the purpose of or in the course of any trade or business; and

(b) the circumstances in which the infringing copy is so possessed give rise to a reasonable suspicion that the trade or business consists of dealing in infringing copies of copyright works,

then, unless there is evidence to the contrary, the trade or business is presumed, for the purposes of any proceedings instituted under subsection (1)(f)(ii), to be a trade or business which consists of dealing in infringing copies of copyright works."

(3) Section 118 is amended by adding -

"(2A) ~~Without prejudice to subsection (1), a~~A person commits an offence if he, without the licence of

the copyright owner of a copyright work to which this subsection applies, possesses an infringing copy of the work for the purpose of or in the course of any trade or business with a view to its being used by any person for the purpose of or in the course of that trade or business.

(2B) Subsection (2A) applies to a copyright work that is -

- (a) a computer program;
- (b) a movie;
- (c) a television drama;
- (d) a musical sound recording; or
- (e) a musical visual recording.

(2C) Subsection (2A) does not apply to an infringing copy of a computer program in a printed form.

(2D) Subsection (2A) does not apply to the possession of an infringing copy of a computer program if -

- ~~(a) the computer program was made available to the public together with another work, not being a computer program itself, that requires the use of the computer program to be viewed or listened to; and~~
- ~~(b) the person who possesses the infringing copy of the computer program does so -~~

~~merely because it is technically  
required for the viewing or listening of  
the other work referred to in paragraph  
(a).~~

(a) the computer program incorporates the  
whole or any part of a work that is not  
a computer program itself, and the  
computer program is technically required  
for the viewing or listening of the work  
by a member of the public to whom a copy  
of the work is made available; or

(b) the computer program is incorporated in  
a work that is not a computer program  
itself, and the computer program is  
technically required for the viewing or  
listening of the work by a member of the  
public to whom a copy of the work is made  
available.

(2DA) Subsection (2A) does not apply to the  
possession of an infringing copy of a movie, television  
drama, musical sound recording or musical visual  
recording by the Hong Kong Film Archive for the purpose  
of heritage conservation if -

(a) the infringing copy was donated or given  
to the Hong Kong Film Archive by the  
public; or

(b) the infringing copy was made by the Hong Kong Film Archive to preserve or replace the infringing copy referred to in paragraph (a) against loss, deterioration or damage.

(2DB) Subsection (2A) does not apply to the possession of an infringing copy of a movie, television drama, musical sound recording or musical visual recording by the Hong Kong Film Archive for the purpose of doing any act in relation to the infringing copy (other than for the purpose referred to in subsection (2DA)) if -

(a) the infringing copy was -

(i) an infringing copy donated or given to the Hong Kong Film Archive by the public; or

(ii) an infringing copy made by the Hong Kong Film Archive to preserve or replace the infringing copy referred to in subparagraph (i) against loss, deterioration or damage;

(b) it is not possible by reasonable enquiry to ascertain the identity and contact details of the copyright owner of the

work in question; and

(c) a copy (other than an infringing copy)  
of the work in question cannot be  
obtained on reasonable commercial terms.

(2E) Subsection (2A) does not apply if -

~~(a) the person who possesses an infringing  
copy does so for the purpose of giving  
legal advice in the professional  
capacity of a solicitor or barrister in  
relation to the infringing copy to his  
client;~~

(a) the person who possesses an infringing  
copy does so for the purpose of giving  
legal advice in relation to the  
infringing copy, and -

(i) the person is enrolled on the  
roll of solicitors or the roll  
of barristers kept under the  
Legal Practitioners  
Ordinance (Cap. 159); or

(ii) the person has been admitted  
as a legal practitioner in a  
jurisdiction other than Hong  
Kong;

(aa) the person who possesses an infringing  
copy is serving a pupillage under the

Barristers (Qualification for Admission and Pupillage) Rules (Cap. 159 sub. leg. AC) and he possesses the infringing copy for the purpose of assisting the barrister with whom he serves the pupillage in giving legal advice in relation to the infringing copy;

- (b) the person who possesses an infringing copy does so for the purpose of providing investigation service in relation to the infringing copy to the copyright owner or exclusive licensee of the copyright work concerned; or
- (c) the person who possesses an infringing copy does so on his client's premises and the infringing copy is provided to him by his client."

(4) Section 118 is amended by adding -

"(2F) Without prejudice to section 125, where a body corporate or a partnership has done an act referred to in subsection (2A), the following person shall, unless he proves there is evidence showing that he did not authorize the act to be done, be presumed also to have done the act -

- (a) in the case of the body corporate -
  - (i) any director of the body



corporate who, at the time when the act was done, was responsible for the internal management of the body corporate; or

- (ii) if there was no such director, any person who, at the time when the act was done, was responsible under the immediate authority of the directors of the body corporate for the internal management of the body corporate;

(b) in the case of the partnership -

- (i) any partner in the partnership who, at the time when the act was done, was responsible for the internal management of the partnership; or

- (ii) if there was no such partner, any person who, at the time when the act was done, was responsible under the immediate authority of the partners in the partnership for the internal management of the partnership.

~~subsection (2A) by virtue of subsection (2F) is taken to have proved that he did not authorize the act in question to be done if—~~

- ~~(a) sufficient evidence is adduced to raise an issue with respect to that fact; and~~
- ~~(b) the contrary is not proved by the prosecution beyond reasonable doubt.~~

~~(2H) In determining whether sufficient evidence is adduced for the purposes of subsection (2G)(a), the court may have regard to, including but not limited to, the following—~~

- ~~(a) whether the defendant has introduced policies or practices against the use of infringing copies of copyright works by the body corporate or partnership;~~
- ~~(b) whether the defendant has set aside financial resources or incurred expenditure for the acquisition by the body corporate or partnership of copies of copyright works which are not infringing copies;~~
- ~~(c) whether the defendant has taken action to prevent the use of infringing copies of copyright works by the body corporate or partnership."~~

(2G) A defendant charged with an offence under

subsection (2A) by virtue of subsection (2F) is taken  
not to have done the act in question if -

(a) sufficient evidence is adduced to raise  
an issue that he did not authorize the  
act to be done; and

(b) the contrary is not proved by the  
prosecution beyond reasonable doubt.

(2H) For the purposes of subsection (2G)(a) -

(a) the defendant shall be taken to have  
adduced sufficient evidence if the court  
is satisfied that -

(i) the defendant has caused the  
body corporate or partnership  
concerned to set aside  
financial resources, and has  
directed the use of the  
resources, for the  
acquisition of a sufficient  
number of copies of the  
copyright work to which the  
proceedings relate, which are  
not infringing copies, for the  
use of the body corporate or  
partnership; or

(ii) the body corporate or  
partnership concerned has

incurred expenditure for the acquisition of a sufficient number of copies of the copyright work to which the proceedings relate, which are not infringing copies, for the use of the body corporate or partnership;

(b) subject to paragraph (a), in determining whether sufficient evidence is adduced, the court may have regard to, including but not limited to, the following -

(i) whether the defendant has introduced policies or practices against the use of infringing copies of copyright works by the body corporate or partnership;

(ii) whether the defendant has taken action to prevent the use of infringing copies of copyright works by the body corporate or partnership.

(5) Section 118(3) is amended by adding "or (2A)" after "subsection (1)".

(6) Section 118 is amended by adding -

"(3A) It is a defence for the person charged with an offence under subsection (2A) to prove that -

- (a) he possessed the infringing copy in question in the course of his employment;  
and
- (b) the infringing copy in question was provided to him by or on behalf of his employer for use in the course of his employment.

(3B) Subsection (3A) does not apply to an employee -

- (a) who, at the time when the infringing copy in question was acquired, was in a position to make or influence a decision regarding the acquisition of the infringing copy; or
- (b) who, at the time when the offence in question was committed, was in a position to make or influence a decision regarding the use or removal of the infringing copy in question."

(7) Section 118(4) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

(8) Section 118(5) is amended by repealing "for the purpose

of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

(8A) Section 118(6) is amended by repealing "not being excluded under section 35(4)" and substituting "not being excluded under section 35(4) and which was lawfully made in the country, territory or area where it was made".

(9) Section 118(8) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

(10) Section 118(8A) is repealed.

(11) Section 118 is amended by adding -

"(10) In this section, "dealing in" (經銷) means selling, letting for hire, or distributing for profit or reward."

24. Section added

The following is added -

"119B. ~~Offence of making for distribution~~  
~~—or distributing in relation to~~  
making for distribution or  
distributing on a regular or frequent  
basis infringing copies  
of copyright works in printed  
form contained in books, etc.

~~(1) Without prejudice to section 118(1), a person commits an offence if he, without the licence of the copyright owner of a copyright work to which this subsection applies, does any of the following acts on a regular or frequent basis, for the purpose of or in the course of any trade or business, and it results in a financial loss to the copyright owner—~~

~~(a) makes an infringing copy of the work for distribution; or~~

~~(b) distributes an infringing copy of the work.~~

(1) A person commits an offence if he does any of the following acts on a regular or frequent basis for the purpose of or in the course of any trade or business -

(a) without the licence of the copyright owner of a copyright work described in subsection (2), makes an infringing copy of the work for distribution, resulting in a financial loss to the copyright

owner; or

(b) without the licence of the copyright owner of a copyright work described in subsection (2), distributes an infringing copy of the work, resulting in a financial loss to the copyright owner.

~~(2) Subsection (1) applies to~~The copyright work referred to in subsection (1)(a) and (b) is a copyright work in a printed form that is contained in -

- (a) a book;
- (b) a magazine;
- (c) a periodical; or
- (d) a newspaper.

~~(3) Subsection (1) does not apply in the circumstances specified in the regulations made under subsection (14).~~

(3) Subsection (1) does not apply in circumstances where -

- (a) the making or distribution of the infringing copies of one or more than one copyright work referred to in subsection (1) does not exceed the extent specified in the regulations made under subsection (14); or
- (b) the infringing copies of one or more than



one copyright work referred to in subsection (1) are made or distributed in the manner specified in the regulations made under subsection (16).

(4) Subsection (1) does not apply to an educational establishment of any of the following descriptions -

- (a) an educational establishment specified in section 1 of Schedule 1;
- (b) an educational establishment exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112); or
- (c) an educational establishment receiving direct recurrent subvention from the Government.

(5) Subsection (1) does not apply to the distribution through a wire or wireless network of an infringing copy to which access is not restricted by procedures of authentication or identification.

(5A) Subsection (1) does not apply if the infringing copy -

- (a) forms part of the special collection of a library or archive owned by the Government, or a library or archive designated under subsection (5B)(a); and
- (b) is distributed solely -
  - (i) for on-the-spot reference use

in, or during an activity  
organized by, a library or  
archive referred to in  
paragraph (a); or

(ii) for loan to other libraries or  
archives for the purpose of  
exhibition or research.

(5B) The Secretary for Commerce, Industry and  
Technology may, having regard to the advice of the  
Director of Leisure and Cultural Services -

(a) by notice published in the Gazette  
designate for the purposes of subsection  
(5A)(a) any library or archive that is  
exempt from tax under section 88 of the  
Inland Revenue Ordinance (Cap. 112); and

(b) by regulations prescribe the conditions  
that a library or archive designated  
under paragraph (a) must comply in order  
to be eligible for the exception under  
subsections (5A) and (5E).

(5C) In subsection (5A), "special collection"  
( ) -

(a) in the case of a library or archive owned  
by the Government, means a collection  
consisting primarily of works or  
articles, or copies of works or articles,

donated or given by the public that are, in the opinion of the Director of Leisure and Cultural Services, of cultural, historical or heritage importance or value;

(b) in the case of a library or archive designated under subsection (5B)(a), means a collection consisting primarily of works or articles, or copies of works or articles, donated or given by the public that are, in the opinion of the head or controlling body (by whatever named called) of the library or archive, of cultural, historical or heritage importance or value.

(5D) For the purposes of the exception under subsection (5A), an archive owned by the Government includes a museum owned by the Government.

(5E) Subsection (1) does not apply to the making for distribution, or distribution, by a library or archive referred to in subsection (5A)(a), of a single copy of any item forming the special collection, for the purpose of preserving or replacing the item against loss, deterioration or damage, but the copy may only be distributed for the use referred to in subsection (5A)(b).

(6) Without prejudice to section 125, where a body corporate or a partnership has done an act referred to in subsection (1), the following person shall, unless ~~he proves~~ there is evidence showing that he did not authorize the act to be done, be presumed also to have done the act -

(a) in the case of the body corporate -

(i) any director of the body corporate who, at the time when the act was done, was responsible for the internal management of the body corporate; or

(ii) if there was no such director, any person who, at the time when the act was done, was responsible under the immediate authority of the directors of the body corporate for the internal management of the body corporate;

(b) in the case of the partnership -

(i) any partner in the partnership who, at the time when the act was done, was responsible for the internal management of the partnership; or

- (ii) if there was no such partner, any person who, at the time when the act was done, was responsible under the immediate authority of the partners in the partnership for the internal management of the partnership.

~~(7) A defendant charged with an offence under subsection (1) by virtue of subsection (6) is taken to have proved that he did not authorize the act in question to be done if—~~

- ~~(a) sufficient evidence is adduced to raise an issue with respect to that fact; and~~
- ~~(b) the contrary is not proved by the prosecution beyond reasonable doubt.~~

~~(8) In determining whether sufficient evidence is adduced for the purposes of subsection (7)(a), the court may have regard to, including but not limited to, the following—~~

- ~~(a) whether the defendant has introduced policies or practices against the making and distribution of infringing copies of copyright works by the body corporate or partnership;~~
- ~~(b) whether the defendant has set aside financial resources or incurred—~~

~~expenditure for the purposes of  
obtaining licences to make and  
distribute copies of copyright works;~~

~~(c) whether the defendant has taken action  
to prevent the making or distribution of  
infringing copies of copyright works by  
the body corporate or partnership.~~

(7) A defendant charged with an offence under  
subsection (1) by virtue of subsection (6) is taken not  
to have done the act in question if -

(a) sufficient evidence is adduced to raise  
an issue that he did not authorize the  
act to be done; and

(b) the contrary is not proved by the  
prosecution beyond reasonable doubt.

(8) For the purposes of subsection (7)(a) -

(a) the defendant shall be taken to have  
adduced sufficient evidence if the court  
is satisfied that -

(i) the defendant has caused the  
body corporate or partnership  
concerned to set aside  
financial resources, and has  
directed the use of the  
resources, for the  
acquisition of appropriate

licences, in accordance with  
the needs of the body  
corporate or partnership, to  
make or distribute, or to make  
and distribute, copies of the  
copyright work to which the  
proceedings relate for the use  
of the body corporate or  
partnership;

(ii) the defendant has caused the  
body corporate or partnership  
concerned to set aside  
financial resources, and has  
directed the use of the  
resources, for the  
acquisition of a sufficient  
number of copies of the  
copyright work to which the  
proceedings relate, which are  
not infringing copies, for the  
use of the body corporate or  
partnership;

(iii) the body corporate or  
partnership concerned has  
incurred expenditure for the  
acquisition of appropriate

licences, in accordance with  
the needs of the body  
corporate or partnership, to  
make or distribute, or to make  
and distribute, copies of the  
copyright work to which the  
proceedings relate for the use  
of the body corporate or  
partnership; or

(iv) the body corporate or

partnership concerned has  
incurred expenditure for the  
acquisition of a sufficient  
number of copies of the  
copyright work to which the  
proceedings relate, which are  
not infringing copies, for the  
use of the body corporate or  
partnership;

(b) subject to paragraph (a), in determining  
whether sufficient evidence is adduced,  
the court may have regard to, including  
but not limited to, the following -

(i) whether the defendant has

introduced policies or  
practices against the making



and distribution of  
infringing copies of  
copyright works by the body  
corporate or partnership;

(ii) whether the defendant has  
taken action to prevent the  
making or distribution of  
infringing copies of  
copyright works by the body  
corporate or partnership.

(9) It is a defence for the person charged with an offence under subsection (1) to prove that -

(a) he has taken adequate and reasonable steps to obtain a licence from the copyright owner in question but failed to get a timely response from the copyright owner;

~~(b) he has made reasonable efforts but failed to obtain commercially available copies of the copyright work in question and the copyright owner in question has refused to grant him a licence on reasonable commercial terms; or~~

~~(c) he did not know and had no reason to believe that the copies made or distributed are infringing copies.~~

- (b) he has made reasonable efforts but failed to obtain commercially available copies of the copyright work in question and the copyright owner in question has refused to grant him a licence on reasonable commercial terms;
- (c) he did not know and had no reason to believe that the copies made or distributed are infringing copies; or
- (d) he cannot, after making reasonable enquiries, ascertain the identity and contact details of the copyright owner in question.

(10) It is a defence for the person charged with an offence in respect of an act under subsection (1) to prove that -

- (a) he did the act in the course of his employment; and
- (b) he did the act in accordance with the instruction given to him by or on behalf of his employer in the course of his employment.

(11) Subsection (10) does not apply to an employee who, at the time when the infringing copy in question was made or distributed, was in a position to make or influence a decision regarding the making or

distribution of the infringing copy.

(12) A person who commits an offence under subsection (1) is liable on conviction on indictment to a fine at level 5 in respect of each infringing copy and to imprisonment for 4 years.

(13) Sections 115 and 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under subsection (1).

~~(14) For the purposes of subsection (3), the Secretary for Commerce, Industry and Technology may by regulations specify the circumstances in which subsection (1) does not apply."~~

(14) For the purposes of subsection (3)(a), the Secretary for Commerce, Industry and Technology may, in relation to one or more than one copyright work referred to in subsection (1), make regulations to prescribe that subsection (1) does not apply in circumstances where the making or distribution of the infringing copies of the copyright work or works does not exceed the extent specified in the regulations.

(15) The Secretary for Commerce, Industry and Technology may, in the regulations made under subsection (14), specify the extent referred to in that subsection by reference to -

(a) the number of infringing copies made or distributed;

(b) the value of those infringing copies; and

(c) any other factors that he may consider relevant,

and provide for a method or methods for determining the number of those infringing copies, and a method or methods for determining the value of those infringing copies, having regard to the retail value of the related books, magazines, periodicals or newspaper, and any other factors that he may consider relevant.

(16) For the purposes of subsection (3)(b), the Secretary for Commerce, Industry and Technology may, in relation to one or more than one copyright work referred to in subsection (1), make regulations to prescribe that subsection (1) does not apply in circumstances where the infringing copies of the copyright work or works are made or distributed in the manner specified in the regulations, after having regard to -

(a) the availability of any licensing scheme that covers the making or distribution of copies of the copyright work or works in the specified manner; and

(b) any other factors that he may consider relevant."

56. Sections added

The following are added immediately after section 273 -

**"273A. Rights and remedies in respect of circumvention of effective technological measures**

(1) Subject to sections 273D and 273H, this section applies where an effective technological measure has been applied in relation to a copyright work, and a person does any act which circumvents the measure, knowing, or having reason to believe, that he is doing an act which circumvents the measure.—

~~(a) that he is doing an act which circumvents the measure; and~~

~~(b) that the act will induce, enable, facilitate or conceal an infringement of the copyright in the work.~~

(2) The following persons have the same rights and remedies against the person referred to in subsection (1) as a copyright owner has in respect of an infringement of copyright -

(a) the copyright owner of the work;

(b) an exclusive licensee of the copyright owner of the work; and

(c) any other person who, with the licence of the copyright owner of the work -

(i) issues to the public copies of the work;

- (ii) makes available to the public copies of the work; or
- (iii) broadcasts the work, or includes the work in a cable programme service.

(3) The rights and remedies conferred by subsection (2) on the copyright owner, the exclusive licensee and the person referred to in subsection (2)(c) are concurrent.

(4) Sections 112(3) and 113(1), (4), (5) and (6) apply, with the necessary modifications, in proceedings in relation to the copyright owner, the exclusive licensee and the person referred to in subsection (2)(c), as they apply in proceedings in relation to a copyright owner and an exclusive licensee with concurrent rights and remedies.

(5) Sections 115, 116 and 117 (presumptions as to certain matters relating to copyright) apply, with the necessary modifications, in proceedings instituted under this section, as they apply in proceedings instituted under Part II (copyright).

**273D. Exceptions to section 273A**

(1) Section 273A does not apply to an act which circumvents an effective technological measure if -

(a) the measure has been applied in relation to a computer program;

(b) the act is done with respect to the identification or analysis of particular elements of the computer program that are not readily available to the person who does the act;

~~(c) the act is done for the sole purpose of achieving interoperability of an independently created computer program with the computer program or another computer program; and~~

~~(d) the copy of computer program in relation to which the act is done is not an infringing copy.~~

(c) the act is done for the sole purpose of achieving interoperability of an independently created computer program with the computer program or another computer program;

(d) the copy of computer program in relation to which the act is done is not an

infringing copy; and

(e) the act of identification or analysis referred to in paragraph (b) does not constitute an infringement of copyright.

(2) Section 273A does not apply to an act which circumvents an effective technological measure if -

- (a) the act is done by or under the authority of the owner or operator of a computer, computer system or computer network; and
- (b) the act is done for the sole purpose of testing, investigating or correcting a security flaw or vulnerability of the computer, computer system or computer network, as the case may be.

(3) Section 273A does not apply to an act which circumvents an effective technological measure if the act is done for the sole purpose of research into cryptography and -

- ~~(a) where the research is conducted~~
  - ~~(i) by or on behalf of a specified educational establishment; or~~
  - ~~(ii) for the purposes of giving or receiving instruction in a specified course of study in the field of cryptography provided by a specified~~



~~educational establishment,  
the information derived from the  
research is not disseminated to the  
public except in a specified manner; or  
(b) in any other case, the act or the  
dissemination to the public of  
information derived from the research  
does not affect prejudicially the  
copyright owner.~~

(a) where the research is conducted by or on  
behalf of a specified educational  
establishment, or for the purposes of  
giving or receiving instruction in a  
specified course of study in the field  
of cryptography provided by a specified  
educational establishment -

(i) the research does not  
constitute an infringement of  
copyright;

(ii) it is necessary for the act to  
be done in order to conduct the  
research; and

(iii) the information derived from  
the research is not  
disseminated to the public  
except in a specified manner;

or

(b) in any other case -

(i) the research does not

constitute an infringement of  
copyright;

(ii) it is necessary for the act to

be done in order to conduct the  
research; and

(iii) the act or the dissemination

to the public of information  
derived from the research does  
not affect prejudicially the  
copyright owner.

(4) In subsection (3) -

~~"specified educational establishment" (指明教育機構)~~

~~means an educational establishment specified in  
section 4, 6, 7, 8, 9, 12, 14 or 15 of Schedule 1;~~

"specified educational establishment" (指明教育機構)

means -

(a) an educational establishment specified  
in section 4, 6, 7, 8, 9, 12, 14 or 15  
of Schedule 1; or

(b) Hong Kong Shue Yan University registered  
under the Post Secondary Colleges  
Ordinance (Cap. 320);

"specified manner" (指明方式), in relation to the dissemination to the public of information derived from a research into cryptography -

- (a) means a manner which is reasonably calculated to advance the state of knowledge or development of cryptography or related technology; and
- (b) includes dissemination of the information in a journal or at a conference the target readers or audiences of which are primarily persons engaged in, or pursuing a course of study in, the field of cryptography or related technology.

(5) Section 273A does not apply to an act which circumvents an effective technological measure if -

- (a) the measure, or the copyright work in relation to which the measure has been applied, has the capability to collect or disseminate personally identifying information which tracks and records the manner of a person's use of a computer network without providing conspicuous notice of such collection or dissemination to the person;
- (b) the act is done for the sole purpose of

identifying or disabling the function of the measure or work, as the case may be, in collecting or disseminating personally identifying information; and

- (c) the act does not affect the ability of any person to gain access to any work.

(6) Section 273A does not apply to an act which circumvents an effective technological measure if -

- (a) a person does the act when using a technology, product or device; and
- (b) the sole purpose of the technology, product or device, as the case may be, is to prevent access of minors to harmful materials on the Internet.

(7) Section 273A does not apply to an act which circumvents an effective technological measure ~~if—~~

- ~~(a) the measure has been applied in relation to a copyright work of any description;~~
- ~~(b) the measure contains regional coding or otherwise has the effect of preventing or restricting access to the work for the purpose of controlling market segmentation;~~
- ~~(c) the act is done for the sole purpose of overcoming the restriction which controls market segmentation so as to~~

~~gain access to the work; and~~

if -

- (a) the measure has been applied in relation to a copyright work of any description issued to the public in a physical article;
- (b) the measure contains regional coding or any other technology, device, component or means which has the effect of preventing or restricting access to the work for the purpose of controlling market segmentation on a geographical basis;
- (c) the act is done for the sole purpose of overcoming the regional coding, technology, device, component or means, as the case may be, contained in the measure so as to gain access to the work;  
and
- (d) the copy of the work in relation to which the act is done -
  - (i) is not an infringing copy; or
  - (ii) if it is an infringing copy, is an infringing copy by virtue only of section 35(3) and was lawfully made in the country,

territory or area where it was made.

(7A) Section 273A does not apply to an act which circumvents an effective technological measure if -

(a) the measure has been applied in relation to a copy of any description mentioned in section 50(1), 51(1) or 53;

(b) the act of circumvention is done by the librarian or archivist of a specified library or archive; and

(c) the act is done for the sole purpose of carrying out any of the acts permitted under sections 50, 51 and 53.

(8) Section 273A does not apply to an act which circumvents an effective technological measure if the act is done by, or on behalf of, law enforcement agencies for the purpose of the prevention, detection or investigation of an offence, or the conduct of a prosecution.

**273H. Exceptions to sections 273A, 273B,  
273C and 273G**

The Secretary for Commerce, Industry and Technology may, by notice published in the Gazette, exclude from the application of any provisions of sections 273A, 273B, 273C and 273G any work or performance, class of works or performances or class of devices, products, components, means or services if he is satisfied -

- (a) that any use of or dealing with the work or performance, class of works or performances or class of devices, products, components, means or services, as the case may be, does not constitute or lead to an infringement of copyright or the rights conferred by Part III (rights in performances); and
- (b) that any such use or dealing has been, or is likely to be, adversely impaired or affected as a result of the application of the provisions."

Clause 61  
Schedule 7

19. **Retrospective application of the exemption and defence provided by ~~section 118(2E)~~ section 118(2DA), (2DB), (2E), (3A) and (3B) of this Ordinance**

(1) ~~Section 118(2E)~~Section 118(2DA), (2DB), (2E), (3A) and (3B) of this Ordinance applies in proceedings to which this subsection applies, in the same manner as it applies in proceedings for an offence under section 118(2A) of this Ordinance.

(2) Subsection (1) applies to proceedings for an offence under section 118(1)(d) of this Ordinance as in force immediately before the commencement date of section 22(3) of the 2006 Amendment Ordinance and read together with the Suspension Ordinance, in a case where the infringing copy to which the charge relates is an infringing copy of the kind described in section 2(2), (3), (4) or (5) of the Suspension Ordinance.

(3) Subsection (1) does not apply to proceedings for an offence committed before 1 April 2001.



