Submissions to the Bills Committee on the Copyright (Amendment) Bill 2006

(I)	**Criminal liability against making or dealing in infringing articles etc.**		
(1)	***Redrafting of the existing section 118(1) of the Copyright Ordinance***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
1.1	**Hong Kong Association of Banks**	Supports the modification at new section 118(1)(f) in clause 22(1).	Noted.
1.2	**An organization from software game industry** [NB. This organization requests to remain anonymous in the paper.] **Business Software Alliance (BSA)** **The Law Society of Hong Kong**	Suggests to add in the new section 118(1)(e) and (f)(ii) "or part of which includes" after the word "consists of", in order to clarify that the offence applies so long as part of the trade or business is dealing in infringing copies. BSA comments that the requirement that the trade or business must consist of dealing in infringing copies at the proposed section 118(1)(e) and (f) would create enforcement loopholes whereby offender can escape liability if they also trade in non-pirated goods or if they trade in infringing copies on an ad hoc or one-time basis. The Law Society shares similar views. BSA queries if the proposed section 118(1)(e) will catch a trader in mobile phones who on an ad hoc or one time basis exhibits or distributes counterfeit software as the trader's normal trade or business consists of trade in mobile phones and does not consist of dealing in infringing software. BSA suggests amending section 118(1)(e) and (f)(ii) to read as follows -	The existing section 118(1)(d) of the Copyright Ordinance is intended to combat two types of copyright infringement: first, possession of infringing copies with a view to the copies being sold, let for hire or distributed in the course of a "dealing in" (i.e. selling, letting for hire, or distributing for profit or reward) business, and second, possession of an infringing copy of a copyright work for use in business which does not consist of dealing in infringing copies of copyright works (i.e. a business end-user). We redraft section 118(1) in the Copyright (Amendment) Bill 2006 so that these two types of infringing acts will be caught under two separate provisions. That is, the new section 118(1)(f)(ii) tackles the former act (i.e. possession for "dealing in") and applies to all categories of copyright works, whereas the new section 118(2A) tackles the latter act (i.e. possession for business end-use) and applies to the four categories of copyright works only, namely, computer programs, movies, TV dramas and musical recordings.

(I)	**Criminal liability against making or dealing in infringing articles etc.**		
(1)	***Redrafting of the existing section 118(1) of the Copyright Ordinance***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		"(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)(ii)possesses an infringing copy of the work with a view to its being exhibited in public or distributed by an person for the purpose of in the course of any trade or business ~~which consists of dealing in infringing copies of copyright works~~" The Law Society suggests amending the section to provide that the business does at least to some extent directly or indirectly involve dealing in infringing copies, i.e. "any trade or business which **to any extent directly or indirectly** consists of dealing in infringing copies of copyright works". It also comments that the deletion of "in connection with" in the phrase "for the purpose of, in the course of or in connection with, any trade or business" and removal of section 118(8A) would create loopholes whereby counterfeiters claim that the sale or other dealing	Furthermore, we need to make our intention clear that the offences in the existing section 118(1)(e)(iii) and (iv) of the Copyright Ordinance are to tackle infringing acts involving exhibiting in public or distributing an infringing copy of a copyright work in the course of a **"dealing in" business** only rather than by any business end-users. Hence, when we formulate the new section 118(e) and (f)(ii), we make it clear that the concerned trade or business should consist of dealing in infringing copies of copyright works. The wording "any trade or business which consists of dealing in infringing copies of copyright works" already covers any trade or business where part of it is involved in dealing in infringing copies. We therefore do not consider it necessary to amend the new section 118(1)(e) and (f)(ii) as proposed by the organization from the software game industry. Likewise, we do not consider it necessary to amend the sections as proposed by the Law Society. We do not agree with BSA's suggestion to delete "which consists of dealing in infringing copies of copyright works" in the new section 118(e) and (f)(ii) as this would extend the scope of this "dealing in"

(I)	**Criminal liability against making or dealing in infringing articles etc.**		
(1)	***Redrafting of the existing section 118(1) of the Copyright Ordinance***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		was not actually done in the course of or for the purpose of a particular business.	offence to cover the possession of infringing copies of copyright works by business end-users which should only apply to four categories of works (namely, computer programs, movies, TV dramas and musical recordings). This would also extend the existing scope of the offence to those acts of distributing infringing copies of copyright works for internal use within business which is not to the extent of causing any prejudicial effect on copyright owners or exhibiting in public by business end-users who are not engaged in dealing in business. As regards whether the trading of an infringing copy of a copyright work on an ad hoc or one-time basis would be caught in the new section 118(1), it would depend on the facts of the case, which is the same as with the current provisions in the Ordinance. We would like to point out that the phrase "in connection with" was already removed from section 118(1) by virtue of the Copyright (Suspension of Amendments) Ordinance 2001 ("Suspension Ordinance") so that activities incidental to or marginally related to business already fall outside the scope of the criminal offence provisions. The amendments in the Bill only seek to incorporate the existing arrangement into the Copyright Ordinance.

(I)	**Criminal liability against making or dealing in infringing articles etc.**		
(1)	***Redrafting of the existing section 118(1) of the Copyright Ordinance***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
			It should be noted that the operation of section 118(8A) has been suspended under the Suspension Ordinance except with respect to the five kinds of copyright works referred to in the new section 118(2B). The effect of section 118(8A) with respect to the four categories of copyright works is now retained in the new section 118(2A) and the proposed repeal of section 118(8A) in the Bill only seeks to incorporate the arrangement under the Suspension Ordinance into the Copyright Ordinance.
1.3	**<u>Business Software Alliance</u>**	BSA considers that the legislative intention of the new section 118(1)(g) is to capture or include those infringing acts that may not fall into the specific provisions for dealing in offences. Therefore it opines that those acts which may affect prejudicially the rights of copyright owner should not be limited to acts of distribution only. It therefore suggests amending section 118(1)(g) as follows – "(g) ~~distributes~~ <u>does any act referred to in subsection (1)(a) to (f) in relation to</u> an infringing copy of the work (otherwise than for the purpose of or in the course of any trade or business and whether or not such trade or business which consists of dealing in infringing copies of copyright works) to such an extent as to affect	The new section 118(1)(g) is actually redrafted based on the existing section 118(1)(f) against prejudicial distribution of infringing copies of copyright works, with modifications consequential to the redrafting of the existing section 118(1)(d) and (e)(iii) and (iv) as explained in item 1.2 above. Hence, we do not agree with BSA's proposed amendment which effectively extends the scope of the current offence against prejudicial distribution.

(I)	**Criminal liability against making or dealing in infringing articles etc.**		
(1)	***Redrafting of the existing section 118(1) of the Copyright Ordinance***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
	<u>Hong Kong Association of Banks</u>	prejudicially the copyright owner." The Hong Kong Association of Banks opines that the wording "affect prejudicially" in the new section 118(1)(g) is too vague.	The wording of "affect prejudicially" already exists in the existing section 118(1) of the Copyright Ordinance.

(II)	**Business end-user liability**		
(2)	***Business end-user possession offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
2.1	**<u>Trade organizations</u>** • Hong Kong Association of Banks • Federation of Hong Kong Industries • Hong Kong General Chamber of Commerce **<u>Movie Producers and Distributors Association of Hong Kong Ltd. (MPDA)</u>**	Support the proposal to maintain the status quo regarding the scope of the business end-user possession criminal offence.	Noted.
2.2	**<u>Consumer Council</u>**	Suggests removing all end-user criminal liabilities at an opportune time.	The existing proposal to maintain the existing scope of the business end-user possession criminal offence is drawn up having carefully balanced the interests of copyright owners and users of copyright works.
2.3	**<u>Publication industry</u>** • Aristo Educational Press Ltd. • The Anglo-Chinese Textbook Publishers Organisation • Chung Tai Educational Press • The Commercial Press (HK) Ltd • Educational Booksellers' Association, Ltd • Excellence Publication Co Ltd	All object to excluding printed copyright works from the scope of business end-user possession criminal liability for the reason that it is unfair to accord less protection to printed works vis-à-vis the four categories of works. IIPA and HKIPA opines that such exclusion is inconsistent with Article 61 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) since	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 is appropriate having regard

(II)	**Business end-user liability**		
(2)	***Business end-user possession offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
	• Greenwood Press • Hon Wing Book Co. Ltd. • Hung Fung Book Co. Ltd. • Hong Kong Educational Publishers Association • Hong Kong and International Publishers' Alliance (HKIPA) • HK Publishing Federation Ltd • Jing Kung Education Press • Pilot Publishers Services Ltd. • Pilot Publishing Company Ltd. • Religious Education Resource Centre • Tai Chung Publisher Limited • Hong Kong Reprographic Rights Licensing Society • Springer • Hong Kong Educational Publishing Co. • Witman Publishing Co. (HK) Ltd. **<u>International Intellectual Property Alliance (IIPA)</u>**	commercial enterprise that builds its business upon using infringing copies of printed works should be regarded as copyright piracy on a commercial scale which should attract criminal sanction.	to the community's grave concern over the implications of any extension of this liability to printed works on free flow of information and classroom teaching. TRIPS Agreement (Article 61) only requires members to provide for criminal procedures and penalties to be applied in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. The possession of an infringing copy of a copyright work for use in business is **<u>not</u>** willful copyright piracy on a commercial scale. Our proposal is therefore already above the standard required under Article 61 of TRIPS.

(II)	**Business end-user liability**		
(2)	***Business end-user possession offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
2.4	**<u>Television Broadcasting Ltd</u>**	Objects that non-dramatic television programmes are excluded from the business end-user possession offence for the following reasons – (a) the commercial and appreciation values of non-dramatic programmes are equally important as dramatic programmes; (b) it is unfair that non-dramatic programmes are not accorded the same level of protection; and (c) the inclusion of non-dramatic programmes into the scope will not prejudice free flow of information as the Bill already provides exemptions for education, archive and public administration purposes.	As pointed out in item 2.2 above, the existing proposal has struck a reasonable balance between the interests of copyright owners and users of copyright works. We see no strong case to extend the scope of the business end-user possession offence to non-dramatic TV programmes.
2.5	**<u>Software industry</u>** • Business Software Alliance **<u>The Law Society of Hong Kong</u>**	<u>Section 118(2A)</u> Notes that the new section 118(2A) requires the possession of infringing copies must be "with a view to its being used for the purpose of that trade or business". It comments that this requirement would create an additional evidential burden for the prosecution and makes it virtually impossible for the prosecution to prove such an intention. It also worries that offenders possessing unlicensed	All along the business end-user possession offence is not a mere possession offence. A business would not be caught by this offence by mere possession of an infringing copy of a copyright work. The enforcement needs to collect evidence to prove that the infringing copy is being used or to be used for the business. The new section 118(2A) only aims to make this intention clear. We would also like to point out that an employee

(II)	**Business end-user liability** ***(2)*** ***Business end-user possession offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		software would get away by alleging that the copies possessed were brought by employees for personal use. It suggests replacing "with a view to its being used by any person for the purpose of or in the course of that trade or business" with "or for any other purpose so as to affect prejudicially the copyright owner". The Law Society shares similar views and suggests making the same amendments as proposed by BSA above. It comments that the proposed wording would undermine law enforcement as compared with the existing wording of "with a view to committing any act infringing copyright".	bringing an infringing copy of copyright work to his company for his personal use but not for his company's business or trade would not be caught under the existing section 118(1)(d). It should not be caught under the new section 118(2A) which is a business end-user criminal offence. We also disagree with the suggested amendment by the BSA and the Law Society to the new section as this would practically extend the criminal net to catch non-business end-use.
2.6	**<u>Hong Kong Bar Association</u>**	The Hong Kong Bar Association objects to the criminalization of end-users for possession of an infringing copy without adequate commensurate safeguards against abuse of exclusive rights, such as extending statutory exemptions and introducing complete relaxation of parallel imports. It opines that criminalization ought to be based on "use", rather than "possession".	The Bill contains various improvements to the exemption provisions and proposals to liberalize parallel importation. We have struck a reasonable balance between the interests of copyright owners and users of copyright works. As pointed out in item 2.5 above, the offence is not a mere possession offence. A business end-user may only attract criminal liability if he possesses an infringing copy of copyright work (belonging to the four categories of

(II)	**Business end-user liability** ***(2)*** ***Business end-user possession offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
			works) with a view to its being used in that business.
2.7	**<u>Software industry</u>** • Business Software Alliance	<u>Section 118(2D) –</u> Suggest to amend section 118(2D)(a) to clarify that only legitimate copies of computer program made available with the authorization of the copyright owner may be downloaded, and that dealings in the computer program that would otherwise affect prejudicially the rights of the copyright owner are not permitted under section 118(2D).	The new section 118(2D) is required mainly because the business end-user possession criminal liability only applies to four categories of works. For example, where a person downloads a work other than belonging to the four categories of works from the Internet and save a copy for future reference in business, it may also save the computer program that is technically required to view or listen to the work. The copy of computer programe so saved may become an infringing copy because the act of downloading involve making a copy and prior authorization from the copyright owner of the computer programme may not be available. This in effect means that the act of downloading of a work which does not belong to the four categories of works may attract criminal liability under section 118(2A). Hence, the new section 118(2D) is required to avoid this situation. We would like to point out that where a copyright work belonging to the four

(II) **Business end-user liability** ***(2)*** ***Business end-user possession offence***			
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
			categories of works (e.g. a business software) is downloaded without the prior authorization of the concerned copyright owner, the possession of the infringing copy of this copyright work with a view to its being used in business will attract criminal liability under section 118(2A). Section 118(2D) will not apply to this situation. In fact, a similar provision is currently provided under section 2(6)(b) of the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568).

(II)	**Business end-user liability**		
(3)	***Business end-user copying/distributing offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
3.1	**<u>Educational bodies and libraries</u>** • Concern Group of the Education Sector on Copyright Law • HUCOM Task Force on Copyright in Education • Joint University Librarians Advisory Committee • Hong Kong Association for Computer Education • Hong Kong Subsidized Secondary Schools Council • Open University of Hong Kong (OUHK) • Hong Kong Library Association • Hong Kong Professional Teachers' Union (HKPTU) • Hong Kong Institute of Education	Supports the proposed exemption of non-profit-making or Government subvented educational establishments from the copying/ distribution offence. They consider the exemption necessary, without which teachers will have great hesitation in using copyright printed works and students' learning will be jeopardized. OUHK welcomes that conditions for committing the copying/distribution offence are clearly set out and safe harbour perimeters are clearly defined. It comments that the safe harbour for newspaper articles would permit internal dissemination of relevant news from newspaper and magazines. HKPTU suggests to also exempt schools which are not subvented by Government, including some private kindergarten, since some kindergartens have to operate in private mode due to Government's educational policy. The Hong Kong Institute of Education gives general support to the proposals in the Bill.	Regarding HKPTU's comments, we would like to point out that kindergartens which are exempted from tax under section 88 of the Inland Revenue Ordinance (Cap. 112) would be exempted from the proposed business end-user copying/distribution offence even if they do not receive any direct subvention from the Government. We do not think that profit-making kindergartens should be given special treatment vis-à-vis other profit-making educational establishments.

(II)	**Business end-user liability**		
(3)	***Business end-user copying/distributing offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
3.2	**<u>Trade organizations</u>** • Chinese Manufacturers' Association (CMA) • Federation of Hong Kong Industries (FHKI) • Hong Kong Association of Banks • Hong Kong General Chamber of Commerce (HKGCC) **<u>Hong Kong Institute of Trade Mark Practitioners (HKITMP)</u>** **<u>Consumer Council</u>** **<u>Project Management Institute Hong Kong Chapter (PMIHK)</u>**	All trade organizations, except HKGCC, indicate objection to the copying/distribution offence for the reasons that they may hamper dissemination of information, impede normal operation of their business, and affect the development of a knowledge-based economy. CMA questions the justifications for criminalizing business end-users and the severity of the infringement situation faced by the publication industry. HKGCC, while not opposing to the new offence, reiterates that criminal sanction is a serious matter and care must be taken in implementation of the new provision. It urges the Government to mount an effective education and publicity campaign on IPR before enforcing the provision. The Hong Kong Association of Banks suggests exempting distribution activities for in-house dissemination of information and sharing of learning and resources from the new offence. FHKI opines that it does not object to imposing criminal sanctions against serious and willful piracy of printed works to protect the concerned copyright owners, provided that the infringing copies made or distributed are for sale or for other direct financial gain. It considers the existing	The proposed business end-user copying/distribution criminal liability is intended to target at regular or frequent infringements involving printed works in business. In formulating the proposed criminal provision, we have taken great care to address the public's concern on dissemination of information. Only those infringements exceeding the numerical perimeters to be laid down in the law may attract criminal liability. We do not consider it appropriate to limit the scope of the proposed offence as proposed by the Hong Kong Association of Banks as the offence is to combat infringements involving the act of making for distribution and distributing infringing copies of the four types of specific printed works within business including in-house use.

(II)	**Business end-user liability**		
(3)	***Business end-user copying/distributing offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		"copyshop offence" under section 119A of the Copyright Ordinance should be adequate to tackle the problem. On the safe harbour, CMA opines that it is technically difficult to decide on the numerical value to determine the criminality of an act. HKGCC comments that the proposed safe harbour appears acceptable for small and medium enterprises in general but would be grossly inadequate for large users and some smaller companies which are large-volume users. A fair and balanced copyright licensing scheme will be important to these smaller companies.	
		HKGCC disagrees with the discriminatory treatment between commercial and non-profit organizations while HKITMP suggests exempting all educational establishments. The Consumer Council suggests removing all business end-user criminal liabilities at an opportune time.	Please see our response at 3.4.
		PMIHK comments that the liability for uploading an infringing copy onto private network for access should rest with the person who uploads the copy,	Whether individual staff members or the organization would be liable under the new offence would depend on the circumstances

(II)	**Business end-user liability** ***(3)*** ***Business end-user copying/distributing offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		instead of the organization providing the network access.	of individual cases.
3.3	**<u>Publication industry</u>** • Aristo Educational Press Ltd. • The Anglo-Chinese Textbook Publishers Organisation • Chung Tai Educational Press • The Commercial Press (HK) Ltd • Educational Booksellers' Association, Ltd • Excellence Publication Co Ltd • Greenwood Press • Hon Wing Book Co. Ltd. • Hung Fung Book Co. Ltd. • Hong Kong Educational Publishers Association • Hong Kong and International Publishers' Alliance (HKIPA) • HK Publishing Federation Ltd • Jing Kung Education Press • Pilot Publishers Services Ltd. • Pilot Publishing Company Ltd. • Religious Education Resource Centre • Tai Chung Publisher Limited	The submissions from the publication industry (except the one from HKCLA) – (a) consider that "one-time" serious infringements should also be caught under the offence; (b) consider that the "safe harbour" proposed by the Administration too lax; (c) propose that the new offence should catch the infringing acts which are committed regularly or frequently, **<u>or</u>** otherwise if the retail value of the total number of infringing copies made for distribution or distributed within a 180-day period exceeds $2000. As regards the "safe habour", infringing copies made or distributed on a single occasion not exceeding 15% of the works, **<u>or</u>** not exceeding 30% of the work within a 180-day period would not be counted as infringing copies for the purpose of determination of regularity, frequency or retail value;	We would like to point out that the proposed offence confers additional protection for printed works and is meant to target significant infringements. Because of the intrinsic nature of printed works, the community has grave concern that the proposed offence will hamper information dissemination. The current formulation of the proposed offence represents our best efforts to balance the interest of copyright owners and users of copyright works. "One-off" distribution of infringing copies of copyright works to the extent that would affect prejudicially the concerned copyright owners already attracts criminal liability under the Copyright Ordinance. The proposed safe harbour is to address the community's concern over the implications of the offence on information dissemination and business operation and to ensure that the offence only catches infringement activities which are significant. We have considered

(II)	**Business end-user liability** ***(3)*** ***Business end-user copying/distributing offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
	• Hong Kong Reprographic Rights Licensing Society • Springer • Hong Kong Educational Publishing Co. • Witman Publishing Co. (HK) Ltd • HK Copyright Licensing Association (HKCLA) **<u>International Intellectual Property Alliance</u>** **<u>Comic book industry</u>** • Hong Kong Comics and Animation Federation Ltd.	(d) demand that exemption of non-profit making educational establishments and educational establishments subvented by the Government must be conditional, i.e. the exemption – (i) must expire after a finite time period; (ii) is accompanied by a government review of the practices of educational establishments and the extent to which they have entered into available licensing arrangements; (iii) applies only to bona fide uses for instruction purposes; (iv) do not apply to textbooks or other materials marketed primarily for instructional uses. HKIPA opines that the threshold should be set much lower than $8000 per 180-day period and all such copying that is more than de minimis should count against that threshold. It objects to the proposed statutory defence on grounds of lack of timely response from copyright owners to licensing requests and refusal of copyright owners to grant licence on reasonable commercial terms, since the retention of copyright owner's right to refuse licensing a particular use should not forfeit	the perimeters of the "safe habour" suggested by the publication industry and consider them on the low side. Nonetheless, we will continue to maintain dialogue with the copyright owners on the appropriate safe harbour for the offence. The proposed conditions for exemption of non-profit-making or government subvented educational establishments from the proposed offence would render the exemption meaningless as all the textbooks and materials marketed primarily for instructional uses are excluded from the scope of the exemption. We would like to point out that those exempted establishments will still attract the existing civil liability for copyright infringements and the existing criminal liability against prejudicial distribution. We encourage these institutions to continue acquiring licences from copyright owners so as to absolve themselves from possible liability arising from the making and distribution of copies of copyright works. We note HKIPA's comments on the "safe habour" and will continue to maintain

(II)	**Business end-user liability** ***(3)*** ***Business end-user copying/distributing offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		criminal protection. It also recommends clarifying that "academic journals" include all professional, technical and medical journals. HKCLA supports that the criminal offence targeting at printed works should be introduced against significant infringing acts. However, the Administration's proposed "safe habour" is too lax which allows large companies committing large-scale and regular infringements to escape from the criminal net. It proposes that for newspapers, magazines and periodicals (except academic journals), the numerical perimeter should be set at 300 infringing copies of copyright works within a 14-day period rather than 1000 copies as proposed by the Administration. It welcomes the Government's proposal not to exclude distribution of infringing copies via private networks (such as Intranets) from the new offence provisions. For the safe harbour, it suggests that, where logs showing actual number of access to an infringing copy uploaded is not available, the number of infringing copies distributed should be presumed to be 10% of the number of persons who could potentially access the infringing copy uploaded on the network. An alternative is to substantially reduce the	dialogue with the copyright owners on the appropriate safe harbour for the offence as pointed out above. In response to HKIPA's other comments, we would like to point out that the proposed statutory defence is drawn up having regard to the grave concern of the community that the proposed business end-user copying/distribution offence may affect dissemination of information. The defence is only applicable to the proposed criminal liability but not the civil liability. We will discuss with the publishers' associations as to how to define academic journals when drafting the regulations on the safe harbour. We note HKCLA's proposed safe harbour for private network situation. The application of the new offence to the private networks situation will be deferred until issues such as formulation of an appropriate "safe habour" and availability of licensing scheme for using copies of printed works in an electronic environment are sorted out. We will specify this deferred application arrangement in the regulations to be made by the Secretary for Commerce, Industry and Technology. We will continue to discuss with the copyright

(II)	**Business end-user liability** ***(3)*** ***Business end-user copying/distributing offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		number of copies for the safe habour in the private network situation. The Hong Kong Comics and Animation Federation objects to the "safe harbour" proposed by the Government, which they consider will in effect render nil protection to investment by the publication industry.	owners the appropriate "safe habour" formulation for the private network situation.
3.4	**<u>Film industry</u>** • Movie Producers and Distributors Association of Hong Kong Limited (MPDA) • Hong Kong Video Development Foundation (HKVDF) **<u>Music industry</u>** • International Federation of the Phonographic Industry (IFPI) (Hong Kong Group)	MPDA support that a safe habour should be formulated for the proposed offence. It opines that if certain educational establishments are exempted from the proposed offence, these establishments should still attract civil liability for any infringements undertaken. HKVDF and IFPI object to the exemption of educational establishments from the proposed offence as these institutions are capable of distributing copyright materials to such an extent as to affect prejudicially the interest of the copyright owner in a very large scale. They consider that without criminal sanction for wrong doings and without digital rights management systems, schools would be the safe haven for on-line piracy. Moreover, the exemption would fortify the social value that it is always acceptable to cheat in school.	The proposed exemption is to ensure that the proposed offence would not impede classroom teaching. We fully agree that schools should not commit copyright infringements. As pointed out above, schools exempted from the proposed offence would still attract the existing civil liability for copyright infringements. Indeed, we encourage schools to continue acquiring licences from copyright owners so as to absolve themselves from possible civil liability arising from the making and distribution of copies of copyright works.

(II)	**Business end-user liability**		
(3)	***Business end-user copying/distributing offence***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
3.5	**<u>Hong Kong Bar Association</u>**	The Hong Kong Bar Association does not see any good reason for the proposed offence as the existing section 118(1)(e) and (f) of the Copyright Ordinance should have covered the proposed offence, save and except two aspects, "distributing to staff or participant" and "distributing by digital means". It questions the reasons for specifically criminalizing the former act. For the latter act, the Association has no objection to extending liability to "distributing by digital means" by amending section 118(1)(e) and (f) of the Ordinance. The new offence may affect barrister who makes copies of the relevant printed works for his own use and to colleagues, instructing solicitors and lay clients, in the course of practice and for research purpose. The statutory defence provided for the new offence is inadequate and unsatisfactory since there is no compulsory licensing and the barrister will have to stop the acts of making and sending copies to staff and participants if the permission by copyright owners is not forthcoming.	The proposed offence is formulated to meet copyright owners' concerns that printed works may be copied and distributed easily and such infringing activities by business affect their interests. Having balanced the interests of users of copyright works, we formulate the proposed offence to catch significant infringements only. The existing section 118(1)(e) and (f) of the Ordinance should cover distribution by digital means as the provisions should be technologically neutral and apply to both the physical and digital environment. The existing section 118(1)(e) is intended to combat the act of distribution of infringing copies of copyright works in a "dealing in" business context, and we have taken the opportunity of the Bill to clarify the intention of this provision. The proposed offence is intended to be a specific offence targeting at infringing acts involving four specific types of printed works and the act of copying for distribution is also caught, whereas the existing section 118(1)(f) (new section 118(1)(g)) is a general provision targeting at the act of distribution only which is

(II) **Business end-user liability** ***(3)*** ***Business end-user copying/distributing offence***			
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
			applicable to all copyright works with the test "prejudicial effect on copyright owners" being imposed. Barristers who need to make copies of the four types of printed works for distribution or distribute such copies on a regular or frequent basis in the course of their practice might be caught under the proposed offence if the circumstances of use do not fall under the existing permitted act for judicial proceedings under section 54 of the Copyright Ordinance. We would like to point out that there is already civil liability under the said circumstances. We encourage users to acquire licences from copyright owner to absolve any liability that may arise from such acts of copying or distribution. There are already well-established licensing bodies for granting copyright licences for newspapers and printed publications. We will continue to liaise with these bodies to encourage them to offer one-stop services to users.

(II)	**Business end-user liability** ***(4)*** ***Directors'/partners' liability***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
4.1	**<u>Trade organizations</u>** • Chinese Manufacturers' Association (CMA) • Federation of Hong Kong Industries (FHKI) • Hong Kong Association of Banks • Hong Kong General Chamber of Commerce (HKGCC) **<u>Hong Kong Video Foundation Development (HKVDF)</u>** **<u>Consumer Council</u>**	CMA, FHKI, HK Association of Banks and HKVDF are against the proposed directors'/partner's liability for the following reasons – (a) small and Medium Enterprises (SMEs), which account for the majority of the business establishments in Hong Kong, do not have the resources to ensure that their employees do not commit infringements. They do not have the necessary knowledge to distinguish whether a copyright work is infringing or genuine, neither do they have the resources and expertise to develop IP management system. Hence, the proposal will discourage investors from setting up businesses in Hong Kong; (b) the proposal contravenes the common law principle of presumption of innocence and imposes undue burden on directors and partners as they need to prove that they have not authorized the infringing acts in question to be done; and	Enforcement experience reveals that it is not easy for the prosecutions to prove that the offence had been committed with the consent or connivance of, or to be attributable to any act on the part of, the director or the partner concerned under the existing section 125 of the Copyright Ordinance. As a result, many cases of business end-user piracy would only result in the company, as a legal entity, being convicted and subject to only a fine. The management of the companies concerned may treat such fines as one element of the company's operational cost and have no incentive to put in place proper management measures to ensure that infringing copies would not be used in their business. The proposed offence aims to promote corporate accountability and responsible governance against business end-user piracy. We expect that with the introduction of the proposed offence, businesses should put in place polices 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

(II) **Business end-user liability** ***(4)*** ***Directors'/partners' liability***			
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		(c) no urgency to introduce the new liabilities as section 125 of the Copyright Ordinance already provides such liability and it is not so difficult to prove a case under the section. Subjecting businessman to the new criminal liability is uncalled for as end-user possession offence does not endanger life or health of any person. HKVDF comments that the present draft would not obviate the concern of the management of a business entity since staff may install infringing copies in the absence of knowledge of the management. HK Association of Banks opines that directors or partners responsible for internal management does not necessarily have full knowledge or control of their staff's activities in the course of business and the defence in the new sections would be difficult to be raised by the defendant. HKVDF suggests that, if the offence were to be introduced, the first offender should be dealt with by way of summons punishable by fine. CMA suggests that the Government should replace the	distributed to staff or participants of the business's activities. If the offence were enacted, we would conduct public education and publicity activities to assist SMEs to understand the implications of the offence and the measures that they may put in place in their business against business end-user piracy. We would like to point out that the burden imposed on the defendant is only an evidential burden. If the defendant has adduced sufficient evidence to raise an issue, the prosecutions would need to prove beyond reasonable doubt that he has authorized the infringing acts to be done. We understand that the directors or management of a business may not know that certain infringing copies are installed by their staff. Under the proposed offence, a defendant would be able to absolve his liability if he can adduce sufficient evidence to raise an issue with respect to the fact that he has authorized the infringing act to be done. Sections 118(2H) and 119B(8)

(II)	**Business end-user liability** ***(4)*** ***Directors'/partners' liability***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		proposal by other milder measures such as providing for civil remedies or only imposing a fine on the directors and partners. The Consumer Council has grave reservation over the reversed burden of proof. It considers that the provision are not only too harsh on directors and partners, especially in offences relating to parallel import, but has also fundamentally changed the element of the criminal justice system. HKGCC has no objection to the proposal on the condition that it is the prosecutions' duty to prove offence. It also highlights the importance of public education and provision of clear guidelines for SMEs before enforcing the provision.	stipulate the factors that the court may consider when considering whether sufficient evidence is adduced which includes (e.g. whether policies or practices against the use of infringing copies are introduced, whether financial resources have been set aside for the acquisition of genuine copies). We note the concerns of users of copyright works over the penalty level. We will further liaise with the user stakeholder groups.
4.2	**<u>IT and software industry</u>** • Business Software Alliance (BSA) • Hong Kong Information Technology Federation (HKITF) **<u>International Intellectual Property Alliance (IIPA)</u>**	BSA, HKITF and IIPA welcome the proposed offence as it could encourage more responsible corporate governance. BSA comments that the reference to "responsible for internal management of the body corporate" results in ambiguities which could make prosecution difficult in practice. For example, the responsibilities of internal management may be	The existing wording of the proposed sections 118(2F) and 119B(6) do not have the effect that the offence would only apply if all the responsibilities of internal management are vested in one single director/senior management officer. If the responsibilities of internal management are shared by different directors/persons, the prosecutions would base on the facts and evidence of the

(II)	**Business end-user liability** ***(4)*** ***Directors'/partners' liability***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
	<u>The Law Society of Hong Kong</u>	shared by different directors and people who can directly influence the commission of the infringing act may not actually be involved in the internal management of the company. BSA opines that it is important that the evidence to be adduced by the defendant under the proposed section 118(2G)(a) is not frivolous, but is credible, reasonable and which must at least raise a triable issue for such purposes. The Law Society shares a similar view. BSA suggests qualifying the issues to be raised by including the word "triable" before "issue" in section 118(2G)(a) and adding "to subsection (a)" after "the contrary" in section 118(2G)(b). Both BSA and HKITF support setting out in the Bill the factors that a court may take into account in determining whether a director or partner has adduced sufficient evidence to prove that he has not authorized the infringing act. BSA further suggests adding the following two factors under section 118(2H) – (i) whether the defendant had reasonable grounds to be satisfied in the circumstances of the case	case to determine against whom the charge would be laid. As regards the second example, if the person who can influence the commission of the infringing act can be identified, it may be possible to charge the person under section 125 or even directly under section 118(2A) offence and there is no need to rely on the new section 118(2F). If the person can directly influence the use of software within the company as part of his duty, it may be argued that he is responsible for internal management in so far as this duty is concerned. The wording of the proposed section 118(2G)(a) and (b) reflect the nature of an "evidential burden" as described in the case law (e.g. HKSAR v. Lam Kwong Wai and Lam Ka Man (CACC 213/2003)) and have been adopted in similar provisions in the statutes imposing an evidential burden on the defendant (e.g. section 4(5) of the Prevention of Child Pornography Ordinance (Cap. 579)). We have reservation on introducing the two factors proposed by BSA for the following

(II)	**Business end-user liability** ***(4)*** ***Directors'/partners' liability***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		that the copy was not an infringing copy of a copyright work; and (ii) the completeness, accuracy and reliability of relevant books of accounts and/or records kept by the person pursuant to the Companies Ordinance and the Inland Revenue Ordinance and the related guidelines issued by the Commissioner of Inland Revenue respectively and all other circumstances of the case. BSA considers that if the employee defence provisions are introduced into the law without the directors'/partners' liability provisions, Hong Kong's copyright protection will be seriously weakened.	reasons – (a) under the proposed section 118(3), it is already a defence for the person charged with the offence under section 118(2A) to prove that he did not know and had no reason to believe that the copy in question was an infringing copy. Hence, the first factor proposed by BSA appears superfluous; and (b) it is doubtful if the compliance with the obligations under the other two Ordinances should be taken as a relevant factor under the proposed offence.

(II)	**Business end-user liability** ***(5)*** ***Defence for Employees and Exemptions for Certain Professionals in respect of Business End-user Criminal Liability***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
5.1	**Hong Kong Association of Banks** **Open Universities of Hong Kong**	All support the proposed defence and exemptions.	Noted.
5.2	**Project Management Institute Hong Kong Chapter**	Suggests to also include project management professionals, engineers, IT and business consultants into the scope of "exemptions for certain professionals".	The exemption in the proposed 118(2E)(c) is applicable to a person who possesses an infringing copy where the possession takes place on his client's premises and the infringing copy is provided to him by his client. Project management professionals, engineers and consultants may also rely on this exemption where applicable.
5.3	**Consumer Council**	Comments that the business end-user possession provisions are too harsh on the employees especially in offences relating to parallel import – (a) no similar employees' defence is provided for employees involved in commercial dealing of infringing copies which are parallel imported copies; and (b) the defence is not available to employees who are in a position to influence a decision regarding the use or removal of a movie, TV	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. Hence the defence is only available in respect of business end-user offences (which includes the second type of offence cited by Consumer Council) and **not** to offences of dealing in

(II)	**Business end-user liability** ***(5)*** ***Defence for Employees and Exemptions for Certain Professionals in respect of Business End-user Criminal Liability***		
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		dramas, musical sound recording or musical visual recording which are parallel imported for public showing or playing.	infringing copies. We consider this scope appropriate. We are of the view that, where parallel imported copies fall under the definition of "infringing copies" for the purpose of section 118 and attract criminal sanction, the operation of the criminal provisions in respect of parallel imported copies should be the same as other infringing copies.
5.4	**IT and software industry** • Business Software Alliance (BSA) • Hong Kong Information Technology Federation (HKITF) **International Intellectual Property Alliance (IIPA)** **Hong Kong General Chamber of Commerce (HKGCC)** **The Law Society of Hong Kong**	BSA, HKITF and IIPA are strongly against the proposed employees' defence because (a) the existing "absence of knowledge" defence is already adequate; (b) there is no indication that the existing business end-user criminal liability provision operates unduly harshly upon lower-level employees; (c) a specific employees' defence is not available in other jurisdictions; (d) the proposed employees' defence will create loopholes in law enforcement and exacerbate	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. We have reservation on the suggestion that only employees as defined by the Employment Ordinance could invoke the proposed employees' defence. We would like to point out that "employee" is defined in section 198(1) of the Copyright Ordinance as referring to a contract of service or

(II)	**Business end-user liability** ***(5)***	***Defence for Employees and Exemptions for Certain Professionals in respect of Business End-user Criminal Liability***
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		the piracy situation in Hong Kong; (e) the proposed employees' defence will create disincentive for employees to refuse to use infringing copies and for directors/managers to encourage or allow the use of pirated software, and hence foster a culture of disrespect of intellectual property; and (f) the introduction of an employees' defence would send a wrong and confusing message to the general public on the importance of IP protection, and could undermine past efforts to promote IPR in the territory. HKGCC objects to the employees' defence as it considers that both employer and employees should equally abide by the law and an "absence of knowledge" defence is already available for unintentional infringement. If a specific employees' defence is to be introduced, BSA suggests the following amendments to the defence provision to reduce the potential for abuse –	apprenticeship. The Employment Ordinance (Cap. 57) indeed does not provide a detailed definition of "employee" as such. It only provides that the Employment Ordinance applies to "every employee engaged under a contract of employment with certain exceptions, such as those employed by family members or as crew on a ship. Hence, under Cap. 57, it is still necessary to refer to the meaning of "employee" in common law to decide whether the relationship between two parties is that of employer-employee. We see no strong reason to follow the interpretation of "employees" under Cap. 57 in the Copyright Ordinance. Rather, we would rely on the common law to determine whether a person is an "employee" for the purpose of the proposed employees' defence. It should be noted that the common law does not provide a specific definition to the term "employee" but instead has established, through a long line of cases, the criteria to be considered in determining whether a person is engaged under a contract of service (i.e. a contract of employment). The criteria include: the degree of control of one party

(II) **Business end-user liability** ***(5)*** ***Defence for Employees and Exemptions for Certain Professionals in respect of Business End-user Criminal Liability***			
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		(a) the defendant must establish that they are employees as defined by the Employment Ordinance; (b) the defendant must establish that they are not directors, officers, proprietors, managers or employees with managerial functions; and (c) the defendant must identify or assist in the identification of the person(s) who actually provided the infringing copy to them. The Law Society shares the view that the proposed employees' defence might be open to abuse and suggests amending the provision along the proposed amendments in (a) and (c) above raised by BSA. BSA further suggests incorporating a whistle-blower provision so that an employee who has filed complaint or testified in court against his employers for business end-user possession offence, or who provided assistance in investigation or proceedings related to such offence, shall not be fired or discriminated against by his employer.	over the other on how the work is done, methods of payment, the risk of loss and benefit of profit…etc. This common law approach is used in assessing the nature of an engagement for the purposes of the Employment Ordinance as well as the Copyright Ordinance. As regards the proposal that that employees are required to identify the person who actually provided the infringing copy to them as a prerequisite for invoking the defence, we would like to point out that in some circumstances they may not be able to identify such a natural person. It is too onerous on the employees if they are required to investigate who acquired the infringing copies and placed the copies for use in business. Nonetheless, to invoke the defence, the defendant needs to prove that the infringing copy was provided to him by or on behalf of his employer (could be a natural or legal person). We would like to point out that the current formulation which allows managers,

(II) **Business end-user liability** ***(5)*** ***Defence for Employees and Exemptions for Certain Professionals in respect of Business End-user Criminal Liability***			
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
		BSA comments that the proposed employees' defence is inconsistent with and might defeat the operation of section 159A of the Crimes Ordinance, which provides that any person who agrees with another person that a course of conduct be pursued and which, if the agreement is carried out, will involve the commission of an offence, will be guilty of conspiracy to commit the offence in question. It also comments that the word "influence" and the reference to "acquisition" and "use or removal" in section 118(3B) are narrow and unclear, disregarding those relevant acts of installation, access and other dealing by employee.	employees with managerial functions, etc. to invoke the defence if they are not in a position to influence the acquisition, use, or removal of the infringing copy is made having regard to the views received in the consultation exercise ended in early 2005. On BSA's comments that the proposed employees' defence may be inconsistent with the offence of conspiracy under s.159A of the Crimes Ordinance (Cap.200) and that the defence would defeat the operation of the conspiracy offence, we would like to point out that section 159A(1) of Cap. 200 defines the conspiracy offence as when a person agrees with any other person(s) that a course of conduct which will involve the commission of any offence shall be pursued. The element of "agreement" is essential. Where an employee simply obeys the order of his employer to use the pirated software in business and satisfies the elements for the employee's defence, one may argue that there is no "agreement" between the employer and employee; the employee is just carrying out the order of the employer and thus should not

(II)	**Business end-user liability** ***(5)***	***Defence for Employees and Exemptions for Certain Professionals in respect of Business End-user Criminal Liability***
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
			be liable for conspiracy under section 159A anyway. We therefore have doubt on how the proposed employees' defence would defeat the operation of the conspiracy offence. We note BSA's concern about the wording "influence", "acquisition" and "use or removal". We believe these words should be general and clear enough. We will continue to maintain dialogue with BSA.