

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

**Copyright Exemption**

**(1) Fair dealing for education and public administration**

	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
1.1	<p><b><u>Educational bodies</u></b></p> <ul style="list-style-type: none"> <li>• Open University of Hong Kong</li> <li>• HUCOM Task Force on Copyright in Education</li> <li>• Concern Group of the Education Sector on Copyright Law</li> <li>• Hong Kong Subsidized Secondary Schools Council</li> <li>• Hong Kong Association for Computer Education</li> <li>• Hong Kong Institute of Education</li> <li>• Hong Kong Professional Teachers' Union (HKPTU)</li> </ul> <p><b><u>Trade organization</u></b></p> <ul style="list-style-type: none"> <li>• Hong Kong General Chamber of Commerce (HKGCC)</li> </ul>	<p>All support the introduction of fair dealing provision for education and the four factors to be considered in determining whether a particular dealing is fair or not.</p> <p>HUCOM Task Force suggests modifying the wording to include fair dealing with a work by or <u>on behalf of</u> a teacher so that anyone acting on behalf of a teacher (such as clerk) may also rely on the exemption.</p> <p>The Concern Group opines that the fair dealing provision should cover the act of making multiple copies for classroom instruction and uploading materials to school Intranet so long as the amount distributed/ uploaded is reasonable and fair. The provision should also cover fair use of copyright materials in teacher-supervised extra-curricular activities.</p> <p>The HK Association for Computer Education assures that schools will not abuse the fair dealing provision by copying exercise materials for students</p>	<p>We will consider HUCOM Task Force's suggestion to include "or on behalf of a teacher" into the provision.</p> <p>It is not our intention to specify the acts which would fall within the scope of the fair dealing provision for education purposes. Whether the act of making multiple copies for classroom instruction and uploading materials onto school Intranet constitute fair dealing would depend on the circumstances of individual case having regard to the four factors and any other relevant factors considered by the court as set out in the proposed section 41A(2). It should be noted that the impact on the interests of copyright owners arising from the distribution of multiple copies or uploading of the works onto school Intranet would be different from that arising from the use of a single copy. This will be relevant in considering whether the proposed dealing is fair, in particular in relation to the third</p>

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		<p>or copying the full textbook by making copies of many small segments accumulatively.</p> <p>HKPTU suggests that an exhaustive rather than non-exhaustive list of factors should be provided for the court to consider whether certain dealing with a copyright work constitutes fair dealing as this could provide clarity for school principals and teachers. It considers that the four factors as stipulated in section 41A(2) should be adequate.</p> <p>HKGCC suggests that the fair dealing concept should also apply to the business sector.</p>	<p>factor “effect of the dealing on the potential market or value of the work”.</p> <p>The proposed fair dealing provision will apply to giving or receiving instruction in a specified course of study provided by an educational establishment. “Specified course of study” is defined under section 198 and it means –</p> <p>(a) a course of study which is provided for the delivery of a curriculum (however described) developed on the basis of curriculum guidelines issued or endorsed by the Curriculum Development Council; or</p> <p>(b) a course of study which consists of an assessment of a pupils’ competence in the area covered by the course, and leads to the award of a qualification.</p> <p>If teacher-supervised extra-curricular activities fall within the meaning of a specified course of study, the fair dealing provision may apply.</p>

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			<p>As regards HKPTU's suggestion, we would like to point out that the four factors stipulated in section 41A(2) are modelled on the fair use provision in the US copyright law in which the factors are also not meant to be exhaustive.</p> <p>We note HKGCC's suggestion to provide for a fair dealing provision for the business sector. In the public consultation in early 2005, copyright owners were generally opposed to the introduction of a general fair dealing provision whilst views from users were divided. Having considered the interests of the copyright owners and the fact that the existing permitted acts already cover certain education and public administration uses, we have proposed to restrict the scope of the new fair dealing provision to these two purposes only.</p>
1.2	<p><b><u>Publishing industry</u></b></p> <ul style="list-style-type: none"> <li>• The Anglo-Chinese Textbook Publishers Organisation</li> <li>• Aristo Educational Press Ltd.</li> <li>• Chung Tai Educational Press</li> </ul>	<p>All submissions suggest that the fair dealing provisions should not be applicable when the user knew or ought to have been aware that licences were available to cover the activity in question, or the law should specify that a detrimental effect on the potential market for or value of the work (i.e.,</p>	<p>We disagree with the book publishers that the fair dealing provision for education would only apply if there is no licensing scheme covering the concerned activities. The existing fair dealing provisions for research and private study, and for criticism,</p>

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	<ul style="list-style-type: none"> <li>• The Commercial Press (HK) Ltd</li> <li>• Educational Booksellers' Association, Ltd</li> <li>• Excellence Publication Co Ltd</li> <li>• Greenwood Press</li> <li>• Hon Wing Book Co. Ltd.</li> <li>• Hung Fung Book Co. Ltd.</li> <li>• Hong Kong Educational Publishers Association</li> <li>• Hong Kong and International Publishers' Alliance (HKIPA)</li> <li>• HK Publishing Federation Ltd</li> <li>• Jing Kung Education Press</li> <li>• Pilot Publishers Services Ltd.</li> <li>• Pilot Publishing Company Ltd.</li> <li>• Religious Education Resource Centre</li> <li>• Tai Chung Publisher Limited</li> <li>• Witman Publishing Co. Ltd.</li> <li>• Hong Kong Reprographic Rights Licensing Society</li> </ul> <p><b><u>International Intellectual Property Alliance (IIPA)</u></b></p>	<p>one of the four factors that the court should take into account when considering whether an act constitutes fair dealing or not) may be presumed whenever such licences are available. They suggest that where any dealing involves making works accessible over a network, the applicability of the fair dealing provision should be conditioned on the adoption of technological measures encompassing access controls to restrict access to the materials, and use controls to prevent or inhibit unauthorized downloading, printing or further dissemination of the works.</p> <p>HKIPA further requests express provision recognizing that school's unauthorized use for instructional purposes of any substantial portion of a textbook or other material marketed for instructional purposes will ordinarily have a significant detrimental effect on the potential market for such works.</p> <p>All submissions question the justifications for introducing fair dealing provision for public administration and opine that it could cripple the Hong Kong market for legal materials, medical publications and reference books. HKIPA comments that the provision requires further</p>	<p>review and news reporting in the Copyright Ordinance do not have such a requirement. Nor does this licensing restriction exist in the fair use and fair dealing regimes in the US and Singapore. Also, we do not consider it appropriate to explicitly set out what activities are presumed to have detrimental effect on the potential market for or value of the work concerned. It should be up to the court to determine whether there is detrimental effect having regard to the specific circumstances of individual cases.</p> <p>As regards the suggestion to require educational establishments to implement technological measures before the fair dealing provision should be applied to the digital environment, we have strong reservations as we understand that the measures suggested are complicated, not readily available in the market and very expensive. The inclusion of such a requirement may render the fair dealing provision not applicable to the fair use of digital works in secondary and primary schools as they are unlikely to have the resources and technical support to adopt the</p>

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		<p>safeguards to ensure compliance with Hong Kong's international obligations and suggests providing a definition of "urgent business".</p> <p>IIPA suggests providing more safeguards and guidance to prevent the abuse of the proposed fair dealing provisions.</p>	<p>technological measures so required. What is more important is that we believe that the kind of abusive use envisaged by copyright owners could not constitute fair dealing.</p> <p>Upon the enactment of the fair dealing provisions, we will undertake public education activities together with the Education and Manpower Bureau, and issue circulars to government departments to explain in details the coverage and implications of the provisions.</p> <p>We do not think that acquisition of legal materials, medical publications and reference books for normal operation in the course of public administration could be displaced by the proposed fair dealing provision for public administration since the proposed provision only applies in cases of efficient administration of urgent business. We do not consider it desirable to provide a legal definition for "urgent business". Instead, the plain and ordinary meaning of "urgent" (i.e., needs to be dealt with immediately) would be adopted. Whether there is a need for something to be dealt with immediately</p>

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			depends largely on the circumstances at the material time. We note copyright owners' concerns about the scope of this provision and we will maintain dialogue with the copyright owners to see if any improvements could be made.
1.3	<p><b><u>Music Industry</u></b></p> <ul style="list-style-type: none"> <li>• IFPI (Hong Kong Group) (dated <b>30.04.2006</b>)</li> <li>• IFPI (Hong Kong Group) (dated <b>05.06.2006</b>)</li> </ul>	<p>IFPI (Hong Kong Group) is concerned that the fair dealing provision for education will render our school system the safest haven for online piracy in the world. It suggests that the Technology Education and Copyright Harmonization Act ("TEACH Act") of the US should be a starting point for considering how the application of the fair dealing provision for education to the digital environment should be restricted. The TEACH Act stipulates that in order to be covered by the exemption concerned, a non-profit educational institution is required, amongst other things, to –</p> <p>(a) maintain copyright material on its network system in a way that is reasonably preventing its use by anyone other than the intended recipients and for any longer than is necessary for class use;</p>	<p>Please see our response to the request for limiting the application of the fair dealing provision to the digital environment as set out in item 1.2 above. We would also like to point out that the "background and need for the legislation" section of the US TEACH Act states that the Act stems from a policy determination that certain performances and displays of copyrighted works in connection with systematic instruction using then-known forms of distance education should be permitted without a need to obtain a license or rely on fair use. The "purpose and summary" section of the Act explains that the Act updates the distance education provisions of the Copyright Act for the 21st Century, and allows students and teachers to benefit from deployment in education of advanced digital transmission technologies like the Internet,</p>

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		<p>(b) apply technological measures that reasonably prevent works from being retained by students in an accessible form longer than are necessary for class use and prevent unauthorized re-distribution of the work to others in an accessible form; and</p> <p>(c) prevent any misuse through technological means.</p> <p>IFPI (Hong Kong Group) cannot see examples of use that cannot be met by the exemptions and collective licensing system that are currently in place. It opines that the proposed fair dealing provision for public administration will signal to the world that the SAR Government leads the way for special privilege by legislative means.</p> <p><b>It comments that the fair dealing provision would only lead to litigations between owners and the education sector.</b></p>	<p>while introducing safeguards to limit the additional risks to copyright owners that are inherent in exploiting works in a digital format. Hence, the TEACH Act does not provide for a pre-requisite for the application of the “fair use” provision in the US Copyright Law to the digital environment. Instead, it provides specific exemption to facilitate distance learning in the digital environment involving the Internet. Indeed, according to the Senate Report accompanying the TEACH Act, nothing in the Act is intended to limit or otherwise to alter the scope of the fair use doctrine. It was expressly recognised that the fair use doctrine is technologically neutral and applies to activities in the digital environment and the lack of established guidelines for any particular type of use does not mean that fair use is inapplicable. Hence, the TEACH Act is in addition to the fair use doctrine and the doctrine will continue to apply in appropriate circumstances in the digital learning environment.</p>

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			There are already permitted act provisions for public administration as well as judicial and legislative proceedings purposes under the Copyright Ordinance. The proposed fair dealing provision for public administration seeks to provide flexibility to the existing exemption regime to meet the community's increased expectations for timely response by the public administration in urgent matters.
1.4	<p><b><u>Film Industry</u></b></p> <ul style="list-style-type: none"> <li>• Movie Producers and Distributors Association of Hong Kong Ltd. (MPDA)</li> <li>• Motion Picture Association (MPA)</li> </ul>	<p>MPDA agrees to the proposed copyright exemption and suggests that users should notify the relevant copyright owners where the situation permits. MPDA is concerned that some educational bodies may intentionally or unintentionally use a reasonable portion of copyright work for their commercial exploitation.</p> <p>MPA prefers relying on licensing scheme to the fair dealing provision for reasons below –</p> <p>(a) where potential abuses are discovered, copyright owners have to do investigation and go through the court to determine whether the acts are infringing;</p>	<p>We disagree with MPDA that users should notify the relevant copyright owners where the situation permits. The existing permitted acts and fair dealing provisions for research and private study, and for criticism, review and news reporting in the Copyright Ordinance do not have such a requirement. Nor does this requirement exist in the fair use and fair dealing regimes in the US and Singapore. In determining whether certain dealing constitutes fair dealing, one of the factors that the court shall consider is the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature. Hence,</p>

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	<p>(b) the lack of proper guidelines will create confusions and some people may abuse the provision by offering copyright works commercially without authorization or reimbursement and thereby diluting the value of the copyright work; and</p> <p>(c) the effect of abuse will be magnified by the increasing popularity of online and other non-traditional teaching methods.</p> <p>It fears that the provision will be abused e.g. people developing and offering "teaching materials" that would otherwise request authorization from copyright owners; and making available such materials online to paying "members" under the disguise of "students of online interactive course". Any expansion of educational exceptions should be carefully designed to ensure that any such exception introduced might be invoked only in certain limited cases that comply with the three-step test stipulated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).</p> <p>MPA comments that the current fair dealing provision for public administration is too vague and urges further clarification as to what constitutes "urgent business".</p>	<p>the fact that a portion of a copyright work is used for commercial exploitation will be taken into account when the court considers whether the dealing is fair or not.</p> <p>As regards MPA's concerns, we would like to point out that dealing with a work for the purposes of education under the specified circumstances would only be exempted if the dealing constitutes fair dealing. We have taken good care to ensure that the proposed provision is compatible with our TRIPS obligations and the "three-step test". The fair dealing provision is subject to the primary consideration as stipulated in section 37(3) of the Copyright Ordinance, namely, the act should not conflict with a normal exploitation of the work; and unreasonably prejudice the legitimate interests of the copyright owner. We note the concerns over the possible abuse. As pointed out above, we will undertake public education activities together with the Education and Manpower Bureau in order to provide the education sector with guidance on the coverage and implications of the fair dealing provision.</p>

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			As regards MPA's concern on the meaning of "urgent business", please see our response at item 1.2 above.
1.5	<p><b><u>Software industry</u></b></p> <ul style="list-style-type: none"> <li>• Business Software Alliance (BSA)</li> <li>• Hong Kong Information Technology Federation (HKITF)</li> </ul>	<p>BSA questions the justifications for introducing the fair dealing provisions for education and public administration, having regard to the absence of any legal action against educators or public administrators for copyright infringement, the availability of academic version software for the education sector, and the Government's leading role in using licensed work. BSA is concerned that without proper guidelines, the proposed fair dealing for education would encourage the use of unlicensed computer software by the educational community. In particular, the application of the provision to all educational establishments such as private tutorial and computer training centres would inevitably lead to greater abuse. BSA considers that the term "urgent business" in the fair dealing provision for public administration should be limited in scope and apply to circumstances related to national security and/or public safety issues only. HKITF shares similar views. It comments that the fair dealing provisions are unduly wide and could be prone to abuse, and that it is unnecessary and inappropriate to have the provision applicable to</p>	<p>We think that the use of an entire unlicensed software can hardly constitute fair dealing. To be consistent with the existing fair dealing provisions in the Copyright Ordinance, we consider that the proposed fair dealing provisions for education and public administration should also apply to all categories of copyright works including computer programs.</p> <p>As regards the proposed amendments to section 41A(2) and 54A(2), we would like to point out that the four factors as provided for in the provisions are modelled on the fair dealing provision in the US copyright law. These are meant to be non-exhaustive factors and the court should take into account any other relevant factor. We therefore do not agree with the proposed amendments. Specifically, we believe that the availability of academic versions of copyright works and the relative availability of licensed copies of works would be relevant facts for the court to</p>

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		<p>computer software since software products and specialized licensing scheme are already available to schools at discount and that licensed software is widely available in Hong Kong for use by the Government.</p> <p>BSA suggests deleting the fair dealing provisions. But if the Government is minded to retain them, it suggests the following amendments –</p> <p>(a) include the availability of academic versions of works for use by the teacher or pupil in section 41A(e) as one of the factors to be considered in determining whether any dealing with the work is fair;</p> <p>(b) exclude computer programs from the operation of the fair dealing provision for public administration;</p> <p>(c) adding “urgency” and “necessity” to the first factor in section 54A(2) so that it will read as “the purpose, urgency, necessity and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature”; and</p>	<p>consider when considering the fourth factor “the effect of the dealing on the potential market for or value of the work”. As regards the proposed addition of “urgency” and “necessity” to the first factor in section 54A(2), we would like to point out that the fair dealing provision for public administration will only apply if the dealing is for efficient administration of urgent business. The factors of “urgency” or the need for “efficient administration” should be considered in that context.</p> <p>As regards BSA’s concern on the meaning of “urgent business”, please see our response at item 1.2 above.</p> <p>We do not consider it necessary to add “without prejudice to section 37” in the proposed section 41A(2) as section 37 applies to all exemption provisions under Division III of Part II of the Copyright Ordinance, including the proposed section 41A.</p> <p>We do not agree with adding “distribution” to the definition of “dealt with” in the</p>

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		<p>(d) adding the fifth factor to section 54A(2) which reads as “the relative availability of licensed copies of works”</p> <p>It also suggests the following amendments –</p> <p>(a) to add “without prejudice to section 37” in section 41A(2) after “in determining whether any dealing with a work is fair dealing under subsection (1)”; and</p> <p>(b) to include “distribution” in the definition of “dealt with” in section 41A(6) and to make the definition inclusive rather than exhaustive.</p>	<p>proposed sections 41A(6) and 54A(4) and making the definition inclusive rather than exhaustive. This definition has been adopted in the existing permitted act provisions to define the scope of “subsequent dealing” which would render the copies made under the permitted act provisions infringing copies. The proposed addition of “distribution” would in effect prohibit the making of multiple copies of or uploading on the school intranet a reasonable portion of copyright work and we do not think that we should narrow the scope of the provision as suggested. Please also see our response at item 1.1 above.</p>
1.6	<b><u>Hong Kong Institute of Trade Mark Practitioners (HKITMP)</u></b>	<p>HKITMP comments that Government should be setting an example to the public in its treatment of copyright works and the proposed fair dealing provision for public administration is uncalled for, especially when the business sector is left out. It suggests deleting the fair dealing provision for public administration, unless the exemption applies to all users. It counter-proposes extending section 54(1) to cover proceedings before any Government department, if the Government is concerned about its ability to take copies in circumstances involving</p>	<p>When we consulted the public in early 2005, the question was whether to introduce a general fair dealing provision. Our current proposal to restrict the purpose of the new provision was in response to copyright owners' concerns and the divided views of users. Please see our response at item 1.1 above. We would like to point out that there are already permitted acts in the Copyright Ordinance for certain government business. The proposed fair dealing</p>

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		quasi-judicial proceedings through a Government department (e.g. hearings at Trade Marks Registry).	<p>provision for public administration seeks to provide flexibility to the existing exemption regime to meet the community's increased expectations for timely response by the public administration in urgent matters. The fair dealing provision will only apply if the "urgent business" criteria is met. Such formulation is much less general than the US fair use provision.</p> <p>We would like to point out that under section 198(1) of the Copyright Ordinance, "judicial proceedings" is defined to include proceedings before any court, tribunal or person having authority to decide any matter affecting a person's legal rights or liabilities. This should cover quasi-judicial proceedings conducted by Government departments, including proceedings before the Registrar of Trade Marks, Patents, and Designs and there is no need to amend section 54(1).</p>
1.7	<b><u>Law Society of Hong Kong</u></b>	<p>The Law Society has the following comments –</p> <p>(a) while there is no definition of "fair dealing" in the Ordinance, there are three different definitions concerning "dealing", namely</p>	<p>Our response are as follows –</p> <p>(a) "Dealing" of a work in the context of fair dealing provision can cover the act of copy, distribution, public performance</p>

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	<p>“dealing in” in the existing section 198(2) and the proposed section 118(10), and “dealt with” in the existing section 41(5). It questions the meaning of “dealing” in the provision and whether it covers copying and/or subsequent dealing and distribution;</p> <p>(b) section 41A(5)&amp;(6) and section 54A(3)&amp;(4) should be omitted as fair dealing is a narrower concept confined by its own definition and for the purpose of fair dealing in education or public administration, no subsequent dealing can be envisaged;</p> <p>(c) it should be clarified at sections 38(3), 41A and 54A that any fair use of a work must not conflict with the normal exploitation of the work by the copyright owner or unreasonably prejudice its legitimate interests, just as what is provided by section 37;</p> <p>(d) there is a need to clarify the overlapping between the fair dealing provision for education at section 41A with the existing permitted acts at sections 41 to 45, in order to avoid difficulties in interpretation; and</p>	<p>etc. Whether the dealing constitutes “fair dealing” would be determined by the court having regard to the above-mentioned four factors and the circumstances of the case. The application of the term “dealing in” in section 198(2) and the proposed section 118(10) and “dealt with” in section 41(5) is specifically confined to the concerned sections of the Ordinance and should be interpreted separately in the context of those specific sections;</p> <p>(b) The “subsequent dealings” provisions in sections 41A and 54A aim to make it clear that a copy which apart from the fair dealing provisions would be an infringing copy could not be subsequently dealt with (i.e., sold, let for hire, or offered or exposed for sale or hire). This provides clear indication to users of copyright works that the copies made should be confined for the purposes of giving or receiving instruction in a course of study or for efficient public administration of urgent business. We will consider whether</p>

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	<p>(e) the meaning of “efficient administration of urgent business” should be defined and add that the court should take into account the urgency and necessity for the dealing in determining whether a dealing is fair.</p>	<p>there are alternative drafting approaches to achieve the same purpose;</p> <p>(c) We would like to point out that section 38(3) and the fair dealing provisions are already subject to the primary consideration stipulated in section 37(3). Hence there is no need to amend the provisions as proposed by the Law Society;</p> <p>(d) The arrangement of introducing a fair dealing provision while retaining all the existing permitted acts for education in the Ordinance aims to make our copyright exemption regime more flexible to cater for the reasonable needs for use of copyright works by the education sector. Section 37(5) of the Copyright Ordinance already stipulates that the permitted acts provisions are to be construed independently of each other, so that the fact that an act does not fall within one provision does not mean that it is not covered by another provision. Likewise, an act that falls under one permitted act provision does</p>

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			<p>not mean that it cannot fall under another provision; and</p> <p>(e) Please see our response at items 1.2 and 1.5.</p>
1.8	<b><u>Television Broadcasting Limited</u></b>	<p>TVB suggests amending the definition of “dealt with”, wherever the words appear in the Bill and in other provisions of the Copyright Ordinance, to include “or distribute for profit or reward” at the end of the definition.</p>	<p>The definition of “dealt with” in the Bill and in other provisions of the Copyright Ordinance are found in the permitted act provisions. The definition defines the scope of “subsequent dealing” which would render the copies made under the permitted act provisions infringing copies. The proposed extension of the meaning of this definition would change the scope and operation of the existing permitted act provisions. This requires thorough discussion and consultation with all affected parties.</p>
1.9	<p><b><u>Joint submission (dated 15.6.2006) from –</u></b></p> <ul style="list-style-type: none"> <li>• <b>IFPI (HK Group) Ltd</b></li> <li>• <b>Hong Kong Video Development Foundation Ltd. (HKVDF)</b></li> <li>• <b>Intercontinental Group Holding Ltd</b></li> </ul>	<p><b>Comments that the fair dealing provision would undermine the market value of the works created for education, therefore eliminating Hong Kong creators’/ investors’ incentive for producing such copyright materials and schools will have to use all the imported teaching materials which may or may not share the value of our educational objectives.</b></p>	<p><b>As pointed out in our response at item 1.1, in determining whether a dealing of a work is “fair”, the court shall consider the effect of the use upon the potential market for or value of the copyright work.</b></p> <p><b>Please see our response to the request for limiting the application of the fair dealing</b></p>

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	<ul style="list-style-type: none"> <li>• <b>HK Comics and Animation Federation Ltd</b></li> <li>• <b>HKIPA</b></li> <li>• <b>HKRRLS</b></li> <li>• <b>Association of American Publishers (USA)</b></li> <li>• <b>HK Publishing Federation Ltd</b></li> <li>• <b>The Anglo-Chinese Textbook Publishers Organization</b></li> <li>• <b>Hong Kong Educational Publishers Association</b></li> <li>• <b>Federation of Hong Kong Filmmakers and Film Industry Response Group</b> (the "Joint Submission")</li> </ul>	<p>It comments that school must have control by digital right management (DRM) over whatever copyright materials used for teaching purpose in the digital environment, otherwise school will become the safest haven of on-line piracy. It disagrees that DRM is not available and mentions that encryption and password protection technology have been widely used in commercial transaction.</p>	<p>provision to the digital environment as set out in item 1.2 above. The proposed fair dealing provision has clearly confined the scope of the exemption to using copyright works for giving or receiving instructions in specified courses and has clearly set out the factors to be considered. We could not see how activities such as Peer-to-Peer file sharing of the entire copyright works among students and teachers could be justified as fair dealing. Nonetheless, we will further discuss with the copyright owners and users of copyright works to consider if any amendments should be made to the provision.</p>
<b>1.10</b>	<p><u>Trade organization</u></p> <ul style="list-style-type: none"> <li>• <b>American Chamber of Commerce (AmCham)</b></li> </ul>	<p>Considers that the fair dealing provision for education could be used as an excuse or may encourage the use of pirated works. It questions the justifications for introducing the fair dealing provisions, having regard to the absence of any legal action against educators or public administrators for copyright infringement, the availability of academic version and licences for certain copyright works for the education sector, and the Government's leading role in fostering</p>	<p>We would like to point out that the fair dealing provisions for education and public administration seek to provide more flexibility to the existing copyright exemption regime so that acts which do not fall under the existing copyright permitted act provisions for the two purposes may still be exempted from copyright restriction if they constitute fair dealing. To address copyright owners'</p>

<b>Copyright Exemption</b>			
<b>(1) <i>Fair dealing for education and public administration</i></b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
		<p>respect for IPRs. AmCham suggests refining dealing the fair provision to avoid the abuse of it for piracy by the education community. On the fair dealing provision for public administration, it comments that the provision is extremely wide and suggests limiting it to situations where licensed works are not available in Hong Kong and the Government requires the work on an urgent basis e.g. in the interests of national security or public safety, that it could not be expected to obtain the proper licence from the rights owners.</p>	<p>worry about possible abuse, we have taken care in drafting the provisions, e.g. to restrict the application of the provision for education purposes to “a specified course of study” provided by an educational establishment only. On AmCham’s suggestion to limit the fair dealing provision for public administration, we would like to point out that the availability of the works/ licence would be relevant facts for the court to consider when considering the fourth factor “the effect of the dealing on the potential market for or value of the work”. We note the comment that the provision is too wide and we will consider if any amendments should be made.</p>
1.11	HKVDF (dated 6.6.06)	<p>Comments that the education sector should rely on licensing scheme instead of seeking to harbour misuse of copyright materials under the fair dealing provision.</p>	<p>Please see our response at item 1.4 above.</p>

<b>Copyright Exemption</b>			
<b>(2) To remove the licensing restriction at sections 44(2) and 45(2)</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
2.1	<p><b><u>Educational bodies</u></b></p> <ul style="list-style-type: none"> <li>• University Library of CUHK</li> <li>• Open University of Hong Kong</li> <li>• HUCOM Task Force on Copyright in Education</li> <li>• Joint University Librarians Advisory Committee</li> <li>• Concern Group of the Education Sector on Copyright Law</li> <li>• Hong Kong Subsidized Secondary Schools Council</li> <li>• Hong Kong Institute of Education</li> <li>• Hong Kong Professional Teachers' Union (HKPTU)</li> </ul>	<p>Support the repeal of section 45(2) as the restriction takes away copyright exemption once relevant licensing scheme is introduced. Exemption needs to be provided for educational establishments no matter whether licensing schemes exist or not. The removal of the restriction is crucial to promote the use of information for teaching and learning. The HUCOM Task Force remarks that there is no intention in the tertiary education sector to withdraw from the existing licensing schemes. HKPTU also points out that there is no intention for the education sector to refuse acquiring licences from copyright owners even with the proposed deletion of section 45(2) of the Copyright Ordinance.</p>	<p>Noted.</p>
2.2	<p><b><u>Publishing industry</u></b></p> <ul style="list-style-type: none"> <li>• The Anglo-Chinese Textbook Publishers Organisation</li> <li>• Aristo Educational Press Ltd.</li> <li>• Chung Tai Educational Press</li> <li>• The Commercial Press (HK) Ltd</li> <li>• Educational Booksellers' Association, Ltd</li> <li>• Excellence Publication Co Ltd</li> <li>• Greenwood Press</li> </ul>	<p>All strongly object to the removal of the existing section 45(2) as this would weaken the voluntary licensing scheme established by the industry, increase the risk of education sector copying their works to a large portion without compensation, and eliminate the incentives of the education sector to renew existing licence agreements. HKIPA opines that Hong Kong should continue to recognize that the best and most efficient way to manage educational uses of copyright works is to encourage</p>	<p>The removal of the licensing restriction in section 45(2) of the Copyright Ordinance is to address the concern of copyright work users that this licensing condition would totally disallow copying of a reasonable portion of a work for educational purposes, which should be a permitted act. With the removal of the restriction, the portion permitted for reprographic copying for the purposes of giving and receiving instruction</p>

<b>Copyright Exemption</b>			
<b>(2) To remove the licensing restriction at sections 44(2) and 45(2)</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
	<ul style="list-style-type: none"> <li>• Hon Wing Book Co. Ltd.</li> <li>• Hung Fung Book Co. Ltd.</li> <li>• Hong Kong Educational Publishers Association</li> <li>• Hong Kong and International Publishers' Alliance (HKIPA)</li> <li>• HK Publishing Federation Ltd</li> <li>• Jing Kung Education Press</li> <li>• Pilot Publishers Services Ltd.</li> <li>• Pilot Publishing Company Ltd.</li> <li>• Religious Education Resource Centre</li> <li>• Tai Chung Publisher Limited</li> <li>• Witman Publishing Co. Ltd.</li> <li>• Hong Kong Reprographic Rights Licensing Society</li> <li>• Copyright Agency Ltd (CAL)</li> <li>• International Federation of Reproduction Rights Organisations (IFFRO)</li> <li>• <b>Hong Kong and International Publishers' Alliance (HKIPA) (16.6.2006)</b></li> </ul>	<p>voluntary agreements between right holders and schools. It suggests that, if section 45(2) is to be repealed, clear guidelines regarding the volume and kind of copying that will be permitted must be provided in the law. It recommends that guidelines which have already been agreed upon by user groups and right holders should provide a good model for legislation or subsidiary regulation in the area.</p> <p>IFRRO opines that the licensing restriction is in line with current legislation in other jurisdictions and the repeal of it will put Hong Kong out of step with the legislative development in the region and rest of the world. It questions the reference made by the Administration to the non-existence of the licensing restrictions in the Australia and Singapore and points out that statutory licences exist in the two jurisdictions.</p> <p>CAL considers that the removal of the restrictions will weaken reliance on the licence schemes offered by licensing bodies and hence adversely affect the potential market for and value of the licensed works. This will directly conflict with the proposed section 38(3) (i.e., the inclusion of the effect of the dealing on the potential market for or value of the</p>	<p>still needs to fall within a "reasonable extent". The amended section 45 should still be subject to the primary consideration as stipulated in section 37(3) of the Copyright Ordinance, namely, the act should not conflict with a normal exploitation of the work; and unreasonably prejudice the legitimate interests of the copyright owner. For copying beyond a "reasonable extent", schools are required to acquire licences from the relevant copyright owners. To be certain that no liability would arise from reprographic copying of copyright works for education purposes; schools are encouraged to acquire licences from copyright owners' associations. <b>We will welcome copyright owners to promulgate licensing schemes for electronic transmission of copyright works. We will encourage schools to reflect their needs for such use so that useful and reasonable schemes could be worked out by both sides to meet the needs of the education sector.</b></p> <p>We note the publishers' suggestion that if section 45(2) is to be deleted, there should be clear guidelines in the law regarding the</p>

<b>Copyright Exemption</b>			
<b>(2) To remove the licensing restriction at sections 44(2) and 45(2)</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
	<ul style="list-style-type: none"> <li>• <b>Hong Kong Reprographic Rights Licensing Society (HKRRLS) (16.6.2006)</b></li> </ul> <p><b><u>International Intellectual Property Alliance (IIPA)</u></b></p> <p><b><u>The Law Society of Hong Kong</u></b></p>	<p>work as a factor relevant to reasonableness of any dealing under the fair dealing provision for private study and research) and with Hong Kong's international obligations which the proposed section 38(3) seeks to address.</p> <p><b>HKIPA and HKRRLS's submissions dated 16.6.2006 seek to re-emphasize the importance of maintaining the restriction at section 45(2), without which the Government's goal of encouraging the development of licensing schemes for electronic dissemination of works would be completely undermined.</b></p> <p>The Law Society opines that it is not right to repeal sections 44(2) and 45(2) because this would allow a "reasonable" extent of reprographic copying be made without the requirement for a licence even where a licensing scheme is in place.</p>	<p>volume and kind of copying that will be permitted. They have suggested that the guidelines which have already been agreed upon by user groups and right holders should be taken as the reference. We understand that they are referring to the Guidelines for Photocopying of Printed Works by Not-for-profit Educational Establishments which were promulgated by them in 2002. It is likely that the court will have regard to the guidelines when interpreting section 45. We doubt if it is desirable or appropriate to lay down in the law what is meant by a reasonable extent. We will further liaise with the concerned copyright owners to alleviate their concerns over the possible abuse of section 45 if subsection (2) is deleted.</p> <p>In the copyright law in Australia and Singapore, there are permitted act provisions which allow multiple copying, subject to certain prescribed conditions. There is no licensing restriction in these provisions. There are also other provisions which permit multiple copying to a greater extent than that allowed in the aforementioned provisions but</p>

<b>Copyright Exemption</b>			
<b>(2) To remove the licensing restriction at sections 44(2) and 45(2)</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
			such copying would be subject to a statutory licence.
2.3	<b><u>Motion Picture Association</u></b>	MPA comments that the proposed amendments to sections 44(2) and 45(2) are potentially harmful to right holders' ability to receive remuneration from their works, and that the deletion of the restriction at section 45(2) appears to undermine established and successful business practices under which educational institutions and right holders have operated for some time.	Please see our response in item 2.2.
2.4	<b><u>Joint Submission dated 15.6.2006</u></b> <b><u>IFPI (Hong Kong Group) (dated 5.6.2006)</u></b> <b><u>HKVDF (dated 6.6.2006)</u></b>	<b>Collective licence should be the most effective way to deal with the use of copyright works in the digital environment or where a large number of copyright owners and works are involved. They consider that the Administration's proposal to delete the restriction at sections 44(2) and 45(2) go against international norms and obligations and will lead to increased litigations against schools.</b>	<b>Please see our response at item 2.2 above.</b>

<b>Copyright Exemption</b>			
<b>(3) To extend the scope of some existing “permitted acts” for education</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration’s Response</b>
3.1	<p><b><u>Educational bodies</u></b></p> <ul style="list-style-type: none"> <li>• Open University of Hong Kong</li> <li>• HUCOM Task Force on Copyright in Education</li> <li>• Joint University Librarians Advisory Committee</li> <li>• Concern Group of the Education Sector on Copyright Law</li> <li>• Hong Kong Subsidized Secondary Schools Council</li> <li>• Hong Kong Association for Computer Education</li> </ul>	<p>All support the proposed amendments.</p> <p>HUCOM Task Force and the Concern Group suggest including friends, patrons and donors of educational establishments into the group of audience stated in section 43(1).</p>	<p>We consider it appropriate to expand the composition of audience under section 43 of the Copyright Ordinance to include only immediate family members of pupils but not friends, patrons and donors of educational establishments, having balanced the interests of copyright owners.</p>
3.2	<p><b><u>Motion Picture Association</u></b></p>	<p>Expresses concern that the proposed amendment to section 43 is potentially harmful to right holders’ ability to receive remuneration from their works.</p>	<p>Please see our response in item 3.1</p>
3.3	<p><b><u>Law Society of Hong Kong</u></b></p>	<p>It comments that the definition of “near relative” is peculiar and arbitrary. It further queries whether it is right to retain the permitted act at section 43 because such performances should come within section 76 which already allows performances as part of the activities of or for the benefit of a club, society or other not for profit</p>	<p>The definition of “near relative” is formulated having taken into account the practical needs of educational establishments, and the consideration that the scope of the audience should not be expanded too wide so as to balance the interests of copyright owners. We have also drawn reference from other legislation in Hong Kong</p>

<b>Copyright Exemption</b>			
<b>(3) To extend the scope of some existing “permitted acts” for education</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration’s Response</b>
		organization including educational organizations and proceeds are applied solely for its own purposes. Otherwise educational organizations should obtain licences for such performances.	(e.g. Sex Discrimination Ordinance).  The scope of section 43 is different from that of section 76. Section 43 is a specific permitted act for education which covers activities in educational establishments and instruction activities and apply to all educational establishments at Schedule 1, regardless of whether they are profit making or not. Section 76 covers activities conducted by non-profit making clubs, societies or organizations which are charitable or otherwise concerned with the advancement of religion, education or social welfare. From the limited case law, it appears that “organisation” under section 76 is given a rather restrictive interpretation to cover organisations which are in the nature of clubs and societies only. Therefore, the extent of the application of section 76 to the activities organized by even non-profit making educational establishments may not be that certain.
3.4	<b><u>IFPI (Hong Kong Group)</u></b> <b><u>(dated 5.6.2006)</u></b>	<b>Suggests the Administration to withdraw the proposed amendments to expand the composition of audience under section 43 of the Copyright Ordinance. It further suggests</b>	<b>The proposal to expand the composition of audience to include immediate family members of pupils is to address the concern that the existing scope is too restrictive and</b>

<b>Copyright Exemption</b> <b>(3) To extend the scope of some existing “permitted acts” for education</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration’s Response</b>
		<b>excluding parents of pupils from the audience in order to comply with Berne Convention and other treaties.</b>	<b>hence may not accommodate the practical needs of educational establishments.</b>  <b>The Dispute Settlement Body of the World Trade Organisation has confirmed in a decision (WT/DS/160R) that, inter alia, Article 11 of the Berne Convention (public performance rights) comprises the possibility of providing minor exceptions to the exclusive rights in question. These minor exceptions, as in the case of all other exceptions, are subject to the three-step test in Article 13 of the TRIPS Agreement. We are satisfied that the proposed amendments to section 43 would comply with the three-step test.</b>

<b>Copyright Exemption</b>			
<b>(4) <i>New permitted acts for persons with a print disability</i></b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
4.1	<p><b><u>Educational bodies</u></b></p> <ul style="list-style-type: none"> <li>• Concern Group of the Education Sector on Copyright Law</li> <li>• Hong Kong Subsidized Secondary Schools Council</li> </ul> <p><b><u>Hong Kong General Chamber of Commerce (HKGCC)</u></b></p> <p><b><u>Hong Kong Blind Union</u></b></p> <p><b><u>Movie Producers and Distributors Association of Hong Kong Ltd. (MPDA)</u></b></p>	All support introducing the new permitted act.	Noted.

<b>Copyright Exemption</b>			
<b>(5) New permitted acts for playing sound broadcast in vehicles</b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
5.1	<p><b><u>Movie Producers and Distributors Association of Hong Kong Ltd. (MPDA)</u></b></p> <p><b><u>Hong Kong General Chamber of Commerce (HKGCC)</u></b></p>	<p>HKGCC supports introducing the new permitted act.</p> <p>MPDA agrees to the proposal and opines that the Administration should consider not to subject the permitted act to the condition that the playing of the sound broadcast is for the purpose of affording the driver of the vehicle access to public information.</p>	<p>Copyright owners of the underlying works included in radio broadcast are concerned that the exemption should not apply to playing of radio broadcast for the enjoyment of passengers as this would affect their royalty income. The proposed permitted act is formulated having carefully balanced the interest of copyright owners and those of users of copyright works.</p>
5.2	<p><b><u>IFPI (Hong Kong Group)</u></b></p> <p><b><u>Phonographic Performance (South East Asia) Ltd.)</u></b></p>	<p>IFPI(HK Group) opines that the proposed exemption is not in compliance with Article 13 of the TRIPS agreement and Article 9(2) of the Berne Convention which allows exceptions and limitations to the exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder.</p> <p>Phonographic Performance (SE Asia) agrees that the public information aspect of the sound broadcast (such as news reporting) may be exempted under the proposed section 81A, but <b>not</b> those commercially released musical sound recordings.</p>	<p>The scope of the proposed permitted act is narrowly defined i.e. the playing of sound broadcast inside a land vehicle for a particular purpose. Besides, the permitted act is subject to the overriding principles in section 37(3) of the Copyright Ordinance, which means that any permitted act provision should be interpreted in the light of the requirements therein (i.e. the act does not conflict with a normal exploitation of the work by the copyright owner and does not unreasonably prejudice the legitimate interest of the copyright owner) and in implementation, users may only rely on the exemption to the extent that these requirements are met. Hence, we do not agree that they are not TRIPS compliant.</p>

<b>Copyright Exemption</b>			
<b>(5) <i>New permitted acts for playing sound broadcast in vehicles</i></b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
			<p>We disagree to Phonographic Performance (SE Asia)'s suggestion because as a matter of principle, the permitted act should apply so long as it is played for affording the vehicle driver access to public information, regardless of whether commercial sound recording is also included in the sound broadcast. It should also be noted that the permitted act at the existing section 81 makes no differentiation between commercial and non-commercial sound recording. [N.B. please see our response to PP(SE Asia)'s suggestion to amend section 81 in a separate paper on "other views"].</p>
5.3	<p><b><u>Law Society of Hong Kong</u></b> <b><u>Hong Kong Institute of Trade Mark Practitioners (HKITMP)</u></b></p>	<p>The Law Society comments that it is unnecessary to clarify that a driver can privately listen to a sound broadcast since it is not a public broadcast. Where the broadcast is in public, it is not clear whether this exemption would allow otherwise public broadcasts played in public vehicle to be exempt merely because the purpose is to allow the driver to have access to public information. It suggests that the exemption should apply only "to the extent necessary" rather than based on some notional purpose. HKITMP agrees applying the exemption to taxis (and other commercial vehicles which</p>	<p>The permitted act is proposed in light of the views collected in the public consultation exercise conducted in 2001 and is carefully drafted not to apply to playing of radio broadcast for the enjoyment of passengers which is currently subject to royalty payment. Whether the playing of radio broadcast in a certain case is really for the driver to access to public information depends on the facts of the case. We believe the words "for the purpose of" are sufficient to define both the scope and the extent of the exemption. The inclusion of the phrase "to the extent necessary" in the provision may cause uncertainty in the operation of the permitted act.</p>

<b>Copyright Exemption</b>			
<b>(5) <i>New permitted acts for playing sound broadcast in vehicles</i></b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
		are not for mass fare-paying passengers) which are effectively privately hired by members of public. Vehicles such as buses, public light buses should pay licence fee and there is no justification for exempting them especially considering the fact that they take fixed routes and whatever the road or weather conditions, the driver is not permitted to drive elsewhere.	
5.4	<b><u>Project Management Institute Hong Kong Chapter (PMIHK)</u></b>	Suggests the Administration to consider if the definition of "vehicle" should include vehicles other than vehicles used on roads (e.g. ferries, airplanes).	The proposed permitted act is formulated in light of the views collected in the public consultation exercise conducted in 2001. We believe that it has struck a reasonable balance between the interest of copyright owners and those of users of copyright works.
5.5	<b><u>Yip Ming</u></b>	Suggests to amend section 81A by adding "except for franchised bus" after "vehicle", and to replace section 81A(2) by defining that "vehicle" and "road" in section 81A(1) has the same meanings as those defined in section 2 of the Road Traffic Ordinance.	The main purpose of the proposed exemption is to allow drivers to have access to public information when they are driving without infringing copyright owners' public performance rights. We do not agree that the drivers of certain vehicles, i.e. franchised buses as suggested, should be excluded from this exemption. We wish to point out that the proposed exemption would not apply to the playing of radio broadcast in franchised buses for the enjoyment of the passengers.

<b>Copyright Exemption</b>			
<b>(5) <i>New permitted acts for playing sound broadcast in vehicles</i></b>			
	<b>Organizations / Individuals</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
			As regards the proposed definitions of "vehicle" and "road" in section 81A, we consider that the meaning of "vehicle" under s.81A(2) and the meaning of "road" under s.3 of the Interpretation and General Clauses Ordinance (Cap. 1) reflect our policy intent.