

Bills Committee on Copyright (Amendment) Bill 2006**Proposed Amendments to the Copyright (Amendment) Bill 2006****Purpose**

The Copyright (Amendment) Bill 2006 (“the Bill”) was introduced into the Legislative Council in March 2006. Since then, stakeholder groups have put in a number of submissions on the Bill. The Administration has carefully considered these views, as well as those made by Members of the Bills Committee. This paper informs Members of the Administration’s proposed amendments to the Bill in the light of these views. We have also taken the opportunity to propose some technical amendments to improve the drafting of the Bill.

Considerations

2. Copyright owners demand stronger protection through the introduction of new civil liabilities and criminal sanctions. They are also wary of any exemptions or exceptions of liabilities for fear that these may create loopholes for abuse. On the other hand, users of copyright works are concerned that criminal sanctions and new civil liabilities may hamper legitimate and reasonable use of copyright works. Since the interests of the two sides are often diametrically different, we recognize from the outset that it may not be easy to meet in full the demands of the two sides despite our best endeavours to bridge the gap.

3. In devising the proposed amendments to the Bill, we have sought to uphold our commitment to striking a reasonable balance between the interests of the owners and those of users of copyright work. Taken as a whole, the proposed amendments to the Bill as detailed at Annex A represent, in our judgment, the farthest that we could possibly go in accommodating the legitimate concerns of the two sides, without tilting the overall balance. We trust the proposed amendments are in the overall interest of the community. Annex B sets out the suggestions which we earlier undertook to consider, but have decided not to take on board.

Way Forward

4. We are meeting the stakeholder groups to brief them on the proposed amendments to the Bill. We will continue to engage them in dialogue in refining the drafting of the concerned Committee Stage Amendments (CSAs).

5. The draft CSAs will be submitted for Members’ consideration once ready.

Proposed Amendments to the Copyright (Amendment) Bill 2006

I. Major Amendments

Item	Concerns	Response/Proposed Amendments
<i>Directors’/partners’ liability</i>		
1.	There were concerns that the reversal of the burden of proof on directors and partners would seriously affect the operation of small and medium enterprises (SMEs). A Bills Committee Member suggested that the Administration should provide more definitive and exhaustive guidelines in the law for the management of corporate/business organizations to follow.	<p>The proposed directors’/partners’ liability is a crucial proposal in the Bill to strengthen our measures against business end-user piracy. It aims to promote corporate accountability and responsible governance by entrenching a culture of respect for intellectual property rights, including the use of genuine copies of copyright works in business. We, however, acknowledge Members’ concern that more certainty should be given to SMEs as to what their directors/partners should do to absolve their liability. We therefore <i>propose</i> to specify clearly the actions that directors/partners may take to absolve their liability. This will be done by making amendments to the following effect –</p> <p>We propose to delete the proposed section 118(2H)(b) and section 119B(8)(b), and add new provisions to provide that, for the purposes of the proposed section 118(2G)(a) or section 119B(7)(a), if the court is satisfied that the defendant has set aside financial resources or incurred expenditure –</p> <p>(a) for acquisition of sufficient number of copies of the copyright work concerned (i.e. the copyright work that is the subject matter of the proceedings) which are not infringing copies for the use of the body corporate/partnership in question; or</p> <p>(b) for acquisition of sufficient number of appropriate licences to make or distribute copies of the copyright work concerned (i.e. the copyright work that is the subject matter of the proceedings), or for acquisition of sufficient copies which are not infringing copies of the copyright work concerned to meet the needs of the body corporate/partnership in question,</p>

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		the defendant shall be regarded as having adduced sufficient evidence to raise an issue that he did not authorize the act in question.
<i>Circumvention of Technological Measures for Copyright Protection</i>		
2.	<p><u>Knowledge of copyright infringement under the proposed sections 273A and 273B</u></p> <p>Copyright owners are strongly against the proposed “knowledge of infringement of copyright” in sections 273A and 273B as they consider it extremely difficult to prove the mental state of the circumventors or the dealers selling circumvention devices. They consider that the knowledge requirement would pose a significant barrier to effective protection of technological protection measures (TPMs).</p>	<p>The reason for including a requirement of “knowledge of infringement of copyright” is to ensure that users’ legitimate interests to use copyright works under the permitted acts would not be jeopardized. We acknowledge copyright owners’ concerns about the difficulties to prove the mental state of the defendants in the cases concerned. We have also carefully considered the comments expressed at a Bills Committee meeting that the knowledge requirement is drafted as an inevitable consequence of the act of circumvention. In the light of these views, we <i>propose</i> that amendments be made to the following effect –</p> <p>(a) the requirement of knowledge of infringement of copyright under the civil provision against the act of circumvention (section 273A(1)) will be deleted. A new subsection under section 273A will be added to the effect that a defendant in any proceedings initiated under section 273A(1) may absolve his liability if he can establish to the court’s satisfaction that the act of circumvention is done for the purpose of carrying out a non-infringing act. We trust that these proposed amendments would address users’ concerns that the anti-circumvention provisions should not affect their legitimate interest to use copyright works, whilst balancing the worries expressed by copyright owners to prove the mental state of the circumventor;</p> <p>(b) the requirement of knowledge of infringement of copyright under the civil provision against commercial dealing of circumvention devices (section 273B(1)) will be deleted. We agree that it might in practice be difficult for copyright owners to prove the mental state of the</p>

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		<p>persons who deal in circumvention devices. On the other hand, providing a defence to dealers of such devices may not serve any meaningful purpose as it would be difficult for them to ascertain the purpose for which the device is required by their customers. On balance, we consider that it would be more effective to combat circumvention activities by controlling the problem at source (i.e., the supply of devices or services which enable circumvention activities to be done). This calls for a more stringent control at the upstream level. Therefore, unlike the liability for the act of circumvention, we do <i>not propose</i> that a defence be provided to dealers of circumvention devices or operators of circumvention services.</p>
3.	<p><u>Liability of exhibiting in public and distributing circumvention device for non-business or trade purposes</u></p> <p>The Bill required that the act of “exhibits in public” and “distributes” should be done for the purpose of or in the course of trade or business in section 273B(1)(b). Copyright owners consider that this requirement is unnecessary and will significantly limit the effectiveness of this section. They point out that many individuals distribute or traffic circumvention devices not for business or trade purposes but the net effect is that such activities cause substantive prejudice to copyright owners. Hence, they suggest deleting the reference to “for the purpose of or in the course of trade or business”.</p>	<p>We do not consider it appropriate to delete the reference “for the purpose of or in the course of any trade or business” as this would mean that distribution or exhibition in public of any number of circumvention devices (e.g. even a single unit of the device) in a casual or private social context may incur liability. However, we acknowledge copyright owners’ concern that extensive distribution of circumvention devices might prejudicially affect their interests and remedies should be provided to them against such activities. We therefore <i>propose to</i> amend section 273B so that any person who distributes (otherwise than for the purpose of or in the course of any trade or business) any circumvention device to such an extent as to affect prejudicially the owner of the copyright may attract civil liability.</p> <p>In the 2004 public consultation exercise we consulted the public on the question of criminalization of circumvention activities. Having examined the views received, we considered it appropriate to criminalize commercial dealing of circumvention devices or the commercial provision of circumvention services only. That remains our view today. Hence, we do <i>not propose</i> to impose criminal sanctions against prejudicial distribution of circumvention devices in a non-business context.</p>

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4.	<p><u>Definition of “circumvention device”</u></p> <p>Copyright owners point out that the definition of “circumvention device” in the criminal provision (section 273C(2)) is narrower than that in the civil provision (section 273B(2)). They claim that it would be difficult for the prosecution to prove beyond reasonable doubt that a circumvention device is primarily designed, produced or adapted for the purpose of facilitating circumvention. Furthermore, the copyright owner may not be the best party to provide such evidence as he is not the designer of such devices. They suggest adopting the other two tests used in the civil provision, which are much simpler, for the criminal provision.</p>	<p>Our intention is to apply a more stringent standard to the criminal provision. Having considered copyright owners’ concerns, we agree that the different standards of proof required for criminal and civil cases provide sufficient safeguard without any need to narrow the definition. Hence, we <i>propose</i> to amend the definition of “circumvention device” in the criminal provision (section 273C(2)) to make it the same as that in the civil provision (section 273B(2)).</p>
5.	<p><u>Clause 55/section 273</u></p> <p>The Cable and Satellite Broadcasting Association of Asia (CASBAA) suggests amending section 273(2) so that a measure will be referred to as an effective technological measure if the use of the work is controlled by the copyright owner of the work, or his authorized licensee or distributor as very often it is the authorized licensee or distributor who puts in place the measure to control the use of the copyright work.</p>	<p>The current wording in the Bill was modelled on the UK Copyright, Designs and Patents Act 1988 (CDPA).</p> <p>We agree that in practice, the person exercising control over the use of the work could be a licensee (e.g. the copyright owner could license a telecommunication operator to use his musical works for downloading by subscribers as ring tones). In such case, the telecom operator might very well be the party who applies the TPM and controls the use of the musical works. The level of control exercised by the copyright owner over the use of the works protected by the TPM may vary from case to case.</p> <p>For the above reasons, we agree that there is a case for including persons authorized by the copyright owner in section 273(2) to build in more flexibility. We <i>propose</i> that section 273(2) should be revised to the effect that use of the work is controlled by the copyright owner of the work and/or persons set out in section 273A(2) or 273B(3).</p>

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		<p>In line with the amendment in section 273(2), we <i>propose</i> that section 273(1) be amended to the effect that “circumvent” means to circumvent without the authority of the copyright owner of the copyright work in relation to which the measure has been applied and/or persons set out in section 273A(2) or 273B(3).</p>
6.	<p><u>Exception to section 273A for achieving interoperability</u></p> <p>Some copyright owners consider that the identification or analysis done for interoperability of computer programs should be carried out without infringing the copyright in the computer programs in question.</p>	<p>The purpose of this proposed exception to the anti-circumvention provision is to ensure that legitimate software development activities would not be undermined. We agree that it is reasonable to impose a condition to the effect that the acts of identification and analysis should not infringe copyright in the works concerned as circumvention should only be allowed for the pursuit of a legitimate objective. We <i>propose</i> to make amendments to clarify this policy intention. A new paragraph under section 273D(1) will be added so that the interoperability exception will only apply if the acts of identification and analysis in question does not constitute an infringement of copyright.</p>
7.	<p><u>Exception to section 273A for research into cryptography</u></p> <p>Some copyright owners propose that the exception should only apply if the circumvention is essential to the research objective and the research activities should not involve infringement of copyright.</p>	<p>The proposed exception seeks to ensure that the anti-circumvention provisions would not hinder technological development and advances in the state of knowledge in the field of cryptography. We agree that the exception should only apply –</p> <ul style="list-style-type: none"> (a) to those acts of circumvention which are necessary to the research activities; and (b) no copyright infringement should be involved in the course of the activities. <p>We <i>propose</i> to amend section 273D(3) to clarify the above policy intention.</p>

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8.	<p><u>Exception to section 273A for parallel imports</u></p> <p>Copyright owners comment that the exception should only apply to works stored in physical articles. Furthermore, they submit that almost any TPMs could be categorised as having the purpose of “controlling market segmentation” e.g. a movie made available through a video-on-demand service is often accompanied by a technological protection measure to prevent recipients from making a permanent copy, thus segmenting the market from those who are entitled to make a permanent copy. They consider that the proposed exemptions would open a huge gap in legal protection of TPMs.</p>	<p>The purpose of section 273D(7) is to ensure that users’ legitimate interest in gaining access to parallel imported copyright works would not be jeopardized. By parallel imported copies, we are referring to works that are stored or incorporated in physical articles. We understand that copyright owners are concerned that almost any TPMs may have the effect of market segmentation because a copy-control measure can be argued as having the effect of market segmentation which may be un-related to geographical market segmentation. We <i>propose</i> that amendments be made to the following effect to clarify our intent –</p> <p>(a) section 273D(7)(a) only applies if the measure has been applied in relation to a copyright work issued to the public in a physical article; and</p> <p>(b) the word “otherwise” in section 273D(7)(b) and section 273F(11)(b) means other technology, device, component or means which have an effect similar to regional coding in preventing or restricting access to the work for the purpose of controlling market segmentation.</p>
9.	<p><u>Exception to section 273B and 273C for parallel imports</u></p> <p>Some copyright owners comment that the proposed section 273F(11) provides a far broader exception than the proposed section 273D(7). Some suggest that the proposed exception should only apply to those circumvention device, the sole purpose of which is to be used to circumvent TPMs that control market segmentation.</p>	<p>In order to address the concern raised by the copyright owners, we <i>propose</i> that amendments be made to the following effect –</p> <p>(a) the exception in section 273F(11) will only apply to those circumvention devices/services the sole purpose of which is to overcome the restriction which controls market segmentation so as to gain access to the work; and</p> <p>(b) an exception similar to (a) above will be provided in section 273E for the civil liability pertaining to making/dealing in of circumvention devices or provision of circumvention service under section 273B. As the knowledge of infringement of copyright is to be deleted under section 273B (see item 2 above), dealers trading in circumvention devices/operators providing circumvention services of which the sole</p>

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		<p>purpose is to enable users to access to parallel-imported copyright works may attract civil liability. Hence, we consider it necessary to provide for an exception to section 273B for parallel imports.</p>
10.	<p><u>Exception to section 273C for time-shifting purpose</u></p> <p>Copyright owners from the broadcasting industry object to the proposed exception as they think that it would not only exempt legitimate time-shifting activities but also other activities circumventing a wide range of digital rights management (DRM) systems. For example, a DRM system could prohibit recording of a program sold as a pay-per-view or video-on-demand service or allow the making of a single copy on the viewer’s recorder but prohibit its transfer.</p>	<p>The intention of the proposed exception is to ensure that users’ legitimate interest to record cable and broadcast programmes for the purpose of enabling the programmes to be viewed at a more convenient time (“time-shifting”) would not be jeopardized. We note copyright owners’ concerns about the wording of the existing section 273F(12) which may make the scope of the exceptions wider than intended. In particular, we agree that video-on-demand services and pay-per-view services may require special treatment from other broadcast and cable programmes as users are free to choose the time which is convenient to them to enjoy the concerned programmes.</p> <p>Hence, we <i>propose</i> to amend section 273F(12) so that it will not apply to an effective technological measure which is applied solely in relation to a broadcast or a cable programme the reception of which takes place in response to requests made by users of the service and at a time individually chosen by the users (such as the service commonly known as video-on-demand).</p>
<i>Rental rights</i>		
11.	<p><u>Rental rights for comic books</u></p> <p>The comic book industry considers that the exclusion of “on-the-spot reference” from the rental rights provision would allow comic cafes and tea house to operate <i>de facto</i> rental businesses under the name of “on-the-spot reference” without paying any copyright royalty nor attract any legal liability. It requests that the proposed</p>	<p>We consider that there may be a case for special treatment for this type of operation and <i>propose</i> to make amendments to section 25 along the following line –</p> <p>In respect of the rental of copies of a literary or artistic work included in a comic book or the typographical arrangement of a published edition of a comic book, “rental” should cover the making available of copies of the work for on-the-spot reference subject to direct or</p>

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	<p>rental rights should also cover the rental operation of comic cafes and tea houses which offer comic books for on-the-spot reference in return for a charge. Bills Committee Members were concerned that the rental rights provision may lead to unintended consequences such as adversely affecting the normal activities of establishments not engaged in the business of commercial renting of comic books.</p>	<p>indirect payment. For the avoidance of doubt, this shall include where goods or services are supplied by a person at a place at prices which are substantially attributable to the making available of copies of the work for on-the-spot reference. The purpose of making the above clarification is to prevent the creation of a legal loophole that enables comic cafes and tea houses to avoid the rental royalties by charging exceptionally high on other services and goods as a return for the provision of comic books for on-the-spot reference.</p> <p>We have taken into account Members' concerns when devising the above formulation. We trust that the provision of comic books in club houses of private properties for the enjoyment of its residents for free would generally <i>not</i> be caught under the rental rights provision if such facilities are merely incidental to the services/facilities provided at the club houses. However, if any private club operates a service which charges a fee on its members who read comic books provided by the club within the club premises, the rental rights provision would apply.</p>
Copyright Exemption		
12.	<p><u>Fair dealing for education</u></p> <p>Copyright owners are very concerned about the application of the proposed fair dealing provision for education to the digital environment for fear that schools may become a safe haven for online piracy. They suggest that the applicability 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>The inclusion of such a requirement in full 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 technological measures so required. In fact, we fail to see how the kind of abusive use envisaged by copyright owners could constitute fair dealing.</p> <p>Nonetheless, we agree that schools should properly manage the copyright works they put onto their school network system due to the potential prejudicial impact on the interests of copyright owners arising from the ease of reproduction and transmission of copyright works in the digital environment. We <i>propose</i> to amend section 41A (fair dealing with a</p>

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		<p>copyright work for education purpose) to require that the applicability of the fair dealing provision for education to the digital environment should be conditioned on –</p> <p>(a) the adoption of technological measure to restrict access to the copies of copyright works maintained on the school network system so that the copies are not accessible to anyone other than those necessary for the purpose of receiving and giving instruction in the specified course of study in question; and</p> <p>(b) the copies so maintained on the school network system should not be retained for any longer than is necessary for the purpose of giving or receiving instruction in the specified course of study in question.</p> <p>Similar amendments will need to be made to section 242A (fair dealing with a performance or fixation for education purpose).</p>
13.	<p><u>Section 44(2)</u></p> <p>Copyright owners opine that 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 proposal to remove section 44(2) (i.e., the permitted act of recording under section 44 will not be available to users if there is a licensing scheme available authorizing the recording in question) go against international norms and obligations and will lead to increased litigations against schools. The sound recording and home video industries are strongly against the proposal.</p>	<p>The proposal was formulated after a public consultation exercise back in 2001. Since the recording permitted under section 44 should not conflict with a normal exploitation of the work by the copyright owner, or unreasonably prejudice his legitimate interests as required under section 37(3) it was considered that the removal of section 44(2) could facilitate teaching without prejudicing the interests of copyright owners in an unreasonable way. Hence, the Government undertook in 2002 to remove section 44(2).</p> <p>Given that this permitted act allows the recording of a full cable or broadcast programme rather than copying of a reasonable portion as in other permitted acts for educational purposes, copyright owners' worry is understandable. On the other hand, we are not aware of any significant problem in using this permitted act by the education sector in practice. Having carefully considered the views received, we propose to delete clause 14 from the Bill (i.e., section 44(2) will remain).</p>

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14.	<p><u>Section 45(2)</u></p> <p>Book publishers are strongly against the proposed removal of the existing s.45(2) (i.e., the permitted act of reprographic copying to a reasonable extent under section 45 will not be a permitted act if there is a licensing scheme available authorizing the copying in question) as they consider that it 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 for the education sector to renew existing licence agreements. Other copyright owners consider that the proposal go against international norms and obligations and will lead to increased litigations against schools.</p>	<p>Although at present the publishing industry has reached an agreement with the education sector which permits free copying under specified conditions even when there is a licensing scheme available authorizing the copying in question, the education sector considers some existing conditions under the agreement too restrictive. These conditions include the restriction that a copyright work should not be used in the same course for more than once. Furthermore, copying should be “spontaneous”, i.e. the time of the decision to use the work and the proposed time of its use should be no more than 3 working days. The education sector considers that if certain copying constitutes fair dealing, it should be permitted despite that it does not meet the above-mentioned conditions as imposed by the book publishers. On the other hand, copyright owners’ worries about the adverse implications of deleting section 45(2) on the industry’s licensing scheme are understandable.</p> <p>Having carefully considered the views received, we <i>propose</i> to make amendments along the following line –</p> <p>(a) to delete clause 15(3) (i.e., section 45(2) will remain); and</p> <p>(b) to include a subsection in section 41A (the fair dealing provision) to expressly state that notwithstanding the generality of section 37(5), making of reprographic copies which does not fall within section 45 does not mean that it is not covered under section 41A and subsection (2) applies in determining whether the making of copies is fair dealing under subsection (1).</p> <p>The amendments at (b) will clarify that educational establishments may still rely on the fair dealing provision for copyright exemption despite that a licensing scheme is available authorizing the copying in question and the copying does not meet the above-mentioned conditions. Whether the copying can be exempted would depend on whether it constitutes fair</p>

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		dealing as weighed against the four factors in section 41A(2) and other factors which the court considers appropriate.
15.	<p><u>Fair dealing for public administration</u></p> <p>At its meeting on 19 July 2006, the Bills Committee suggested that the Administration should consult the LegCo Commission and the Judiciary Administrator on the need to include LegCo and the Judiciary under the proposed section 54A and to explain to them the operation of section 54A.</p> <p>The Administration consulted that LegCo Commission at its meeting on 31 October 2006. Members of the Commission made the following points at the meeting –</p> <p>(a) there is no definition for the term “the proceedings of the Legislative Council” in the existing section 54 of the Copyright Ordinance. Members consider that “the proceedings of the Legislative Council” should include all ancillary preparatory and follow-up work related to meetings of the Council or its committees. Work being done by Members which may become business of the Council or its committees should also be included, as it is impossible to determine when a matter that such work relates will or will not become proceedings of the Council;</p> <p>(b) the absence of a clear definition for the term “urgent business” in the proposed new sections 54A and 246A of the Copyright Ordinance will create practical difficulties for the Legislative Council; and</p>	<p>We have carefully considered the views made by the LegCo Commission. It is noted that, with the possible exception of the handling of complaints which may not ultimately be covered by LegCo proceedings, the current exemption provided under section 54 of the Copyright Ordinance by and large covers business done by the LegCo for the purpose of exercising its functions and powers under the Basic Law. We acknowledge that at the outset when a complaint from the public is received, it may be difficult to determine whether the case would ultimately end up in LegCo proceedings.</p> <p>Subject to further consultation with the copyright owners, we are inclined to provide for a general exemption to the LegCo for business done for the purpose of exercising its functions and powers. The proposed fair dealing provision for public administration would not need to apply to LegCo business anymore. We will report our final deliberations to the LegCo Commission and Bills Committee.</p> <p>We are consulting the Judiciary Administrator on the proposed section 54A and are still awaiting its reply.</p>

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	<p>(c) since it is clear that the policy behind section 54 of the Copyright Ordinance is to enable Legislative Council to exercise its powers and functions effectively without being exposed to liabilities for any copyright infringement act, the Administration should consider making clear that the section 54 exemption is to cover anything done by the Legislative Council for the purposes of exercising its powers and functions pursuant to Article 73 of the Basic Law.</p>	
<p><i>Parallel importation</i></p>		
<p>16.</p>	<p><u>Shortening of the criminal sanction period</u></p> <p>Copyright owners strongly oppose the proposal to shorten the criminal sanction period for parallel importation from the existing 18 months to 9 months.</p> <p>Bills Committee members were also concerned that the proposed liberalization might affect the level of investment in creative industries and even threaten the survival of certain industries, particularly the comic industry and the film industry. Members urged the Administration to deal with the issue of parallel importation in a cautious manner and to consider carefully the impact of the proposed liberalization on the development and survival of local creative industries.</p>	<p>To meet the community's aspirations for free circulation of parallel imported copyright works, the Bill seeks to liberalize the existing restriction against parallel imports. However, in view of the grave concerns expressed by copyright owners and the views of Bills Committee members, we <i>propose</i> to lengthen the proposed criminal sanction period for parallel importation. We are prepared to consider a criminal sanction period ranging from 12 to 15 months (as opposed to reducing it to 9 months).</p> <p>We welcome Members' views on the matter. Ultimately, the issue requires a delicate balance to be struck between the interests of copyright owners on the one hand and the demands from our business sectors and consumer groups for complete de-criminalization of parallel imports, on the other hand.</p>

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17.	<p><u>New proposal for facilitating enforcement</u></p> <p>Copyright owners strongly urge the Administration to consider if amendments could be made to the Copyright Ordinance to facilitate enforcement against commercial dealing of parallel imported copyright works.</p>	<p>We acknowledge that there are difficulties in bringing prosecution against commercial dealing of parallel imported copies of copyright works due to the high evidential requirements for proving that (a) the copies were imported and that (b) the hypothetical making of the copies in Hong Kong would have constituted an infringement in copyright.</p> <p>To facilitate the proof of importation (i.e., condition (a)), we <i>propose</i> to provide the following presumptions in the Copyright Ordinance so that –</p> <ul style="list-style-type: none"> (a) any optical disc which does not bear a licensed manufacturer’s code¹ will be presumed to be an imported copy; and (b) a copy containing a description of restriction of sales in areas other than Hong Kong, or a description of the place of manufacture other than Hong Kong, will be presumed to be an imported copy. <p>The proposed presumptions are intended to impose an evidential burden on the defendant only. If the defendant adduces sufficient evidence to raise an issue with respect to the fact of importation, the prosecution (or the plaintiff in civil proceedings) would be required to prove this issue beyond reasonable doubt (or on balance of probabilities in civil proceedings).</p> <p>To substantiate that the hypothetical making of a parallel imported copy of copyright work in Hong Kong would have constituted an infringement in copyright, the copyright owner may need to attend court to give evidence to prove that the copy was made by his licensee which did not have the right to make the copy in Hong Kong. To alleviate the burden for copyright owners to attend court to give evidence on such matters, we <i>propose</i> to</p>

¹ Under section 3 of the Prevention of Copyright Piracy Ordinance (Cap. 544), every manufacturer of optical discs in Hong Kong must be licensed with the Commissioner of Customs and Excise. Under section 15 of Cap. 544, every licensed optical disc manufacturer should cause each optical disc manufactured by him in Hong Kong to be marked with the manufacturer’s code endorsed on his licence.

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		<p>allow the copyright owner or any person acting on his behalf to make an affidavit stating that a licence to make the copy in question has been granted to an overseas licensee (the manufacturer) but such right does not cover the making of it in Hong Kong. The affidavit shall be admitted in court proceedings without further proof and the facts stated in the affidavit shall be accepted as prima facie evidence. In such case, the chance that the copyright owner is required to testify in court is lower because the defendant must be able to convince the court if he chooses to challenge the affidavit and requires the attendance of the copyright owner. Furthermore, the court may at its discretion award costs against a defendant who had requested the attendance of the copyright owner in court to give evidence but was subsequently convicted of the relevant offence or held liable for infringement.</p> <p>The above facilitation measures are intended to apply to both civil and criminal proceedings.</p>

II. Technical Amendments

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<i>Business end-user possession offence</i>		
1.	<p><u>Clause 22/section 118(2D)</u></p> <p>The Business Software Alliance (BSA) is concerned that if a computer program is posted on a website for sale to the public together with another work, not being a computer program itself, that requires the use of the computer program to be viewed or listened, the existing wording of the new section 118(2D) may enable a person to illegally download and possess the infringing copy of the computer program for use in business without attracting any criminal liability</p>	<p>Where a person downloads a copyright work (A), not being a work belonging to the four categories of works, to which the business end-user possession offence applies from the Internet and save a copy for future reference in business, he may also save the computer program that incorporates or is embedded in the copyright work (A) and is made available together with the copyright work (A). The copy of computer program so saved may become an infringing copy because the act of downloading involves making a copy and prior authorization from the computer owner of the computer program may not be available. Our policy intention is not to criminalize the person for possessing the infringing copy of the computer program as mentioned above. However, the person who illegally downloads and possesses infringing copies in BSA’s scenario should remain liable under the business end-user possession offence. To clarify our policy intention, we <i>propose</i> that section 118(2D) should be amended to the effect that that section 118(2A) does not apply to the possession of an infringing copy of a computer program if –</p> <p>(a) the computer program incorporates the whole or any part of a work not being a computer program itself; or</p> <p>(b) the computer program is incorporated as part of another work not being a computer program itself,</p> <p>and the computer program is technically required for the viewing or listening of that work by a member of the public to whom a copy of the work is made available.</p>

Item	Concerns	Response/Proposed Amendments
2.	<p><u>Clause 22/section 118(2E)</u></p> <p>The Hon Wong Ting Kwong asks if the new section 118(2E) applies to Government lawyers, in-house lawyers, trainee solicitors and barristers in pupillage.</p>	<p>This provision seeks to exempt from the business end-user possession offence lawyers who need to possess infringing copies of copyright works for the purpose of providing legal advice pertaining to the copies. The policy intention is that all lawyers who are professionally qualified or permitted under Hong Kong law to give legal advice on local and overseas laws in Hong Kong should be exempted. We <i>propose</i> that amendments be made to section 118(2E) to clarify the policy intention along the following line –</p> <p>The exemption should apply to any person who possesses an infringing copy of a copyright work for the purpose of giving legal advice in his professional capacity in relation to the infringing copy to his client i.e. the exemption will cover barristers and solicitors qualified to practise in Hong Kong, as well as foreign lawyers permitted to practise whether in the public or private sector in Hong Kong.</p>
<i>Business end-user copying/distribution offence</i>		
3.	<p><u>Clause 24/section 119B(1)</u></p> <p>The then Assistant Legal Adviser of the Legislative Council (ALA) for this Bills Committee considers that the current drafting of the provision has the effect that a person will only commit an offence if he/she makes for distribution or distributes infringing copies of the same copyright work on a frequent or regular basis, resulting in financial loss to the copyright owner.</p>	<p>The policy intention is that a person commits an offence under section 118B(1) if he does the relevant act, whether or not in relation to the same copyright work, on a regular or frequent basis. The relevant act refers to the act of, without the licence of the copyright owner of a copyright work –</p> <p>(a) making an infringing copy of the work for distribution; or</p> <p>(b) distributing an infringing copy of the work;</p> <p>for the purpose of or in the course of any trade or business resulting in a financial loss to the copyright owner concerned.</p>

Item	Concerns	Response/Proposed Amendments
		We <i>propose</i> to make appropriate amendment so as to reflect the above intention more clearly.
4.	<p><u>Clause 24/section 119B</u></p> <p>It was noted that the defence provision in the proposed section 119B(a) may not cover the situations in which it is not reasonably practicable to trace the copyright ownership or the whereabouts of the copyright owner (e.g. due to long lapse of time or the substantial number of copyright owners involved).</p>	It is our policy intention that the defence under section 119B(9) should cover scenarios in which the copyright owners cannot be identified or located. To clarify this policy intention, it is <i>proposed</i> that section 119B(9) should be amended to expressly provide for the circumstances where the person charged with an offence under subsection (1) is able to prove that the identity or whereabouts of the copyright owner cannot be ascertained by reasonable inquiry.
<i>Directors’/partners’ liability</i>		
5.	<p><u>Clauses 22 and 24/sections 118(2F) and 119B(6)</u></p> <p>The then ALA for this Bills Committee points out that the wording in the new sections 118(2F) and 119B(6) (“shall be presumed also to have done an act unless he proves that he did not authorize the act to be done”) is different from the new section 118(1A) and (1B) where the words “unless there is evidence to the contrary” are used to specify that the defendant bears only an evidential burden.</p>	There is no doubt that sections 118(2F) and 119B(6) as presently drafted impose an evidential burden on a defendant. For the sake of consistency, we will make amendments so that the approach of sections 118(2F) and 119B(6) would be similar to that of section 118(1A) and (1B).
<i>Circumvention of Technological Measures for Copyright Protection</i>		
6.	<p><u>Clause 56/sections 273A(2)(c) & 273B(3)(c)</u></p> <p>Copyright owners from the broadcasting and American movie industries, and the then ALA for this Bills Committee consider that only those persons who, pursuant to the authority of the copyright owner, issue to the public copies of a copyright work, make available to the public copies of a copyright work, broadcast a work, or</p>	This is indeed our policy intention. We <i>propose</i> to amend section 273A(2)(c) and section 273B(3)(c) to put it beyond doubt that the persons referred to in these sections are those who act with the authority of the copyright owner.

Item	Concerns	Response/Proposed Amendments
	include the work in a cable programme service should be entitled to seek civil remedies under sections 273A and 273B.	
WIPO Internet Treaties		
7.	<p><u>Clause 37/section 200(2)</u></p> <p>According to the official Chinese version of the WIPO Internet Treaties on the WIPO website, the Chinese rendition of “expression of folklore” is “民間文學藝術作品” rather than “民間傳說的表達” in the Bill. The same Chinese expression is also adopted by the National Copyright Office of People’s Republic of China.</p>	<p>We <i>propose</i> to amend the Chinese rendition of “expression of folklore” in section 200(2) from “民間傳說的表達” to “民間文學藝術作品”. We also propose to amend the heading of section 189 so that “民間文學藝術” will be used for the term “folklore”.</p>
Copyright exemption		
8.	<p><u>Clause 11/section 40B(1)</u></p> <p>The Hon Wong Ting-kwong considers that the drafting of the Chinese version is not clear as to whether section 40B(1) applies to any person who makes on behalf of a person with a print disability an accessible copy of copyright work for the personal use of that person with a print disability.</p>	<p>It is our policy intention that section 40B(1) should permit the making of the accessible copy by a person with a print disability himself or any person acting on his/her behalf. In fact, section 40B(3) and (4) clearly reflect that the accessible copy is not required to be made by the person with a print disability himself. We <i>propose</i> that amendments be made along the following lines to put the intention beyond doubt –</p> <p>(a) to provide expressly under section 40B(1) that an accessible copy may be made by or on behalf of a person with a print disability; and</p> <p>(b) a corresponding change in section 40B(3) to make it clear that the subsection applies irrespective of whether the accessible copy is made by the person with a print disability or on his behalf.</p>

Item	Concerns	Response/Proposed Amendments
9.	<p><u>Clause 12/section 41A</u></p> <p>Heds of University Committee (HUCOM) Task force on Copyright in Education suggests modifying the wording to include fair dealing with a work by or on behalf of a teacher so that anyone acting on behalf of a teacher (such as a clerk) may also rely on the exemption.</p>	<p>This is indeed our policy intention. We <i>propose</i> to amend section 41A to put it beyond doubt that an act of fair dealing under section 41A may be done on behalf of a teacher. A similar amendment will also be made to section 242A.</p>
<i>Parallel importation</i>		
10.	<p><u>Clause 7/section 35(3)</u></p> <p>The then ALA for this Bills Committee considers that the drafting of sections 35, 35A and 35B should be improved to clarify the legal position of a parallel-imported copy of a computer program, a musical sound recording or an e-book.</p>	<p>The existing section 35A and the proposed section 35B set out different situations under which a copy of copyright work will not be an infringing copy for the purposes of section 35(3). A copy of work is not an infringing copy for the purposes of section 35(3) if it is a copy of work to which section 35A applies, or to which section 35B applies, or to which both sections 35A and 35B apply. We <i>propose</i> to make amendments to improve the drafting in any of sections 35, 35A and 35B for the avoidance of doubt.</p>
<i>Improving enforcement efficiency</i>		
11.	<p><u>Clause 27(4) and (5)/section 121(2A), (2B) and (2C)</u></p> <p>The Law Society of Hong Kong considers that the proposed facilitation measure which requires the affidavit to be made by or on behalf of the copyright owner might not cover the case where a sub-licence is granted.</p> <p>Separately, our policy intention is that if the defendant would like to call the deponent to the court to give evidence, he needs to satisfy the court that the lack of licence is genuinely in issue. This is also in line with the existing section 121 on the submission of affidavit evidence for proof of copyright subsistence and ownership. The</p>	<p>Clarifications will be made to the relevant sections to confirm that the facilitation provisions would apply to cases where there are sub-licensing arrangements.</p> <p>We will also take the opportunity to make a technical amendment to clarify our policy intention regarding the circumstances under which the defendant may call the deponent to the court to give evidence.</p>

Item	Concerns	Response/Proposed Amendments
	proposed amendments to section 121 do not reflect this policy intention clearly.	
<i>Amendments to Chinese text</i>		
12.	<u>To improve certain Chinese text for greater clarity</u>	<p>The Chinese text of “展覽” (“exhibit”) will be amended to “陳列” in sections 17(5)(b)(i), 25(3)(b), 31(1)(c), 62(3), 72, 89(4)&(7), 92(4)(a), 95(1)(c), 96(2)(b)&(7), 196(4)(b)(i).</p> <p>The Chinese text of “體現” (“asserted”) will be amended to “宣示” in sections 89(1)&(8), 90, 99(1) and 106(3)(a),197(1)&(2), and heading to section 90.</p> <p>The Chinese text of “達成” (“satisfied”) will be amended to “體現” in sections 99(2) and 106(3)(b).</p>

Response to certain suggestions concerning the Copyright (Amendment) Bill 2006

Item	Concerns	Response
<i>Circumvention of Technological Measures for Copyright Protection</i>		
1.	<p><u>Exception to section 273A for protection of privacy</u></p> <p>The Business Software Alliance (BSA) is concerned that the exemption would affect legitimate measures put in place by organizations to track the computer usage of their employees for the purpose of safeguarding computer networks and corporate security.</p>	<p>Our intention is not to affect legitimate measures put in place by organizations to track the computer usage of their employees for the purpose of safeguarding computer networks and corporate security. We have re-considered the wording of the existing provision and are of the view that the exemption would not affect such measures if the organizations provide conspicuous notice to its employees that their computer usage may be tracked and recorded. As the manner of one's computer usage within an organization may involve personal data, we consider it reasonable and appropriate that the organization notify its employees of such tracking activities. This exception to section 273A will not apply once the users are given a conspicuous notice of the collection or dissemination of personally identifying information. Hence we do <i>not</i> propose to make any amendments to this exception.</p>
<i>Copyright Exemption</i>		
2.	<p><u>Fair dealing for public administration</u></p> <p>Copyright owners question the justifications for introducing the fair dealing provision for public administration and consider that the existing wording of the provision would cast the scope of exemption too wide.</p>	<p>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. It 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 have carefully considered the existing wording of the concerned provisions in the Bill and do not agree with the copyright owners' views that its scope is unduly wide.</p>

Item	Concerns	Response
<i>Parallel Importation</i>		
3.	<p data-bbox="297 333 1037 400"><u>On-the-spot reference of parallel imported comic books</u></p> <p data-bbox="297 443 1037 655">The Hong Kong Comics and Animation Federation Ltd (HKCAF) was concerned that the proposed liberalization of parallel imports for business end-use would enable comic book tea houses to source parallel imported items for on-the-spot reference under the name of “business end-use”.</p>	<p data-bbox="1068 333 2078 692">Where it is proved that a teahouse imported/acquired parallel imported copies of comic books for on-the-spot reference of its customers for direct or indirect payment, it is unlikely that the teahouse operator could obtain the benefit of the proposed relaxation in section 35B. We consider that the teahouse operator would, in such case, be considered to be dealing in the comic books by letting them for hire. Hence, the copies so imported or acquired would remain as infringing copies and the operator would remain subject to the criminal offences in section 118 (if the criminal sanction period for parallel imports under section 35(4) has yet to expire) or the civil liability (under section 31).</p>