Submissions by various organizations on the Copyright (Amendment) Bill 2006 after the Administration's introduction of the proposed Committee Stage Amendments (as of 30 April 2007)

(I) Business end-user liability			
	Organizations	**Views / Concerns**	**Administration's Response**
1.1	**Trade organizations/ Professional bodies** • Federation of Hong Kong Industry (FHKI) • Hong Kong Retail Management Association (HKRMA) • Hong Kong General Chamber of Commerce (HKGCC) • Hong Kong Institute of Certified Public Accountants (HKICPA)	Business end-user possession offence HKRMA supports the Government's proposal of maintaining the scope of the business end-user possession offence (i.e., it only applies to the following four categories of works : computer programs, movies, television dramas, and musical recordings). Business end-user copying/distribution offence FHKI opines that photocopying newspaper/magazine articles for internal circulation, discussion or reference do not involve wilful intent to prejudice the legitimate interests of the copyright owners or profit-making motives. There is no justification for criminalizing such acts so long as no direct financial gain is involved. Besides, the existing legislation already provides adequate channels for copyright owners of printed works to safeguard their interests by seeking legal redress for any economic loss due to copyright infringement. It strongly urges the Government to remove from the Bill the business end-user copying/distribution offence. The HKRMA expresses similar views and considers that the new offence would deter free flow of information and delay the business	Business end-user possession offence Noted. Business end-user copying/distribution offence The proposed business end-user copying/ distribution offence is intended to combat significant infringements involving printed works in business. We note the concern of the business community. In formulating the proposed criminal provisions, we have taken great care to address the concern in the community about the impact that the offence may have on dissemination of information. Only infringements that occurred on a frequent or regular basis and exceeded the numerical perimeters to be laid down in the law (i.e., the "safe harbour") would attract criminal liability. The copying and distribution of newspaper/ magazine articles for internal circulation in business could constitute significant infringements if the infringing acts are

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		decision-making process. FHKI further opines that the "safe harbour" provision will require very complicated calculations to determine whether an offence has not been committed. Hence the inclusion of such provision cannot address their main concern, namely the scenario of business end-users breaking the law unknowingly. HKICPA is not convinced of the need to introduce the new offence. It makes the following comments – (a) the infringing act must be proved to have resulted in "real and substantial losses", instead of just "financial loss"; (b) the mechanism of applying "safe harbour" provisions should be spelled out more clearly in the main legislation; (c) the numerical threshold should be high enough to ensure that distribution of newspaper articles for internal purposes is allowed. HKICPA considers that the numerical threshold proposed by the Administration may not be adequate for meeting the operational needs of a sizable professional body (such as HKICPA);	conducted on a regular or frequent basis, and where the extent of copying or distribution exceeds the "safe harbour". We do not consider it appropriate to exempt such infringing activities from the proposed offence. Business end-users should acquire appropriate licences from the concerned copyright owners if they need to copy for distribution/distribute newspaper or magazine articles for their business use on a regular or frequent basis. The numerical threshold of the "safe habour" provision seeks to reflect the intention that only significant infringement is to be criminalized. In formulating the proposed numerical threshold, we need to strike a balance between the need for timely information flow and the serious harms that regular or frequent infringements of a significant nature could bring to the concerned copyright owners. We hope that the "safe harbour" can provide certainty to the public while avoiding the creation of loopholes that allow wilful infringers to get away easily. We note FHKI's concerns that business end-users may still fall into the criminal net inadvertently since the proposed "safe harbour" may not be easy to understand. We will conduct public education activities to publicize, to the business community, the numerical perimeters of the safe harbour

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		(d) it supports the suggestion that distribution for purposes of in-house dissemination of information and sharing of learning resources should be exempted from the provision; (e) it urges the Administration to clarify the treatment of copyright works reproduced on private networks under the new offence and opines that new measures should be introduced only after going through public debate and making reference to overseas practices.	provisions after the Bill is enacted and before commencement of the relevant provisions. On the specific comments raised by the HKICPA, our response is as follows – (a) we will make Committee Stage Amendments (CSAs) to set out more clearly the scope of the empowering provision, i.e. section 119B(14), for the proposed "safe harbour"; (b) under the existing Copyright Ordinance, copying of a work includes storing the work in any medium by electronic means. Distribution of copies under the new offence is not limited to distribution of physical copies. It also covers distribution of digital copies via electronic means. Examples of electronic distribution include distributing scanned copies of news articles by email or uploading the scanned copies onto the company's intranet for access by its staff. We will consider a separate formulation for the "safe harbour" for distribution over private networks as such a means of distribution is very different from distribution of physical copies or distribution via emails. Besides, appropriate licensing schemes to enable users to upload copies of printed works onto

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			private networks including intranets must be available before the proposed offence could take effect in relation to such means of distribution. Hence, the application of the proposed offence to the private network situation will be deferred until the above-mentioned issues have been sorted out. We will specify this deferred application arrangement in the regulations to be made by SCIT under section 119B(14).
		Directors'/partners' liability FHKI strongly objects to shifting the burden of producing evidence to company directors. It emphasizes that criminal sanctions should not be lightly imposed on minor, non-profit motivated copyright infringements and that the proposal is likely to deter investors from investing in Hong Kong. HKRMA expresses similar views and adds that small and medium enterprises (SMEs) have limited resources and expertise about copyright infringement and hence they will be legally vulnerable in cases of unwilful, minor, non-revenue related copyright infringements. While considering the proposed CSAs an improvement for they lessen the burden of proof on directors/ partners, HKGCC remains of the view that it is objectionable to shift the burden of proof to the defendant.	Directors'/partners' liability The proposed directors'/partners' liability aims to promote corporate accountability and responsible governance against business end-user piracy. We would like to reiterate that the burden imposed on the defendant is only an evidential burden. If the defendant has adduced sufficient evidence to raise an issue, the prosecution would need to prove beyond reasonable doubt that he has authorized the infringing acts to be done. Furthermore, we will propose CSAs to specify clearly the actions that directors or partners may take to discharge the evidential burden imposed on them. We believe the concerned provisions, as revised, help strike a reasonable balance. We are conducting public education and publicity activities to assist the business community, especially SMEs, to understand

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			what measures they may put in place in their business against business end-user piracy. For instance, the Administration launched, in collaboration with right owners, the "Business Software Certification Programme" in Oct 2006 to promote best practices in software asset management to SMEs and to encourage compliance with the copyright law. The Programme, pilot in nature, will end in mid-March 2007. We will review the efficacy of the Programme and consider if and when the next phase should be introduced. We will also roll out suitable public education and publicity activities to get the business community, especially SMEs, prepared before the new criminal provisions come into operation.
		<u>Defence for employees</u> HKICPA raised a scenario whereby an employee may generally have some ability to influence decisions concerning the acquisition, removal or use of infringing copy but he was overruled by others when he sought to use such influence. HKICAP questions whether the employees' defence would still be available to this employee in such scenario. HKICPA suggests that the defence provision should not apply to an employee only when such an employee is a decision-marker. Hence, the words "or influence" should be deleted.	<u>Defence for employees</u> Whether an employee was in a position to make or influence a decision regarding the acquisition or removal or use of the infringing copy is a matter of fact depending on the circumstances of each case. Where an employee's objection to use infringing copy was overruled by persons of a higher authority, it is our policy intent that he should be entitled to use the "employee's defence" as he should not be regarded as being "in a position to make or influence a decision" in relation to that infringing copy.

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1.1a	***International Association of Scientific, Technical and Medical Publishers (STM) (16 April 2007)***	**STM objects to the exclusion of printed works from the scope of business end-user possession offence. It urges for the removal of the business end-user copying/ distribution offence (section 119B of the Bill) and the inclusion of printed works and their corresponding electronic version into the scope of the business end-user possession offence.**	**Due to the intrinsic nature of printed works (including books and newspapers), criminalizing the possession of a single infringing copy of any printed works in the course of business (which already attracts civil liability under the existing law) is impracticable. Our current proposal to maintain the existing scope of the business end-user possession criminal liability is appropriate having regard to the community's grave concern over the implications of any extension of this liability to printed works on free flow of information and classroom teaching.**
1.2	**Publication industry** • The Anglo-Chinese Textbook Publishers Organisation • Chung Tai Educational Press • Enrich Publishing • Happy Mind Ltd • Hong Kong Educational Publishers Association • HK Educational Publishing Co. • Hong Kong and International Publishers' Alliance (HKIPA) • HK Publishing Federation Ltd • Jing Kung Education Press • Precise Publications Ltd • Hong Kong Reprographic	Business end-user copying/distribution offence The book publishers suggest the following amendments – (a) to revise the phrase "a copyright work" in section 119B(1)(a)&(b) to read as "any copyright work" so as to clarify that the offence applies to one who does the relevant infringing act, *whether or not in relation to the same copyright work*, on a regular or frequent basis; (b) to strike out the new section 119B(5) which excludes the application of the offence to the Internet environment;	Business end-user copying/distribution offence Our response to the publishers' suggestion is as follows – (a) we will make CSAs to section 119B(a)&(b) to clarify that the infringing acts need not be done in relation to the same copyright work, albeit in a formulation different from the publishers' suggestion. The revised section 119B(1) refers to the act as described in section 119B(1)(a) or section 119B(1)(b) that is done on a regular or frequent basis, and not the copying/ distribution of the same copyright work on a regular or frequent basis;

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	Rights Licensing Society (HKRRLS) • Modern Education Network Ltd • Modern Educational Research Society Ltd • Oxford University Press (China) Ltd • Sino United Publishing (Holdings) Ltd ***International Association of Scientific, Technical and Medical Publishers (STM) (16 April 2007)*** ***Hong Kong and International Publishers' Alliance (HKIPA) (24 April 2007)***	(c) if the defence provision at section 119B(9) is to be introduced (though they object to such a provision), the defences provided should be based on proof of what occurred prior to the time of the infringement but not based on evidence that is produced afterwards. Besides, the defence should not be operative when it applies only to a few such works while the defendant regularly or frequently infringed copyright in other works.	(b) it is already an offence under the existing section 118(1)(f) of the Copyright Ordinance (revised as section 118(1)(g) after the enactment of the Bill) if any person distributes an infringing copy of a copyright work to the extent that prejudicially affects the copyright owner. Distribution of infringing copies of copyright works over the Internet platform to which any person can access is likely to be prejudicial to the relevant copyright owners. Hence, we do not consider it necessary for applying the proposed copying/distribution offence to such a mode of distribution; and (c) when invoking the defence under the new section 119B(9)(a) or (b), the defendant should produce evidence to the court's satisfaction that prior to the time of the concerned infringement, he has taken adequate and reasonable steps to obtain a licence from the copyright owner but failed to get a timely response from the copyright owner; or has made reasonable efforts to obtain commercially available copies but in vain and the copyright owner has refused to grant him a licence on reasonable commercial terms. The liability of the defendant would not be absolved in a situation where the defence provisions at 119(9)(a)&(b) apply to some of the

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			copyright works in relation to which the concerned infringing acts relate, but taken as a whole, the defendant's acts of making for distribution or distributing infringing copies of other copyright works constitute regular or frequent infringements.
		STM comments that the business end-user copying/distribution offence discriminates against copyright owners of printed works in comparison with copyright owners of movies, TV dramas, musical recordings and computer programs. This is because section 119B imposes additional cumulative conditions (such as the "intention to distribute", the elements of "on frequent or regular basis" and "resulting in financial loss to copyright owners") for criminal liability related to printed works, while mere possession of infringing copies of the 4 categories of work already attracts criminal liability. It suggests deleting all the three conditions and criminalizing possession of infringing copies of printed works.	**As mentioned in our response at item 1.1a, it is impracticable to criminalize possession of infringing copies of printed works. The proposed business end-user copying/ distribution offence aims to combat serious infringements (concerning the act of copying for distribution or distribution) which are conducted on a regular or frequent basis resulting in financial loss to copyright owners. Therefore the elements of "frequent or regular" and "resulting in financial loss to copyright owners" are necessary while the safe harbour perimeters reflect our policy intention that only serious infringements should attract criminal liability.**
		It objects to the two defence provisions, i.e. the defendant has taken steps to obtain licence from the copyright owner concerned but failed to obtain a timely response or where copyright owner refused to grant him a licence on reasonable commercial terms.	**The defence provisions are necessary to address the grave concern of the community that the proposed business end-user copying/distribution offence may affect dissemination of information. It must be noted that the defence is only applicable to**

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		It considers that these defence provisions contradict the principle that copyright owners have the right to determine whether and under what conditions a licence should be granted.	**the proposed criminal liability but not the civil liability. Copyright owners' right to decide whether and under what conditions a licence should be gratned will not be affected by the defence provisions.**
		It objects to exempting educational establishments from the new offence, otherwise educational publishers would be entirely deprived of the enforcement measure.	**The proposed exemption for educational establishments (which are non-profit making or receive direct recurrent subsidies from the Government) is to ensure that the proposed offence would not impede classroom teaching. We fully agree that schools should not commit copyright infringements. Schools exempted from the new offence would still attract the existing civil liability for copyright infringements. We encourage schools to continue acquiring licences from copyright owners so as to absolve themselves from possible civil liability arising from the making and distribution of copies of copyright works.**
		It comments that section 119B should also apply to the electronic versions of printed works such as e-books, e-magazines, e-newspaper. It also suggests deleting the exception at section 119B(5) as distribution of infringing copies by wire or wireless network without any access restriction does more harm than via a network with restricted access.	**Section 119B will also apply to a digital infringing copy (for example, a scanned copy) of copyright work which was published in printed form in a book, magazine, periodical or a newspaper. STM's suggestion to apply the offence to copyright work which has not been published in printed form will expand the scope of the offence tremendously and cause grave concern in respect of dissemination of information. As regards**

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			STM's suggestion to remove section 119B(5), please see our above response at paragraph (b) of item 1.2.
		HKIPA reiterates its suggestion at point (a) and (c) above. On point (a), it suggests amending "an infringing copy of the work" to "an infringing copy of any such work", or to specify under section 119B(1) that "an act specified in subsections 1(a) or (b) that is done to any copyright work to which this subsection applies may be considered in determining whether the act was done on a regular or frequent basis". On point (c), it urges the Administration to clarify in the legal provisions that the defence should be based on proof of what occurred prior to the time of the infringement but not based on evidence that is produced afterwards.	**Please refer to our response at paragraphs (a) and (c) above. It is clear from the current drafting of section 119B(1) that the offending act need not be done in relation to the same copyright work. Hence, HKIPA's suggested amendments are unnecessary. It is intrinsic that a defence may be invoked only where the defendant has done the acts (such as taking steps to obtain licence from copyright owners or making reasonable efforts to obtain commercial available copies of the work) before the infringement occurred. We fail to see why this need to be clarified in law.**
		<u>Safe harbour</u> The publishers consider that the Bills Committee should consider the offence provision together with the detailed legislative provisions providing the numerical perimeters within which the infringing acts will not be criminalized (i.e. the "safe harbour" provisions). On the safe harbour, the publishers suggest to clarify that "academic journals" should include all professional, technical and medical journals. They also submit a revised proposal on the	<u>Safe harbour</u> The Administration's proposed perimeters for the "safe harbour" in relation to books (including academic journals) are as follows – The proposed business end-user copying/ distribution offence will not apply if the total retail value of the infringing copies made for distribution or distributed within a 180-day period does not exceed **$8,000**. Infringing copies made or distributed on a single occasion

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		numerical perimeters, i.e. the retail value of the total number of infringing copies of books made for distribution or distributed within a 180-day period does not exceed **$3000**. Infringing copies made or distributed on a single occasion not exceeding 15% of the books, or cumulatively not exceeding 30% of the books within a 180-day period would not be counted for the calculation of the retail value. (Note: The book publishers' original proposal was to apply the proposed offence to the infringing acts which were committed regularly or frequently, **or** if the retail value of the total number of infringing copies made for distribution or distributed within a 180-day period exceeded **$2,000**. Infringing copies made or distributed on a single occasion not exceeding **15%** of the books, or cumulatively not exceeding **30%** of the books within a 180-day period would not be counted for the calculation of the retail value.)	not exceeding **15%** of the books, or cumulatively not exceeding **50%** of the books within a 180-day period would not be counted for the calculation of the retail value. We understand that the book publishers consider the Administration's proposed safe harbour too lax for fear that significant infringements would be excluded from the criminal net. On the other hand, the business community continues to express reservations against the proposed offence for fear that it would seriously affect dissemination of information in the community. We note the numerical perimeters recently counter-proposed by the publishers. We will further discuss with them as well as the business users, with a view to reaching common grounds on the safe harbour formulation as far as practicable. At the end of the day, a reasonable balance needs to be struck. Since the Bill contains a host of other proposals that help strengthen copyright protection and make copyright exemption more flexible to users, we see merits for early enactment and commencement of the Bill. As more time would be required to discuss with the copyright owners and business users the perimeters of the "safe harbour" provisions and to consider other fine details of the "safe harbour" formulation, the "safe harbour" should be prescribed by way of regulations which will be prepared after the

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			passage of the Bill.
		STM comments that the safe harbour provision is an invitation to piracy as people will hide their infringing activities under the "safe harbour" perimeters. It suggests that the "safe harbour" provision should not be introduced at all.	**Please see our response above on the necessity of safe harbour provision.**
		HKIPA notes the Administration's intention to exclude the application of the new offence to the distribution of works via certain platforms under the regulation to be made under section 119B. It is concerned if the safe harbour is to be defined to include all instances in which a licence to distribute is unavailable. It opines that unauthorized copying and distribution which exceed the safe harbour perimeters should attract criminal liability regardless of the platforms of distribution and availability of licences authorizing the copying/ distribution in question. Hence it suggests removing the limb of "manner in which infringing copies are made or distributed" from the scope of the regulation.	**Please see our response at paragraph 2 of item 1.1 above on the consideration and reasons for deferring the application of the new offence to distribution or works via certain platforms (such as Intranet). It must be clarified that we do not intend to exclude all instances in which a licence to distribute is unavailable. However, the availability of relevant licences or otherwise will be a key factor for SCIT to consider when determining whether regulations should be made to exclude distribution in a specified manner. Without any relevant licences, a person cannot resort to a legal means to continue the concerned distribution activities. Extending the criminal net to cover such distribution activities may in effect prohibit such activities altogether which could have serious implications on dissemination of information.**

(II) Rental rights for film and comic books			
	Organizations / Individuals	**Views / Concerns**	**Administration's Response**
2.1	**Hong Kong Comics and Animation Federation**	The Federation welcomes the Government's proposal to make amendments so that rental rights for comic books will cover the provision of comic books for on-the-spot reference subject to direct and indirect payment. On the proposed provision, it suggests deleting the test of "substantial attributability" as it will lead to arguments on the threshold for deciding whether a certain price charged is substantially attributable to the provision of comic books for on-the-spot reference. It considers that the test of "direct or indirect payment" sufficient to restrict the operation of comic cafes and tea houses.	The concerned CSA submitted to the Bills Committee has already accommodated the Federation's suggestion.