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BUSINESS SOFTWARE ALLIANCE

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Business Software Alliance

Submission in response to the Copyright (Amendment) Bill 2006

1 Introduction

1.1 BSA welcomes the legislative proposals for the Copyright (Amendment) Bill 2006

The Business Software Alliance ("**BSA**") welcomes the opportunity to comment on the detailed legislative amendments to the Copyright Ordinance contained in the Copyright (Amendment) Bill 2006 ("**Copyright Bill**") published on 16 March 2006.

BSA wishes to express its support of the Hong Kong Government's efforts to bring Hong Kong's copyright law up to date with evolving international standards and to address specific challenges presented by the intellectual property environment in Hong Kong. At the same time, we would like to express our appreciation to the Administration for the opportunities provided to the BSA to give feedback and comments during the preparation of the Copyright Bill.

BSA's comments in this submission reinforce our prior submissions provided during the consultation stage of the Copyright Bill, and highlight concerns and aspects of the Copyright Bill that the BSA believes would benefit from further consideration and/or refinement.

2 BSA's perspective on Copyright Bill

As the voice of the world's leading commercial software publishers and their hardware partners, BSA has been actively involved in copyright law reform across many countries including Hong Kong. BSA members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, Cadence Design Systems, Cisco Systems, CNC Software/Mastercam, Dell, Entrust, HP, IBM, Intel, Internet Security Systems, McAfee, Microsoft, Minitab, PTC, RSA Security, SAP, SolidWorks, Sybase, Symantec, Synopsys, The MathWorks, Trend Micro and UGS.

BSA members, and the broader IT sector, are directly impacted by changes to Hong Kong's copyright law and the problem of software piracy. BSA believes that strong laws are needed to foster Hong Kong's creative industry and to allow our local economy to reap the economic benefits of a reduction in software piracy.

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Hong Kong's software piracy rate stands at 52%, and losses due to software piracy amount to USD116 million, according to a global software piracy study released by IDC and BSA in 2005 (www.bsa.org/globalstudy). These figures are too high for an economy as developed as Hong Kong, and too high when compared with comparable economies in the region. The software industry appreciates that the Government has maintained good progress in eradicating optical disk piracy at the retail level, and has recently begun to look at ways to address the growing problem of Internet piracy in the peer-to-peer environment. However, business end-user piracy has not yet been effectively addressed in Hong Kong.

It is a fact that there has not been a single case (involving the use of illegal software in business) that has been successfully prosecuted where a defendant has pleaded not guilty and contested the trial. In other words, every fully contested case has resulted in an acquittal.

With these challenges, a roll-back in copyright protection under the Copyright Bill would be wrong as a matter of policy direction.

3 Executive Summary

We have summarized the major points of our submission below.

Our drafting suggestions on the text of the Copyright Bill are set out in the attached marked-up version of the Bill. Specific comments are set out in the footnotes to that document and for ease of reference, an index of those footnotes follows this summary.

Our submission consists of this summary and the marked-up Copyright Bill, and both documents should be read together.

3.1 New provisions on copyright exemptions

In general, it is important that any new copyright exemptions introduced by the Copyright Bill do not conflict with the normal exploitation of the work by the copyright owner.

We are extremely concerned by the new fair dealing exemptions for education and public administration, which are unnecessary and overly broad. We are concerned that, without proper guidelines, these exemptions will confuse the public on the boundaries of copyright law and encourage the use of pirated or unlicensed software. We are not aware of any legal cases where either educators or public administrators have been at risk of inappropriate legal action for copyright infringement. We believe that such a blanket exemption for either group would be totally inappropriate, especially given the leadership role of both sectors.

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(1) Fair dealing for purposes of giving or receiving instructions

The Government should be aware that most software companies already provide computer software to students, teachers and academic institutions at substantially reduced prices through specialized academic products and licensing schemes. In light of the availability of academic version software catered for the education sector, BSA questions why there is still a need to include computer software in the fair dealing exemption for teachers and students. We strongly believe that this exemption should be deleted from the Copyright Bill. However, if the Government is minded to retain it, at the very least, the availability of academic versions of works should be included in section 41A(2)(e) as one the factors to be considered by a court in determining whether any dealing with the work is fair under sub-section (1).

(2) Fair dealing for purposes of public administration

We find it difficult to reconcile the Government's policy intention to foster creative industries in Hong Kong with its proposal under the Copyright Bill to, effectively, create an avenue for the Government to use unlicensed works under an "fair dealing for purposes of efficient administration for urgent business" exemption. In our view, the Government should lead by example in relation to the use of licensed works, and such a fair dealing exemption should be resisted.

We appreciate that proposed section 54A is intended to address very limited and urgent circumstances where the Government is unable to obtain licenses from rights holders to proceed with efficient public administration. However, as previously communicated to the Administration, we find it difficult to envisage ***any*** circumstances where the Government would require the use of unlicensed computer software, especially considering the wide availability of computer software in the territory, and the ease with which licenses may be obtained for such software. Indeed, in our discussions with the Administration, we were not presented with any factual scenario warranting the application of the exemption to computer programs. We strongly believe that new section 54A should be deleted from the Copyright Bill. However, if the Government is minded to retain it, we strongly seek that computer programs be excluded from the operation of that provision.

In general, we realize that there may be a need to balance the interests of copyright owners and users. However, we strongly believe that intellectual property laws should not be weakened, compromised or undermined simply to address changing consumer interests or preferences. Strong and effective laws are a critical factor to the development of Hong Kong's knowledge-based economy. Copyright owners are responding to changes to consumer demand with evolving and new technologies and it is important that such innovation is not undermined with weak legal protection.

3.2 Criminal liability for making or dealing with infringing articles, etc. - Dealing offences

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BSA believes that the provisions on criminal liability for exhibiting in public or distributing an infringing copy of the work (section 118(1)(e)) and possession of an infringing copy of the work for exhibition or distribution (section 118(1)(f)) are unduly narrow in application. This is because of the requirement that the trade or business of the offender must effectively only consist of dealing in infringing copies for criminal liability to arise. This requirement will lead to an erroneous outcome as offenders can escape liability if they also trade in non-pirated goods or if they trade in infringing copies on an adhoc or one-time basis; we therefore recommend its deletion from the Copyright Bill.

3.3 Criminal liability for making or dealing with infringing articles, etc. -Possession offences

We are concerned that before an offence is committed under section 118(2A), there is a new requirement that the possession of the infringing works must be with a view to its being used for the purpose of that trade or business.

This requirement is not present in the existing section 118(1)(d) under current law and is not mentioned in the Preliminary Proposals or Refined Proposals previously published by the Administration for public consultation.

We believe that if this requirement is included into the legislation, it would be virtually impossible and represent an additional evidential burden for the prosecution to prove such an intention, particularly as it is something very much within the personal knowledge of the defendant. Further, the prosecution is already required to overcome the onerous hurdles of proving that the work itself is an infringing copy and that it is possessed by the offender for the purpose of or in the course of trade or business – the introduction of this additional qualifying requirement would render this provision unenforceable.

Under the new provision, conniving offenders could easily raise doubt on the prosecution's case by alleging that unlicensed software found on computers and/or loose CD-Rs at their premises were not intended to be used for the purpose of or in the course of the particular trade or business of that company but instead that they were brought into the company by employees for personal use. Therefore, we recommend that the term "with a view to its being used by any person for the purpose of or in the course of that trade or business" be deleted from section 118(2A) as its inclusion would render that provision unenforceable.

3.4 Directors' and partners' liability

We support the Government's proposal to introduce directors'/partners' criminal liability under the Copyright Bill. This proposal is widely supported by both local and foreign industry groups as a positive step towards promoting good corporate governance and accountability in Hong Kong. Enforcement and prosecution

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experience to date clearly demonstrates that current laws are ineffective and do not have the necessary deterrence against workplace piracy, and do not promote responsible corporate governance in relation to copyright works.

We believe that the introduction of directors'/partners' liability is especially important to ensure that directors/partners who authorise or condone copyright infringements by their organizations are held accountable and responsible. Prosecution experience over 5 years has shown that it is difficult under current laws to establish liability against personal defendants, with the result that in the overwhelming majority of cases, only corporate defendants are convicted following plea bargains reached with their directors/partners. Without the real threat of criminal consequence as a deterrence, piracy in the business environment will continue unabated and Hong Kong's already serious software piracy problem can only worsen.

BSA supports the Government's proposed wording in section 118(2H) relating to factors that a court may take into account in determining whether a director or partner has adduced sufficient evidence to rebut a presumption of liability. This provision provides important guidance to the court on the type of evidence needed to rebut the presumption of liability on the part of directors/partners. Also, it serves to guide law abiding directors and partners on how they can limit their liability. Clearly, directors/partners who have put in place adequate policies/processes for the responsible management of their software assets would be able to rebut the presumption without undue difficulties under the proposed section 118(2F).

We have also put forward other suggestions which we believe would increase the effectiveness of section 118(2H), including allowing the court to reference business record keeping obligations under existing legislation in Hong Kong.

In relation to the proposed wording of section 118(2F), the reference to "responsible for the internal management of the body corporate" results in ambiguities which could make prosecution difficult in practice. We have commented on those issues in detail in the attached mark-up of the Copyright Bill.

Despite inclusion into the Copyright Bill, we understand there is a real risk that the proposed directors'/partners' liability provisions will not be passed into law. If this happens, and provisions such as the employee defence provision *are* introduced into law, the net effect is a substantial and serious weakening of copyright protection in Hong Kong. This will send a wrong message to the local and international communities on the Government's commitment to a strong intellectual property regime, and will exacerbate Hong Kong's piracy problems.

3.5 Defence for employees

BSA strongly opposes the introduction of an express employee defence against end-user criminal liability. As a matter of principle, it is unclear why employees who

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knowingly possess or use pirated software should be exempted from liability under the Copyright Ordinance, whereas for physical property they would be liable for handling stolen goods, say under the Theft Ordinance.

No other major jurisdiction (including Australia, Singapore, the United Kingdom or the United States) has introduced an employee defense for copyright offences in the end-user environment.

Hong Kong's current copyright law already provides a complete defense to anyone (whether employees or employers) if they do not know or had no reason to believe that the copyright work provided to them was in fact an infringing copy.

The proposed introduction of the employee defence occurs at a time when the rate of business piracy with respect to computer software is high, and has seen no improvement in recent years. More than half of the software used in Hong Kong is pirated – this is unacceptable for such an advanced economy, especially when compared with countries like Japan, Singapore, Taiwan, Australia and New Zealand, which all enjoy the economic benefits of a lower rate of software piracy. The introduction of the employee defence would only exacerbate the piracy situation in Hong Kong. Legislative amendments should instead be made to facilitate the successful enforcement and prosecution of businesses using illegal software.

The availability of an employee defence will create a disincentive for employees to refuse to use infringing works and for directors / managers to encourage or allow use of pirated software in their organisations. This fosters a culture of disrespect for intellectual property in Hong Kong.

We do not find any support for the introduction of an employee defence from enforcement or prosecution experience. We are not aware of any lower level employees being charged with copyright infringement since the introduction of criminalisation of end-user piracy. Further, there are no provisions contained the Copyright Bill, which if enacted into law, would result in an increase in potential liability for lower-level employees to warrant the defence.

However, if the Government is minded to implement the employee defence at the real risk of seeing a worsening in our software piracy problem, we have provided suggested amendments to the provisions to reduce the potential for abuse to some extent. This includes requiring that persons taking advantage of the defence: establish that they are employees as defined by the Employment Ordinance; establish that they are not directors, officers, proprietors, managers or employees with managerial functions; and identify or assist in the identification of the person(s) who actually provided the infringing copy of the work to them.

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We also recommend incorporating a whistle-blower provision in the Copyright Ordinance to protect employees who are willing to reject the use of infringing software by their employers.

3.6 Affidavit evidence

We welcome the introduction of new provisions relating to proof of licensing by affidavit evidence under sections 121(2A), 121(2B) and 121(2C). We have suggested minor amendments to those sections, by adding the term "authorised", to reflect the fact that in many copyright industries, including the software industry, copyright owners do not directly issue licenses to resellers or sub-distributors but provide general authorisation to them to distribute legitimate copies of their works.

3.7 Circumvention of effective technological measures

We welcome and support the Government's efforts to strengthen legal protection for technology protection measures by introducing civil liability for acts of circumvention and criminal liabilities for dealings in circumvention devices or services under the Copyright Bill.

However, we are concerned that some of the provisions concerning technology protection measures in the Copyright Bill will not provide full and effective legal remedies in practice. These concerns are summarized below:

(1) Acts of circumvention – To establish infringement, it must be proven that the circumventor knew or had reasons to know that his act of circumvention would "induce, enable, facilitate or conceal an infringement" of copyright in the work pursuant to section 273A(1)(b). This type of knowledge is really only known to the offender and imposes an unnecessary barrier to enforcement. It will certainly make investigations by copyright owners difficult and reduce the effectiveness of the remedy. We therefore suggest removing this requirement, particularly as legitimate uses of underlying copyright works that would require circumvention of a technology protection measure are already provided for in the exemptions in section 273D.

Separately, we note that section 273(2)(b) under the current Copyright Ordinance is repealed under the Copyright Bill and a similar provision dealing with persons who publishes information to assist or enable circumvention of copy-protection is not introduced. In today's environment, hackers and hobbyists regularly publish information and methods on how to bypass technology protection measures with an aim to encourage others to do so. We therefore recommend that a provision similar to current section 273(2)(b) should be included into Copyright Bill to address this omission, and include a reference to the rights of free speech (in a similar manner to Section 1201(4) of the U.S Digital Millennium Copyright Act).

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(2) Dealing in devices/services: Similarly, there is a requirement to prove that the dealer not only knew or reasonably should have known that the device would be used to circumvent, but also that the circumvention would be done "to induce, enable, facilitate or conceal an infringement" of copyright in the work. This second element is unnecessary and will pose significant difficulties on the part of copyright owners when gathering evidence to show that the circumvention was done with that knowledge. Also, we would suggest removing the requirement that the distribution of a prohibited device must be done "for the purpose of or in the course of any trade or business" under section 273B(1)(b). This is to ensure that an offender's objectionable dealings, which can have a significant commercial impact on right holders and but are not necessarily conducted in a business context, are actionable in Hong Kong.

(3) Criminal offences. The criminal provisions for dealing in circumvention devices are unduly limited in several respects.

First, the definition of a "relevant device" in section 273C(2) is limited to devices that are "primarily designed, produced or adapted" for circumvention purposes. As a result, devices which have, for example, only limited commercially significant purposes or uses other than to circumvent might be argued to fall outside the definition. To address this deficiency, the definition of relevant device found in section 273B(2) (which takes into account two further tests for "relevant device") should be adopted for section 273C(2) and section 273F(1). This reflects the same position as found in section 1201 of the Copyright Law in the United States.

Similarly, we suggest adopting the same definition of relevant service for section 273C(2) and section 273F(1) as provided in section 273B(2).

Secondly, section 273C(1)(e) provides for criminal liability for the distribution of circumvention devices only if it takes place "for the purpose of or in the course of any trade or business which consists of dealing in circumvention devices." The wording of this section is far too narrow and will render the provision unenforceable. This section fails to provide criminal liability for offenders who operate large scale distribution of circumvention devices but also distribute other unrelated (non-pirated) items, or distribute circumvention devices on an adhoc or one-time basis. Clearly, amendments to this section of the Copyright Bill are needed to address this issue.

(4) Statutory Exemptions. The Copyright Bill proposes broad exemptions to liability. As a matter of principle, these exemptions should not extend to relevant acts/dealings which also affect prejudicially the rights of the copyright owner or are carried out with respect to an infringing copy of a work. We have made suggested amendments to the proposed exemptions to reflect these principles.

In relation to the particular exemptions proposed, we are particularly concerned by the proposed exemption to allow circumvention of technology measures that have the effect of or purpose of controlling market segmentation under section 273F(11). Such

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a blanket exemption fails to take into account the serious problem of devices that are used to bypass regional controls in order to allow access to pirated copyright works. We have proposed amendments to this section to limit the application of section 273F(11) to those situations where the purpose is to bypass regional coding measures only to access legitimate works (eg. parallel imported products) and not to gain access to pirated works. We believe this is a more acceptable solution to both end-users and rights holders.

4. Concluding remarks

BSA thanks the Bills Committee and Administration for their consideration of this submission, and welcomes the opportunity to discuss the points we have raised. We look forward to continuing participation in this legislative process.

Business Software Alliance
Hong Kong Committee
April 27, 2006

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A BILL

To

Amend the Copyright Ordinance to make provisions or further provisions for—

(*a*) the acts which may be done in relation to works or performances notwithstanding the copyright in the works or the rights in the performances;

(*b*) the rental right of copyright owners and performers;

(*c*) the moral rights of performers;

(*d*) the infringement of copyright in works or rights in performances;

(*e*) the technological measures which are used for the protection of copyright in works or rights in performances; and

(*f*) miscellaneous and transitional matters,

to repeal the Copyright (Suspension of Amendments) Ordinance 2001, and to make provisions for related matters.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title

This Ordinance may be cited as the Copyright (Amendment) Ordinance 2006.

2. Commencement

(1) Subject to subsection (2), this Ordinance shall come into operation on the day on which it is published in the Gazette.

(2) The following sections shall come into operation on a day to be appointed by the Secretary for Commerce, Industry and Technology by notice published in the Gazette—

(*a*) section 4 (insofar as it relates to the new section 25(1)(*c*), (*d*), (*e*) and (*f*));

(*b*) section 22(4);

(*c*) section 24;

(*d*) section 27(5);

(*e*) section 27(6), (7), (8) and (9) (insofar as it relates to the new section 121(2C));

(*f*) section 28;

(*g*) section 29;

(*h*) section 30;

(*i*) section 35(2) (insofar as it relates to paragraphs (*c*), (*d*), (*e*) and (*f*) of the new definition of "rental right" in section 198(1));

(*j*) section 37;

(*k*) section 39;

(*l*) section 41;

(*m*) section 42;

(*n*) section 46;

(*o*) section 47;

(*p*) section 53;

(*q*) section 54;

(*r*) section 55;

(*s*) section 56;

(*t*) section 57; and

(*u*) section 61 (insofar as it relates to Parts 3 and 4 of the new Schedule 7).

PART 2

AMENDMENTS TO COPYRIGHT ORDINANCE

3. The acts restricted by copyright in a work

Section 22(1)(*c*) of the Copyright Ordinance (Cap. 528) is repealed and the following substituted—

"(c) to rent copies of the work to the public (see section 25);".

4. Infringement by rental of work to the public

Section 25(1) is repealed and the following substituted—

"(1) The rental of copies of any of the following works to the public is an act restricted by the copyright in the work—

(*a*) a computer program;

(*b*) a sound recording;

(*c*) a film;

(*d*) a literary, dramatic or musical work included in a sound recording;

(*e*) a literary or artistic work included in a comic book; or

(*f*) the typographical arrangement of a published edition of a comic book.".

5. Secondary infringement: possessing or dealing with infringing copy

(1) Section 31(1)(*a*) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

(2) Section 31(1)(*c*) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

(3) Section 31(1)(*d*) is amended by repealing "otherwise than for the purpose of, in the course of, or in connection with, any trade or business" and substituting "otherwise than for the purpose of or in the course of any trade or business".

6. Secondary infringement: providing means for making infringing copies

Section 32(1)(*c*) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

7. Meaning of "infringing copy"

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

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

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

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

(*a*) section 35B(5) (imported copy not an "infringing copy" for purposes of section 35(3));

(*b*) section 40B(5) (accessible copies made for persons with a print disability);

(*c*) section 40C(7) (accessible copies made by specified bodies for persons with a print disability);

(*d*) section 40D(2) (intermediate copies possessed by specified bodies);

(*e*) section 40D(7) (intermediate copies dealt with by specified bodies);

(*f*) section 41A(5) (copies made for purposes of giving or receiving instruction);

(*g*) section 41(5) (copies made for purposes of instruction or examination);

(*h*) section 44(3) (recordings made by educational establishments for educational purposes);

(*i*) section 45(3) (reprographic copying by educational establishments for purposes of instruction);

(*j*) section 46(4)(b) (copies made by librarian or archivist in reliance on false declaration);

(*k*) section 54A(3) (copies made for purposes of public administration);

(*l*) section 64(2) (further copies, adaptations, etc. of work in electronic form retained on transfer of principal copy);

(*m*) section 72(2) (copies made for purpose of advertising artistic work for sale); or

(*n*) section 77(4) (copies made for purposes of broadcast or cable programme).".

8. Section added

The following is added immediately after section 35A—

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

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

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

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

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

(*a*) that is—

(i) a musical sound recording;

(ii) a musical visual recording;

(iii) a television drama; or

(iv) a movie; and

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

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

(*a*) by an educational establishment for the educational purposes of the establishment; or

(*b*) by a specified library for use of the library.

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

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

(*a*) if that dealing takes place within the period of 9 months referred to in section 35(4)(*b*), it is, for the purposes of sections 118 to 133 (criminal provisions), to be treated, in relation to that dealing and the person who deals in it, as an infringing copy; and

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

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

(9) Defences for the purposes of sections 30 and 31

Section 36(1) is amended by adding "and which was lawfully made in the country, territory or area where it was made" after "section 35(3)".

(10) Research and private study

(1) Section 38(1) is amended by repealing "of any description".

(2) Section 38(3) is repealed and the following substituted—

"(3) In determining whether any dealing with a work is fair dealing under subsection (1), without prejudice to Section 37,[1] the court shall take into account all the circumstances of the case and, in particular—

(*a*) 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;

(*b*) the nature of the work;

(*c*) the amount and substantiality of the portion dealt with in relation to the work as a whole; and

(*d*) the effect of the dealing on the potential market for or value of the work.".

11. Sections added

The following are added immediately after section 40 -

"**Persons with a print disability**

40A. Definitions for sections 40A to 40F

In this section and in sections 40B to 40F—

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[1] In general, we realize that there may be a need to balance the interests of copyright owners and users. However, we strongly believe that intellectual property laws should not be weakened, compromised or undermined simply to address changing consumer interests or preferences. Strong and effective laws are a critical factor to the development of Hong Kong's knowledge-based economy. Copyright owners are responding to changes to consumer demand with evolving and new technologies and it is important that such innovation is not undermined with weak legal protection.

We wish to remind the Government that in view of Section 37 of the Copyright Ordinance, in particular Section 37(3), any fair use of a copyright work must not conflict with the normal exploitation of the work by the copyright owner. This is the spirit of the Copyright Ordinance and an important balance between the interests of copyright owners and end users.

"accessible copy" (便於閱讀文本), in relation to a copyright work, means a version which provides improved access to the work for a person with a print disability;

"lend" (借出), in relation to a copy, means to make it available for use, otherwise than for direct or indirect economic or commercial advantage, on terms that it will be returned;

"print disability" (閱讀殘障), in relation to a person, means -

(*a*) blindness;

(*b*) an impairment of his visual function which cannot be improved by the use of corrective lenses to a level that would normally be acceptable for reading without a special level or kind of light;

(*c*) inability, through physical disability, to hold or manipulate a book; or

(*d*) inability, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading;

"specified body" (指明團體) means a body of any of the following descriptions—

(*a*) an educational establishment specified in section 1 of Schedule 1;

(*b*) an educational establishment exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112);

(*c*) an educational establishment receiving direct recurrent subvention from the Government; or

(*d*) an organization which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of welfare for persons with a print disability.

40B. Making a single accessible copy for a person with a print disability

(1) If—

(*a*) a person with a print disability possesses a copy of the whole or part of a literary, dramatic, musical or artistic work (referred to in this section as "master copy"); and

(*b*) the master copy is not accessible to him because of the disability,

it is not an infringement of copyright in the work or, in the case of a published edition, in the typographical arrangement, for one accessible copy of the master copy to be made for his personal use.

(2) Subsection (1) does not apply—

(*a*) if the master copy is an infringing copy;

(*b*) if the master copy is of a musical work or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of the work; or

(*c*) if the master copy is of a dramatic work or part of a dramatic work, and the making of an accessible copy would involve recording a performance of the work or part of the work.

(3) Subsection (1) does not apply unless, at the time when the accessible copy is made for the person with a print disability, the maker of the copy is satisfied, after making reasonable enquiries, that copies of the relevant copyright work in a form that is accessible to the person cannot be obtained at a reasonable commercial price.

(4) If a person makes an accessible copy for a person with a print disability under this section and charges for it, the sum charged must not exceed the cost incurred in making and supplying the copy.

(5) Where an accessible copy which apart from this section would be an infringing copy is made or supplied in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy—

(*a*) for the purpose of that dealing; and

(*b*) if that dealing infringes copyright, for all subsequent purposes.

(6) In subsection (5), "dealt with" (被用以進行交易) means sold, let for hire, or offered or exposed for sale or hire.

40C. Making multiple accessible copies by specified bodies for persons with a print disability

(1) If—

(*a*) a specified body possesses a copy of the whole or part of a commercial publication of a literary, dramatic, musical or artistic work (referred to in this section as "master copy"); and

(*b*) the master copy is not accessible to persons with a print disability,

it is not an infringement of copyright in the work or, in the case of a published edition, in the typographical arrangement, for the specified body to make for those persons or supply to those persons accessible copies of the master copy for their personal use.

(2) Subsection (1) does not apply—

(*a*) if the master copy is an infringing copy;

(*b*) if the master copy is of a musical work or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of the work; or

(*c*) if the master copy is of a dramatic work or part of a dramatic work, and the making of an accessible copy would involve recording a performance of the work or part of the work.

(3) Subsection (1) does not apply unless, at the time when the accessible copies are made, the specified body is satisfied, after making reasonable enquiries, that copies of the relevant copyright work in a form that is accessible to a person with a print disability cannot be obtained at a reasonable commercial price.

(4) The specified body must—

(*a*) within a reasonable time before making or supplying the accessible copies, notify the relevant copyright owner of its intention to make or supply the accessible copies; or

(*b*) within a reasonable time after making or supplying the accessible copies, notify the relevant copyright owner of the fact that it has made or supplied the accessible copies.

(5) The requirement under subsection (4) does not apply if the specified body cannot, after making reasonable enquiries, ascertain the name and address of the relevant copyright owner.

(6) If the specified body charges for making and supplying an accessible copy under this section, the sum charged must not exceed the cost incurred in making and supplying the copy.

(7) Where an accessible copy which apart from this section would be an infringing copy is made or supplied in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy—

(*a*) for the purpose of that dealing; and

(*b*) if that dealing infringes copyright, for all subsequent purposes.

(8) In subsection (7), "dealt with" (被用以進行交易) means sold, let for hire, or offered or exposed for sale or hire.

40D. Intermediate copies

(1) A specified body entitled to make accessible copies of a master copy under section 40C may possess an intermediate copy of the master copy which is necessarily created during the production of the accessible copies, but—

(*a*) the specified body may possess the intermediate copy only for the purpose of the production of further accessible copies; and

(*b*) the specified body must destroy the intermediate copy within 3 months after it is no longer required for that purpose.

(2) An intermediate copy possessed otherwise than in accordance with subsection (1) is to be treated as an infringing copy.

(3) A specified body may lend or transfer an intermediate copy possessed under subsection (1) to another specified body which is also entitled to make accessible copies of the relevant copyright work under section 40C.

(4) The specified body must—

(*a*) within a reasonable time before lending or transferring the intermediate copy, notify the relevant copyright owner of its intention to lend or transfer the intermediate copy; or

(*b*) within a reasonable time after lending or transferring the intermediate copy, notify the relevant copyright owner of the fact that it has lent or transferred the intermediate copy.

(5) The requirement under subsection (4) does not apply if the specified body cannot, after making reasonable enquiries, ascertain the name and address of the relevant copyright owner.

(6) If the specified body charges for lending or transferring an intermediate copy under this section, the sum charged must not exceed the cost incurred in lending or transferring the copy.

(7) Where an intermediate copy which apart from this section would be an infringing copy is possessed, lent or transferred in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy—

(*a*) for the purpose of that dealing; and

(*b*) if that dealing infringes copyright, for all subsequent purposes.

(8) In subsection (7), "dealt with" (被用以進行交易) means sold, let for hire, or offered or exposed for sale or hire.

40E. Records to be kept by specified bodies

(1) A specified body must make a record of any accessible copy made or supplied under section 40C as soon as practicable after it is made or supplied.

(2) The record referred to in subsection (1) must include—

(*a*) the date on which the accessible copy is made or supplied;

(*b*) the form of the accessible copy;

(*c*) the title, publisher and edition of the relevant master copy;

(*d*) where the accessible copy is made for or supplied to a body or a class of persons, the name of the body or a description of the class of persons; and

(*e*) where more than one copy of the accessible copy is made or supplied, the total number of such copies.

(3) A specified body must make a record of any intermediate copy lent or transferred under section 40D as soon as practicable after it is lent or transferred.

(4) The record referred to in subsection (3) must include—

(*a*) the name of the specified body to which and the date on which the intermediate copy is lent or transferred;

(*b*) the form of the intermediate copy; and

(*c*) the title, publisher and edition of the relevant master copy.

(5) A specified body must—

(*a*) retain any record made under subsection (1) or (3) for a period of at least 3 years after it is made; and

(*b*) allow the relevant copyright owner or a person acting for him, on giving reasonable notice, to inspect and make copies of the record at any reasonable time.

40F. Supplementary provisions for sections 40A to 40E

(1) This section supplements sections 40A to 40E.

(2) A copy (other than an accessible copy made under section 40B or 40C) of a copyright work is taken to be accessible to a person with a print disability only if it is as accessible to him as it would be if he were not suffering from the disability.

(3) An accessible copy of a copyright work may be in the form of—

(*a*) a sound recording of the work;

(*b*) a Braille, large-print or electronic version of the work; or

(*c*) any other specialized format of the work.

(4) An accessible copy of a copyright work may include facilities for navigating around the version of the work but must not include—

(*a*) changes which are not necessary to overcome problems caused by a print disability; or

(*b*) changes which infringe the moral right of the author of the work conferred by section 92 not to have the work subjected to derogatory treatment.".

12. Section added

The following is added immediately before section 41 under the cross-heading of "**Education**"—

"41A. Fair dealing for purposes of giving or receiving instruction[2]

(1) Fair dealing with a work by a teacher or pupil for the purposes of giving or receiving instruction in a specified course of study provided by an educational establishment does not infringe the copyright in the work or, in the case of a published edition, in the typographical arrangement.[3]

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[2] **New section 41A - Fair dealing for purposes of giving or receiving instruction:**

Same comments as in Section 38. Any fair use of a copyright work must not conflict with the normal exploitation of the work by the copyright owner.

[3] We are extremely concerned by the new fair dealing exemptions for education and public administration proposed by the Copyright (Amendment) Bill 2006 ("**The Copyright Bill**"), which are unnecessary and overly broad. We are concerned that, without proper guidelines, these exemptions will confuse the public on the boundaries of copyright law and simply encourage the use of pirated or unlicensed software. We are not aware of any legal cases where educators have been at risk of "inappropriate" legal action for copyright infringement and given the leadership role of the education sector, we believe that such a blanket exemption for the education sector is totally inappropriate.

Section 41A introduces a broader fair dealing exemption for giving or receiving education instructions. The introduction of this fair use provision for education is new in Hong Kong and we are concerned about the effect this provision may have on the use of computer software within the education community. We believe that without proper guidelines, the proposed section 41A may encourage the use of unlicensed computer software by the educational community. It should be noted that the application of the fair use exemption is too wide and includes all educational establishments listed in Schedule 1 of the Copyright Ordinance, which includes profit making educational establishments such as private tutorial and computer training centres. Based on BSA's enforcement experience, such an extension of the proposed exemption to such organizations would inevitably lead to greater abuse.

Another area of concern is that many of the software products developed by members of the Business Software Alliance ("BSA") enable interactive/project teaching or contain interactive/project based functionality. As the main basis for introducing the proposed section 41A is to cater for interactive and/or project based teaching as stated in the Refined Proposals, BSA members are concerned that use of unlicensed computer software to make use of this functionality would also be exempted.

The Government should be aware that members of the BSA have already been providing computer software to students, teacher and academic institutions at substantially reduced prices through specialized academic products and licensing schemes. These schemes enable and encourage access to computer software by the educational sector, and are especially catered for them. In light of the availability of ***academic version software*** to the educational sector, BSA questions why there is still a need to include computer software in the fair dealing exemption. We find it difficult to understand the policy intention behind proposed section 41A in the context of computer programs.

We strongly believe that this exemption should be deleted from the Copyright Bill. However, if the Government is minded to retain it, at the very least, the availability of academic versions of works should be included in Section 41A(2)(e) as one of the factors to be considered by the court in determining whether any dealing with the work is fair under sub-section (1).

(2) In determining whether any dealing with a work is fair dealing under subsection (1), without prejudice to Section 37, the court shall take into account all the circumstances of the case and, in particular—

(*a*) 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;

(*b*) the nature of the work;

(*c*) the amount and substantiality of the portion dealt with in relation to the work as a whole; ~~and~~

(*d*) the effect of the dealing on the potential market for or value of the work; and ~~.~~

(e) whether any academic version of the copyright work is available for use by the teacher or pupil.

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(3) Where any dealing with a work involves the inclusion of any passage or excerpt from a published literary or dramatic work in an anthology—

(*a*) if the inclusion is not accompanied by a sufficient acknowledgement, the dealing is not fair dealing under subsection (1); and

(*b*) if the inclusion is accompanied by a sufficient acknowledgement, subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

(4) Where any dealing with a work involves the making of a recording of a broadcast or cable programme or a copy of such a recording—

(*a*) if an acknowledgement of authorship or other creative effort contained in the work recorded is not incorporated in the recording, the dealing is not fair dealing under subsection (1); and

(*b*) if an acknowledgement of authorship or other creative effort contained in the work recorded is incorporated in the recording, subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

(5) Where a copy which apart from this section would be an infringing copy is made in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy—

(*a*) for the purpose of that dealing; and

(*b*) if that dealing infringes copyright, for all subsequent purposes.

(6) In subsection (5), "dealt with" (被用以進行交易) ~~means~~ includes sold, let for hire, or offered or exposed for sale or hire or distribution.".[4]

13. Performing, playing or showing work in course of activities of educational establishments

(1) Section 43(1) is amended by repealing "other persons directly connected with the activities of the establishment" and substituting "the near relatives or guardians of the pupils".

(2) Section 43(2) is amended by repealing "for the purposes of instruction" and substituting "for the purposes of giving or receiving instruction".

(3) Section 43(3) is repealed and the following substituted—

"(3) In subsection (1), "near relative" (近親) means—

(*a*) a parent;

(*b*) a grandparent;

(*c*) a spouse;

(*d*) a brother or sister;

(*e*) a half-brother or half-sister;

(*f*) a child (including an illegitimate child and an adopted child);

(*g*) a grandchild; or

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[4] **New section 41A (6) - Fair dealing for purposes of giving or receiving instruction:**

The section 41(A)(6) statutory exemption is uniquely premised on the individual circumstances of the case and/or type of user (teacher/student). The individual circumstances of the case or type of user may change with any subsequent dealing with the "infringing copy" and therefore "any subsequent dealings" should include activities not limited to sales or an intention to reap profits from such sales and should include any other subsequent dealings in any form.

We therefore suggest that the definition of "***dealt with***" under subsection (6) should be expanded to include all subsequent dealings with the infringing copy and should be amended as shown above.

(*h*) a son-in-law or daughter-in-law (including a spouse of an illegitimate child or of an adopted child).".

14. Recording by educational establishments of broadcasts and cable programmes

Section 44(2) is repealed.

15. Reprographic copying made by educational establishments of passages from published works

(1) Section 45 is amended, in the heading, by adding "**or pupils**" after "**educational establishments**".

(2) Section 45(1) is amended by repealing "for the purposes of instruction" and substituting "for the purposes of giving instruction, or by a pupil for the purposes of receiving instruction in a specified course of study provided by an educational establishment,".

(3) Section 45(2) is repealed.

16. Section added

The following is added immediately before section 54 under the cross-heading of "**Public administration**"—

"54A. Fair dealing for purposes of public administration

(1) Fair dealing with a work by the Government, the Executive Council, the Legislative Council, the Judiciary or any District Council for the purposes of efficient administration of urgent business does not infringe the copyright in the work or, in the case of a published edition, in the typographical arrangement.[5]

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[5] **New Section 54A - Fair dealing for purposes of public administration:**

We oppose the introduction of a fair use exemption for public administration. We are concerned the Copyright Bill inadvertently creates new avenues for the use of infringing works. Given the Government's commitment to building a knowledge-based economy and the leadership role played by the Government, we believe that such a blanket exemption for the public administration is totally inappropriate. The Government should lead by example and set the bar on good corporate citizenship.

We were assured that proposed section 54A is intended to address very limited and urgent circumstances where the Government is unable to obtain licenses from rights holders to proceed with efficient public administration. However, we note that the meaning of "urgent business" and "efficient administration" is not defined in the Copyright Bill and there is a risk such a statutory exemption could be open to abuse. Clearly, we believe that the term "urgent business" should be limited in scope and apply to circumstances related to national security and/or public safety issues only. Further, given the potentially wide definition of "government", quasi-government entities may also be able to take advantage of this exemption when they should not.

We have previously communicated to the Administration that we find it difficult to envisage any circumstances where the Government would require the use of unlicensed computer software, especially considering the wide availability of computer software in the territory, and the ease with which licenses may be obtained for such

(2) In determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular—[6]

(*a*) 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;

(*b*) the nature of the work;

(*c*) the amount and substantiality of the portion dealt with in relation to the work as a whole; ~~and~~

(*d*) the effect of the dealing on the potential market for or value of the work; and ~~.~~

(e) the relative availability of licensed copies of works.

(3) Where a copy which apart from this section would be an infringing copy is made in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy—

(*a*) for the purpose of that dealing; and

(*b*) if that dealing infringes copyright, for all subsequent purposes.

(4) In subsection (3), "dealt with" (被用以進行交易) ~~means~~ includes sold, let for hire, or offered or exposed for sale or hire or distribution.".[7]

17. Advertisement of sale of artistic work

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software. Indeed, in our discussions with the Administration, we were not presented with any factual scenario warranting the application of the exemption to computer programs. We strongly believe that new section 54A should be deleted from the Copyright Bill. However, if the Government is minded to retain it, we strongly seek that computer programs be excluded from the operation of that provision.

[6] **New Section 54A(2)(a) - Fair dealing for purposes of public administration (cont.):**

Notwithstanding our comments in footnote 5, we recommend amending section 54(A)(2)(a) to include the word "***urgency***" and "***necessity***" after "***the purpose***" as shown above. Clearly, as noted above, the circumstances under which the exemption operates should be strictly limited. Important factors the Court should therefore take into account is whether there is such urgency and necessity that the Government does not have any sufficient time and ability to obtain properly licensed/authorized works from the copyright owners, and the availability of licensed works within the time required.

[7] **New Section 54A (4) -Fair dealing for purposes of public administration (cont.):**

Similar to our comments to footnote 4, we recommend expanding the definition of "***dealt with***" under section 54A (4) to include all subsequent dealings with the infringing copy, as shown above, given the unique premise upon which the exemption is created.

Section 72(2) is amended, in the English text, by repealing "if that dealing infringes copyright for all subsequent purposes" and substituting "and, if that dealing infringes copyright, for all subsequent purposes".

18. Section added

The following is added—

"81A. Playing of sound broadcasts inside vehicles

(1) The playing of a sound broadcast inside a vehicle for the purpose of affording the driver of the vehicle access to public information (including but not limited to news reports, weather forecasts and information relating to road traffic) does not infringe the copyright in the sound broadcast, any sound recording included in it or any literary, dramatic or musical work included in it.

(2) In subsection (1), "vehicle" (車輛) includes any private or public vehicle which is constructed or adapted for use on roads.".

19. Infringement of right by possessing or dealing with infringing article

(1) Section 95(1)(*a*) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

(2) Section 95(1)(*c*) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

(3) Section 95(1)(*d*) is amended by repealing "otherwise than for the purpose of, in the course of, or in connection with, any trade or business" and substituting "otherwise than for the purpose of or in the course of any trade or business".

20. False attribution of work

(1) Section 96(5) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

(2) Section 96(6) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

21. Order for delivery up

Section 109(1)(*a*) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

22. Criminal liability for making or dealing with infringing articles, etc.

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

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

(*a*) makes for sale or hire an infringing copy of the work;

(*b*) imports an infringing copy of the work into Hong Kong otherwise than for his private and domestic use;

(*c*) exports an infringing copy of the work from Hong Kong otherwise than for his private and domestic use;

(*d*) sells, lets for hire, or offers or exposes for sale or hire an infringing copy of the work for the purpose of or in the course of any trade or business;

(*e*) exhibits in public or distributes an infringing copy of the work for the purpose of or in the course of any trade or business ~~which consists of dealing in infringing copies of copyright works~~;[8]

(*f*) possesses an infringing copy of the work with a view to—

(i) its being sold or let for hire by any person for the purpose of or in the course of any trade or business; or

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[8] **New section 118(1) - Criminal liability for making or dealing with infringing articles, etc.:**

In the proposed Section 118(1)(e), the inclusion of the term "***which consists of dealing in infringing copies of copyright works***" in section 118(1)(e) creates an added requirement that to commit an offence under this section, a person's usual business or trade must consist of dealing in "infringing" copies of copyright works.

We trust this is not the Administration's intention. An interpretation of this section suggests that a person who exhibits or distributes infringing copies of copyright works which is outside or not part of its normal business activity would not commit an offence under this section. For example, a trader in mobile phones who on an ad-hoc or one time basis exhibits or distributes counterfeit software would not be liable for infringement under the proposed provision - as the trader's normal trade or business consists of trade in mobile phones and does not consist of dealing in infringing software, the trader would not commit an offence under this section. Nor would the trader arguably be liable if his trade/business also consisted of unrelated items in addition to the infringing software. These would be erroneous outcomes. The provision ought to operate regardless of the type of trade/business engaged by the infringer or the propensity with which he deals with infringing works. Accordingly, we would recommend deletion of the phrase "***which consists of dealing in infringing copies of copyright works***" from section 118(1)(e) as shown above.

In the event that the Administration agrees with the above recommendations, appropriate amendments would need to be made to section 118(1A) (a) and 118(1A)(b) accordingly.

(ii) its being exhibited in public or distributed by any person for the purpose of or in the course of any trade or business ~~which consists of dealing in infringing copies of copyright works~~[9]; or

(*g*) ~~distributes an~~ does any act referred to in subsection 1(a) to (f) in relation to an infringing copy of the work (otherwise than for the purpose of or in the course of any trade or business and whether or not such trade or business ~~which~~ consists of dealing in infringing copies of copyright works) to such an extent as to affect prejudicially the copyright owner.".[10]

(2) Section 118 is amended by adding—

"(1A) Where—

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

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

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

(1B) Where—

(*a*) a person possesses an infringing copy of a copyright work with a view to its being exhibited in public or distributed by any

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[9] **New section 118(1)(f)(ii) - Criminal liability for making or dealing with infringing articles, etc. (cont.):**

Our comments in footnote 8 above similarly apply to the proposed section 118(1)(f)(ii). Further, we note that the legislative intent as reflected in the current section 118(8A) of the Copyright Ordinance is that it is immaterial for the purpose of such offences whether or not the trade or business consists of dealing in infringing copies of copyright works. Hence the reference to "which consists of dealing in infringing copies of copyright works" should be removed from the proposed provision.

[10] New **section 118(1)(g) - Criminal liability for making or dealing with infringing articles, etc. (cont):**

We believe the legislative intention of section 118(1)(g) is to capture or include those infringing acts that may not fall into the specified provisions for dealing offences. Therefore, we do not see the justification to limit such acts that may affect prejudicially the rights of copyright owner to acts of distribution only. All other dealings in subsections 1(a) to (f) in relation to an infringing copy of copyright works that affect prejudicially the rights of a copyright owner should be included.

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

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

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

(3) Section 118 is amended by adding—

"(2A) Without prejudice to subsection (1), a person commits an offence if he, without the licence of the copyright owner of a copyright work to which this subsection applies, possesses an infringing copy of the work for the purpose of or in the course of any trade or business ~~with a view to its being used by any person for the purpose of or in the course of that trade or business~~ or for any other purpose so as to affect prejudicially the copyright owner.[11]

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

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[11] **New Section 118(2A) - Criminal liability for making or dealing with infringing articles, etc. (cont.):**

The proposed section 118(2A) provides a new approach for business end-user possession criminal liability (previously found in S.118(1)(d)). We welcome this effort to add clarity to end-user criminal liability provisions. However, we are concerned that the proposed section 118(2A) creates an additional onerous requirement that the infringer must have had a view to the infringing copy being used for the purpose of or in the course of "that" particular trade or business before the offence can be committed.

This requirement is not present in the existing section 118(1)(d) and is not mentioned in the Preliminary Proposals or Refined Proposals previously published by the Administration for public consultation. We believe that if this requirement is included into the legislation, it would make prosecutions of end-user piracy even more difficult and limited, at a time when Hong Kong has had zero success with fully contested prosecutions in that area.

Based on BSA's actual enforcement experience over the last 5 years against the use of unlicensed software by businesses in Hong Kong, BSA has found that businesses are normally discovered to be in possession of unlicensed computer software installed on their computers and loose CD-Rs containing counterfeit software. In such a situation, it would be virtually impossible and represents an additional evidential burden for the prosecution to prove that the intention of the offender at that time was to use the unlicensed software or CD-Rs for trade or business, particularly as such intention is something very much within the personal knowledge of defendants and defendants invariably do not cooperate with enforcement authorities.

Further, the current wording of section 118(2A) provides an opportunity for businesses to evade liability. For example, conniving offenders could easily raise doubt on the prosecution's case by alleging that the unlicensed software found on a computer(s) and/or CD R(s) was not intended to be used for the purpose of or in the course of any trade or business as it was brought into the company by individual employees (for personal use) and/or it was not being used or intended to be used for the company's trade or business because the unlicensed software is of an earlier version or an obsolete version when compared to the software presently used by the company.

We therefore recommend that the term "with a view to its being used by any person for the purpose of or in the course of that trade or business" should be deleted as shown above, as its inclusion would render the provision unenforceable.

(*a*) a computer program;

(*b*) a movie;

(*c*) a television drama;

(*d*) a musical sound recording; or

(*e*) a musical visual recording.

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

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

(*a*) the computer program is not an infringing copy and was made available to the public together with another work, not being a computer program itself, with the authorisation of the copyright owner and in a manner not otherwise offending subsection (1), that requires the use of the computer program to be viewed or listened to; ~~and~~

(*b*) the person who possesses the infringing copy of the computer program does so merely because it is technically required for the viewing or listening of the other work referred to in paragraph (*a*); and

(c) the possession does not otherwise affect prejudicially the rights of the copyright owner.[12]

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

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[12] **New section 118(2D) - Criminal liability for making or dealing with infringing articles, etc. (cont.):**

We note that a similar version of section 118(2D) was previously introduced into the Copyright (Amendment) Bill 2003 to exempt from criminal liability the possession of computer programs that are solely required for the viewing or listening of other works. We submitted our concerns on the drafting of that provision and made suggestions in our submissions in relation to the Copyright (Amendment) Bill 2003. We believe that the new proposed Section 118(2D) is equally ambiguous and does not fully address BSA's concerns as previously communicated. BSA proposes the alternative wording as stated above to make it clear that only legitimate copies of computer programs (made available with the authorisation of the copyright owner) may be downloaded, and that transient or permanent copies of such computer programs that are technically required for viewing or listening of other copyright works (which should similarly have been downloaded legitimately) must only be used for that limited purpose. It should also be made absolutely clear that dealings in the computer program that would otherwise affect prejudicially the rights of the copyright owner are not permitted under proposed section 118(2D).

Further, with this new Section 118(2D), corresponding amendments will need to be made to section 65 of the Copyright Ordinance.

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

(*b*) the person who possesses an infringing copy does so for the purpose of providing investigation service in relation to the infringing copy to the copyright owner or exclusive licensee of the copyright work concerned; or

(*c*) the person who possesses an infringing copy does so on his client's premises and the infringing copy is provided to him by his client.".

(4) Section 118 is amended by adding—

"(2F) Without prejudice to section 125, where a body corporate or a partnership has done an act referred to in subsection (2A), the following person shall, unless he proves that he did not authorize the act to be done, be presumed also to have done the act—[13]

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[13] **New section 118(2F) - Criminal liability for making or dealing with infringing articles, etc. (cont.):**

BSA supports the Government's proposal to introduce directors' / partners' criminal liability into the Copyright Bill 2006. The BSA and other associations including Hong Kong General Chamber of Commerce, American Chamber of Commerce, Hong Kong Information Technology Federation, Information and Software Industry Association and Hong Kong Wireless Technology Industry Association as detailed in their respective submissions consider that such a proposal is a positive step towards promoting good corporate governance and accountability in Hong Kong. These principles are important cornerstones to maintaining Hong Kong's competitiveness and reputation as an international finance and service centre.

Hong Kong has a 52% software piracy rate which is far too high for an economy with Hong Kong's level of development and will certainly inhibit Hong Kong aspirations of further developing into a knowledge based economy. The software piracy rate in Hong Kong over the last 5 years (since the enactment of the April 2001 amendments criminalizing business end-user piracy) has remained essentially unchanged, and is largely attributable to the ongoing problem of business end-user piracy. This trend, coupled with the lack of any successful prosecutions in contested end-user cases, demonstrates an urgent need for the Government to refine current legislation to ensure that the end result is a law that is effective in application.

Enforcement and prosecution experience to date demonstrates an obvious need to introduce effective liability provisions for directors and partners who have authorized or condoned criminal acts under the Copyright Ordinance by their organization. In the vast majority of criminal end-user cases brought to trial, plea bargains are reached whereby corporate defendants plead guilty in return for charges to be dropped against personal defendants (often directors of those companies). The prevalence of such plea bargains reflects the recognition that the prosecution of responsible directors/partners is challenging under existing laws. Existing liability provisions for directors/partners are not effective. The result is that current laws do not have the necessary deterrence against workplace piracy and do not promote responsible corporate governance in relation to copyright works.

We therefore strongly support and believe that the introduction of provisions for the presumption of liability of directors' and partners' would greatly help to reduce software piracy and result in improved corporate governance in Hong Kong. Without the real threat of criminal consequence as a deterrence, piracy in the business environment will continue unabated and Hong Kong's already serious software piracy problem can only worsen. To be clear, BSA is not advocating for liability to fall on the shoulders of ethical directors/partners

(*a*) in the case of the body corporate—

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

(ii) if there was no such director, any person who, at the time when the act was done, was responsible under the

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who have put in place adequate policies/processes for the responsible management of their software assets – such directors would be able to rebut the presumption without undue difficulties under the proposed section 118(2F). Nor are we advocating for a reversal of onus of proof, which ought rightly reside with the prosecution, and remains unchanged under section 118(2F). We note that section 118(2H) also serves as guidance for directors and partners on what they can do to rebut the presumption of liability.

Despite inclusion into the Copyright Bill, we understand there is a real risk that the proposed directors'/partners' liability provisions will not be passed into law. If this happens, and provisions such as the employee defence provision *are* introduced into law, the net effect is a substantial and serious weakening of copyright protection in Hong Kong. This will send a wrong message to the local and international communities on the Government's commitment to a strong intellectual property regime, and will exacerbate Hong Kong's piracy problems.

Turning to the proposed wording of section 118(2F), firstly, we welcome the removal of the reference to directors and partners with "chief executive functions" from the proposed directors' / partners' provisions which was previously suggested by the Administration. However, we note that the new requirement of "responsible for the internal management of the body corporate" in sections 118(2F)(a) and (b) also carries ambiguity which could make prosecution difficult in practice.

In particular, we believe the requirement that a director has to be "*responsible for the internal management of the body corporate*" in order for the presumption to take effect will in practice be very difficult to establish. It is often the case that the management structure in modern corporations are organized in a way that there may not be a single director who is chartered with the internal management of the company – responsibilities may not be so clear-cut, and we also query what is meant by the (undefined) term "internal management". Further, the person who can directly influence the commission of the infringing act may not actually be involved in the internal management of the company.

For example, in large law firms or accounting firms, it is the partners who are both the managers and owners of the partnership and have overall responsibility for its internal management. Different aspects of the business may be supervised by different management committees and no single partner may be considered as having the ultimate say in decision making. In this situation, while the managing partner may be dealing with a number of administrative matters of the firm, it is unlikely that he can be shown to be the only one having responsibility for the management of the firm as a whole. If that is the case, we wonder whether it is the legislative intent to prosecute the whole partnership.

Similarly, in the case of large corporations, management is organized in the form of chief executive officers (CEO), chief financial officers (CFO), chief operation officers (COO), vice presidents, directors and managers. In this situation, it is difficult to establish who has the responsibility for the company's internal management. While it is natural to assume that the CEO has the overall responsibility, he may not be involved in the day-to-day internal management of the corporation.

Conversely, while a marketing director is not generally thought to be involved in the internal management of a corporate body, due to his or her job nature, however, it is clearly possible that he or she can play an important part in making a decision to acquire or use unlicensed software. As an example, he or she may instruct or request the installation of unlicensed versions of desktop publishing software in order to produce marketing materials.

immediate authority of the directors of the body corporate for the internal management of the body corporate;

(*b*) in the case of the partnership—

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

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

(2G) A defendant charged with an offence under subsection (2A) by virtue of subsection (2F) is taken to have proved that he did not authorize the act in question to be done if—

(*a*) sufficient evidence is adduced to raise ~~an~~ triable issue with respect to that fact; and

(*b*) the contrary to subsection (a) is not proved by the prosecution beyond reasonable doubt.[14]

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[14] **New section 118(2G) - Criminal liability for making or dealing with infringing articles, etc. (cont):**

In order to utilize the new section 118(2G)(a) to rebut the presumption of liability, it is important that the evidence to be adduced by the director/partner is not frivolous, but is credible, reasonable and which must at least raise a triable issue for such purposes. We have therefore suggested qualifying the issues to be adduced by including the word "triable" in section 118(2G)(a). Our amendment to subsection 118(2G)(b) is merely for clarification purpose and to avoid ambiguity.

We strongly support the provisions in section 118(2H). We believe that these provisions provide important guidance to the Court on the type of evidence needed to prove or establish that a director or partner has not authorized an infringing act to be done. It should be noted that this section also provides guidance to directors / partners as to what they need to do in order to limit their liability and details the type of evidence they need to adduce to the Court to rebut the presumption of liability. We have put forward additional provisions as sections 118(2H)(d) and (e) which we believe would increase the effectiveness of section 118(2H).

In our suggested S.118(2H)(e), we have made reference to the record keeping obligations imposed on businesses under existing legislation, the Companies Ordinance and Inland Revenue Ordinance, as factors which a court *may* take into account. This provision would impose any additional administrative or legal burden on companies/partnerships as businesses are already legally obliged to keep various records regarding their assets under the Companies Ordinance and Inland Revenue Ordinance and its related guidelines – regardless whether a tax benefit is being claimed.

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

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

(*b*) whether the defendant has set aside financial resources or incurred expenditure for the acquisition by the body corporate or partnership of copies of copyright works which are not infringing copies;

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

(d) whether he had reasonable grounds to be satisfied in the circumstances of the case that the copy was not an infringing copy of a copyright work; and

(e) the completeness, accuracy and reliability of relevant books of accounts and/or records kept by the person pursuant to the Companies Ordinance (Cap 32) and the Inland Revenue Ordinance (Cap 112) and the related guidelines issued by the Commissioner of Inland Revenue respectively and all other circumstances of the case.

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

(6) Section 118 is amended by adding—

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

(*a*) he possessed the infringing copy in question in the course of his employment; and

(*b*) the infringing copy in question was provided to him by or on behalf of his employer for use in the course of his employment;

(c) he is an employee as defined under the Employment Ordinance (Cap 57); and

(d) he has, not less than [14] clear working days before the hearing of the proceedings, served a notice on the person bringing the proceedings giving such information identifying or assisting in

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the identification of the person who provided the infringing copy to him.[15]

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[15] **New section 118(3A) and 118(3B)- Criminal liability for making or dealing with infringing articles, etc:**

We are seriously concerned by the proposed introduction of a new defence for employees against end-user criminal liability. A list of our concerns is summarized below.

(a) Where the employees knowingly possess or use pirated software, it is unclear as a matter of principle why such employees should be exempted from liability under the Copyright Ordinance whereas for physical property they will still be penalized for, for example, handling stolen goods under the Theft Ordinance. The proposed defence would send a wrong message to the public that one form of theft is of lesser consequence than another, and further dilute respect for intellectual property rights in Hong Kong.

(b) The presence of an express employee defence would create a disincentive for employees to refuse or object to the use of infringing software and would create an incentive for directors and managers to encourage or allow their employees to use pirated software in their organization or simply turn a blind eye to such use.

The Administration has communicated that the basis of the introduction of an employee's defence is due to concerns that employees are in a weak position to refuse to commit infringing acts demanded by their employers and could face potential prosecution for copyright infringement.

In fact, our experience clearly shows that concerns regarding potential employee liability are unfounded. BSA is not aware of any criminal case over the last 5 years involving the prosecution of a lower-level employee for use of infringing software in business. Further, there are no provisions contained in the Copyright Bill, which if enacted into law, would result in an increase in the potential liability for lower-level employees and thus prompt a need to introduce an employee defence. It should also be noted that the current defence of "no knowledge" already protects employees and directors alike.

(c) The introduction of the employee defence is clearly ignoring the interests and voices of the information technology industry and general business community. It represents a major and serious rollback in the law. More seriously, it will represent an obstacle to the development of creative industries in Hong Kong and will foster a culture of disrepect for IP.

Both industry and business associations, including the Hong Kong General Chamber of Commerce , American Chamber of Commerce, Hong Kong Information Technology Federation, , Information and Software Industry Association, Hong Kong Wireless Technology Industry Association and several local IT businesses have all strongly rejected a specific employee defence for the same or similar reasons.

(d) We note that a specific employee defence is not available under similar circumstances pursuant to copyright legislation in other markets, including the United Kingdom, United States, Singapore and Australia. It is unclear why Hong Kong would choose to break new ground in this area, given the rampant problem of business end-user piracy here and the fact that Hong Kong has now fallen well behind its neighbours in addressing this serious form of IPR crime.

Unlike neighbouring countries in Asia, which have experienced a reduction in their rate of software piracy in recent years, Hong Kong's software piracy rate has remained disappointingly high and essentially the same over the last four years. Studies have shown that the software piracy problem in Hong Kong is primarily constituted by the rampant use of infringing software in the business environment. Without concerted efforts to address this particular form of piracy, we will not see a reduction in Hong Kong's piracy rate.

Under its TRIPS obligations, the Government shoulders an important responsibility to ensure that enforcement procedures are available so as to permit effective action against any act of infringement of intellectual property rights. Hong Kong's lack of progress in reducing its software piracy rate is a clear indication that the effectiveness of our legislative infrastructure is compromised. The introduction of further obstacles, in the form

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

of specific defences for employees and professionals, can only further hamper effective enforcement against software piracy and risk threatening Hong Kong's compliance with its obligations under TRIPS.

(e) In practice, the introduction of an exemption for a specified class of persons from criminal liability may have broader and even adverse implications on other areas of law relating to criminal liability. For example, Section 159A of the Crimes Ordinance provides that any person who agrees with another person that a course of conduct shall be pursued and which, if the agreement is carried out, will involve the commission of an offence, will be guilty of conspiracy to commit the offence in question. The introduction of a specific defence for employees who agree to the installation and use of pirated software is inconsistent with and might defeat the operation of this section of the Crimes Ordinance.

(f) In light of the absence of any evidence justifying the introduction of a specific employee defence, BSA urges the Government to reject introduction of such a defence. At a minimum, such a proposal should be shelved until any end-user enforcement experience adversely impacting lower-level employees comes to light; only then would it be appropriate to consider whether and what legislative provisions ought to be introduced.

(g) If the Government is minded to propose the introduction of a specific employee defence – despite clear indication of the need to strengthen rather than to roll back copyright protection – there must be checks and balances structured into this defence to minimize the potential for abuse.

Sections 118(3A) and 118(3B) as currently structured create potential for abuse. New section 118(3B) provides that whether an employee can invoke the proposed defence depends on whether he/she is able to make or influence a decision on the acquisition, use or removal of the infringing copies. This wording is susceptible to various loopholes for those wishing to avoid liability. In particular, the word "influence" and the reference to "acquisition" and "use or removal" are narrow and unclear and, in particular, such wording and reference disregards those relevant acts of installation, access and other dealing by the employee.

BSA believes the employee defence as currently structured would result in either a blanket defence easily invoked by any persons charged under the Copyright Ordinance or provide a route for unscrupulous persons to structure their organisations to allow them to take advantage of the defence and unjustly escape liability through claiming that they are mere employees or were unable to influence the acquisition/use/removal of infringing software.

We propose that employees wishing to avail themselves of the defense should first establish that (i) they are employees as defined under the Employee Ordinance, (ii) they are not directors, corporate officers, proprietors, or managers or employees having managerial functions and (iii) they should identify or assist in identifying the person who actually provided the infringing copy to them during the course of employment, this type of disclosure requirement as a pre-condition to the availability of a defence can be found in other existing legislation in Hong Kong (e.g. Section 56B(2) of the Electricity Ordinance). It is important to build in such pre-conditions to avoid abuse by employees and other managerial staff who wish to shield their liability by hiding behind this specific defence.

We also suggest inserting an additional statutory provision as a new section 118(3C) to enable lower-level employees who are aware of the use of the infringing software by their employers to reject the use of those products without fear of retaliation by their employers. This type of provision would support the operation of section 118(3A)(d), and also promote corporate accountability by advancing ethical conduct.

(*a*) who, at the time when the infringing copy in question was acquired, was in a position to make or influence a decision regarding the acquisition of the infringing copy; or

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

(*c*) who, at the time when the offence in question was committed, held a position of a director, officer of the company, proprietor, partner or was a manager or employee having managerial functions.".

(3C) No employer shall terminate any contract of employment with or in any manner discriminate against any employee solely on the ground that such employee-

(a) has filed any complaint or instituted or caused to be instituted any investigation or proceeding under or related to an offence under subsection 118(2A);

(b) has testified or is about to testify in any proceedings under or related to an offence under subsection 118(2A); or

(c) has provided information or other assistance in connection with an investigation or proceedings under or related to an offence under subsection 118(2A).

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

(8) Section 118(5) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

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

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

(11) Section 118 is amended by adding—

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

23. Penalties for offences under section 118

Section 119(1) is amended by adding "or (2A)" after "section 118(1)".

24. Section added

The following is added—

"119B. Offence of making for distribution or distributing infringing copies of copyright works in printed form contained in books, etc.

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

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

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

(2) Subsection (1) applies to a copyright work in a printed form that is contained in—

(*a*) *a book;*

(*b*) *a magazine;*

(*c*) *a periodical; or*

(*d*) *a newspaper.*

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

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

(*a*) an educational establishment specified in section 1 of Schedule 1;

(*b*) an educational establishment exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112); or

(*c*) an educational establishment receiving direct recurrent subvention from the Government.

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

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

(*a*) in the case of the body corporate—

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

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

(*b*) in the case of the partnership—

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

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

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

(*a*) sufficient evidence is adduced to raise an issue with respect to that fact; and

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

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

(*a*) whether the defendant has introduced policies or practices against the making and distribution of infringing copies of copyright works by the body corporate or partnership;

(*b*) whether the defendant has set aside financial resources or incurred expenditure for the purposes of obtaining licences to make and distribute copies of copyright works;

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

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

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

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

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

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

(*a*) he did the act in the course of his employment; and

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

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

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

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

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

25. Making infringing copies outside Hong Kong, etc.

Section 120(2) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

26. Time limit for prosecutions

Section 120A is amended by repealing everything after "commission of the offence" and substituting a full stop.

27. Affidavit evidence

(1) Section 121(1) is amended by repealing "An affidavit" and substituting "For the purpose of facilitating the proof of subsistence and ownership of copyright, and without prejudice to the operation of sections 11 to 16 (authorship and ownership of copyright) and sections 17 to 21 (duration of copyright), an affidavit".

(2) Section 121(1)(*b*) is repealed and the following substituted -

"(*b*) the name of the author of the work;

(*ba*) where the author of the work is an individual—

(i) the place of domicile of the author;

(ii) the place of residence of the author; or

(iii) the place where the author has a right of abode;

(*bb*) where the author of the work is a body corporate—

(i) the place of incorporation of the author; or

(ii) the principal place of business of the author;".

(3) Section 121(2) is amended by repealing "Without prejudice to subsection (1), an affidavit" and substituting "For the purpose of facilitating the proof of subsistence and ownership of copyright, and without prejudice to subsection (1) and the operation of sections 11 to 16 (authorship and ownership of copyright) and sections 17 to 21 (duration of copyright), an affidavit".

(4) Section 121 is amended by adding—[16]

"(2A) For the purposes of any proceedings instituted under section 118(1), an affidavit which purports to have been made by or on behalf of the owner of a copyright work and which—

(*a*) states the name of the owner of the work; and

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[16] **New section 121(2A), section 121(2B) and section 121(2C) – Affidavit Evidence:**

We welcome the introduction of sections 121(2A), 121(2B) and 121(2C) as we believe it will help simplify use of affidavits by copyright owners in court proceedings and strengthen the evidential weight of affidavit evidence relied upon by copyright owners to establish infringement of copyright.

(*b*) states that the owner has not authorised or[17] granted a licence to a person named in the affidavit ~~a licence~~ to do an act referred to in section 118(1)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*) or (*g*) in respect of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings.

(2B) For the purposes of any proceedings instituted under section 118(2A), an affidavit which purports to have been made by or on behalf of the owner of a copyright work and which—

(*a*) states the name of the owner of the work; and

(*b*) states that the owner has not authorised or[17] granted a licence to a person named in the affidavit ~~a licence~~ to do an act referred to in section 118(2A) in respect of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings.".

(5) Section 121 is amended by adding—

"(2C) For the purposes of any proceedings instituted under section 119B(1), an affidavit which purports to have been made by or on behalf of the owner of a copyright work and which—

(*a*) states the name of the owner of the work; and

(*b*) states that the owner has not authorised or[17] granted a licence to a person named in the affidavit ~~a licence~~ to do an act referred to in section 119B(1) in respect of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings.".

(6) Section 121(3) is amended by repealing "subsection (1) or (2)" and substituting "subsection (1), (2), (2A), (2B) or (2C)".

(7) Section 121(4) is amended by repealing "subsection (1) or (2)" and substituting "subsection (1), (2), (2A), (2B) or (2C)".

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[17] We have made minor amendments to the relevant sections by including the term "authorised". This is to reflect the fact that in many copyright industries, including the software industry, copyright owners do not directly issue licenses to resellers or sub-distributors but provide general authorisation to them to distribute legitimate copies of their works.

(8) Section 121(7) is amended by repealing "subsection (1) or (2)" and substituting "subsection (1), (2), (2A), (2B) or (2C)".

(9) Section 121(13)(*a*) is amended by repealing "subsection (1) or (2)" and substituting "subsection (1), (2), (2A), (2B) or (2C)".

28. Seized articles, etc. liable to forfeiture

(1) Section 131(1) is amended by adding ", 119B" after "119A".

(2) Section 131(7) is amended by adding ", 119B" after "119A".

29. Disposal of articles, etc. where a person is charged

Section 132 is amended by adding ", 119B" after "119A".

30. Determination of application for forfeiture

(1) Section 133(5) is amended by adding ", 119B" after "119A".

(2) Section 133(6) is amended by adding ", 119B" after "119A".

31. Licensing schemes to which sections 155 to 160 apply

Section 154(*b*) is repealed and the following substituted—

"(*b*) renting copies of the work to the public;".

32. Licences to which sections 162 to 166 apply

Section 161(*b*) is repealed and the following substituted—

"(*b*) renting copies of the work to the public;".

33. Constitution for purposes of proceedings

(1) Section 172 is amended by adding—

"(1A) Notwithstanding subsection (1), any proceedings specified for the purposes of this subsection in rules made under section 174 (general procedures rules) may be heard and determined by any of the following persons sitting alone—

(*a*) the Chairman of the Tribunal;

(*b*) the Deputy Chairman of the Tribunal; or

(*c*) a suitably qualified ordinary member of the Tribunal appointed by the Chairman of the Tribunal.".

(2) Section 172(5) is amended by repealing "subsection (4)(*b*)" and substituting "subsection (1A) or (4)(*b*)".

34. Groundless threat of proceedings in relation to parallel import

Section 187(1) is amended by adding "and which was lawfully made in the country, territory or area where it was made" after "section 35(3)".

35. Minor definitions

(1) Section 198(1) is amended by repealing the definition of "business" and substituting—

""business" (業務) includes business conducted otherwise than for profit;".

(2) Section 198(1) is amended by repealing the definition of "rental right" and substituting -

""rental right" (租賃權) means the right of a copyright owner to authorize or prohibit the rental of copies of any of the following works—

(*a*) a computer program;

(*b*) a sound recording;

(*c*) a film;

(*d*) a literary, dramatic or musical work included in a sound recording;

(*e*) a literary or artistic work included in a comic book; or

(*f*) the typographical arrangement of a published edition of a comic book;".

(3) Section 198(1) is amended by adding—

""specified course of study" (指明課程) means a course of study of any of the following descriptions—

(*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

(*b*) a course of study which consists of an assessment of a pupil's competence in the area covered by the course, and leads to the award of a qualification;".

(4) Section 198(2) is amended by repealing ", 118(8A)".

36. Index of defined expressions

Section 199 is amended, in the Table, by adding—

"specified course of study section 198(1)".

37. Rights conferred on performers and persons having fixation rights

(1) Section 200(1)(*a*) is amended by repealing "207" and substituting "207A".

(2) Section 200(2) is amended, in the definition of "performance", by adding—

"(*ca*) a performance of an artistic work (which includes every production in the artistic domain, whatever may be the mode or form of its expression);

(*cb*) an expression of folklore; or".

38. Infringement of performer's rights by importing, exporting, possessing or dealing with infringing fixation

Section 207(1)(*b*) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

39. Section added

The following is added immediately after section 207—

"207A. Infringement of performers' rights by renting copies to the public without consent

(1) A performer's rights are infringed by a person who, without the performer's consent, rents to the public copies of a sound recording in which the whole or any substantial part of a qualifying performance is fixed.

(2) In this Part, "rent" (租賃), in relation to a sound recording—

(*a*) subject to paragraph (*b*), means making a copy of the sound recording available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage;

(*b*) does not include—

(i) making a copy of the sound recording available for the purpose of public performance, playing or showing in public, broadcasting or inclusion in a cable programme service;

(ii) making a copy of the sound recording available for the purpose of exhibition in public; or

(iii) making a copy of the sound recording available for on-the-spot reference use.

(3) A reference in this Part to the renting of copies of a sound recording includes the renting of the original.

(4) The right of a performer under this section to rent copies of a sound recording to the public is referred to in this Part as "rental right".".

40. Infringement of fixation rights by importing, exporting, possessing or dealing with infringing fixation

Section 211(1)(*b*) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

41. Section added

The following is added immediately after section 213—

"213A. Power of Tribunal to give consent on behalf of owners of performers' rental right in certain cases

(1) The Copyright Tribunal may, on the application of a person wishing to rent a copy of a sound recording in which a performance is fixed, give consent in a case where that person cannot, after making reasonable enquiries, ascertain the identity or whereabouts of the person entitled to the rental right.

(2) Consent given by the Tribunal has effect as consent of the person entitled to the rental right for the purposes of the provision of this Part relating to performers' rental right and may be given subject to any conditions specified in the Tribunal's order.

(3) The Tribunal shall not give consent under subsection (1) except after the service of such notices as may be required by rules made under section 174 (general procedural rules) or as the Tribunal may in any particular case direct.

(4) Where the Tribunal gives consent under this section, it shall, in default of agreement between the applicant and the person entitled to the rental right, make such order as it thinks fit as to the payment to be made to that person in consideration of consent being given.".

42. Performers' economic rights

Section 215(1) is repealed and the following substituted—

"(1) The following rights conferred by this Part on a performer are property rights ("a performer's economic rights")—

(*a*) the right of reproduction (section 203);

(*b*) the right of distribution (section 204);

(*c*) the right of making available to the public (section 205);

(*d*) the rental right (section 207A).".

43. Order for delivery up

Section 228(1) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

44. Meaning of "infringing fixation"

(1) Section 229(4) is amended by repealing "A fixation" and substituting "Except as provided in section 229A, a fixation".

(2) Section 229(7) is repealed and the following substituted—

"(7) In this Part, "infringing fixation" (侵犯權利的錄製品) includes a fixation which is to be treated as an infringing fixation by virtue of any of the following provisions—

(*a*) section 229A(5) (imported fixation not an "infringing fixation" for purposes of section 229(4));

(*b*) section 242A(3) (fixations made for purposes of giving or receiving instruction);

(*c*) section 243(3) (fixations made for purposes of instruction or examination);

(*d*) section 245(3) (fixations made by educational establishments for educational purposes);

(*e*) section 246A(3) (fixations made for purposes of public administration);

(*f*) section 251(2) (fixations of performance in electronic form retained on transfer of principal fixation); or

(*g*) section 256(3) (fixations made for purposes of broadcast or cable programme).".

45. Section added

The following is added immediately after section 229—

"229A. Imported fixation not an "infringing fixation" for the purposes of section 229(4)

(1) A fixation of a performance to which this subsection applies is not, in relation to the person who imports it into Hong Kong or acquires it after it is imported into Hong Kong, an infringing fixation for the purposes of section 229(4) if—

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

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

(2) Subsection (1) applies to a fixation of any performance except a fixation of a performance—

(*a*) that is—

(i) a musical sound recording;

(ii) a musical visual recording;

(iii) a television drama; or

(iv) a movie; and

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

(3) Notwithstanding the exception in subsection (2), subsection (1) applies to a fixation of a performance that is referred to in subsection (2)(*a*) and that is, or is intended to be, played or shown in public—

(*a*) by an educational establishment for the educational purposes of the establishment; or

(*b*) by a specified library for use of the library.

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

(5) Where a fixation of a performance which is not, in relation to the person referred to in subsection (1), an infringing fixation by virtue of that subsection is subsequently dealt in for the purpose of or in the course of any trade or business, it is to be treated, in relation to that dealing and the person who deals in it, as an infringing fixation.

(6) In this section, "lawfully made" (合法地製作) does not include the making of a fixation in a country, territory or area where there is no law protecting

rights in performances in the performance or where the rights in performances in the performance has expired.

(7) Subject to subsection (6), expressions used in this section have the same meaning as in section 35B.".

46. Jurisdiction of Copyright Tribunal

Section 233(1) is amended by adding—

"(*aa*) section 213A (application to give consent on behalf of owners of performers' rental right);".

47. Index of defined expressions

Section 239 is amended, in the Table, by adding—

"rental right section 207A(4)".

48. Section added

The following is added—

"242A. Fair dealing for purposes of giving or receiving instruction

(1) Fair dealing with a performance or fixation by a teacher or pupil for the purposes of giving or receiving instruction in a specified course of study provided by an educational establishment does not infringe any of the rights conferred by this Part.

(2) In determining whether any dealing with a performance or fixation is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular—

(*a*) 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;

(*b*) the nature of the performance or fixation;

(*c*) the amount and substantiality of the portion dealt with in relation to the performance or fixation as a whole; and

(*d*) the effect of the dealing on the potential market for or value of the performance or fixation.

(3) Where a fixation which apart from this section would be an infringing fixation is made in accordance with this section but is subsequently dealt with, it is to be treated as an infringing fixation—

(*a*) for the purpose of that dealing; and

(*b*) if that dealing infringes any of the rights conferred by this Part, for all subsequent purposes.

(4) Expressions used in this section have the same meaning as in section 41A.".

49. Playing or showing sound recording, film, broadcast or cable programme at educational establishment

(1) Section 244(1) is amended by repealing "for the purposes of instruction" and substituting "for the purposes of giving or receiving instruction".

(2) Section 244(1) is amended by repealing "other persons directly connected with the activities of the establishment" and substituting "the near relatives or guardians of the pupils".

(3) Section 244(2) is repealed.

50. Recording of broadcasts and cable programmes by educational establishments

Section 245(2) is repealed.

51. Section added

The following is added—

"246A. Fair dealing for purposes of public administration

(1) Fair dealing with a performance or fixation by the Government, the Executive Council, the Legislative Council, the Judiciary or any District Council for the purposes of efficient administration of urgent business does not infringe any of the rights conferred by this Part.

(2) In determining whether any dealing with a performance or fixation is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular—

(*a*) 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;

(*b*) the nature of the performance or fixation;

(*c*) the amount and substantiality of the portion dealt with in relation to the performance or fixation as a whole; and

(*d*) the effect of the dealing on the potential market for or value of the performance or fixation.

(3) Where a fixation which apart from this section would be an infringing fixation is made in accordance with this section but is subsequently dealt with, it is to be treated as an infringing fixation—

(*a*) for the purpose of that dealing; and

(*b*) if that dealing infringes any of the rights conferred by this Part, for all subsequent purposes.

(4) Expressions used in this section have the same meaning as in section 54A.".

52. Section added

The following is added—

"258A. Playing of sound broadcasts inside vehicles

(1) The playing of a sound broadcast inside a vehicle for the purpose of affording the driver of the vehicle access to public information (including but not limited to news reports, weather forecasts and information relating to road traffic) does not infringe any of the rights conferred by this Part.

(2) Expressions used in this section have the same meaning as in section 81A.".

53. Part IIIA added

The following is added after Part III—

"PART IIIA

PERFORMERS' MORAL RIGHTS

Introductory

272A. Moral rights conferred on certain performers

(1) This part confers the following moral rights on a performer of a live aural performance or a performer whose performance is fixed in a sound recording—

(*a*) the right to be identified as a performer (section 272B); and

(*b*) the right not to have his performance subjected to derogatory treatment (section 272F).

(2) The moral rights are conferred on the performer only if the performance is a qualifying performance.

(3) The moral rights conferred on the performer are in addition to any other rights in relation to the performance that the performer or any other person may have under this Ordinance.

(4) In this Part—

"aural performance" (聲藝表演)—

(*a*) means a performance which may be perceived by the human ear; or

(*b*) where part of a performance may be perceived by the human ear, means that part of the performance,

and includes a musical performance, a spoken performance and a performance in any intermediate forms between singing and speaking;

"make available to the public live" (即場向公眾提供), in relation to a performance, means to make available of the unfixed performance, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the performance from a place individually chosen by them;

"performership" (演出) means participation in a performance, as the performer or one of the performers;

"sound recording" (聲音紀錄)—

(*a*) subject to paragraph (*b*), has the same meaning as in Part II (copyright);

(*b*) does not include a film sound-track which accompanies a film within the meaning of Part II.

(5) The following expressions have the same meaning in this Part as in Part II (copyright)—

broadcast;

business;

cable programme;

cable programme service; and

published.

(6) The following expressions have the same meaning in this Part as in Part III (rights in performances) —

fixation;

performance;

performer; and

qualifying performance.

(7) For the purposes of this Part, if a performance of a musical work is conducted by a conductor, the sounds of the performance are treated as having been made by the conductor and the person who actually made those sounds, and a reference to a performer includes a reference to the conductor.

(8) Section 204(2), (3) and (4) applies, with the necessary modifications, to references in this Part to the issue to the public of copies of a sound recording, as it applies to references in Part III to the issue to the public of copies of a fixation.

(9) Section 205(2), (3) and (4) applies, with the necessary modifications, to references in this Part to the making available to the public of copies of a sound recording, as it applies to references in Part III to the making available to the public of copies of a fixation.

Right to be identified as performer

272B. Right to be identified as performer

(1) A performer of a live aural performance or a performer whose performance is fixed in a sound recording has the right to be identified as a performer in the performance whenever—

(*a*) the performance is staged in public, made available to the public live, broadcast live or included live in a cable programme service; or

(*b*) copies of the sound recording in which the performance is fixed are issued or made available to the public, broadcast or included in a cable programme service.

(2) The right of the performer under this section is, in the case of the issue or making available to the public of copies of a sound recording in which the performance is fixed, the right to be identified in or on each copy or, if that is not appropriate, in some other manner likely to bring his identity to the notice of a person acquiring a copy.

(3) The right of the performer under this section is, in any case other than the case referred to in subsection (2), the right to be identified in a manner likely to bring his identity to the notice of a person hearing the performance, broadcast or cable programme in question.

(4) The rights of the performer referred to in subsections (2) and (3) include the right to be identified in a clear and reasonably prominent or audible manner.

(5) If the performer in asserting his right to be identified specifies a pseudonym, initials or some other particular form of identification, that form must be used; otherwise any reasonable form of identification may be used.

(6) If a performance is presented by performers who use a group name, identification by using the group name is sufficient identification of the performers in the group.

272C. Requirement that right under section 272B be asserted

(1) A person does not infringe the right conferred by section 272B (right to be identified as performer) by doing any of the acts referred to in that section unless the right has been asserted in accordance with the following provisions so as to bind him in relation to that act.

(2) The right may be asserted generally, or in relation to any specified act or description of acts—

(*a*) on an assignment of a performer's economic rights conferred by Part III in a live aural performance that has taken place or is to take place or in a performance that has been fixed or is to be fixed in a sound recording, by including in the instrument effecting the assignment a statement that the performer asserts in relation to that performance or that performance fixed in the sound recording his right to be identified; or

(*b*) by instrument in writing signed by the performer.

(3) The persons bound by an assertion of the right under subsection (2) are—

(*a*) in the case of an assertion under subsection (2)(a), the assignee and anyone claiming through him, whether he has notice of the assertion;

(*b*) in the case of an assertion under subsection (2)(b), anyone to whose notice the assertion is brought.

(4) In an action for infringement of the right the court shall, in considering remedies, take into account any delay in asserting the right.

272D. Exceptions to right under section 272B

(1) The right conferred by section 272B (right to be identified as performer) does not apply where it is not reasonably practicable to identify the performer.

(2) The right does not apply in relation to a performance given for the purposes of reporting current events.

(3) The right does not apply in relation to a performance given for the purposes of advertising any goods or services or making announcements of matters of public interest.

(4) The right is not infringed by an act which by virtue of any of the following provisions would not infringe any right conferred by Part III—

(*a*) section 241 (fair dealing for certain purposes), insofar as it relates to the reporting of current events by means of a sound recording, broadcast or cable programme;

(*b*) section 242 (incidental inclusion of performance or fixation);

(*c*) section 243(2) (examination questions);

(*d*) section 247 (Legislative Council and judicial proceedings);

(*e*) section 248 (statutory inquiries).

Right to object to derogatory treatment

272E. Right to object to derogatory treatment

(1) A performer of a live aural performance or a performer whose performance is fixed in a sound recording has the right not to have his performance subjected to derogatory treatment.

(2) The right is infringed by a person who does any of the following acts—

(*a*) in relation to a live aural performance, causes to be heard in public, broadcasts, includes in a cable programme service or makes available to the public live a derogatory treatment of the performance;

(*b*) in relation to a performance fixed in a sound recording—

(i) causes to be heard in public, broadcasts or includes in a cable programme service the performance by means of the sound recording in a manner which subjects the performance to derogatory treatment; or

(ii) makes available to the public copies of the sound recording in a manner which subjects the performance to derogatory treatment; or

(*c*) in relation to a performance which has been subjected to derogatory treatment and is fixed in a sound recording—

(i) causes to be heard in public, broadcasts or includes in a cable programme service the sounding recording; or

(ii) makes available to the public copies of the sound recording.

(3) For the purposes of this section—

(*a*) "treatment" (處理)—

(i) in relation to a live aural performance, means any addition to, deletion from, alteration to or adaptation of the performance; or

(ii) in relation to a performance fixed in a sound recording, means any addition to, deletion from, alteration to or adaptation of the sound recording; and

(*b*) the treatment of a live aural performance or a performance fixed in a sound recording is derogatory if it amounts to distortion, mutilation or other modification that is prejudicial to the reputation of the performer.

272F. Infringing of right under section 272E by possessing or dealing with infringing articles

(1) The right conferred by section 272E (right to object to derogatory treatment) is also infringed by a person who—

(*a*) possesses for the purpose of or in the course of any trade or business; or

(*b*) sells or lets for hire, or offers or exposes for sale or hire, or distributes,

an article which is, and which he knows or has reason to believe is, an infringing article.

(2) In this section—

"infringing article" (RIMUMa) means a performance fixed in a sound recording which

(*a*) has been subjected to derogatory treatment within the meaning of section 272E; and

(*b*) has been or is likely to be the subject of any of the acts referred to in that section in circumstances infringing that right.

272G. Exceptions to right under section 272E

(1) The right conferred by section 272E (right to object to derogatory treatment) does not apply in relation to any performance given for the purposes of reporting current events.

(2) The right is not infringed by modifications made to a performance which are consistent with normal editorial or production practice.

(3) Subject to subsection (4), the right is not infringed by an act done for the purpose of—

(*a*) avoiding the commission of an offence; or

(*b*) complying with a duty imposed by or under an enactment.

(4) Where a performer is identified at the time of the relevant act under subsection (3) or has previously been identified in or on published copies of sound recordings in which the relevant performance is fixed, subsection (3) has effect only if there is a sufficient disclaimer.

(5) In subsection (4), "sufficient disclaimer" (足夠的卸責聲明) means a clear and reasonably prominent indication -

(*a*) given at the time of the relevant act under subsection (3); and

(*b*) if the performer is then identified, appearing along with the identification,

that the live aural performance or the performance fixed in a sound recording has been subjected to treatment to which the performer has not consented.

Supplementary

272H. Duration of rights

The rights conferred by section 272B (right to be identified as performer) and section 272E (right to object to derogatory treatment) continue to subsist so long as the performer's rights conferred by Part III subsist in the sound recording in which the performance is fixed.

272I. Consent and waiver of rights

(1) It is not an infringement of any of the rights conferred by section 272B (right to be identified as performer) and section 272E (right to object to derogatory treatment) to do any act to which the person entitled to the right has consented.

(2) Any of the rights referred to in subsection (1) may be waived by instrument in writing signed by the person giving up the right.

(3) A waiver may relate to a specific performance, to performances of a specified description or to performances generally, and may relate to existing or future performances.

(4) A waiver may be conditional or unconditional, and may be expressed to be subject to revocation.

(5) If a waiver is made in favour of the owner or prospective owner of the right in the performance, it is presumed to extend to his licensees and successors in title unless a contrary intention is expressed.

(6) Nothing in this Part is to be construed as excluding the operation of the general law of contract or estoppel in relation to an informal waiver or other transaction in relation to any of the rights referred to in subsection (1).

(7) In this section, "performance" (表演) means a live aural performance or a performance fixed in a sound recording.

272J. Application of provisions to joint performers

(1) The right conferred by section 272B (right to be identified as performer) is, in the case of joint performership, a right of each joint performer to be identified as a joint performer and must be asserted in accordance with section 272C by each joint performer in relation to himself.

(2) The right conferred by section 272E (right to object to derogatory treatment) is, in the case of joint performership, a right of each joint performer and his right is satisfied if he consents to the treatment in question.

(3) A waiver under section 2721 of those rights by one joint performer does not affect the rights of the other joint performer or performers.

(4) If there are 2 or more performers in a live aural performance or a performance fixed in a sound recording, the performers may enter into a joint performership agreement in writing by which each of them agrees not to exercise his right conferred by section 272E (right to object to derogatory treatment) in respect of the live aural performance or the performance fixed in a sound recording, as the case may be, except jointly with the other performer or performers.

272K. Application of provisions to part of performance

(1) The right conferred by section 272B (right to be identified as performer) applies in relation to the whole or any substantial part of a live aural performance or a performance fixed in a sound recording.

(2) The right conferred by section 272E (right to object to derogatory treatment) applies in relation to the whole or any part of a live aural performance or a performance fixed in a sound recording.

272L. Moral rights not assignable

The rights conferred by section 272B (right to be identified as performer) and section 272E (right to object to derogatory treatment) are not assignable.

272M. Transmission of moral rights on death

(1) On the death of a person entitled to the right conferred by section 272B (right to be identified as performer) or section 272E (right to object to derogatory treatment)—

(*a*) the right passes to such person as he may by testamentary disposition specifically direct;

(*b*) if there is no such direction but the performer's economic rights conferred by Part III in respect of the performance in question form part of his estate, the right passes to the person to whom the economic rights pass; and

(*c*) if or to the extent that the right does not pass under paragraph (*a*) or (*b*), the right is exercisable by his personal representatives.

(2) Where a performer's economic rights conferred by Part III and forming part of his estate pass in part to one person and in part to another, as for example where a bequest is limited so as to apply—

(*a*) to one or more, but not all, of the things the owner has the exclusive right to do or consent; or

(*b*) to part, but not the whole, of the period for which the rights subsist,

any right which passes with the performer's economic rights by virtue of subsection (1)(*b*) is correspondingly divided.

(3) Where by virtue of subsection (1)(*a*) or (*b*) a right becomes exercisable by more than one person, the following provisions have effect with respect to the right—

(*a*) it may, in the case of the right conferred by section 272B (right to be identified as performer), be asserted by any of them;

(*b*) it is, in the case of the right conferred by section 272E (right to object to derogatory treatment), a right exercisable by each of them and is satisfied in relation to any of them if he consents to the treatment or act in question; and

(*c*) any waiver of the right in accordance with section 272I by any of them does not affect the rights of the others.

(4) A consent or waiver previously given or made binds any person to whom a right passes by virtue of subsection (1).

(5) Any damages recovered by personal representatives by virtue of this section in respect of an infringement after a person's death devolve as part of his

estate as if the right of action had subsisted and been vested in him immediately before his death.

272N. Remedies for infringement of performers' moral rights

(1) An infringement of the right conferred by section 272B (right to be identified as performer) or section 272E (right to object to derogatory treatment) is actionable as a breach of statutory duty owed to the person entitled to the right.

(2) In proceedings for infringement of the right conferred by section 272E, the court may, if it thinks it is an adequate remedy in the circumstances, grant an injunction on terms prohibiting the doing of any act unless a disclaimer is made, in such terms and in such manner as may be approved by the court, dissociating a performer from the treatment of a live aural performance or a performance fixed in a sound recording.

272O. Presumptions relevant to sound recordings in which performances are fixed

In proceedings brought by virtue of this Part with respect to a sound recording in which a performance is fixed, where copies of the sound recording as issued or made available to the public bear a statement—

(*a*) that a named person was a performer in the performance; or

(*b*) that a named group of performers were the performers in the performance,

the statement is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved.".

54. Cross-heading substituted

The cross-heading before section 273 is repealed and the following substituted—

"Circumvention of effective technological measures".[18]

55. Section substituted

Section 273 is repealed and the following substituted—

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[18] **Circumvention of effective technological measures:**

In general, we support the introduction and extension of criminal and civil liabilities for circumvention activities and circumvention of technology measures proposed in the Copyright Bill. In today's digital environment, authors and rights owners increasingly rely on technology protection measures to combat unauthorized copying, distribution and use of their works, and it is important that our copyright law address activities designed to undermine these efforts.

"273. Interpretation of sections 273 to 273H

(1) In sections 273A to 273H, "circumvent" (規避), in relation to an effective technological measure, means to circumvent the measure without the authority of the copyright owner of the copyright work in relation to which the measure has been applied.

(2) For the purposes of this section and sections 273A to 273H, where a technological measure has been applied in relation to a copyright work, the measure is referred to as an effective technological measure if the use of the work is controlled by the copyright owner of the work through—

(*a*) an access control or protection process (including the encryption, scrambling and any other transformation of the work) which achieves the intended protection of the work in the normal course of its operation; or

(*b*) a copy control mechanism which achieves the intended protection of the work in the normal course of its operation.

(3) In subsection (2)—

(*a*) "technological measure" (科技措施) means any technology, device, component or means which is designed, in the normal course of its operation, to protect any description of copyright work;

(*b*) the reference to protection of a copyright work is to the prevention or restriction of acts which are done without the licence of the copyright owner of the work and are restricted by the copyright in the work;

(*c*) the reference to use of a copyright work does not extend to any use of the work which is outside the scope of the acts restricted by the copyright in the work."

56. Sections added

The following are added immediately after section 273—

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

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

~~(a)~~ that he is doing an act which circumvents the measure; [19] ~~and~~

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

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

(*a*) the copyright owner of the work;

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

(*c*) any other person who—

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[19] **New section 273A - Rights and remedies in respect of circumvention of effective technological measures (cont):**

Under section 273A(1), the additional requirement that the circumventor must also know that his act will "induce, enable, facilitate or conceal an infringement" of copyright is an unduly onerous requirement and will certainly make establishment of liability extremely difficult. This type of knowledge is really only known to the offender and imposes an unnecessary barrier to enforcement. It will certainly make investigations by copyright owners difficult and reduce the effectiveness of the remedy.

We believe that the knowledge requirement is already sufficient to protect the unwary circumventor and hence suggest deleting proposed section 273(1)(b) altogether. That subsection is also not necessary since there are few (if any) legitimate uses of the underlying copyright works that would require circumvention of the technology protection measures that are not already provided in the exemptions in section 273D.

BSA also invites the Administration to clarify whether it is a typographical error to include the reference to "copyright owner" in section 273A(2)(a).

Separately, we note that section 273(2)(b) under the current Copyright Ordinance is repealed under the Copyright Bill and a similar provision dealing with persons who publishes information to assist or enable circumvention of copy-protection is not introduced. This is a serious omission. In today's environment, hackers and hobbyists regularly publish information and methods on how to by pass technology protection measures with an aim to encourage others to do so. We therefore recommend that a provision similar to current section 273(2)(b) should be included into Copyright Bill to address this problem and include a reference to the rights of free speech (in a similar manner to Section 1201(4) of the US Digital Millennium Copyright Act).

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

(ii) makes available to the public copies of the work; or

(iii) broadcasts the work, or includes the work in a cable programme service.

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

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

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

273B. Rights and remedies in respect of devices and services designed to circumvent effective technological measures

(1) Subject to sections 273E and 273H, this section applies where an effective technological measure has been applied in relation to a copyright work, and a person—

(*a*) makes, imports, exports, sells or lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, any relevant device;

(*b*) exhibits in public, possesses or distributes any relevant device ~~for the purpose of or in the course of any trade or business; or~~

(*c*) provides any relevant service; or

knowing or having reason to believe that the relevant device or the relevant service, as the case may be, will be used to circumvent the measure ~~to induce, enable, facilitate or conceal an infringement of the copyright in the work~~.[20]

(2) In subsection (1)—

"relevant device" (有關器件), in relation to the effective technological measure referred to in that subsection, means any device, product, component or means—

(*a*) which is promoted, advertised or marketed for the purpose of the circumvention of the measure;

(*b*) which has only a limited commercially significant purpose or use other than to circumvent the measure; or

(*c*) which is primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of the measure;

"relevant service" (有關服務), in relation to the effective technological measure referred to in that subsection, means any service—

(*a*) which is promoted, advertised or marketed for the purpose of the circumvention of the measure;

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[20] **New section 273B - Rights and remedies in respect of devices and services designed to circumvent effective technological measures:**

Similarly, we are concerned that under section 273B(1) contains an additional requirement that it must be shown that the offender has knowledge that the relevant device or service "will be used to circumvent the measure to induce, enable, facilitate or conceal an infringement of the copyright in the work" to establish liability.

This requirement presents an insurmountable hurdle for rights holders to establish liability on the part of the offender. It should be noted that rights holders must already prove that the offender knew or ought to have known that the device would be used for the purpose of circumvention. We believe that the further requirement that the offender must know that the device or service would be used to "***induce, enable, facilitate or conceal an infringement***" is unnecessarily onerous. Accordingly, we suggest deleting this requirement as suggested above.

We also note that section 273B(1)(b) contains a requirement that distributing a prohibited device is only actionable if it is done "for the purpose of or in the course of any trade or business". This section contrasts with the acts of importation under subsection (a) and the provision of service under subsection (c) which do not require any trade or business connection and seems to suggest that any act of gratuitous trafficking in circumvention devices would not be actionable in Hong Kong.

Many individuals distribute/traffic circumvention devices for non-business or trade purposes but merely for the intention of causing disruption to rights owners. These activities significantly affect the commercial activities of copyright owners.It should not be the legislative intent to exclude these types of offenders and we recommend deleting the requirement of trade as suggested above and in the corresponding section 273C(1)(d) under criminal liability provision for trafficking.

(*b*) which has only a limited commercially significant purpose or use other than to circumvent the measure; or

(*c*) which is performed for the purpose of enabling or facilitating the circumvention of the measure.

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

(*a*) the copyright owner of the work;

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

(*c*) any other person who—

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

(ii) makes available to the public copies of the work; or

(iii) broadcasts the work, or includes the work in a cable programme service.

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

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

(6) The copyright owner, the exclusive licensee and the person referred to in subsection (3)(*c*) have the same rights and remedies under section 109 (order for delivery up) in relation to any device, product, component or means which a person has in his possession, custody or control with the intention that it is to be used to circumvent effective technological measures, as a copyright owner has in relation to an infringing copy.

(7) The rights and remedies conferred by subsection (6) on the copyright owner, the exclusive licensee and the person referred to in subsection (3)(*c*) are concurrent.

(8) Section 113(7) (order as to exercise of rights by copyright owner where exclusive licensee has concurrent rights) applies, with the necessary modifications, in respect of anything done under section 109 by virtue of subsection (6), in relation to the copyright owner, the exclusive licensee and the person referred to in subsection (3)(*c*), as it applies, in respect of anything done under section 109, in relation to a copyright owner and an exclusive licensee with concurrent rights and remedies.

(9) Section 111 (order as to disposal of infringing copy or other article) applies, with the necessary modifications, in relation to the disposal of anything delivered up under section 109 by virtue of subsection (6).

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

273C. Criminal liability for circumvention of effective technological measures

(1) Subject to sections 273F and 273H, where an effective technological measure has been applied in relation to a copyright work, a person commits an offence if he—

(*a*) makes for sale or hire any relevant device;

(*b*) imports into Hong Kong for sale or hire any relevant device;

(*c*) exports from Hong Kong for sale or hire any relevant device;

(*d*) sells, lets for hire, or offers or exposes for sale or hire any relevant device ~~for the purpose of or in the course of any trade or business~~;

(*e*) exhibits in public or distributes any relevant device for the purpose of or in the course of any trade or business ~~which consists of dealing in circumvention devices~~;[21]

(*f*) possesses any relevant device with a view to—

(i) its being sold or let for hire by any person for the purpose of or in the course of any trade or business; or

(ii) its being exhibited in public or distributed by any person for the purpose of or in the course of any trade or business ~~which consists of dealing in circumvention devices~~; or

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[21] **New section 273C - Criminal liability for circumvention of effective technological measures:**

We are concerned that under section 273C (1)(e) and section 273C(1)(f), criminal liability for distribution of and possession with a view to exhibit or distribute a circumvention device only takes place if done for the purposes of or in the course of any trade or business "which consists of dealing in circumvention devices" . The wording of this section is far too narrow and will render the provision unenforceable. This section fails to provide criminal liability for offenders who operate large scale distribution of circumvention devices but also distribute other unrelated (non-pirated) items or distributes circumvention devices on an adhoc or one-time basis. We therefore recommend deleting the requirement of "***which consists of dealing in circumvention devices***" in section 273C (1)(e) and section 273C(1)(f) to remove this loophole in the legislation. We also recommend deleting "***for the purpose of or in the course of any trade or business***" in section 273C(1)(d) for the reasons set out in footnote 20 above.

(*g*) provides any relevant service for the purpose of or in the course of a circumvention business.

(2) In subsection (1)—

"circumvention business" (規避業務) means a business, conducted for profit, which includes the offering to the public of services which enable or facilitate the circumvention of effective technological measures;

"circumvention device" (規避器件) means any device, product, component or means which is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of effective technological measures;

"dealing in" (經銷) means selling, letting for hire, or distributing for profit or reward;

"relevant device" (有關器件), in relation to the effective technological measure referred to in that subsection—[22]

(*a*) subject to paragraph (*b*), means any device, product, component or means:-

(i) which is promoted, advertised or marketed for the purpose of the circumvention of the measure;

(ii) which has only a limited commercially significant purpose or use other than to circumvent the measure; or

(iii) which is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of the measure;

(*b*) does not include any unauthorized decoder referred to in section 6, or any decoder referred to in section 7, of the Broadcasting Ordinance (Cap. 562);

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[22] **Section 273C - Criminal liability for circumvention of effective technological measures (cont.):**

Also, we are concerned that the criminal provisions under section 273C on circumvention of effective technological measures are unduly narrow. We note that criminal liability for dealing in a circumvention device is limited to devices that are primarily designed, produced or adapted for circumvention purposes only (see definition of "relevant device" in section 273C(2)). It would seem, therefore, dealing in a device used for circumvention, which has only limited commercial significance or uses other than to circumvent would not be a criminal offence under section 273C(1). This is so even if the device is marketed or promoted as a circumvention tool.

On the other hand, we note that section 273B(2) provides for a more flexible definition of "relevant device". We believe that the definition of "relevant device" to be used under sections 273B(2) and 273C(2) should be consistent and hence recommend adopting the same definition in both sections. This reflects the same position as found in section 1201 of the Copyright Law in the United States.

"relevant service" (有關服務), in relation to the effective technological measure referred to in that subsection, means any service -[23]

(a) which is promoted, advertised or marketed for the purpose of the circumvention of the measure;

(b) which has only a limited commercially significant purpose or use other than to circumvent the measure; or

(c) which is performed for the purpose of enabling or facilitating the circumvention of the measure.

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(3) A person who commits an offence under subsection (1) is liable on conviction on indictment to a fine of $500,000 and to imprisonment for 4 years.

(4) It is a defence for the person charged with an offence in respect of an effective technological measure under subsection (1) to prove that he did not know and had no reason to believe that the relevant device or relevant service which is the subject of the offence enabled or facilitated the circumvention of the measure.

273D. Exceptions to section 273A

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

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

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

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

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

provided in so doing or in issuing information derived from that circumvention, he does not affect prejudicially the rights of the copyright owner.[24]

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[23] **New section 273C - Criminal liability for circumvention of effective technological measures (cont.):**

Similar to the definition of "relevant device", we also believe that the definition for "relevant service" for both sections 273B(2) and 273C(2) should be the same. We therefore recommend the same wording as in section 273B(2).

[24] **See Footnote 27**

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

(*a*) the act is done by or under the authority of the owner or operator of a computer, computer system or computer network; ~~and~~

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

(c) the copy of the work in relation to which the act is done-

(i) is not an infringing copy; or

(ii) if it is an infringing copy, is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made

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provided in so doing or in issuing information derived from that circumvention, he does not affect prejudicially the rights of the copyright owner.[24]

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

(*a*) where the research is conducted—

(i) by or on behalf of a specified educational establishment; or

(ii) for the purposes of giving or receiving instruction in a specified course of study in the field of cryptography provided by a specified educational establishment,

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

(*b*) in any other case, the act or the dissemination to the public of information derived from the research does not affect prejudicially the rights of the copyright owner.

(4) In subsection (3)—

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[24] **See Footnote 27**

"specified educational establishment" (指明教育機構) means an educational establishment specified in section 4, 6, 7, 8, 9, 12, 14 or 15 of Schedule 1;

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

(*a*) means a manner which is reasonably calculated to advance the state of knowledge or development of cryptography or related technology; and

(*b*) includes dissemination of the information in a journal or at a conference the target readers or audiences of which are primarily persons engaged in, or pursuing a course of study in, the field of cryptography or related technology.

(5) Section 273A does not apply to an act which circumvents an effective technological measure if—[25]

(*a*) the measure, or the copyright work in relation to which the measure has been applied, has the capability ~~to collect or disseminate personally identifying information to which~~ tracks and records the manner of a person's use of a computer network without providing conspicuous notice of such tracking ~~collection or dissemination~~ to the person;

(*b*) the act is done for the sole purpose of identifying or disabling the function of the measure or work, as the case may be, in ~~collecting or disseminating personally identifying information~~tracking and recording the manner of a person's use of a computer network; and

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

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[25] **New section 273D(5)-Exceptions to section 273A**

We are concerned that the exemption provided in section 273D(5) could affect the legitimate operations of measures put in place by organizations to track the computer usage of their employees for the purposes of safeguarding computer networks and corporate security. There is a risk that the exemption proposed in section 273D(5) could prevent the operation of such legitimate practices. We would like to know if this is the consequence intended by the Administration.

We have removed references to "personally identifying information" and the collection/dissemination thereof to avoid confusion with the term "personally identifiable information" as used in the Personal Data (Privacy) Ordinance. That Ordinance sets out an established process for the proper collection of personally identifiable information, including opt-out mechanisms, and proposed section 273D(5) as currently drafted goes beyond the Personal Data (Privacy) Ordinance – it does not sit well with, and may effectively undermine, that Ordinance.

Our concerns above apply equally to proposed sections 273E(8) and 273F(8) which provide similar exemptions for the devices and services that track and record a person's computer usage.

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

(*a*) a person does the act when using a technology, product or device; and

(*b*) the sole purpose of the technology, product or device, as the case may be, is to prevent access of minors to harmful materials on the Internet.

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

(*a*) the measure has been applied in relation to a copyright work of any description;

(*b*) the measure contains regional coding or otherwise has the effect of preventing or restricting access to the work for the purpose of controlling market segmentation;

(*c*) the act is done for the sole purpose of overcoming the restriction which controls market segmentation so as to gain access to the work; and

(*d*) the copy of the work in relation to which the act is done–

(i) is not an infringing copy; or

(ii) if it is an infringing copy, is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made.

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

273E. Exceptions to section 273B

(1) In this section–

"relevant device" (有關器件) means any device, product, component or means—

(*a*) which is promoted, advertised or marketed for the purpose of the circumvention of effective technological measures;

(*b*) which has only a limited commercially significant purpose or use other than to circumvent effective technological measures; or

(*c*) which is primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of effective technological measures;

"relevant service" (有關服務) means any service—

(*a*) which is promoted, advertised or marketed for the purpose of the circumvention of effective technological measures;

(*b*) which has only a limited commercially significant purpose or use other than to circumvent effective technological measures; or

(*c*) which is performed for the purpose of enabling or facilitating the circumvention of effective technological measures.

(2) Section 273B does not apply if—

(*a*) a person works collaboratively with another person to identify or analyse particular elements of a computer program for the sole purpose of achieving interoperability of an independently created computer program with the computer program or another computer program; and

(*b*) that person, for the purpose of enabling that other person to do any relevant act—

(i) makes or imports any relevant device for that other person;

(ii) sells, lets for hire, exports or distributes any relevant device to that other person;

(iii) possesses any relevant device; or

(iv) provides any relevant service to that other person.

(3) In subsection (2), "relevant act" (有關作爲) means—

(*a*) an act which circumvents an effective technological measure and to which section 273A does not apply by virtue of section 273D(1); or

(*b*) an act done outside Hong Kong which, if done in Hong Kong, would constitute an act referred to in paragraph (*a*).

(4) Section 273B does not apply if—

(*a*) a person works collaboratively with another person to test, investigate or correct a security flaw or vulnerability of a computer, computer system or computer network under the

authority of the owner or operator of the computer, computer system or computer network, as the case may be; and

(*b*) that person, for the purpose of enabling that other person to do any relevant act—

(i) makes or imports any relevant device for that other person;

(ii) sells, lets for hire, exports or distributes any relevant device to that other person;

(iii) possesses any relevant device; or

(iv) provides any relevant service to that other person.

provided in so doing or in issuing information derived from that research, he does not affect prejudicially the rights of the copyright owner.[26]

(5) In subsection (4), "relevant act" (有關作爲) means—

(*a*) an act which circumvents an effective technological measure and to which section 273A does not apply by virtue of section 273D(2); or

(*b*) an act done outside Hong Kong which, if done in Hong Kong, would constitute an act referred to in paragraph (*a*).

(6) Section 273B does not apply if—

(*a*) a person works collaboratively with another person to conduct research into cryptography; and

(*b*) that person, for the purpose of enabling that other person to do any relevant act—

(i) makes or imports any relevant device for that other person;

(ii) sells, lets for hire, exports or distributes any relevant device to that other person;

(iii) possesses any relevant device; or

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[26] **See Footnote 27.**

(iv) provides any relevant service to that other person.

provided in so doing or in issuing information derived from that research, he does not affect prejudicially the rights of the copyright owner.[27]

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(7) In subsection (6), "relevant act" (有關作爲) means—

(*a*) an act which circumvents an effective technological measure and to which section 273A does not apply by virtue of section 273D(3); or

(*b*) an act done outside Hong Kong which, if done in Hong Kong, would constitute an act referred to in paragraph (*a*).

(8) Section 273B does not apply to a relevant device or relevant service if—[28]

(*a*) an effective technological measure, or a copyright work in relation to which an effective technological measure has been applied~~, has a function in collecting or disseminating personally identifying information~~ towhich tracks and records the manner of a person's use of a computer network; ~~and~~

(*b*) the sole purpose of the device or service, as the case may be, is to identify or disable that function of the measure or work, as the case may be;~~.~~

(c) the copy of the work in relation to subsection (b)–

(i) is not an infringing copy; or

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[27] **New section 273E(6) – Exceptions to 273B**

We believe that the application of section 273E(6) is too wide and could be used to allow the dealing in circumvention devices or provision of circumvention services under the guise of research into cryptography. We suggest to limit application of section 273E(6) to those activities that do not affect prejudicially the rights of the copyright owner. This reflects the similar position in the United Kingdom under section 296ZA of the Copyright Act.

We have made the same suggested amendments to section 273D(1), 273D(2), 273E(4), 273F(2), 273F(4), and 273F(6) to limit the scope of the exemptions to such activities as to not prejudice the rights of the copyright owner to exploit the work in question.

[28] **See Footnote 25.**

(ii) if it is an infringing copy, is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made; and

(d) in so doing or in issuing information derived from that identification or disabling, the rights of the copyright owner are not prejudicially affected.

(9) Section 273B does not apply to a relevant device if—

(*a*) the relevant device is incorporated, or is intended to be incorporated, into a technology, product or device; and

(*b*) the sole purpose of the technology, product or device, as the case may be, is to prevent access of minors to harmful materials on the Internet.

(10) Section 273B does not apply to a relevant service if the sole purpose of the service is to prevent access of minors to harmful materials on the Internet.

(11) Section 273B does not apply to an act done by, or on behalf of, law enforcement agencies for the purpose of the prevention, detection or investigation of an offence, or the conduct of a prosecution.

273F. Exceptions to section 273C

(1) In this section—

"relevant device" (有關器件) means any device, product, component or means; ~~which is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of effective technological measures;~~

(a) which is promoted, advertised or marketed for the purpose of the circumvention of the measure;

(b) which has only a limited commercially significant purpose or use other than to circumvent the measure; or

(c) which is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of the measure;[29]

"relevant service" (有關服務) means any service ~~which is performed for the purpose of enabling or facilitating the circumvention of effective technological measures.~~

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(*a*) which is promoted, advertised or marketed for the purpose of the circumvention of the measure;

(*b*) which has only a limited commercially significant purpose or use other than to circumvent the measure; or

(*c*) which is performed for the purpose of enabling or facilitating the circumvention of the measure.[29]

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(2) Section 273C does not apply if—

(*a*) a person works collaboratively with another person to identify or analyse particular elements of a computer program for the sole purpose of achieving interoperability of an independently created computer program with the computer program or another computer program; and

(*b*) that person, for the purpose of enabling that other person to do any relevant act—

(i) makes or imports any relevant device for that other person;

(ii) sells, lets for hire, exports or distributes any relevant device to that other person;

(iii) possesses any relevant device with a view to selling, letting for hire or distributing the device to that other person; or

(iv) provides any relevant service to that other person.

provided in so doing, he does not affect prejudicially the rights of the copyright owner[30].

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(3) In subsection (2), "relevant act" (有關作爲) means—

(*a*) an act which circumvents an effective technological measure and to which section 273A does not apply by virtue of section 273D(1); or

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[29] **New section 273F - Exceptions to section 273C**

We recommend that the definitions of "relevant device" and "relevant service" as provided in section 273B(2) be adopted.

[30] **See Footnote 27.**

(*b*) an act done outside Hong Kong which, if done in Hong Kong, would constitute an act referred to in paragraph (*a*).

(4) Section 273C does not apply if—

(*a*) a person works collaboratively with another person to test, investigate or correct a security flaw or vulnerability of a computer, computer system or computer network under the authority of the owner or operator of the computer, computer system or computer network, as the case may be; and

(*b*) that person, for the purpose of enabling that other person to do any relevant act—

(i) makes or imports any relevant device for that other person;

(ii) sells, lets for hire, exports or distributes any relevant device to that other person;

(iii) possesses any relevant device with a view to selling, letting for hire or distributing the device to that other person; or

(iv) provides any relevant service to that other person.

provided in so doing, he does not affect prejudicially the rights of the copyright owner[31].

(5) In subsection (4), "relevant act" (有關作爲) means—

(*a*) an act which circumvents an effective technological measure and to which section 273A does not apply by virtue of section 273D(2); or

(*b*) an act done outside Hong Kong which, if done in Hong Kong, would constitute an act referred to in paragraph (a).

(6) Section 273C does not apply if—

(*a*) a person works collaboratively with another person to conduct research into cryptography; and

(*b*) that person, for the purpose of enabling that other person to do any relevant act—

(i) makes or imports any relevant device for that other person;

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[31] **See Footnote 27.**

(ii) sells, lets for hire, exports or distributes any relevant device to that other person;

(iii) possesses any relevant device with a view to selling, letting for hire or distributing the device to that other person; or

(iv) provides any relevant service to that other person.

provided in so doing, he does not affect prejudicially the rights of the copyright owner.[32]

(7) In subsection (6), "relevant act" (有關作爲) means—

(*a*) an act which circumvents an effective technological measure and to which section 273A does not apply by virtue of section 273D(3); or

(*b*) an act done outside Hong Kong which, if done in Hong Kong, would constitute an act referred to in paragraph (*a*).

(8) Section 273C does not apply to a relevant device or relevant service if—

(*a*) an effective technological measure, or a copyright work in relation to which an effective technological measure has been applied~~, has a function in collecting or disseminating personally identifying information~~[33] to~~which~~ tracks~~and~~ records the manner of a person's use of a computer network; ~~and~~

(*b*) the sole purpose of the device or service, as the case may be, is to identify or disable that function of the measure or work, as the case may be;

(c) the copy of the work in relation to subsection (b)–

(i) is not an infringing copy; or

(ii) if it is an infringing copy, is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made; and

(d) in so doing or in issuing information derived from that identification or disabling, the rights of the copyright owner are not prejudicially affected.

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[32] **See Footnote 27.**

[33] **See Footnote 25.**

(9) Section 273C does not apply to a relevant device if—

(*a*) the relevant device is incorporated, or is intended to be incorporated, into a technology, product or device; and

(*b*) the sole purpose of the technology, product or device, as the case may be, is to prevent access of minors to harmful materials on the Internet.

(10) Section 273C does not apply to a relevant service if the sole purpose of the service is to prevent access of minors to harmful materials on the Internet.

(11) Section 273C does not apply to any circumvention device, relevant device or the provision of any relevant service which circumvents an effective technological measure if:[34]— **Formatted:** Font: Bold

(a) ~~which~~ the measure has been applied in relation to a copyright work ~~issued to the public in a physical article~~of any description; ~~and~~

(b) ~~which~~ the measure contains regional coding or otherwise has the effect of preventing or restricting access to the work for the purpose of controlling market segmentation;

(c) the circumvention device or relevant device is designed, produced or adapted, or the provision of the relevant service is provided (as the case may be), for the sole purpose of overcoming the restriction which contains market segmentation so as to gain access to the work; and

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[34] **New section 273F (11) – Exceptions to section 273C:**

BSA does not agree to the blanket exclusion from criminal liability of commercial dealings in technology protection measures which have region or geographical restriction function only.

We believe that the effect of this exclusion would allow the continued dealing in the modified game consoles installed with modifying chips or installation of modifying chips in games consoles which are used solely for the purpose of playing pirated game software. It is such activities that support and contribute to the existence of a thriving market for infringing computer games in Hong Kong.

We believe to exclude criminal liability for dealing in devices which by pass region-controls would only create a major loophole in the law by allowing suppliers and manufacturers to continue to freely deal and trade in such circumvention devices to access pirated works under the guise of by passing regional coding. We understand the Administration's concerns to not affect consumer's rights to access legitimate parallel imported works. However, BSA believes a middle ground can be reached as to limit application of section 273F(11) to those activities where the sole purpose is to bypass regional coding only and not to gain access to pirated works. We believe this is a more acceptable solution to both end-users and rights holders. Our suggested wording for this provision is as shown above. Our amendments to section 273F(11) are taken from section 273D(7). We believe that our suggested amendments will alleviate any concerns that users cannot access legitimate copies of copyright works including parallel imported products.

(*d*) the copy of the work in relation to which the act is done–

(i) is not an infringing copy; or

(ii) if it is an infringing copy, is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made.

(12) Section 273C does not apply to an effective technological measure—

(*a*) which prohibits the making of a recording of a broadcast or a cable programme upon its reception; or

(*b*) which prohibits in all circumstances the subsequent viewing or listening of a recording of a broadcast or cable programme made upon its reception.

(13) Section 273C does not apply to an act done by, or on behalf of, law enforcement agencies for the purpose of the prevention, detection or investigation of an offence, or the conduct of a prosecution.

273G. Application of sections 273, 273A, 273B, 273D and 273E to performances

Sections 273, 273A(1), (2), (3) and (4), 273B(1), (2), (3), (4), (5), (6), (7), (8) and (9), 273D and 273E apply, with the necessary modifications, in relation to—

(*a*) an unfixed performance or a fixation of a performance;

(*b*) a performer or a person having fixation rights in relation to a performance; and

(*c*) the rights conferred by Part III on a performer or a person having fixation rights in relation to a performance.

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

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

(*a*) that any use of or dealing with the work or performance, class of works or performances or class of devices, products, components, means or services, as the case may be, does not constitute or lead to an infringement of copyright or the rights conferred by Part III (rights in performances); and

(*b*) that any such use or dealing has been adversely impaired or affected as a result of the application of the provisions.".

57. Rights and remedies in respect of unlawful acts to interfere with rights management information

Section 274 is amended by adding—

"(2A) The person who provides rights management information does not have the rights and remedies against the person referred to in subsection (2) unless the second-mentioned person, when doing an act referred to in subsection (2)(*a*) or (*b*), knows or has reason to believe that by doing the act he is inducing, enabling, facilitating or concealing an infringement of copyright or an infringement of rights conferred by Part III (rights in performances).

(2B) The copyright owner or his exclusive licensee, if he is not the person who provides rights management information, also has the same rights and remedies against the person referred to in subsection (2) as he has in respect of an infringement of copyright.

(2C) The rights and remedies conferred by subsection (1) on the person who provides rights management information and the rights and remedies conferred by subsection (2B) on the copyright owner and his exclusive licensee are concurrent.

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

(2E) Sections 115, 116 and 117 (presumptions as to certain matters relating to copyright) apply, with the necessary modifications, in proceedings instituted under this section, as they apply in proceedings instituted under Part II (copyright).

(2F) This section, except subsection (2E), applies, with the necessary modifications, in relation to—

(*a*) a fixation of a performance;

(*b*) a performer or a person having fixation rights in relation to a performance; and

(*c*) the rights conferred by Part III on a performer or a person having fixation rights in relation to a performance.".

58. Transitional provisions and savings

(1) Section 282 is amended, in the heading, by adding "**in relation to amendments effected by the Copyright (Amendment) Ordinance 2003**" after "**savings**".

(2) Section 282 is amended by adding "by the Copyright (Amendment) Ordinance 2003 (27 of 2003)" after "this Ordinance".

59. Section added

The following is added—

"283. Transitional provisions and savings in relation to amendments effected by the Copyright (Amendment) Ordinance 2006

(1) In this section, "2006 Amendment Ordinance" («2006年修訂條例») means the Copyright (Amendment) Ordinance 2006 (of 2006).

(2) Schedule 7 contains transitional provisions and savings in relation to certain amendments made to this Ordinance by the 2006 Amendment Ordinance.

(3) The Chief Executive in Council may make regulations containing transitional provisions and savings consequent on the enactment of the 2006 Amendment Ordinance.

(4) Without prejudice to the generality of subsection (3), the regulations may in particular provide for—

(*a*) the application of provisions of this Ordinance as amended by the 2006 Amendment Ordinance; or

(*b*) the continued application of provisions of this Ordinance as in force immediately before the commencement of any provisions of the 2006 Amendment Ordinance,

in connection with any matter specified in the regulations.

(5) Regulations made under this section may, if they so provide, be deemed to have come into operation on a date earlier than the date on which they are published in the Gazette but not earlier than the date on which the 2006 Amendment Ordinance is published in the Gazette.

(6) To the extent that any regulations come into operation on a date earlier than the date on which they are published in the Gazette, those regulations shall be construed so as not to—

(*a*) affect, in a manner prejudicial to any person, the rights of that person existing before the date on which the regulations are published in the Gazette; or

(*b*) impose liabilities on any person in respect of anything done, or omitted to be done, before that date.

(7) In the event of an inconsistency between any regulations made under this section and the provisions of Schedule 7, Schedule 7 shall prevail to the extent of the inconsistency.".

60. Educational establishments

(1) Schedule 1 is amended, within the square brackets, by repealing "s. 195" and substituting "ss. 40A, 119B, 195 & 273D".

(2) Schedule 1 is amended by repealing section 15 and substituting—

"15. The Open University of Hong Kong established by The Open University of Hong Kong Ordinance (Cap. 1145).".

61. Schedule 7 added

The following is added—

"SCHEDULE 7 [s. 283]

TRANSITIONAL PROVISIONS AND SAVINGS IN RELATION TO AMENDMENTS EFFECTED BY THE COPYRIGHT (AMENDMENT) ORDINANCE 2006 (OF 2006)

PART 1

INTRODUCTORY

1. **Interpretation**

(1) In this Schedule—

"2006 Amendment Ordinance" («2006 年修訂條例») means the Copyright (Amendment) Ordinance 2006 (of 2006);

"Suspension Ordinance" (暫停條例) means the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568).

(2) Expressions used in this Schedule which are defined for the purposes of Part II (copyright) and Part IIIA (performers' moral rights) of this Ordinance have the same meaning as in those Parts.

PART 2

ACTS PERMITTED IN RELATION TO COPYRIGHT WORKS AND PERFORMANCES

2. **Savings for certain existing agreements**

Nothing in section 11, 12, 13, 14, 15, 16, 18, 48, 49, 50, 51 or 52 of the 2006 Amendment Ordinance affects a licence or agreement made before the commencement date of that section.

PART 3

RENTAL RIGHT OF COPYRIGHT OWNERS AND PERFORMERS

Division 1—Transitional provisions and savings in relation to amendments effected by section 4 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(*c*), (*e*) and (*f*) of this Ordinance)

3. **General provisions**

(1) Subject to sections 4 and 5 of this Schedule, section 4 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(*c*), (*e*) and (*f*) of this Ordinance) applies to copyright works made before, on or after the commencement date of that section.

(2) No act done before the commencement date of section 4 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(*c*), (*e*) and (*f*) of this Ordinance) shall be regarded as an infringement of any new right arising by virtue of that section.

4. New rental right: effect of pre-commencement authorization of copying

Where—

(*a*) the owner or prospective owner of copyright in any work has, before the commencement date of section 4 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(*c*), (*e*) and (*f*) of this Ordinance), authorized a person to make a copy of the work; and

(*b*) a new right arises by virtue of that section in relation to that copy,

the new right shall vest on the commencement date of that section in the person so authorized, subject to any agreement to the contrary.

5. Savings for existing stocks

(1) Any new right arising by virtue of section 4 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(*c*) of this Ordinance) does not apply to a copy of a film acquired by a person before the commencement date of that section for the purpose of renting it to the public.

(2) Any new right arising by virtue of section 4 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(*e*) and (*f*) of this Ordinance) does not apply to a copy of a comic book acquired by a person before the commencement date of that section for the purpose of renting it to the public.

Division 2–Transitional provisions and savings in relation to amendments effected by section 4 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(*d*) of this Ordinance)

6. General provisions

(1) Subject to sections 7 and 8 of this Schedule, section 4 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(*d*) of this Ordinance) applies to copyright works made before, on or after the commencement date of that section.

(2) No act done before the commencement date of section 4 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(*d*) of this Ordinance) shall be regarded as an infringement of any new right arising by virtue of that section.

7. **New rental right: effect of pre-commencement authorization of copying**

Where—

(*a*) the owner or prospective owner of copyright in any work has, before the commencement date of section 4 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(*d*) of this Ordinance), authorized a person to make a copy of the work; and

(*b*) a new right arises by virtue of that section in relation to that copy,

the new right shall vest on the commencement date of that section in the person so authorized, subject to any agreement to the contrary.

8. **Savings for existing stocks**

Any new right arising by virtue of section 4 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(*d*) of this Ordinance) does not apply to a copy of a sound recording acquired by a person before the commencement date of that section for the purpose of renting it to the public.

Division 3—Transitional provisions and savings in relation to amendments effected by section 39 of the 2006 Amendment Ordinance

9. **General provisions**

(1) Subject to sections 10 and 11 of this Schedule, section 39 of the 2006 Amendment Ordinance applies to qualifying performances that take place before, on or after the commencement date of that section.

(2) No act done before the commencement date of section 39 of the 2006 Amendment Ordinance (insofar as it relates to section 25(1)(d) of this Ordinance) shall be regarded as an infringement of any new right arising by virtue of that section.

10. **New rental right: effect of pre-commencement authorization of copying**

Where—

(*a*) the owner or prospective owner of a performer's rights in a qualifying performance has, before the commencement date of section 39 of the 2006 Amendment Ordinance, authorized a person to make a copy of a recording of the performance; and

(*b*) a new right arises by virtue of that section in relation to that copy,

the new right shall vest on the commencement date of that section in the person so authorized, subject to any agreement to the contrary.

11. **Savings for existing stocks**

Any new right arising by virtue of section 39 of the 2006 Amendment Ordinance does not apply to a copy of a sound recording of a qualifying performance acquired by a person before the commencement date of that section for the purpose of renting it to the public.

PART 4

MORAL RIGHTS OF PERFORMERS

Transitional provisions and savings in relation to amendments effected by section 53 of the 2006 Amendment Ordinance

12. **General provisions**

No act done before the commencement date of section 53 of the 2006 Amendment Ordinance shall be regarded as an infringement of any new rights of performers arising by virtue of that section.

13. **Savings for certain existing agreements**

(1) Except as otherwise expressly provided, nothing in section 53 of the 2006 Amendment Ordinance affects an agreement made before the commencement date of that section.

(2) No act done in pursuance of an agreement referred to in subsection (1) on or after the commencement date of section 53 of the 2006 Amendment Ordinance shall be regarded as an infringement of any new rights of performers arising by virtue of that section.

14. **New moral rights of performers of live aural performances**

(1) Any new rights of performers arising by virtue of section 53 of the 2006 Amendment Ordinance in respect of a live aural performance only subsist in a live aural performance that takes place on or after the commencement date of that section.

(2) Any new rights of performers arising by virtue of section 53 of the 2006 Amendment Ordinance in respect of a performance fixed in a sound recording only subsist if the performance concerned takes place on or after the commencement date of that section.

PART 5

INFRINGEMENT OF COPYRIGHT IN WORKS AND RIGHTS IN PERFORMANCES

Division 1–Transitional provisions and savings in relation to amendments effected by section 7(2) of the 2006 Amendment Ordinance

15. **Exemption from criminal liability incurred in respect of copies of works imported before commencement of section (2) of the 2006 Amendment Ordinance**

(1) As from the commencement date of section 7(2) of the 2006 Amendment Ordinance, a person shall not be liable to conviction for an offence under section 118 of this Ordinance in respect of an act done before, on or after that commencement date in relation to a copy of a work to which this subsection applies.

(2) Subsection (1) applies to a copy of a work imported into Hong Kong before the commencement date of section 7(2) of the 2006 Amendment Ordinance–

(*a*) which is an infringing copy by virtue only of section 35(3) of this Ordinance as in force immediately before that commencement date;

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

(*c*) which, if imported into Hong Kong on or after that commencement date, would, by virtue of section 35(4) of this Ordinance as amended by section 7(2) of the 2006 Amendment Ordinance, not be an infringing copy for the purposes of sections 118 to 133 (criminal provisions) of this Ordinance.

Division 2–Transitional provisions and savings in relation to amendments effected by section 8 of the 2006 Amendment Ordinance

16. **Application of section 35B of this Ordinance to previously imported copies**

(1) For the purpose of any act done on or after the commencement date of section 8 of the 2006 Amendment Ordinance in relation to a copy of a work to which this subsection applies (including any act alleged to constitute an infringement of copyright or an offence under this Ordinance)—

(*a*) section 35B of this Ordinance shall have effect as if it had been enacted before the copy is imported into Hong Kong or acquired; and

(*b*) the copy is, by virtue of paragraph (*a*), not an infringing copy for the purposes of section 35(3) of this Ordinance unless, having regard to

section 35B of this Ordinance, it would also be an infringing copy for the purposes of section 35(3) of this Ordinance if it were imported into Hong Kong or acquired on or after that commencement date.

(2) Subsection (1) applies to a copy of a work imported into Hong Kong before the commencement date of section 8 of the 2006 Amendment Ordinance—

(*a*) which is an infringing copy by virtue only of section 35(3) of this Ordinance as in force immediately before that commencement date; and

(*b*) which was lawfully made in the country, territory or area where it was made.

(3) For the avoidance of doubt, nothing in this section or in the 2006 Amendment Ordinance affects any right of action in relation to an infringement of copyright which occurred before the commencement date of section 8 of the 2006 Amendment Ordinance.

17. **Exemption from criminal liability previously incurred in respect of "parallel-imported" copies of works to which section 35B of this Ordinance applies**

(1) As from the commencement date of section 8 of the 2006 Amendment Ordinance, a person shall not be liable to conviction for an offence under section 118(1) of this Ordinance as in force immediately before that commencement date and read together with the Suspension Ordinance, in respect of an act done before that commencement date in relation to a copy of a work to which this subsection applies unless, having regard to section 35B of this Ordinance, the copy would also be an infringing copy for the purposes of section 35(3) of this Ordinance if it were imported into Hong Kong or acquired on or after that commencement date.

(2) Subsection (1) applies to a copy of a work imported into Hong Kong before the commencement date of section 8 of the 2006 Amendment Ordinance—

(*a*) which is an infringing copy by virtue only of section 35(3) of this Ordinance as in force immediately before that commencement date; and

(*b*) which was lawfully made in the country, territory or area where it was made.

Division 3—Transitional provisions and savings in relation to amendments effected by section 22 of the 2006 Amendment Ordinance

18. **Application of section 118(2F) of this Ordinance**

For the avoidance of doubt, section 118(2F) of this Ordinance does not apply in relation to any act referred to in section 118(2A) of this Ordinance and done by a body

corporate or a partnership before the commencement date of section 22(3) of the 2006 Amendment Ordinance.

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

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

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

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

Division 4—Transitional provisions and savings in relation to amendments effected by section 45 of the 2006 Amendment Ordinance

20. **Application of section 229A of this Ordinance to previously imported fixations**

(1) For the purpose of any act done on or after the commencement date of section 45 of the 2006 Amendment Ordinance in relation to a fixation of a performance to which this subsection applies (including any act alleged to constitute an infringement of any of the rights conferred by Part III of this Ordinance)–

(*a*) section 229A of this Ordinance shall have effect as if it had been enacted before the fixation is imported into Hong Kong or acquired; and

(*b*) the fixation is, by virtue of paragraph (*a*), not an infringing fixation for the purposes of section 229(4) of this Ordinance unless, having regard to section 229A of this Ordinance, it would also be an infringing fixation for the purposes of section 229(4) of this Ordinance if it were imported into Hong Kong or acquired on or after that commencement date.

(2) Subsection (1) applies to a fixation of a performance imported into Hong Kong before the commencement date of section 45 of the 2006 Amendment Ordinance—

(*a*) which is an infringing fixation by virtue only of section 229(4) of this Ordinance as in force immediately before that commencement date; and

(*b*) which was lawfully made in the country, territory or area where it was made.

(3) For the avoidance of doubt, nothing in this section or in the 2006 Amendment Ordinance affects any right of action in relation to an infringement of any of the rights conferred by Part III of this Ordinance which occurred before the commencement date of section 45 of the 2006 Amendment Ordinance."

PART 3

MISCELLANEOUS

Copyright (Suspension of Amendments) Ordinance 2001

62. **Repeal**

The Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568) is repealed.

Organized and Serious Crimes Ordinance

63. **Offences relevant to definitions of "organized crime" and "specified offence"**

Schedule 1 to the Organized and Serious Crimes Ordinance (Cap. 455) is amended, in paragraph 18, by adding "and which was lawfully made in the country, territory or area where it was made" after "section 35(3) of that Ordinance" where it twice appears.

Prevention of Copyright Piracy Ordinance

64. **Time limit for prosecutions**

Section 36D of the Prevention of Copyright Piracy Ordinance (Cap. 544) is amended by repealing everything after "commission of the offence" and substituting a full stop.

Explanatory Memorandum

The object of this Bill is to amend the Copyright Ordinance (Cap. 528) ("the principal ordinance") to make provisions or further provisions for–

(*a*) the acts which may be done in relation to works or performances notwithstanding the copyright in the works or the rights in the performances;

(*b*) the rental right of copyright owners and performers;

(*c*) the moral rights of performers;

(*d*) the infringement of copyright in works or rights in performances;

(*e*) the technological measures which are used for the protection of copyright in works or rights in performances; and

(*f*) miscellaneous and transitional matters,

to repeal the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568), and to make provisions for related matters.

2. The Bill is divided into 3 Parts.

PART 1

3. Part 1 (clauses 1 and 2) contains preliminary provisions.

4. Clause 1 provides for the short title of the Bill when enacted.

5. Clause 2 provides for the commencement of the Bill when enacted.

PART 2

6. Part 2 (clauses 3 to 61) amends the principal ordinance.

Acts permitted in relation to copyright works and performances

7. Clause 7(3) replaces the existing section 35(7) of the principal ordinance with the proposed section 35(7) as a result of the introduction of the proposed sections 35B(5), 40B(5), 40C(7), 40D(2) and (7), 41A(5) and 54A(3) of the principal ordinance.

8. Clause 10(2) replaces the existing section 38(3) of the principal ordinance with the proposed section 38(3) to achieve consistency with the proposed sections 41A(2) and 54A(2) of the principal ordinance.

9. Clause 11 introduces the proposed sections 40A to 40F of the principal ordinance to provide for a new permitted act for persons with a print disability. In particular—

(*a*) the proposed section 40A contains definitions for the proposed sections 40A to 40F;

(*b*) the proposed section 40B permits, subject to certain restrictions, the making of one accessible copy of a copyright work for the personal use of a person with a print disability;

(*c*) the proposed section 40C permits, subject to certain restrictions, a specified body to make or supply multiple accessile copies of a copyright work for the personal use of persons with a print disability;

(*d*) the proposed section 40D permits, subject to certain restrictions, a specified body to possess an intermediate copy which is necessarily created during the production of accessible copies, and to lend or transfer the intermediate copy to another specified body;

(*e*) the proposed section 40E requires a specified body to keep records of accessible copies made or supplied under the proposed section 40C and intermediate copies lent or transferred under the proposed section 40D, and to allow the copyright owner to inspect and make copies of the records; and

(*f*) the proposed section 40F contains supplementary provisions for the proposed sections 40A to 40E.

10. Clause 12 introduces the proposed section 41A of the principal ordinance to provide for a new permitted act in respect of the fair dealing with a work for the purposes of giving or receiving instruction in a specified course of study provided by an educational establishment and set out a list of non-exhaustive factors for determining whether any dealing is fair dealing.

11. Clause 13 amends section 43 of the principal ordinance to–

(*a*) extend the scope of the permitted act under section 43 to cover not only an act done for the purposes of instruction, but also an act done for the purposes of receiving instruction; and

(*b*) extend the scope of the audience under section 43 to cover not only the teachers, the pupils and the parents and guardians of the pupils, but also the near relatives of the pupils.

12. Clause 14 repeals section 44(2) of the principal ordinance to remove a restriction relating to the permitted act under section 44.

13. Clause 15 amends section 45 of the principal ordinance to–

(*a*) extend the scope of the permitted act under section 45 to cover not only an act done for the purposes of instruction, but also an act done for the purposes of receiving instruction; and

(*b*) remove a restriction relating to the permitted act under section 45.

14. Clause 16 introduces the proposed section 54A of the principal ordinance to provide for a new permitted act in respect of the fair dealing with a work for the purposes of public administration and, as in clause 12 in relation to the proposed section 41A of the principal ordinance, set out a list of non-exhaustive factors for considering whether any dealing is fair dealing.

15. Clause 18 introduces the proposed section 81A of the principal ordinance to provide for a new permitted act in respect of the playing of a sound broadcast inside a vehicle for the purpose of affording the driver of the vehicle access to public information.

16. Clause 35(3) introduces the proposed definition of "specified course of study" in section 198(1) of the principal ordinance.

17. Clause 36 amends section 199 of the principal ordinance, which contains an index of defined expressions used in Part II of the principal ordinance, by adding a reference to "specified course of study".

18. Clause 44(2) replaces the existing section 229(7) of the principal ordinance with the proposed section 229(7) as a result of the introduction of the proposed sections 229A(5), 242A(3) and 246A(3) of the principal ordinance.

19. Clause 48 introduces the proposed section 242A of the principal ordinance to provide for, as in clause 12 in relation to the proposed section 41A of the principal ordinance, a new permitted act in respect of the fair dealing with a performance for the purposes of giving or receiving instruction in a specified course of study provided by an educational establishment and set out a list of non-exhaustive factors for determining whether any dealing is fair dealing.

20. Clause 49 amends section 244 of the principal ordinance to—

(*a*) extend the scope of the permitted act under section 244 to cover not only an act done for the purposes of instruction, but also an act done for the purposes of receiving instruction; and

(*b*) extend the scope of the audience under section 244 to cover not only the teachers, the pupils and the parents and guardians of the pupils, but also the near relatives of the pupils.

21. Clause 50 repeals section 245(2) of the principal ordinance to remove a restriction relating to the permitted act under section 245.

22. Clause 51 introduces the proposed section 246A of the principal ordinance to provide for, as in clause 16 in relation to the proposed section 54A of the principal ordinance, a new permitted act in respect of the fair dealing with a performance for the purposes of public administration and set out a list of non-exhaustive factors for considering whether any dealing is fair dealing.

23. Clause 52 introduces the proposed section 258A of the principal ordinance to provide for, as in clause 18 in relation to the proposed section 81A of the principal ordinance, a new permitted act in respect of the playing of a sound broadcast inside a vehicle for the purpose of affording the driver of the vehicle access to public information.

Rental right of copyright owners and performers

24. Clause 3 replaces the existing section 22(1)(*c*) of the principal ordinance with the proposed section 22(1)(*c*) as a result of the proposed amendment in clause 4 to section 25(1) of the principal ordinance.

25. Clause 4 replaces the existing section 25(1) of the principal ordinance with the proposed section 25(1) to confer a new right on the owner of the copyright in the following works to rent copies of the works to the public–

(*a*) a film;

(*b*) a literary, dramatic or musical work included in a sound recording;

(*c*) a literary or artistic work included in a comic book; and

(*d*) the typographical arrangement of a published edition of a comic book.

26. Clause 31 replaces the existing section 154(*b*) of the principal ordinance with the proposed section 154(*b*) as a result of the proposed amendment in clause 4 to section 25(1) of the principal ordinance.

27. Clause 32 replaces the existing section 161(*b*) of the principal ordinance with the proposed section 161(*b*) as a result of the proposed amendment in clause 4 to section 25(1) of the principal ordinance.

28. Clause 35(2) replaces the existing definition of "rental right" in section 198(1) of the principal ordinance with the proposed definition of "rental right" as a result of the proposed amendment in clause 4 to section 25(1) of the principal ordinance.

29. Clause 37(1) amends section 200(1)(*a*) of the principal ordinance as a result of the introduction of the proposed section 207A of the principal ordinance.

30. Clause 39 introduces the proposed section 207A of the principal ordinance to confer a new right on a performer whose performance is fixed in a sound recording to rent copies of the sound recording to the public.

31. Clause 41 introduces the proposed section 213A of the principal ordinance to empower the Copyright Tribunal to give consent on behalf of an owner of performers' rental right where the identity or whereabouts of the person entitled to the rental right cannot be ascertained after making reasonable enquiries.

32. Clause 42 replaces the existing section 215(1) of the principal ordinance with the proposed section 215(1) as a result of the introduction of the proposed section 207A of the principal ordinance.

33. Clause 46 amends section 233(1) of the principal ordinance as a result of the introduction of the proposed section 213A of the principal ordinance.

34. Clause 47 amends section 239 of the principal ordinance, which contains an index of defined expressions used in Part III of the principal ordinance, by adding a reference to "rental right".

Moral rights of performers

35. Clause 53 introduces the proposed Part IIIA (sections 272A to 272O) of the principal ordinance to confer new moral rights on a performer of a live aural performance or a performer whose performance is fixed in a sound recording. In particular—

(*a*) the proposed section 272A contains introductory provisions and definitions of expressions used in the proposed Part IIIA;

(*b*) the proposed section 272B confers on a performer of a live aural performance or a performer whose performance is fixed in a sound recording the right to be identified as a performer in the performance;

(*c*) the proposed section 272C requires that a performer's right under the proposed section 272B must be asserted;

(*d*) the proposed section 272D provides for the exceptions to the right conferred by the proposed section 272B;

(*e*) the proposed section 272E confers on a performer of a live aural performance or a performer whose performance is fixed in a sound recording the right not to have his performance subjected to derogatory treatment;

(*f*) the proposed section 272F provides that the right conferred by the proposed section 272E is also infringed by possessing or dealing with infringing articles;

(*g*) the proposed section 272G provides for the exceptions to the right conferred by the proposed section 272E;

(*h*) the proposed section 272H provides for the duration of the rights conferred by the proposed sections 272B and 272E;

(*i*) the proposed section 272I provides for the consent and waiver of the rights conferred by the proposed sections 272B and 272E;

(*j*) the proposed section 272J provides that where a performance is a joint performance, the rights conferred by the proposed sections 272B and 272E are the rights of each joint performer;

(*k*) the proposed section 272K provides for the application of the proposed sections 272B and 272E to part of a performance;

(*l*) the proposed section 272L provides that the rights conferred by the proposed sections 272B and 272E are not assignable;

(*m*) the proposed section 272M provides for the transmission of the rights conferred by the proposed sections 272B and 272E on the death of the person entitled to the rights;

(*n*) the proposed section 272N provides for the remedies for the infringement of the rights conferred by the proposed sections 272B and 272E; and

(*o*) the proposed section 272O provides that in proceedings brought with respect to a sound recording in which a performance is fixed, if copies of the sound recording are issued with a statement that a named person is a performer in the performance, the statement is presumed to be correct until the contrary is proved.

Infringement of copyright and rights in performances

36. Clause 7(1) amends section 35(3) of the principal ordinance as a result of the introduction of the proposed section 35B.

37. Clause 7(2) amends section 35(4)(*b*) of the principal ordinance to reduce the period during which the importation of so-called "parallel-imported" copies of a work would attract criminal liability from 18 months after the publication of the work to 9 months after the publication of the work. (A parallel-imported copy is a copy which was lawfully made in the country, territory or area where it was made but is nonetheless an infringing copy by virtue of section 35(3) of the principal ordinance.)

38. Clause 8 introduces the proposed section 35B of the principal ordinance to exclude from the application of section 35(3) of the principal ordinance parallel-imported copies which are imported or acquired otherwise than for certain purposes of a commercial nature specified in the proposed section.

39. Clause 22 amends section 118 of the principal ordinance. In particular–

(*a*) clause 22(1) replaces the existing section 118(1) with the proposed section 118(1) and clause 22(3) introduces the proposed section 118(2A), (2B), (2C), (2D) and (2E) to reflect and modify the application of section 118(1) as read together with the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568);

(*b*) clause 22(2) introduces the proposed section 118(1A) and (1B) to facilitate proof of offences under paragraphs (*e*) and (*f*)(ii) of the proposed section 118(1);

(*c*) clause 22(4) introduces the proposed section 118(2F), (2G) and (2H) to impose criminal liability on the director of a body corporate or a partner in a partnership who is responsible for the internal management of the body corporate or partnership (or if there is no such director or partner, any person who is responsible under the immediate authority of the directors or partners for the internal management of the body corporate or partnership) if the body corporate or partnership has done an act attracting criminal liability under the proposed section 118(2A); and

(*d*) clause 22(6) introduces the proposed section 118(3A) and (3B) to provide a defence for employees in proceedings for an offence under the proposed section 118(2A).

40. Clause 23 amends section 119 of the principal ordinance to provide for the penalty for an offence under the proposed section 118(2A) of the principal ordinance.

41. Clause 24 introduces the proposed section 119B of the principal ordinance to provide for a new offence of making for distribution or distributing infringing copies of copyright works in a printed form that are contained in books, magazines, periodicals or newspapers on a regular or frequent basis, resulting in financial loss to the copyright owner.

42. Clauses 28, 29 and 30 amend sections 131, 132 and 133 of the principal ordinance respectively as a result of the introduction of the proposed section 119B of the principal ordinance.

43. Clause 35(1) replaces the existing definition of "business" in section 198(1) of the principal ordinance with the proposed definition of "business".

44. Clause 44(1) amends section 229(4) of the principal ordinance as a result of the introduction of the proposed section 229A of the principal ordinance.

45. Clause 45 introduces the proposed section 229A of the principal ordinance to exclude from the application of section 229(4) parallel-imported fixations which are imported or acquired otherwise than for certain purposes of a commercial nature specified in the proposed section.

46. Some clauses amend the expression "for the purpose of, in the course of, or in connection with, any trade or business" which appears in a number of provisions in the principal ordinance as "for the purpose of or in the course of any trade or business". This reflects and modifies the application of those provisions in the principal ordinance as read together with the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568). In particular—

(*a*) clause 5(1), (2) and (3) amends section 31(1)(*a*), (*c*) and (*d*) of the principal ordinance;

(*b*) clause 6 amends section 32(1)(*c*) of the principal ordinance;

(*c*) clause 19(1), (2) and (3) amends section 95(1)(*a*), (*c*) and (*d*) of the principal ordinance;

(*d*) clause 20(1) and (2) amends section 96(5) and (6) of the principal ordinance;

(*e*) clause 21 amends section 109(1)(*a*) of the principal ordinance;

(*f*) clause 22(7), (8) and (9) amends section 118(4), (5) and (8) of the principal ordinance;

(*g*) clause 25 amends section 120(2) of the principal ordinance;

(*h*) clause 38 amends section 207(1)(*b*) of the principal ordinance;

(*i*) clause 40 amends section 211(1)(*b*) of the principal ordinance; and

(*j*) clause 43 amends section 228(1) of the principal ordinance.

Technological measures for the protection of copyright in works or rights in performances

47. Clause 54 amends the cross-heading before section 273 of the principal ordinance as a result of the introduction of the proposed sections 273 to 273H of the principal ordinance.

48. Clause 55 replaces the existing section 273 of the principal ordinance with the proposed section 273 of the principal ordinance, and clause 56 introduces the proposed sections 273A to 273H of the principal ordinance. In particular—

(*a*) the proposed section 273 provides for the meaning of the expressions used in the proposed sections 273 to 273H;

(*b*) the proposed section 273A provides for the rights and remedies in respect of the circumvention of effective technological measures which have been applied in relation to copyright works;

(*c*) the proposed section 273B provides for the rights and remedies in respect of the making of or dealing in specified devices, or the provision of specified services, for the circumvention of effective technological measures which have been applied in relation to copyright works;

(*d*) the proposed section 273C imposes a criminal liability on a person who makes or deals in specified devices, or provides specified services, for the circumvention of effective technological measures which have been applied in relation to copyright works;

(*e*) the proposed section 273D contains exceptions to the proposed section 273A;

(*f*) the proposed section 273E contains exceptions to the proposed section 273B;

(*g*) the proposed section 273F contains exception to the proposed section 273C;

(*h*) the proposed section 273G makes the proposed sections 273, 273A(1) to (4), 273B(1) to (9), 273D and 273E applicable in relation to a performance, a performer, and the rights of a performer; and

(*i*) the proposed section 273H empowers the Secretary for Commerce, Industry and Technology to exclude from the application of any provisions of the proposed sections 273A, 273B 273C and 273G any work, performance, device or service if the use of such work, performance, device or service, which does not constitute or lead to an infringement of copyright or performers' rights, has been seriously impaired as a result of the application of those provisions.

49. Clause 57 amends section 274 of the principal ordinance to—

(*a*) provide that a person who provides rights management information does not have the rights and remedies against a person who interferes with the rights management information unless the second-mentioned person knows or has reason to believe that he is inducing, enabling, facilitating or concealing an infringement of copyright or rights in performances; and

(*b*) provide that the copyright owner and his exclusive licensee has the same rights and remedies as a person who provides rights management information.

Miscellaneous and transitional matters

50. Clause 9 amends section 36(1) of the principal ordinance to clarify that the defences provided by section 36 apply only in relation to an imported copy which was lawfully made in the country, territory or area where it was made.

51. Clause 17 amends section 72(2) of the principal ordinance to achieve consistency with similar provisions (for example, the proposed sections 40B(5) and 40C(7)).

52. Clause 26 amends section 120A of the principal ordinance to vary the time limit for prosecutions under the principal ordinance to 3 years from the date of the commission of the relevant offence.

53. Clause 27(1), (2) and (3) amends section 121(1) and (2) of the principal ordinance to clarify the purpose of section 121(1) and (2) and the particulars that are required to be stated in an affidavit under section 121(1).

54. Clause 27(4) and (5) introduces the proposed section 121(2A), (2B) and (2C) of the principal ordinance to enable the deponent of an affidavit under section 121 to state that the owner of a copyright work has not granted a person named in the affidavit a licence to do an act referred to in the proposed section 118(1)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*) or (*g*) or (2A) or 119B(1) in respect of the work.

55. Clause 33 amends section 172 of the principal ordinance to enable the Chairman or Deputy Chairman of the Copyright Tribunal or any suitably qualified ordinary member of the Tribunal appointed by the Chairman of the Tribunal to act singly at such proceedings as may be specified by the Chief Justice.

56. Clause 34 amends section 187(1) of the principal ordinance to clarify that the reliefs provided by section 187 apply only in relation to an imported copy which was lawfully made in the country, territory or area where it was made.

57. Clause 37(2) amends the definition of "performance" in section 200(2) of the principal ordinance to include a performance of an artistic work and an expression of folklore.

58. Clause 58 amends section 282 of the principal ordinance as a result of the introduction of the proposed Schedule 7 to the principal ordinance.

59. Clauses 59 and 61 introduce the proposed section 283 of and Schedule 7 to the principal ordinance to provide for transitional provisions and savings in relation to the amendments made to the principal ordinance by this Bill when enacted.

60. Clause 60(1) amends Schedule 1 to the principal ordinance as a result of the introduction of the proposed sections 40A, 119B(4) and 273D(4) of the principal ordinance, and clause 60(2) updates the name of an educational establishment specified in Schedule 1 to the principal ordinance.

PART 3

61. Part 3 (clauses 62 to 64) contains miscellaneous amendments to other Ordinances.

62. Clause 62 repeals the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568).

63. Clause 63 amends paragraph 18 of Schedule 1 to the Organized and Serious Crimes Ordinance (Cap. 455) as a result of the proposed amendments in clause 9 to section 36(1) of the principal ordinance.

64. Clause 64 amends section 36D of the Prevention of Copyright Privacy Ordinance (Cap. 544) to vary the time limit for prosecutions under that Ordinance to 3 years from the date of the commission of the relevant offence, as in clause 26 in relation to section 120A of the principal ordinance.