

LEGISLATIVE COUNCIL BRIEF

Copyright Ordinance
(Chapter 528)

COPYRIGHT (AMENDMENT) BILL 2006

INTRODUCTION

A At the meeting of the Executive Council on 14 March 2006, the Council ADVISED and the Chief Executive ORDERED that the Copyright (Amendment) Bill 2006 (“the Bill”), at Annex A, should be introduced into the Legislative Council.

JUSTIFICATIONS

2. Copyright has always been controversial. Copyright owners demand stronger protection through the introduction of new civil and criminal sanctions. In addition, we are obliged to meet certain minimum standards under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

3. On the other hand, the public and business users of copyright works are wary of criminal sanctions and the introduction of new civil rights for copyright owners. Hence, in drawing up the proposals, we need to ensure that the reasonable demands of both sides are met to the greatest extent possible.

4. We consulted the public on a number of copyright-related issues from December 2004 to February 2005. In June 2005, we put forward various preliminary proposals for consultation with the Panel on Commerce and Industry of the Legislative Council (“the Panel”) and concerned stakeholders. Having regard to the views received, we refined some of the preliminary proposals and briefed the Panel and concerned stakeholders on the refined proposals in November 2005. The Bill seeks to implement these proposals to enhance copyright protection and to make our copyright exemption regime more flexible.

B 5. We have also taken the opportunity to include some amendments to enhance enforcement efficiency and to improve the operation of certain existing provisions in the Copyright Ordinance. A list of the major proposals is at Annex B.

Copyright Protection ((a) – (i))

6. Copyright owners were extremely concerned about enterprises and non-commercial organizations using infringing copies of their works in the course of business (“business end-user piracy”). They demanded that business end-user piracy be made a criminal offence, just like selling pirated goods. To curb business end-user piracy, we amended the Copyright Ordinance in 2000 to make possession of an infringing copy of any type of copyright work for use in business a criminal offence. In 2001, in response to widespread community concern, the Legislative Council passed a bill to suspend temporarily the criminalization of business end-user possession of copyright works except with respect to computer programs, movies, television dramas, and musical recordings (“the four categories of works”) (see footnote 1).

7. In 2003, we introduced the Copyright (Amendment) Bill 2003 into the Legislative Council in order to make permanent this suspension arrangement. However, we could not achieve this aim because some owners of copyright works (particularly printed works and newspapers) objected strongly to the permanent exclusion of their works from business end-user criminal protection; whereas copyright work users (e.g. the education sector) continued to express grave concerns about the possible adverse impact of any expansion in the scope of the business end-user possession criminal liability on dissemination of information and education. Hence, we need to decide on the extent (in terms of categories of copyright works and types of infringing acts) to which criminal sanctions should apply to business end-user piracy.

8. In addition, copyright owners have increasingly made use of the digital channel for storing and distributing copies of their works. They have suggested that the Copyright Ordinance requires new protection provisions to reflect this development.

(a) *Business end-user criminal liability*

9. Having considered the views received from a public consultation exercise in December 2004 to February 2005 and subsequent discussion with stakeholder groups, we propose to maintain the existing scope of the business end-user possession criminal liability to cover only “the four categories of works” and incorporate this arrangement into the Copyright Ordinance. The existing criminal offence in section 118(1)(d) combats both possession of infringing copies of copyright works for “business end-use” and “dealing in” purposes. As such, we propose to redefine this offence to make it clear that it applies to all categories of works in a “dealing in” business context only (New section 118(1)(f) in clause 22(1)) and introduce a separate provision on the business end-user possession criminal liability (New section 118(2A) in clause 22(3)).

¹ Copyright (Suspension of Amendments) Ordinance 2001 (“Suspension Ordinance”)

10. Copyright owners of printed works have demanded criminal sanctions against business end-users similar to those for the “four categories of works”. Our assessment is that the business sector, particularly the small and medium-sized enterprises, and the education sector would strongly oppose criminalization of simple possession, so we recommend only meeting such demands to a limited extent. We propose to criminalize the acts of making with a view to distributing or distributing infringing copies of copyright works published in four types of printed works (Clause 24). We aim to combat copying and distribution on a regular or frequent basis resulting in financial loss to the copyright owners of printed works. The four types of printed works are newspapers, magazines, periodicals or books.

11. To avoid any adverse impact on classroom teaching, we propose to exempt from the proposed criminal offence educational establishments which are non-profit making or subvented by Government.

12. To avoid adverse impact on business operations, we propose to provide statutory defences for three scenarios:

- (a) the user made a request for a licence, but failed to receive a timely response;
- (b) the user could not obtain commercially available copies and could not obtain a licence on reasonable commercial terms; or
- (c) the user did not know that the copies he made or distributed infringed copyright.

We also propose that the Secretary for Commerce, Industry and Technology (SCIT) be empowered to prescribe numeric limits within which criminalization will not occur (known as “a safe harbour”) by way of regulation. We will use the “safe harbour” formulation (at Annex C) that we put forward to the Panel in November 2005.

C

13. As the current criminal offence against prejudicial distribution of infringing copies of copyright works already catches distribution via uploading an infringing copy on an Internet website accessible by any person, we propose to exclude this means of distribution from the new business end-user copying/distribution criminal offence.

14. The local newspaper industry demanded strongly that the proposed offence should also apply to distribution via uploading an infringing copy on an Intranet or other private network. It also undertook to develop an appropriate licensing scheme for the electronic environment as soon as possible.

15. We accept that businesses will increasingly rely on private networks like Intranets to disseminate information. To ensure that our legal framework is up-to-date and technology neutral, we should not exclude from the proposed criminal offence the distribution of infringing copies of copyright works through uploading them onto private networks for access. Hence, we propose not to exclude this means of distribution from the proposed criminal provisions.

16. For the purpose of determining the “safe harbour” for distribution via a private network, the local newspaper industry suggested that since logs showing the actual number of accesses to an infringing copy uploaded might not be available in all cases, a presumption should be introduced to the effect that the number of copies made for distribution or distributed would be presumed to be 10% of the number of persons who could potentially access the infringing copy uploaded on the network. If a person charged could produce a network log showing the actual number of persons who had actually accessed the infringing copy, he could rebut the presumption. The book publishing industry, however, advised that it was not yet ready to consider the “safe harbour” for uploading infringing copies on Intranets.

17. A licensing scheme to enable users to use copies of printed works in an electronic environment must be available before the proposed distribution offence for printed works could take effect in relation to materials uploaded on private networks including Intranets. We also need to formulate an appropriate “safe harbour” through consultation with the concerned copyright owners and users. All these will take time. Hence, we propose to defer the application of the proposed offence to the private networks situation until those issues have been sorted out. We will specify this deferred application arrangement in the regulations to be made by SCIT.

(b) Directors’/partners’ criminal liability

18. To promote corporate accountability and responsible governance to prevent business end-user piracy, we originally proposed that if a body corporate or a partnership has done an act attracting the business end-user criminal liability, the director(s) of the body corporate or the partner(s) of the partnership responsible for chief executive functions will also be liable unless there is evidence showing that the director(s)/partner(s) has not authorized the infringing act. When we reported this refined proposal to the Panel in November 2005, there were concerns that it would be very difficult to define “chief executive functions” and for the prosecution to ascertain which directors or partners carried out such functions. We now propose to restrict the criminal liability to directors or partners responsible for the internal management of the body corporate or partnership. If there is no such director or partner, the person responsible for the internal management under the immediate authority of the directors or partners of the body corporate or partnership would be liable (new section 118(2E) in clause 22(4), and new section 119B(6) in clause 24). We also make it clear in the Bill that the burden of proof on the defendant is only an evidential burden and the defendant will absolve his liability if he can adduce sufficient evidence to raise an issue that he did

not authorize the infringing act in question. To clarify the type of evidence that the defendant may adduce, we have included in the provision a list of non-exhaustive factors for the court to consider (e.g. whether the defendant has introduced policies or practices against the use of infringing copies) (new section 118(2H) in clause 22(4), and new section 119B(8) in clause 24).

(c) Defence for employees and exemptions for certain professionals in respect of business end-user criminal liability

19. Concern has been expressed that employees are in a weak position to refuse to commit infringing acts requested by their employers. We propose to introduce new defence provisions for employees (new section 118(3A) and (3B) in clause 22(6), and new section 119B(10) and (11) in clause 24). However, these provisions will only apply if the employees were not in a position to make or influence a decision regarding the acquisition, removal or use of the infringing copy, or the making or distribution of the infringing copies.

20. Furthermore, certain professionals such as lawyers and auditors might be required in the normal course of their work to possess/use infringing copies. We originally proposed to provide a defence for these professionals. On reflection, we consider that it would be more appropriate to use an exemption approach and hence have included a provision to the effect that the business end-user possession criminal offence would not apply to these professionals (new section 118(2E) in clause 22(6)). This exemption and the defence in paragraph 19 above for the business end-user possession criminal liability will be available with retrospective effect from 1 April 2001 (i.e. the date on which the provisions creating the liability came into effect) in proceedings begun before or after the commencement of the concerned defence.

(d) Civil remedies for circumvention of technological measures

21. Apart from statutory measures under copyright law, copyright owners have the option of using “physical barriers” to prevent copyright infringement. Examples could include encryption of data or special chips which prevent unauthorized digital copying. These measures are generally called “technological measures”. Common popular examples of circumvention devices are “mod chips” that can be inserted into digital game machines so that their media can be copied onto personal computers.

22. Copyright owners have demanded the strengthening of protection against activities that circumvent the technological measures that they used to protect copyright works. The education sector, some organizations and individual members of the public feel that such new protection might affect users’ legitimate access to copyright works and hinder scientific research and technological development.

23. On balance, we propose that any person who –
- (a) makes, imports, exports, deals in, or possesses for use in business, circumvention tools that circumvent technological measures (including both copy protection measures and access control measures);
 - (b) provides services to circumvent these technological measures; and
 - (c) commits the act of circumventing these technological measures.

will be civilly liable provided that they know that the circumvention will lead to copyright infringement (New sections 273A and 273B in clause 56). We will provide exemptions to address users' concerns (see paragraphs 25 and 26).

(e) Criminal liability relating to circumvention activities

24. To combat the sale of modified game consoles and other tools which help the public to pirate copyright works, we propose to make it a criminal offence for a person who makes for sale or hire, imports or exports for sale or hire, or deals in any circumvention tools or provides circumvention services on a commercial scale. Copyright owners sometimes implement technological measures that have the effect of preventing activities that are lawful in Hong Kong, such as parallel importation for private and domestic use or recording of broadcasts for later viewing. In order not to affect these legitimate activities, we shall exclude from criminal protection technological measures that prevent access to parallel imported copies of copyright works or the recording of a broadcast or cable programme upon its reception. Moreover, the new criminal liability will not apply to television signal decoders which already attract criminal liability under the Broadcasting Ordinance (Cap. 562). We also propose to introduce a defence for those who did not know that the tool in question enabled or facilitated the circumvention (New section 273C in clause 56).

(f) Exceptions to the civil and criminal provisions

25. To address users' legitimate concerns, we propose to provide exemption for circumvention activities with the following purposes -

- (a) achieving interoperability of an independently created computer program;
- (b) research into cryptography;

- (c) identifying and disabling the function of a technological measure to collect or disseminate information which tracks and records the manner of a person's use of a computer network in order to protect privacy;
- (d) security testing for a computer or computer system/network;
- (e) gaining access to parallel imported copies of copyright works;
- (f) preventing access by minors to harmful materials on the Internet;
and
- (g) law enforcement.

When we reported our refined proposals to the Panel in November 2005, we proposed that the exemption for research into cryptography would not apply if the act of circumvention or the subsequent publication of the research information would prejudicially affect copyright owners. The education sector has raised serious concerns about this condition as academic research activities usually involve publication of the research results for further discussion or for instruction in a course of study in the related field. It may deter academic researchers from doing research and hinder further development of technology relating to cryptography. We now propose to exempt from civil and criminal liability research into cryptography involving dissemination of research information in specified manners (e.g. in journals or at conferences the readers or audiences of which are primarily persons engaged in the field of research into cryptography).

26. We also propose to empower SCIT to exclude, by notice in the Gazette, certain copyright works or circumvention tools from the application of the civil and criminal provisions proposed in paragraphs 23 and 24 where he is satisfied that the circumvention would not infringe copyright and there is a risk that the public's legitimate use of works would be unreasonably impaired (new sections 273D, 273E, 273F and 273H in clause 56).

(g) *Rights management information and allowing copyright owners and exclusive licensees to seek civil remedy*

27. With the growing popularity of lawful distribution of copyright works over the Internet, copyright owners need to incorporate data in digitized works through which copyright can be managed. For example, open or hidden data may be inserted with information about authorship, copyright ownership, and licence terms. This is known as "Rights Management Information" (RMI).

28. At present, those who provide RMI can seek civil remedies against anyone who interferes with it (e.g. removes or alters it). Copyright owners have

pointed out that they themselves may not be the person providing the RMI in all copies of their works. They have requested that both they and their exclusive licensees should be given the right as well. We propose to accede to this request. At the same time, we propose to add the condition that the person interfering with the RMI will not be civilly liable unless he or she knows that this will lead to copyright infringement (Clause 57).

(h) Rental rights for films and comic books and providing civil remedy against violation

29. The film, music and comic book industries considered that the proliferation of rental activities had deprived them of sale income and licence fees. They demanded the introduction of rental rights for their works. We propose to accede to their requests (Clause 4). Copyright owners would be able to obtain civil remedies for violation of the rental rights. Similar to the meaning of “rental” as provided for in the existing rental rights of computer programs and sound recordings under the Ordinance, “rental” does not cover making available for on-the-spot reference use. We also propose to expand the jurisdiction of the Copyright Tribunal to cover licences/licensing schemes regarding renting of copies of films and comic books to the public. To relieve possible hardship caused to persons who have acquired stocks of films and comic books for commercial rental purposes prior to the commencement of the amended provisions, we propose to introduce a saving provision so that the proposed rental rights would not apply to these existing stocks.

(i) Incorporation of the World Intellectual Property Organization (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty requirements

30. WIPO concluded two Treaties in December 1996 to update and improve the protection of copyright and related rights in the light of new digital technologies (referred to as “Internet Treaties”). Most of the requirements in the Treaties are already provided in our Copyright Ordinance. Even though we do not have an international obligation to implement the Treaties, we propose to incorporate the few remaining requirements into our Copyright Ordinance so that our intellectual property protection regime will comply with these international standards. The amendments include -

- (a) to give rental rights for literary, dramatic or musical works included in sound recordings (Clause 4);
- (b) to introduce new provisions to grant moral rights to performers with regard to their live aural performances or performances fixed in sound recordings (Clause 53);
- (c) to introduce a new provision to grant rental rights to performers over sound recordings of their performances and to empower the Copyright Tribunal to give consent on behalf of owners of such

rights in certain cases (Clauses 39 and 41). “Rental” should have the same meaning as in paragraph 29; and

- (d) to amend the definition of “performance” in section 200 of the Copyright Ordinance to make clear that it covers artistic works and expressions of folklore (Clause 37(2)).

Copyright Exemptions ((j) – (l))

31. The Copyright Ordinance lists item-by-item specific acts (“permitted acts”) which can be permitted under copyright law. This approach is rather rigid and cannot easily cater for social and technological changes and new circumstances. We need to introduce more flexibility into our copyright exemption regime.

(j) Fair dealing for education and public administration and improvements to the permitted acts for education

32. Today’s educational use of copyright works covers not only classroom instruction but also interactive and project-based teaching. Educational use of copyright works will continue to evolve with changes in teaching methods. Likewise, public administration has become increasingly complex, with stress placed on a timely response by the Government. The existing permitted acts in the Copyright Ordinance do not adequately cater for new circumstances. We therefore propose to supplement our traditional, item-by-item approach with a more general exemption provision (i.e. concept of “fair dealing”) for education and public administration purposes. We also propose to improve some of the existing permitted acts.

33. We propose to introduce a new provision to the effect that fair dealing with a work by a teacher or pupil for the purpose of giving or receiving instruction in a specified course of study provided by an educational establishment would not infringe copyright (Clause 12). We also propose to introduce a new provision to the effect that fair dealing with a work by the Government, the Executive Council, the Legislative Council, the Judiciary or any District Council for the purpose of efficient administration of urgent business would not infringe copyright (Clause 16).

34. To determine what sort of dealing is “fair dealing”, we have included the following non-exhaustive factors for the court to consider -

- (a) the purpose and character of the dealing, including whether such dealing is for a non-profit making purpose and whether the dealing is of a commercial nature;
- (b) the nature of the copyright 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 upon the potential market for or value of the work.

We will introduce similar fair dealing provisions for performances and fixation of performances (Clauses 48 and 51). For consistency, we propose to align with the above four factors the factors under section 38 of the Copyright Ordinance relating to fair dealing for the purpose of research or private study (Clause 10(2)).

35. We also propose to make the following improvements to the existing permitted acts for education to cater for actual situations or new circumstances that have emerged –

- (a) to include near relatives (see footnote 2) in the composition of audiences under section 43 of the Copyright Ordinance so that the performance, playing or showing of a copyright work in the course of activities of educational establishments before them can qualify as a permitted act (Clause 13);
- (b) to remove the existing restriction that the permitted acts of recording broadcasts and cable programmes and reprographic copying of passages from published works by educational establishments under sections 44 and 45 of the Copyright Ordinance will not be permitted if there are relevant licensing schemes granting authorizations for the recording or copying concerned (Clauses 14 and 15(3)); and
- (c) to extend the scope of the permitted act under section 45 of the Copyright Ordinance to allow limited reprographic copying of passages from published works by students at educational institutions (and not just by the teachers and the institutions, as at present)(Clause 15(2)).

We will make similar improvements to those permitted acts for performances where applicable. We also propose to introduce a saving provision to the effect that licences or agreements entered before the commencement of the proposed amendments will not be affected by the amendments. We will provide the same saving provision for existing licences or agreements for the proposed amendments in paragraphs 36 to 38 below.

² “Near relative” means a parent, grandparent, spouse, brother or sister, half-brother or half-sister, child (including illegitimate or adopted child), grandchild, or son-in-law or daughter-in-law (including a spouse of an illegitimate or adopted child).

(k) New permitted act for persons with a print disability

36. In order to meet the special reading needs of persons with a print disability, we propose to introduce a new permitted act to facilitate the production of specially adapted copies of copyright works for their use. This will enable persons with a print disability or specified bodies, under specified circumstances, to make accessible copies (e.g. in the form of a Braille, large-print, electronic version, or sound recording) of certain copyright works without infringing copyright. Persons with a print disability include persons with blindness or visual impairment and those who are not able, through physical disability, to hold or manipulate a book, or to focus or move their eyes for reading. A specified body refers to a non-profit making educational establishment, or a non-profit-making organization which is charitable or for the well-being of persons with a print disability.

37. We propose to apply this new permitted act for persons with a print disability to works published in both printed and electronic forms. The permitted act will not apply unless the agency seeking to make the copies has made reasonable enquiries and is satisfied that accessible copies of the copyright work concerned cannot be obtained at a reasonable commercial price. Moreover, the agencies making the copies need to notify the copyright owners within a reasonable time period before or after making the accessible copies and to keep records of the making and supplying of accessible copies for inspection by copyright owners (Clause 11).

(l) New permitted act for playing sound broadcast in vehicles

38. At present, playing certain copyright works in public requires the copyright owners' prior authorization. In response to suggestions that drivers' access to news, traffic or weather information through radio broadcasts should not be hampered, we propose to introduce a new permitted act provision so that it is not an infringement to play a sound broadcast inside a vehicle for the purpose of affording the driver of the vehicle access to public information (Clauses 18 and 52).

Parallel Importation (m)

39. Under the existing Copyright Ordinance, it is a criminal offence to deal in, or to import otherwise than for private and domestic use, any parallel imported copyright work if the work has been published anywhere in the world for 18 months or less. Besides, using or possessing a parallel imported movie, television drama or musical recording for use in business during the said period is also a criminal offence. If the copyright work has been published for more than 18 months, the above acts would only attract civil liability. The consumers and the business sector, particularly the retailers, are strongly in favour of liberalizing parallel importation, while copyright owners, particularly the film, music and publishing industries remain strongly against it.

(m) Liberalization in the use of parallel imports

40. Having balanced the interests of copyright owners and users, we propose to shorten the criminal liability period from the existing 18 months to nine months (Clause 7(2)). We also propose to amend the law to permit business use of parallel imports of copyright works and fixations, except for commercial dealing purposes or public playing of movies, TV dramas, musical sound/visual recordings by organizations other than educational establishments and libraries (Clauses 8 and 45).

41. We further propose that the decriminalization in relation to parallel imported copies of copyright works should apply retrospectively for any infringing acts committed before commencement of the amendment. However, the right to seek civil remedies by copyright owners against any infringing acts committed before the commencement of the amended provisions will not be affected.

Improving Enforcement Efficiency and Effectiveness ((n) – (p))

(n) Time limit for prosecutions

42. Section 120A of the Copyright Ordinance stipulates that “no prosecution for an offence under the Ordinance shall be commenced after the expiration of three years from the date of commission of the offence or one year from the date of discovery of the offence by the prosecutor, whichever is the earlier.” With the frequent need to obtain evidence from overseas right-owners, the growing complexity of copyright-related offences and possible involvement of triad and syndicate elements, the Customs and Excise Department has found it increasingly difficult to complete investigation into these offences to enable prosecution actions to proceed within the time limit. We therefore propose to amend the time limitation period to three years from the date of commission of the offence (Clause 26). As there may be situations in which a particular criminal act constitutes an offence under both the Copyright Ordinance and the Prevention of Copyright Piracy Ordinance (PCPO) (Cap. 544) which currently provides for the same time limit, we propose that corresponding amendments should be made to the time limit for prosecutions in PCPO as well.

(o) Proof of absence of licence from copyright owner

43. When prosecuting a criminal act under section 118 of the Copyright Ordinance (e.g. distributing or selling infringing copies), one of the things that the prosecution has to prove is that the offending acts were done without the licence of the copyright owner. In some cases, it necessarily requires the copyright owner to give evidence personally in court and it may not be easy when the copyright owner is in overseas. The complex licensing arrangements covering certain works may involve different licensees in different territories and layers of sub-licensing. This can make it difficult for the prosecution to prove that the copyright owner has not licensed the defendant to do the relevant offending acts. Hence, we propose to introduce new

provisions to section 121 of the Copyright Ordinance so that an affidavit may be sworn stating on behalf of the copyright owner that the copyright owner has not licensed the defendant to do the offending acts. Such a statement, subject to certain specified conditions, would be admitted without further proof in the proceedings under section 118 (Clause 27(4) and (5)).

(p) Particulars of the author in affidavit evidence

44. Section 121(1) of the Copyright Ordinance allows the submission of affidavits under specified conditions as prima-facie evidence of copyright subsistence and ownership by copyright owners in infringement proceedings. According to section 121(1)(b), such affidavits should contain the name, domicile, residence or right of abode of the author of the work. In a previous court case [*HKSAR v Elegant Technology Limited*], the Court of Appeal did not accept that “the domicile, residence or right of abode of the author” in section 121(1)(b) were all alternatives. As the places of residence of the authors were omitted from the affidavit filed in that case, the affidavit was held to be defective. There is hence a need to improve the wording of the provision to state clearly the information required to be filled in the affidavits. Besides, some copyright owners have suggested that where the author of a work is a body corporate, the existing wording of section 121(1)(b) may not be clear enough to reflect what information should be provided. We therefore propose to amend section 121(b) to clarify the requirement (Clause 27(1)-(3)).

Operation of the Ordinance [(q) to (s)]

(q) Power of the Chairman, Deputy Chairman and certain members of the Copyright Tribunal to sit singly in certain proceedings

45. According to section 172 of the Copyright Ordinance, panels of the Copyright Tribunal for the purposes of any proceedings shall consist of a chairman (who is either the Chairman or the Deputy Chairman of the Tribunal) and two or more ordinary members of the Tribunal. To ensure that proceedings before the Tribunal are flexible, convenient and inexpensive, we consider that certain proceedings such as pre-trial reviews, case management conferences and interlocutory hearings, which mainly serve to regulate proceedings, do not require the full panel of the Tribunal to sit and determine. The Chairman, Deputy Chairman and ordinary members (required to have the qualification for appointment as a District Judge) as appointed by the Chairman of the Tribunal should be empowered to sit singly in such proceedings and make determinations. We therefore propose to amend section 172 to provide for this arrangement (Clause 33).

(r) Deletion of the phrase “in connection with”

46. We have taken the opportunity of the Bill to effect the proposal put forward by the Government in 2002 to delete the phrase “in connection with” from the

expression “for the purpose of, in the course of, or in connection with, any trade or business” wherever it appeared in the Copyright Ordinance. This will include deleting the phrase from the relevant civil provisions in the Ordinance as well. The effect is that activities incidental to or marginally related to business will fall outside the scope of the civil law and criminal offence provisions.

(s) Definition of “business”

47. We propose to amend the definition of the term “business” in section 198 of the Copyright Ordinance to put it beyond doubt that the term includes business conducted other than for profit.

THE BILL

48. The main provisions of the Bill are set out below –

(a) Business End-user Criminal Liability

(i) **Clause 22** amends section 118 to –

- reflect and modify the application of the existing section 118(1) as read together with the Suspension Ordinance and provides for presumptions to facilitate the enforcement of the re-drafted offences in sections 118(1)(e) and 118(1)(f)(ii); and
- provide for the business end-user possession criminal liability;

(ii) **Clause 62** repeals the Suspension Ordinance;

(iii) **Clause 24** adds the **new section 119B(1) and (2)** to provide for the new offence of making for distribution or distributing infringing copies of copyright works in printed form;

(b) Directors’/partners’ criminal liability

(iv) **Clause 22** amends section 118 to provide for the directors’/partners’ criminal liability in the business end-user criminal possession offence;

(v) **Clause 24** adds the **new section 119B(6) and (7)** to provide for and the directors’/partners’ liability in the business end-user criminal copying/distribution offence;

(c) Defence for employees and exemptions for certain professionals in respect of business end-user criminal liability

(vi) **Clause 22 amends** section 118 to provide for a defence for employees and exemptions for legal professionals and certain service providers from the business end-user criminal possession offence;

(vii) **Clause 24** adds the **new section 119B(10) and (11)** to provide for a defence for employees for the business end-user criminal copying/distribution offence;

(d) Civil remedies for circumvention of technological measures

(e) Criminal liability relating to circumvention activities

(f) Exceptions to the civil and criminal provisions

(viii) **Clauses 55 and 56** add the **new sections 273 to 273H** to, inter alia, introduce the civil law and criminal provisions associated with circumvention, and to provide for exceptions to these provisions;

(g) Rights management information and allowing copyright owners and exclusive licensees to seek civil remedy

(ix) **Clause 57** amends section 274 to, inter alia, provide that the copyright owner and his exclusive licensee has the same right and remedies as a person who provides rights management information;

(h) Rental rights for films and comic books and providing civil remedy against violation

(x) **Clause 4** replaces the existing section 25(1) with the **new section 25(1)** which grants rental rights for, inter alia, films and comic books;

(i) Incorporation of the World Intellectual Property Organization (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty requirements

(xi) **Clause 4** replaces the existing section 25(1) with the **new section 25(1)** which grants rental rights for, inter alia, literary, dramatic or musical works included in sound recordings;

- (xii) **Clause 53** adds the **new Part IIIA** (sections 272A to 272O) to grant new moral rights to a performer of a live aural performance or a performer whose performance is fixed in a sound recording;
 - (xiii) **Clause 39** adds the **new section 207A** to grant rental rights to a performer whose performance is fixed in a sound recording;
 - (xiv) **Clause 37(2)** amends the definition of “performance” in section 200;
- (j) *Fair dealing for education and public administration and improvements to the permitted acts for education*
- (xv) **Clauses 12, 16, 48 and 51** add the **new sections 41A, 54A, 242A and 246A** to provide for new permitted acts in respect of fair dealing with a copyright work, a performance or a fixation of performance for the purposes of education and public administration;
 - (xvi) **Clauses 13, 14, 15, 49 and 50** amend sections 43, 44, 45, 244 and 245 to make improvements to the existing permitted acts for education in respect of copyright and rights in performance;
- (k) *New permitted act for persons with a print disability*
- (xvii) **Clause 11** adds the **new sections 40A to 40F** to provide for a new permitted act for persons with a print disability;
- (l) *New permitted act for playing sound broadcast in vehicles*
- (xviii) **Clauses 18 and 52** add the **new sections 81A and 258A** to provide for new permitted acts in respect of copyright and rights in performance for the playing of a sound broadcast in vehicles;
- (m) *Liberalization in the use of parallel imports*
- (xix) **Clause 7(2)** amends section 35(4)(b) to reduce the period in respect of which parallel importation of copyright works would attract criminal liability from 18 months to nine months after the publication of the work;
 - (xx) **Clauses 8 and 45** add the **new sections 35B and 229A** to exclude from the application of sections 35(3) and 229 respectively to parallel imported copyright works and parallel imported fixations which are imported or acquired otherwise than for certain

commercial dealing purposes so as to remove the liability pertaining to importation and possession of parallel imported items by business end-users;

(n) *Time limit for prosecutions*

(xxi) **Clause 26** amends section 120A to vary the time limit for prosecutions;

(o) *Proof of absence of licence from copyright owner*

(xxii) **Clause 27(4) and (5)** adds the **new section 121(2A), (2B) and (2C)** to facilitate the proof of absence of licence from a copyright owner in relevant criminal proceedings under the new sections 118 and 119B by means of affidavit evidence;

(p) *Particulars of the author in affidavit evidence*

(xxiii) **Clause 27(2)** amends section 121(1) to clarify the particulars that are required to be stated in an affidavit under section 121;

(q) *Power of the Chairman, Deputy Chairman and certain members of the Copyright Tribunal to sit singly in certain proceedings*

(xxiv) **Clause 33** amends section 172 to empower the Chairman, Deputy Chairman or any suitably qualified ordinary member of the Copyright Tribunal appointed by the Chairman to sit and act singly in certain proceedings before the Tribunal.

LEGISLATIVE TIMETABLE

49. The legislative timetable is as follows –

Publication in the Gazette	17 March 2006
First Reading and commencement of Second Reading debate	29 March 2006
Resumption of Second Reading debate, Committee Stage and Third Reading	to be notified

50. The validity of the Suspension Ordinance referred to in paragraph 6 will expire on 31 July 2006. Depending on the progress of discussion at the Bills Committee, we may need to seek the Legislative Council's approval of another extension in the validity of the Suspension Ordinance.

IMPLICATIONS OF THE PROPOSAL

D 51. The proposal has economic, financial and civil service, and sustainability implications as set out at Annex D. It has no productivity and environmental implications and does not change the binding effect of the Copyright Ordinance. The proposal is in conformity with the Basic Law, including provisions concerning human rights.

PUBLIC CONSULTATION

52. Our package of proposals is drawn up after extensive discussions with the relevant stakeholder groups over two years and a public consultation exercise. The recommendations in this paper represent the best that we can do to balance the interests of copyright owners against those of copyright work users. Given the diametrical nature of these interests, it is inevitable that in certain areas (notably parallel importation, business end-user copying/distribution criminal liability and directors'/partners' criminal liability), the appropriate degree of copyright protection and exemption/liberalization will remain a point of controversy that needs to be further debated and resolved at the Bills Committee stage.

53. We first consulted the Panel on the preliminary proposals at its meeting on 21 June 2005. We refined our preliminary proposals in the light of Members' views about the need for a reduction in the criminal liability period for parallel imports and concerns about the proposed directors'/partners' criminal liability. At our second consultation with the Panel on the refined proposals on 15 November 2005, some Members continued to express concerns about the proposed directors'/partners' criminal liability despite the reduction in its scope. A Member, on the other hand, criticized us for watering down some of the protection for copyright owners proposed in our preliminary proposals. Overall, the Panel noted without objection our intention to incorporate all the proposals in the amendment bill for further consideration at the Bills Committee stage.

54. We expect that copyright owners and users will continue to submit diametrical arguments both to us and to the Legislative Council on issues such as parallel importation, the proposed business end-user copying/distribution criminal liability and the directors'/partners' criminal liability. We will continue to engage them in constructive dialogue as we work out Committee Stage Amendments to the Bill.

PUBLICITY

55. A press release will be issued today (16 March 2006). Detailed briefings will be conducted for the media. A spokesman will be made available to answer enquiries.

ENQUIRIES

56. Any enquiries on this brief can be addressed to Ms Priscilla To, Principal Assistant Secretary for Commerce, Industry and Technology (Commerce and Industry) at telephone number 2918 7480.

Commerce and Industry Branch
Commerce, Industry and Technology Bureau
16 March 2006

COPYRIGHT (AMENDMENT) BILL 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), 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 -

"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

(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.

(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 -

- (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.

(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 sold, let for hire, or offered or exposed for sale or hire."

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
 - (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.

(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 -

- (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.

(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 sold, let for hire, or offered or exposed for sale or hire."

17. Advertisement of sale of artistic work

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;
- (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
 - (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; or
- (g) distributes an infringing copy of the work (otherwise than for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works) to such an extent as to affect prejudicially the copyright owner."

(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 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.

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

- (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 was made available to the public together with another work, not being a computer program itself, that requires the use of the computer program to be viewed or listened 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).

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

- (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 -

(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.

(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 issue with respect to that fact; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.

(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."

(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.

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

- (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."

(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 -

"(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
- (b) states that the owner has not granted 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 granted 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 granted 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)".

(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 -

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" (侵犯權利物品) 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 272I 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.

2720. 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".

55. Section substituted

Section 273 is repealed and the following substituted -

"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; 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 -

(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,

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.

(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;
- (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;
- (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
- (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 -

(a) subject to paragraph (b), means any device, product, component or means 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);

"relevant service" (有關服務), in relation to the effective technological measure referred to in that subsection, means any service which is performed for the purpose of enabling or facilitating the circumvention of the measure.

(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.

(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.

(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 copyright owner.

(4) In subsection (3) -

"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 -

- (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 which tracks and records the manner of a person's use of a computer network without providing conspicuous notice of such 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; and
- (c) the act does not affect the ability of any person to gain access to any work.

(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" (有關作為) 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.

(5) In subsection (4), "relevant act" (有關作為) 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

(iv) provides any relevant service to that other person.

(7) In subsection (6), "relevant act" (有關作為) 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 -

- (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 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.

(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;

"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.

(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.

(3) In subsection (2), "relevant act" (有關作為) 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 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.

- (5) In subsection (4), "relevant act" (有關作為) 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;
 - (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.

(7) In subsection (6), "relevant act" (有關作為) 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 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.

(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 an effective technological measure -

- (a) which has been applied in relation to a copyright work issued to the public in a physical article; and
- (b) which contains regional coding or otherwise has the effect of preventing or restricting access to the work for the purpose of controlling market segmentation.

(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 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.

**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 7(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.

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 accessible 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.

Proposals in the Copyright (Amendment) Bill 2006

Copyright Protection ((a) – (i))

(a) *Business end-user criminal liability*

A new business end-user criminal offence against the infringing acts of making with a view to distributing or distributing infringing copies of copyright works published in four types of printed works. Such infringing acts will have to be done on a regular or frequent basis resulting in financial loss to the copyright owners concerned. The four types of printed works are newspapers, magazines, periodicals or books. This criminal offence will not apply to non-profit making or Government subvented educational establishments or if the extent of infringement does not exceed a numerical level to be prescribed by way of regulation by SCIT (“safe harbour”). (*New Criminal Liability*)

(b) *Directors’/partners’ criminal liability*

A new criminal offence against director(s) or partner(s) who are responsible for the internal management of a body corporate or partnership if the body corporate or partnership has done an act attracting the business end-user criminal liability, unless he proves that he did not authorize the act. If there is no such director or partner, any persons responsible for the internal management of the body corporate or partnership under the immediate authority of the directors or partners may then be liable. (*New Criminal Liability*)

(c) *Defence for employees and exemptions for certain professionals in respect of business end-user criminal liability*

(For the business end-user possession criminal offence) A statutory defence for an employee who possesses an infringing copy provided by his employer but the employee should not be in a position to make or influence a decision regarding the acquisition, removal or use of the infringing copy when the offence was committed. (*Exemptions from Criminal Liability*)

(For the business end-user distribution criminal offence) A statutory defence for an employee who makes for distribution or distributes an infringing copy in accordance with the instruction of his employer but the employee should not be in a position to make or influence a decision

regarding the making or distribution of the infringing copy when the offence was committed. (*Exemptions from Criminal Liability*)

(For the business end-user possession criminal offence) Exemptions for a solicitor, barrister or service provider who possesses an infringing copy for the purpose of giving legal advice or investigation services and for a person possessing on his client's premises an infringing copy which was provided by his client. (*Exemptions from Criminal Liability*)

(d) *Civil remedies for circumvention of technological measures*

Extended civil liability against any person who deals in circumvention tools or provides circumvention services (irrespective of whether it is in commercial context or not). It is already a civil liability to deal in tools which circumvent copy-protection measures. Tools which circumvent access control measures and circumvention services will be added to the scope of civil liability. (*New Civil Liability*)

New civil liability against any person who circumvents a technological measure (i.e., access control measures or copy-protection measures) used for copyright protection. (*New Civil Liability*)

(e) *Criminal liability relating to circumvention activities*

A new criminal offence against any person who is engaged in commercial dealing of circumvention tools or provides circumvention services in a circumvention business. (*New Criminal Liability*)

(f) *Exceptions to the civil and criminal provisions*

Exemption for circumvention activities with the following purposes -

- achieving interoperability of an independently created computer program;
- research into cryptography;
- identifying and disabling the function of a technological measure to collect or disseminate information which tracks and records the manner of a person's use of a computer network in order to protect privacy;
- security testing for a computer or computer system/network;

- gaining access to parallel imported copies of copyright works;
- preventing access by minors to harmful materials on the Internet; and
- law enforcement.

(Exemptions from Civil and Criminal Liability)

(g) Rights management information and allowing copyright owners and exclusive licensees to seek civil remedy

New rights to copyright owners and their exclusive licensees to seek civil remedies against any person who tampers with rights management information attached to copyright works. At present, only the persons who provide such information can seek civil remedies. ***(New Civil Liability)***

(h) Rental rights for films and comic books and providing civil remedy against violation

New civil liability against any person who offers films or comic books for commercial rental without the authorization of the copyright owners. ***(New Civil Liability)***

(i) Incorporation of the World Intellectual Property Organization (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty requirements

New civil liability against any person who offers a sound recording for commercial rental without the authorization of the right holders of the underlying works (e.g. lyrics and music) in the sound recording or the right holders of the performances fixed in sound recording. ***(New Civil Liability)***

New civil liability against any person who infringes the moral rights of a performer of a live aural performance or a performance fixed in a sound recording (i.e., the rights to be identified as the performer of the performance or the right to object to any distortion, mutilation or other modifications of this performance that would be prejudicial to his reputation). ***(New Civil Liability)***

Copyright Exemption ((j)-(l))

(j) Fair dealing for education and public administration and improvements to the permitted acts for education

A new exemption for fair dealing with a work for the purposes of education and improvements to the permitted acts for education. ***(Removal of Civil and Criminal Liability)***

A new exemption for fair dealing with a work for the purposes of public administration. ***(Removal of Civil and Criminal Liability)***

(k) New permitted act for persons with a print disability

A new exemption for the making of specialized formats of certain copyright works for persons with a print disability. ***(Removal of Civil and Criminal Liability)***

(l) New permitted act for playing sound broadcast in vehicles

A new exemption so that the playing a sound broadcast in vehicles for enabling drivers to have access to public information will not constitute copyright infringement. ***(Removal of Civil Liability)***

Parallel importation (m)

(m) Liberalization in the use of parallel imports

Shortened criminal sanction period for parallel imports from 18 months to 9 months from the first publication of the work anywhere in the world. As a result, no criminal liability will apply to importing for commercial dealing purposes or commercially deal in parallel imports of copyright works that have been published anywhere in the world between nine and 18 months; but civil liability will remain. ***(Removal of Criminal Liability)***

Removal of the civil and criminal liability associated with the importation and possession of parallel imported copies of copyright works by business end-users. This removal does not apply to movies, TV dramas, musical sound recordings, and musical visual recordings acquired for showing/playing in public, unless the business end-user is an educational establishment or a specified library. ***(Removal of Civil and Criminal Liability)***

Improving Enforcement Efficiency and Effectiveness ((n) – (p))

(n) Time limit for prosecutions

To change the time limit for prosecution to 3 years from the date of commission of the offence (*Not affect the existing liability*)

(o) Proof of absence of licence from copyright owner

To facilitate the proof of absence of licence from a copyright owner in certain criminal proceedings (*Not affect the existing liability*)

(p) Particulars of the author in affidavit evidence

To clarify the particulars required to be stated in an affidavit (*Not affect the existing liability*)

Improving Operation of the Ordinance (q)

(q) Power of the Chairman, Deputy Chairman and certain members of the Copyright Tribunal to sit singly in certain proceedings

To enable the Tribunal to operate in a more flexible, inexpensive and convenient manner (*Not affect the existing liability*)

Annex C

We announced in November 2005 the following safe harbour perimeters for the proposed business end-user copying/distribution criminal offence for printed works –

- (a) For copyright works in newspapers, magazines and periodicals (excluding academic journals), the proposed business end-user copying/distribution criminal offence will not apply if the aggregate number of infringing copies made from all copyright works concerned for distribution or distributed does not exceed 1,000 copies within any 14-day period; and
- (b) For copyright works in books (including academic journals), the proposed business end-user copying/distribution offence will not apply if the total retail value of the infringing copies made for distribution or distributed within a 180-day period does not exceed \$8,000, assuming that one infringing copy of more than 15% of the number of pages of the book concerned (a qualifying infringing copy) only will count for the purpose of calculating the retail value perimeter. Non-qualifying infringing copies will not count for the purpose of retail value calculation except when the cumulative number of copies made/distributed within the 180-day period exceeds 50% of the number of pages of the book concerned, in which case all the non-qualifying infringing copies together will count for the purpose of calculating the retail value perimeter.

2. Below are some examples to illustrate the operation of the safe harbour –

Example I (For the safe harbour in paragraph (a) above)

A company makes for distribution 10 infringing copies each of the following news articles everyday -

- 1 news article from Newspaper A
- 2 news articles from Newspaper B
- 2 news articles from Newspaper C
- 3 news articles from Newspaper D

This company also makes for distribution 10 infringing copies each of the following feature articles within a 14-day period –

1 feature article from Magazine E
2 feature articles from Periodical F

Total number of infringing copies made for distribution within the 14-day period

= (1+2+2+3) news articles x 10 copies x 14 days + (1+2) feature articles x 10 copies

= 1120 + 30 copies

= 1150 copies

Hence, the extent of copying for distribution by this company exceeds the safe harbour.

Example II (For the safe harbour in paragraph (b) above where copies made on each occasion exceed 15% of the number of pages of a book)

A company makes for distribution 10 infringing copies each of the following three reference books within a 180-day period (each book comprises 100 pages and costs HK\$300) –

16 pages from Book A
16 pages from Book B
16 pages from Book C

The retail value of the infringing copies made by this company within the 180-day period

= 10 copies x 3 books x \$300

= \$9,000

Hence, the extent of copying for distribution by this company exceeds the safe harbour.

Example III (For the safe harbour in paragraph (b) above where copies made on each occasion do not exceed 15% of the number of pages of a book)

A company makes for distribution 10 infringing copies each of the following pages from a reference book within a 180-day period (the book comprises 100 pages and costs HK\$300) -

10 pages from the Book on Day 1 (cumulatively 10% of the book)
10 pages from the Book on Day 2 (cumulatively 20% of the book)
10 pages from the Book on Day 3 (cumulatively 30% of the book)
10 pages from the Book on Day 4 (cumulatively 40% of the book)
10 pages from the Book on Day 5 (cumulatively 50% of the book)
10 pages from the Book on Day 6 (cumulatively 60% of the book)

The retail value of the infringing copies made by this company within the 180-day period

= 10 copies x \$300 = \$3,000

Hence, the extent of copying for distribution by this company does not exceed the safe harbour.

Economic Implications

The proposed introduction of a new business end-user copying/distribution offence in relation to copyright works in books, newspapers, magazines and periodicals will strengthen the protection for these copyright works. The concerned publishers will be able to obtain licence fees from business users, which should be conducive to the development of the concerned industries. Whether businesses will be caught under the new offence and the required compliance cost will depend on the purpose and extent of the copying/distribution and the types of copyright works involved. Based on the licensing schemes promulgated by the newspaper licensing association in Hong Kong (which cover 12 Hong Kong newspapers), the compliance cost on SMEs should not be very significant given their small size and assumed limited circulation of the articles¹.

2. The proposed introduction of the partners/directors criminal liability for the business end-user possession and copying/distribution offence may induce businesses to put in place software asset management and better corporate governance. This may involve some additional cost.

3. The proposed further liberalization of parallel imports will enable business end-users and general consumers to enjoy a wider choice of copyright works at lower costs. However, the proposed shortening of the 18-month period to 9 months during which parallel imports may attract criminal liability may have some impact on the commercial interests of copyright owners and exclusive licensees. They will face stronger competition from parallel imports.

4. The proposed additional protection for copyright owners against circumvention of technological measures for copyright protection will facilitate copyright owners to develop new sales model in the digital environment. This is conducive to the further development of creative industries.

¹ The newspaper licensing associating charges a fixed fee of \$500 per year for any organization with less than 50 employees which makes copies of no more than 100 articles per month from any of the 12 newspapers which are members of the association and circulates the newspaper photocopies to no more than 5 readers.

Financial and Civil Service Implications

5. The proposed business end-user copying/distribution criminal offence and the proposed criminal offence concerning circumvention of technological measures will increase the workload of the Customs and Excise Department. The Department will undertake the additional work with its existing resources.

Sustainability Implications

6. The proposals will contribute to the vibrancy of Hong Kong's economy by facilitating the development of creative and copyright industries.