

Yau Tsim Mong District Council Meeting

Proposals on Various Copyright-Related Issues

Introduction

We conducted a public consultation exercise on the review of certain provisions of the Copyright Ordinance (Cap. 528) from mid-December 2004 to mid-February 2005. This paper reports on the results of the consultation exercise and introduces the Administration's preliminary proposals.

Background

2. We amended the Copyright Ordinance in 2000 to introduce end-user criminal liability for the possession of an infringing copy of a copyright work for use in business. As a result of widespread public concerns about the impact of such liability on dissemination of information and education, we suspended on a temporary basis the end-user possession criminal liability provision in the Copyright Ordinance, other than for four categories of copyright works, namely, computer programs, movies, television dramas, and musical recordings. In 2003, we proposed to the Legislative Council (LegCo), amongst other things, to make the suspension arrangement a long term one. Some owners of copyright works (e.g. printed works) strongly objected to this proposal whereas some copyright work users (e.g. users in the education sector) continued to express concerns about the possible adverse impact of the business end-user possession criminal liability on dissemination of information and education. In order to allow time for thorough deliberation of these issues, the Administration extended the validity of the suspension arrangement to end July 2006.

3. As copyright-related issues carry wide social implications affecting many sectors of the community, we decided to consult the public widely before formulating fresh proposals. In mid-December 2004, we issued a consultation document and launched a two month public

consultation exercise. The issues covered in the consultation document including the scope of the business end-user criminal liability, copyright exemption, rental rights and parallel importation etc.

Results of Consultation Exercise

4. We received about 430 submissions, of which more than 120 were from organizations in various sectors and about 300 were from individual members of the public. Three District Councils invited us to give a briefing on the consultation document at their Council/Committee meetings. We also organized a public forum in early February 2005 to gauge the public's views and the forum was well attended by some 200 persons. A summary of the views on the various issues is tabulated at Annex A for Members' reference.

5. In general, the views received from users of copyright works are diametrically different from those of copyright owners on many of the issues raised in the consultation document, e.g. scope of criminal liability, parallel importation and rental rights. Whilst copyright owners stressed the importance of further strengthening our copyright protection regime to facilitate the development of creative industries, copyright work users maintained that their need for the reasonable use of copyright works in specific circumstances and the availability of a wide choice of copyright items should be taken care of.

Proposals

6. After having carefully considered the diverging views received and further discussed with concerned stakeholder groups over the last few months, we have formulated a package of preliminary proposals which we feel could strike a reasonable balance between the interests of copyright owners and those of users. The relevant considerations and details of the preliminary proposals are set out in the following paragraphs. A list summarizing the proposals is at Annex B.

Business End-user Criminal Liability

7. In the Copyright Ordinance, the term 'business' is not only confined to commercial activities, it also covers non-profit making business such as educational, charitable and government activities.

Scope of business end-user possession criminal liability

8. In the public consultation exercise, users of copyright work continued to express great concerns about any extension to the scope of business end-user possession criminal liability to other categories of works, especially printed works, for fear of the adverse impact on the free flow of information and classroom teaching. Copyright owners, on the other hand, continued to demand the widening of the scope of end-user criminal liability to include printed copyright works on the ground that such works might be copied easily and distributed widely and that such copying and distribution existed quite commonly in the business context. On balance, we **propose** to maintain the existing scope of business end-user possession criminal liability to cover only four categories of copyright works, namely, computer programs, movies, television dramas, and musical recordings; and incorporate such provision in the Copyright Ordinance before the suspension arrangement expires in July 2006.

New criminal liability for copying/distribution of copyright infringing printed works

9. To partially meet the concerns of the copyright owners of printed works, we **propose** to introduce a new criminal offence for significant infringing acts of copying with a view to distributing or distributing infringing copies of copyright works published in four specific types of printed works, namely, newspapers, magazines, periodicals and books, in the course of and for the purpose of business, to staff or participants. The proposed offence should cover both the acts of providing the infringing copies physically or making available the copies by digital means.

10. Due to the difference in nature and mode of infringements involving books vis-à-vis the other three types of printed works, we **propose** a different formulation for the suggested criminal offence applying to these two groupings –

- (a) in relation to copyright works in newspapers, magazines or periodicals (excluding academic journals), the infringing acts in paragraph 9 above will attract criminal sanction if they are done on a regular or frequent basis resulting in financial loss to the copyright owner. We intend to specify a numerical threshold in the law under which the infringing acts will not attract criminal liability (“safe harbour”). One possible threshold is that the offence would only apply if the number of copies distributed exceeds a certain level; and
- (b) in relation to copyright works in books (including academic journals), the infringing acts in paragraph 9 above will attract criminal sanction if the acts are done on a significant scale resulting in financial loss to the copyright owner. Again, we intend to provide a “safe harbour” against the criminal liability by stating a numerical threshold in the law. Possible thresholds may include the percentage of the book copied for distribution, the equivalent retail value of purchases displaced on the assumption that one infringing copy will displace the purchase of a book, the number of infringing copies distributed, or a combination of these thresholds.

11. We further **propose** that a person charged with the suggested new criminal offence may invoke a statutory defence if –

- (a) he has taken adequate and reasonable steps to obtain a licence from the copyright owner but failed to get a response or a timely response from the copyright owner;
- (b) the copyright work concerned is out of print or not available for sale in the market and the copyright owner has refused to give a licence on reasonable commercial terms; or
- (c) he does not know and has no reason to believe that the copies made or distributed are infringing copies.

12. We note that teachers may need to make and distribute copies of copyright works in books, newspapers, magazines or periodicals for teaching purposes, particularly for liberal studies and school-based teaching. The proposed criminal offence may deter teachers from using such materials altogether for fear of criminal sanction, thereby hindering classroom teaching. We therefore **propose** to exempt non-profit making educational establishments and educational establishments subvented by the Government from the proposed criminal provision to facilitate teaching. We consider it would not be appropriate to exempt profit-making educational establishments not subvented by the Government from the proposed offence as these establishments receive commercial or financial advantage, directly or indirectly, from the infringing acts.

13. Copyright owners in the publishing industry generally agree that the proposed business end-user copying/distribution offence should target at significant infringing activities only. We will need to discuss with them the detailed formulation of the numerical thresholds for the proposed offence.

14. The local newspaper industry generally agrees with the proposed exemption of non-profit making educational establishments and educational establishments subvented by Government from the proposed business end-user copying/distribution criminal liability. Other copyright owners in the publishing industry, however, would only be prepared to accept the proposed exemption for a finite period (e.g. three years), provided that the exemption does not apply to infringing acts involving textbooks and materials marketed primarily for instructional uses. They consider that infringement on a "significant scale" by non-profit making educational establishments could virtually destroy the potential market for these works and the concerned copying/distribution infringing acts involving such works should attract criminal sanctions. However, we consider this limited exemption could not address the concern that the proposed business end-user copying/distribution criminal liability might hinder classroom teaching as explained in paragraph 12 above.

15. The proposed business end-user copying/distribution offence will strengthen the copyright protection for copyright works in books, newspapers, magazines and periodicals and facilitate the development of the concerned publishing industries. The compliance cost on businesses will vary according to the purpose and extent of the copying/distribution and the types of copyright works involved. Based on the licensing schemes promulgated by the Hong Kong Copyright Licensing Association (which cover 12 Hong Kong newspapers), the compliance cost on small and medium enterprises should not be very significant given their small size and assumed limited circulation of the articles (see footnote 1). The existing mechanism whereby users of copyright works can refer licensing schemes to the Copyright Tribunal, which is empowered to determine the reasonableness of the terms and conditions of the schemes, should provide safeguards against copyright owners imposing unreasonable licence fees or conditions on users.

Employees' and certain professionals' defence against end-user criminal liability

16. Under the existing Copyright Ordinance, employees who are requested by their employers to use infringing copies of copyright work in their employment may attract the business end-user possession criminal liability. There have been concerns that criminal sanction may be too harsh for employees under certain circumstances as they are in a weak position to bargain with their employers for fear of losing their job and hence a specific defence should be provided for employees. The majority of the views received in the consultation exercise supported the introduction of an employee defence and some pointed out that employees' involvement, if any, in the decision-making process of using infringing copies in business should be the determining factor for considering whether the employee defence could be invoked.

17. We **propose** that a specific defence for employees should be provided, but the employees should not be in a position to influence or decide on the acquisition or removal of the infringing copies for use in business. Besides, some professionals have pointed out that they may be given infringing copies by their clients in order to give legal advice or

¹ The Hong Kong Copyright Licensing Association 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 has no more than 5 readers of the newspaper photocopies.

conduct investigatory service pertaining to the copies (e.g. on whether civil litigations can be pursued against the concerned infringers) or they may be required to provide services on their clients' premises which are equipped with infringing copies (e.g. auditors using infringing copies of computer programs installed in their clients' computers to perform on-site audits). We therefore **propose** to provide a new defence against the business end-user possession criminal liability if the infringing copy so possessed by a person for use in business is provided by his client for him to give legal advice or investigatory services pertaining to the infringing copy, or if the infringing copy is provided by a person's client and his possession of the copy for use in business takes place on his client's premises. For the proposed criminal offence against end-user copying/distribution of copyright infringing printed works (ref. paragraph 9 above), we **propose** that a similar defence should be provided to those employees who are not in a position to influence or decide on the copying or distribution of the concerned infringing copies.

Directors'/partners' criminal liability

18. To promote corporate accountability and responsible governance, we **propose** 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 will also be equally liable in the same case unless there is evidence showing that the director(s)/partner(s) has not authorized the infringing act to be done. The proposed directors'/partners' criminal liability is modeled on a similar provision to combat business use of unauthorized decoders introduced in 2004 in the Broadcasting Ordinance (Cap.562). With the introduction of this proposed offence, we expect businesses to put in place software asset management and better corporate governance which may involve some additional cost of operation.

Proof of infringing copies of computer programs in end-user liability cases

19. The enforcement authority (i.e. the Customs & Excise Department) currently relies mainly on circumstantial evidence, such as the presence of pirated optical discs found in the business end-user's premises, to prove the infringing nature of a computer program found in a user's computer. However, this kind of evidence is not available or inadequate in many cases, leading to abortive investigation and prosecution efforts. In

the public consultation exercise, software and computer game industries requested that businesses should be required under law to keep records of licensed computer programs for a certain period to facilitate proof of the infringing nature of a computer program. However, the majority of submissions received in the consultation exercise objected to amending the legislation to facilitate proof of the infringing nature of computer programs including the requirement to keep records. They considered that the software industry should incorporate technological measures into their computer programs to guard against and prove unlicensed usage. Having regard to the views received, we **propose** to accumulate more enforcement experience before concluding whether and what legislative means should be introduced.

Copyright Exemption Regime

General non-exhaustive fair dealing

20. In the public consultation exercise, the education sector and non-governmental organizations generally supported a non-exhaustive copyright exemption regime along the US 'fair use' model (see footnote 2 below) because of the flexibility it could provide. Copyright owners, however, supported the existing exhaustive approach under the Copyright Ordinance whereby all the acts permitted in relation to copyright restriction are clearly listed out as it could give certainty. Views from the business users were mixed. On balance, we consider it important to give clear guidance to both copyright work users and owners regarding the particular purpose and circumstances under which an act might be done without infringing copyright. We therefore **propose** that a general non-exhaustive fair use regime along the US model should not be introduced. Instead, we **propose** that all the existing copyright permitted act provisions in the

² Under the US non-exhaustive "fair use" model, any copyright restricted act which constitutes fair use will not be considered as copyright infringement. However, the purpose of use of copyright work and the circumstances under which an act may constitute fair use are not exhaustively listed out in the law. Whether exemption applies in a particular case depends on the specific facts of the case determined by the court having regard to, amongst other things, the following factors –

- (a) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (b) the nature of the copyright work;
- (c) the amount and substantiality of the portion used in relation to the copyright work as a whole; and
- (d) the effect of the use upon the potential market for or value of the copyright work.

Copyright Ordinance should be retained with some improvements as explained in paragraphs 26-28 and 30 below.

Fair dealing for education and public administration

21. In addition to retaining the existing copyright permitted act provisions for education and public administration purposes, we **propose** to adopt a non-exhaustive fair dealing approach for use of copyright works for these purposes. This arrangement would ensure that acts which do not fall under the existing copyright permitted act provisions may still be exempted from copyright restriction if they constitute fair dealing. We consider this arrangement is justified because it would not be feasible to provide an exhaustive list of permitted acts in the law that can keep up with the constantly changing needs of education and public administration. For example, today's educational use of copyright works covers not only traditional classroom teaching, but also interactive and project-based teaching with outings, group discussions and student presentations, etc. The educational use of copyright works will continue to evolve with changes and advances in pedagogy. Likewise, public administration has become increasingly complex. The existing permitted acts in the Ordinance are no longer adequate to meet the need for fair use of copyright works for the purpose of the efficient administration of urgent public business.

22. We therefore **propose** to provide that –

- (a) fair dealing with a work by or on behalf of a person in the course of and for the purpose of giving or receiving instruction in a course of study provided by an educational establishment (listed in the Schedule to the Copyright Ordinance) would not be considered as copyright infringement; and
- (b) fair dealing with a work by a public body (defined to mean any department of the Government, the Executive Council, the Legislative Council and any District Council) or the Judiciary in the course of and for the purpose of their efficient administration of urgent business would not be considered as copyright infringement.

23. We further **propose** to provide that when considering whether or not certain acts constitute fair dealing, the court should take into account the following factors (modeled on the existing provision in the Copyright Ordinance on fair dealing for research and private study and on the US fair use provision) –

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

24. With regard to the factor at item (c) of paragraph 23 above, copyright owners in general did not favour the introduction of a quantitative test. On the other hand, many users of copyright works supported the introduction of such a test or the issuance of non-statutory guidelines. We do not consider a quantitative test is appropriate as the purposes and nature of the acts that may constitute fair dealing are very different.

25. Copyright owners in the film, music and publication industries are concerned that students could use the proposed non-exhaustive fair dealing provision for instruction to justify sharing copyright works on Peer-to-Peer networks and building up digital libraries on school Intranets. They have suggested that the proposed provision should not apply to digital copyright works unless the concerned educational establishment has applied effective technological measures and rights management information (RMI) to control access to, further dissemination and copying of the works. We have strong reservation on the copyright owners' request as we consider the acts quoted by copyright owners are unlikely to constitute fair dealing. Moreover, the technological measures requested by copyright owners are complicated, not readily available in the market and very expensive. The inclusion of the requirement on technological measures as suggested by copyright owners may render the fair dealing provision not applicable to the fair use of digital works in secondary and primary schools as they are

unlikely to have the resources and technical support to adopt the technological measures so required.

Permitted acts for education

26. We **propose** to make the following improvements to the existing copyright permitted act provisions in the Copyright Ordinance in order to cater for new circumstances of use that have emerged or may emerge in future –

- (a) to extend the scope of the permitted acts for education to cover not only the acts done by or on behalf of persons giving instruction but also those receiving instruction in a course of study by educational establishments in order to accommodate the needs of interactive teaching; and
- (b) to expand the composition of audience to include immediate family members of pupils (see footnote 3) before whom the performance, playing or showing of a copyright work in the course of activities of educational establishments can be considered as a permitted act.

Permitted acts for research or private study

27. Three of the four factors set out in paragraph 23 above (i.e. items (a) to (c)) are already in the Copyright Ordinance on fair dealing for research and private study. For the sake of consistency and clarity, we **propose** to amend the Ordinance to incorporate all the four factors.

Permitted acts for libraries

28. In order to address the needs of libraries to make replacement copies involving medium shifting for library archiving purpose, we **propose** to prescribe conditions (by regulations to the Copyright Ordinance) to provide that libraries can make replacement copies which involves medium

³ At present, the audience under section 43 of the Copyright Ordinance only includes teachers, pupils and the parents/guardians of pupils. We propose that immediate family members should also be included which will have the meaning of “wife or husband, a parent or child, a grandparent or grandchild, or a brother or sister of the person (whether of full blood or half-blood), and “child” includes an illegitimate child and the wife or husband of a child/an illegitimate child”.

shifting if reasonable and adequate steps have been taken to seek authorization from copyright owners but which failed to yield a response within reasonable time.

Proposed Permitted acts proposed by the Government in 2002

29. In 2002, the Government undertook to broaden the concerned permitted act provision in the Copyright Ordinance so as to exempt hotel guest rooms from paying copyright royalties to owners of underlying works when playing free radio or television broadcasts and to extend the scope of the exemption for the playing of free radio or television broadcasts in public places. Since then, the US and the European Communities have accepted a ruling by the World Trade Organization (WTO) that a provision in the US legislation exempting from copyright restriction underlying works for free public showing or playing of broadcast programmes violates the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Separately, the UK has tightened its legislation on the permitted act for free public showing or playing of broadcast programme (see footnote 4 below). In view of these recent developments, we **propose** not to proceed with this proposal to avoid the risk of violating TRIPs. We also **propose** to set aside another amendment proposed in 2002, namely to remove the restriction that the permitted acts of making sub-titled copies of television broadcast or cable programmes for certain people with disabilities will not be permitted if there are relevant licensing scheme. We intend to consider this issue in the further review of the Copyright Ordinance on copyright protection in the digital environment which may entail a revision of the definition of broadcasts and cable programmes.

30. We **propose** to take forward the other proposals relating to permitted acts undertaken in 2002 as follows –

- (a) to remove the existing restriction that the permitted acts of recording of broadcasts and cable programmes and reprographic copying of passages from published works by educational establishments will not be permitted if there

⁴ Before the amendment in the UK, commercial use of broadcast programmes to provide a musical ambience or musical entertainment in a public place, so long as it is not for a paying audience, does not infringe the copyright of the sound recordings in the programmes. After the amendment, such commercial use of broadcast programmes (except in some specified circumstances such as in activities of non-profit making organizations) requires a licence from the concerned copyright association of sound recordings.

are relevant licensing schemes granting authorizations for the work concerned in order to further facilitate education;

- (b) to introduce a statutory exemption for the making of specialized formats of printed works for persons with print disability; and
- (c) to provide exemption in relation to underlying works in radio broadcast programmes for vehicles on the condition that the radio broadcast is played predominantly for the drivers to have access to public information.

31. The publishing industry considers that we should retain the existing restriction that the permitted acts of reprographic copying of passages from published works by educational establishments will not be permitted if there are relevant licensing schemes granting authorizations for the work concerned (ref. paragraph 30(a) above). The industry is concerned that educational establishments would no longer obtain licences from them after the proposed removal of the restriction. We do not agree with this as the permitted act provision does not allow free making of multiple copies without restriction. The extent of copying permitted must be to a reasonable extent under specified circumstances. For copying beyond this extent, educational establishments would still require a licence to meet their needs. Our proposal only aims to address the concern of the education sector that the statutory exemption should not be subject to the requirement that no licensing scheme is available.

Circumvention of Technological Measures for Copyright Protection

32. In the public consultation exercise, copyright owners unanimously supported strengthening protection against circumvention of technological measures for copyright protection. The education sector, some organizations and individual members of the public, however, urged for the careful consideration of the scope of the protection so as to avoid going beyond copyright protection and hindering scientific research and technological development. We agree effective protection against circumvention of technological measures is essential to encourage right owners to develop a digital sales channel, which in turn will help address the Internet piracy problem. We also agree with the need not to hinder scientific research and technological development.

33. On balance, we **propose** to provide civil remedies against –

- (a) the manufacture of, dealing in, or possession for use in business devices, products or components which circumvent effective technological measures (including both copy protection measures and access control measures) used by copyright owners to protect their works against copyright infringements;
- (b) the provision of services on a commercial scale to circumvent effective technological measures; and
- (c) the act of circumventing effective technological measures.

34. To ensure that the protection will not hinder scientific research, we further **propose** that an exemption for research into cryptography should be introduced for the civil liability associated with the act of circumvention. However, this exemption would not apply if the concerned act of circumvention or the subsequent publication of the research information would prejudicially affect copyright owners.

35. We also **propose** to give both copyright owners and their exclusive licensees the same entitlement to civil remedies against any persons who interfere with RMI (e.g., removal or alteration of the RMI) and know that such an unlawful act will induce, enable, facilitate or conceal an infringement of copyright.

36. We note that the sale of modified game consoles installed with modifying chips is rather prevalent in Hong Kong and that such activities contribute substantially to the existence of a thriving market for infringing copies of computer games. The Working Group on Digital Entertainment has suggested that the Government should consider making it a criminal offence to make or sell devices specifically designed or adapted to circumvent effective technological measures. We also note that the music industry has started selling and delivering songs through digital channels. We consider it necessary to protect the technological measures applied to copies of a copyright work to prevent copyright infringements in the digital environment. We therefore **propose** to introduce a new criminal offence against any person who manufactures for sale or deals in devices, products

or components which circumvent effective technological measures applied to a copy of copyright work, or who provides services on a commercial scale to enable or facilitate the circumvention of such effective technological measures.

Parallel Importation of Copyright Works

37. Under the Copyright Ordinance, it is a criminal offence to deal in or to import otherwise than for private and domestic use a parallel imported copyright work if the work has been published for 18 months or less. Using a parallel imported item of copyright work for business will attract business end-user possession criminal liability if the work is a movie, television drama or musical recording. If a copyright work has been published for more than 18 months, the above acts would only attract civil liability. Copyright owners were adamantly against relaxing the existing restrictions on sale or removing all restrictions on the importation and possession of parallel imports of copyright works by business end-users, maintaining this would affect the potential local market for the copyright works concerned. Copyright work users advocated for the removal of all restrictions on parallel importation of copyright works. Educational bodies and libraries claimed that they had a genuine need to source parallel imports which were not available locally or contain contents not available in the versions for sale in Hong Kong for educational purposes and library uses.

38. On balance, we **propose** to retain all the existing restrictions on parallel imports of copyright works. In addition, we **propose** to remove the criminal and civil liability for the importation and possession for use of parallel imports of copyright works by educational establishments and libraries for their education and library uses.

Rental Rights for Films and Comic Books

39. Rental rights refer to the rights of a copyright owner (enforceable by civil action) to authorize or restrict commercial rental of copies of his copyright works. TRIPs stipulates the requirement to provide rental rights to authors (and their successors in title) of computer programs and sound recordings. Accordingly, we have provided such rights to the copyright owners of computer programs and sound recordings under the

Copyright Ordinance and civil remedies are available for them. Under TRIPs, we are not obliged to provide rental rights for films (see footnote 5) unless the commercial rental of a film has led to widespread copying of the film which is materially impairing the exclusive right of reproduction of the film by the concerned authors and their successors in title. TRIPs does not have any requirement regarding rental rights for comic books.

40. In the public consultation exercise, rental shop owners and some individual members from the public objected to the introduction of rental rights for films. The film and music industries and comic book industry, however, strongly requested the introduction of rental rights for films and comic books respectively. They pointed out that commercial rental of films/comic books had seriously impaired their interests and affected the development of their industries. The film industry estimates there are about 200 film rental shops in Hong Kong and the commercial rental of movies resulted in some \$220 million loss of the industry's revenue in 2004. The comic book industry estimates there are around 400 comic book rental shops in Hong Kong and its annual loss in income caused by commercial rental activities is more than HK\$250 million, which is more than half of the industry's annual income. The comic book industry also claims that many newspaper stalls also offer commercial rental of comic magazines and books through underground operation and hence the loss should have been much higher.

41. On balance and in light of the industries' estimated impact on their potential markets, we **propose** to introduce rental rights for films and comic books and to provide civil remedies for violation of these rights. This is in line with the existing arrangement on rental rights for computer programs and sound recordings. To ensure that existing film and comic book rental shops have a legal means of carrying on their current business after the introduction of the new rights, we **propose** that the rental rights provision should not commence operation until a reasonable amount of copyright items available in the existing rental market have been covered by rental licensing schemes. We will also encourage the concerned copyright owners to develop reasonable and user-friendly licensing schemes for the rental business and adopt a one-stop shop approach as far as possible to handle licensing requests. As regards the worry that copyright owners may charge unreasonably high licence fees and impose unreasonable terms and

⁵ Under the Copyright Ordinance, films include movies, musical visual recordings and TV programmes.

conditions after the successful commencement of the proposed rental right provision, we consider that the existing mechanism under the Copyright Ordinance whereby users may refer to the Copyright Tribunal any dispute over licensing schemes will serve as a reasonable safeguard.

Issues relating to the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty (“the Internet Treaties”)

42. The Internet Treaties were concluded by WIPO in December 1996 which aim to update and improve the protection of copyright and related rights to meet the challenges of new digital technologies. Parties to the Internet Treaties (and membership of WIPO) are confined to sovereign states. Most of the requirements in the Internet Treaties are already provided in our Copyright Ordinance. We propose to incorporate the few remaining requirements into our Copyright Ordinance so that our intellectual property protection regime will meet up to the latest international developments –

- (a) to grant commercial rental rights to authors of underlying works in phonograms;
- (b) to grant moral rights (see footnote 6) to performers with regard to his live aural performances or performances fixed in phonograms;
- (c) to grant commercial rental rights to performers over their performances fixed in phonograms; and
- (d) to amend the definitions of “performer” and “performance” (in section 200 of the Copyright Ordinance) to make clear that they cover artistic works and expressions of folklore.

43. The broadcasting industry is concerned that the granting of moral rights to performers may hinder producers’ editing of programs and jeopardize their ability to comply with the legal and licensing requirements

⁶ Moral rights of a performer concern a performer’s right to claim to be identified as the performer of his performances (“the attribution right”), and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to the reputation of the performer (“the integrity right”).

under the Broadcasting Ordinance. We will take these concerns into account when drafting the legislative amendments so that normal editing of programs and obligations of broadcasting licensees to comply with legal and licensing requirements will not be affected.

Way forward

44. We will actively discuss the above preliminary proposals with all concerned stakeholder groups. We will develop and refine our proposals in the light of their views, and prepare the necessary legislative amendments. Our plan is to introduce the amendment bill into LegCo for consideration and enactment before the expiry of the suspension arrangement in end July 2006.

Commerce and Industry Branch
Commerce, Industry and Technology Bureau
June 2005

Views received in the consultation exercise

<u>Scope of End-user Criminal Liability (109 submissions received)</u>	
<i>Whether and how the scope of business end-user possession criminal liability should be expanded to cover more types of copyright work in addition to computer programs, movies, television dramas and musical recordings</i>	
Support	Object
<ul style="list-style-type: none"> ● Submissions from the publishing sector requested that the business end-user possession criminal liability should be extended to cover printed works for the following reasons – <ul style="list-style-type: none"> → criminal liability had proven to be a more effective deterrent to piracy than civil remedies; → appropriate licensing mechanisms and guidelines were already in place; → printed works should be given the same level of copyright protection as the four categories of works. <p>Some opined that the subjects of end-user liability and copyright exemption should be considered separately on their own merits and should not be leveraged in a way that demanded a “trade-off” between them. One submission objected to limiting the criminal provision to works published in books, magazines or periodicals only as this would leave out many valuable publications and electronic published materials or original databases.</p> ● The submission from the local newspaper industry advocated for equal treatment to all categories of copyright work and upheld its position in 2001, i.e. criminal sanctions should target at organized and regular infringement of significant scale for business purposes, where such infringement prejudices the interests of copyright owners substantially. 	<ul style="list-style-type: none"> ● The education sector objected to expanding the existing scope of the business end-user possession criminal liability for the following reasons – <ul style="list-style-type: none"> → it would hamper dissemination and sharing of learning and teaching resources; → it would pose threats to teachers who would refrain from fair use of copyright materials in teaching; → the existing law already afforded sufficient protection for copyright materials, especially with the commencement of the “copy-shop offence” in 2004; → the educational establishments also took actions (such as posting warning notice and entering into licensing arrangements) to prevent inappropriate copying by users; and → it would be difficult and costly to enforce the law if the criminal net was cast too wide. ● Most of the submissions from chambers of commerce/individual trade associations were in favour of status quo and objected to expanding the scope of the criminal liability to cover printed matters as this would create law enforcement problem and impede normal operation of business. ● Other submissions (e.g. from non-governmental organizations) objected to the expansion of the scope of the business end-user

- Submissions from the broadcasting sector requested that the business end-user possession criminal liability should also apply to non-dramatic TV programmes as the differentiation in treatment resulted in anomaly and unfairness and that there was evidence that infringing copies of non-dramatic programmes (recorded football matches) were being used in business (showing in pubs).
- A few other submissions (some representing users of copyright works) also supported extending the scope of the criminal liability with the following views—
 - The scope of the business end-user possession criminal liability could be appropriately extended to protect the interest of copyright owners of printed works and other copyright owners, but such extension should be preceded by the availability of a comprehensive licensing scheme for such works so that no inconvenience would be caused to copyright work users.
 - Consideration could be given to extending the criminal liability to works published in books, magazine and periodicals only.
 - The criminal liability could be limited to commercial business activities.
 - All copyright works should be accorded equal protection.

possession criminal liability represented the following views from users of copyright works –

- The expansion would become unnecessarily onerous on consumers leading to undesirable economic consequences.
- The existing law was already very stringent and non-profit-making organizations should be exempted from the criminal provision.
- The expansion to cover printed works would create disturbance to the public and hamper dissemination of information and classroom teaching and the existing licensing schemes for printed works only covered a minority of publications.

Copyright Exemption (109 submissions received)

(i) Whether a non-exhaustive regime of copyright exemption should be introduced in Hong Kong or the current exhaustive approach of listing all the copyright exempted acts should be maintained

Support	Object
<ul style="list-style-type: none">● Submissions from the education sector and non-governmental organizations in general supported the non-exhaustive approach as it would allow more flexibility in accommodating new circumstances of use and distribution of copyright works brought about by new technologies. In addition, all the existing prescribed purposes for fair dealing should be preserved. There was strong demand from the education sector for applying the non-exhaustive copyright exemption regime to the digital environment, especially in the absence of licensing schemes for electronic copies of copyright works. The education sector also opined that the non-exhaustive regime was compatible with the requirements of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).● A few chambers of commerce and trade associations also supported the non-exhaustive approach for the flexibility it could bring and suggested that the existing permitted act provisions should be retained.● The submission from the local newspaper industry opined that the non-exhaustive approach was worth considering on the assumption that the scope of the business end-user criminal liability would be expanded to cover printed works. It however pointed out that the application of fair dealing in the digital environment would need further discussion.● One submission opined that consideration could be given to introducing a fair use regime, but care should be taken to consider whether the US model would be operable in Hong Kong, given the differences of the two legal systems.	<ul style="list-style-type: none">● Most chambers of commerce and trade associations, nearly all copyright owners' associations, some professional bodies and a few organizations supported the existing exhaustive approach for the following reasons –<ul style="list-style-type: none">→ the exhaustive approach was clear, effective and gave legal certainty;→ there was a lack of jurisprudence of the US "fair use" model in Hong Kong and the legal uncertainty so created might discourage the public from using copyright works, thus contravening the purpose of facilitating the flow of information;→ any perceived flexibility to allow courts to address potential new situation for copyright exemption was a false perception and an inappropriate transfer of policy functions to the court;→ the non-exhaustive approach could create a loophole and increase the enforcement burden on copyright owners and caseloads of the court;→ the non-exhaustive approach might exacerbate the already serious piracy problem in Hong Kong as consumer awareness and respect for intellectual property rights in Hong Kong still lagged behind that of other developed markets; and→ the non-exhaustive regime might not fully satisfy the obligations under the Berne Convention and TRIPs.● Some copyright owners considered that it was premature to discuss copyright exemption in the digital environment.

(ii) Whether a quantitative test should be introduced in the Copyright Ordinance to determine if the act of coping for research or private study purpose is fair dealing

Support	Object
<ul style="list-style-type: none"> • The majority of the submissions from the education sector supported the quantitative test as it could provide clearer guidelines to users. Some submissions from the education sector requested that the quantitative test should also be extended to fair dealing for purposes other than research and private study if a non-exhaustive copyright exemption regime were adopted. A few submissions from chambers of commerce, trade associations and other organizations also supported the quantitative test, but some of them suggested that it should be in the form of non-statutory guidelines or code of practice. 	<ul style="list-style-type: none"> • Nearly all copyright owners' associations objected to the quantitative test as they considered that the current law was not causing uncertainty or wasteful litigation over the extent of permitted copying. • Copyright owners other than publishers indicated that the quantitative test was not suitable in respect of certain copyright works such as films, and if such a test were to be introduced, it should only apply to specific types of copyright work such as reprographic copies of printed materials and literary works in published edition.

(iii) Should we expand the current list of permitted acts

Support	Object
<ul style="list-style-type: none"> • Submissions from the education sector, welfare organizations, business users, and other organizations proposed expanding/ revising the current list of permitted acts – <ul style="list-style-type: none"> → to allow schools to upload a reasonable extent of material to school intranet; → to expand the existing fair dealing provisions to cover the purposes of teaching and learning; → to expand the scope of permitted acts under sections 43 and 45 of the Copyright Ordinance so that they cover education purposes instead of instruction purpose only; → to remove the existing restriction that the permitted acts under sections 44 and 45 of the Copyright Ordinance by educational establishment will not be permitted where licensing schemes granting authorizations are available; 	<ul style="list-style-type: none"> • Submissions from the music and broadcast industries strongly opposed the proposals to provide for exemption in respect of underlying works in free playing of radio and TV broadcasts for hotel guest rooms as well as exemption for free playing of such broadcasts in public places as they claimed that in doing so Hong Kong would be in breach of our international obligations under TRIPs, and that the above proposals were out of step with the international development. • Some copyright owners considered that the current list of permitted acts was sufficient.

- to permit copying by medium shifting for library archiving purpose;
- to allow the making of specialized format of printed works for persons with print disability;
- to allow reproduction of news articles, passage of publications or broadcasts and cable programmes for education, archive, discussion and other non-profit-making purposes by educational establishments and commercial organizations;
- to allow business users to make copies of extracts of literary work for internal use where the user has already purchased a genuine copy;
- to expand the existing permitted act for Legislative Council proceedings to cover proceedings of District Councils and other statutory bodies; and
- to provide exemption for showing, exhibiting, publishing, lending, and exchange of materials by archivists and librarians with non-profit-making organizations for cultural or educational purposes.

End-user Liability Associated with Parallel Imported Items (161 submissions received including 80 standard letters from individual audio/audio-visual product retailers)

Whether the existing criminal and civil liability pertaining to parallel imported items should be relaxed and if yes, the extent of relaxation

Support	Object
<ul style="list-style-type: none">● The vast majority of copyright work users supported relaxation for the following reasons –<ul style="list-style-type: none">→ the existing restrictions contradicted the Government’s policy to encourage free flow of commodities and the trend of online shopping, and limited consumers’ choice;→ it was unfair and impracticable to expect end-users to ensure that a particular true copy of a copyright work they purchased was not a parallel imported item given that there was no readily available source to tell users whether there was a sole agent or not; and→ it would facilitate timely purchase of products from overseas at competitive price and products which are not available locally.● On the extent of relaxation, views are divided –<ul style="list-style-type: none">→ Majority of the supporters (including the audio-visual trade, most individual members of the public and some trade organizations and professional bodies) supported a complete relaxation.→ The education sector and library associations asked for relaxation of parallel imports for educational, training and library uses.→ Some submissions supported shortening the existing period during which parallel importation of copyright items would attract criminal and civil liability. Others supported partial relaxation (e.g. the proposal in the 2003 Bill or relaxation except that the works were used for public performance or playing in business) or phased relaxation.	<ul style="list-style-type: none">● The submissions from music, local movie, broadcasting, local publishing and comic book industries, a professional body and a couple of trade organizations opposed any relaxation for the following reasons –<ul style="list-style-type: none">→ any relaxation will seriously affect the local creative industries and Hong Kong’s status as a regional hub for creativity;→ authorized dealers and retailers and the related industries will be seriously affected, resulting in job reduction and higher unemployment rate;→ relaxation will seriously affect the normal exploitation of copyright works by the related industries, including the film and broadcasting industries which have different “windows” of release of movies or TV programmes;→ pirated copies often disguise themselves as parallel imports and the relaxation will encourage piracy activities; and→ parallel imports could jeopardize the potential theatrical release of films, particularly non-mainstream and non-commercial films, thereby reducing customers’ choice of seeing movies in cinemas.

<u>Defence for Employees against End-user Criminal Liability (62 submissions received)</u>		
<i>Whether specific defence should be provided to employees found in possession of infringing copies provided by their employers for use in the course of their employment</i>		
Support	Object	Other Views
<ul style="list-style-type: none"> ● The majority (including the education sector, trade and labour unions, chambers of commerce, trade associations, professional bodies, copyright owners' associations, and individual members of the public) supported the employee defence as in many circumstances employees could not refuse to use an infringing copy given by their employers. ● Views were divided on the formulation of the employee defence – <ul style="list-style-type: none"> → Some supported the proposal in the 2003 Bill (i.e., “employees with managerial functions” cannot invoke the defence). → Some considered that the meaning of “employees with managerial functions” was not clear and that employees, who were not involved in the relevant decision making or had little influence in making the decision of using the infringing copies, should also be allowed to invoke the defence. 	<ul style="list-style-type: none"> ● Submissions from the software and game industries, two chambers of commerce, a professional body and some individual submissions objected to the introduction of an employee defence for the following reasons – <ul style="list-style-type: none"> → employees and employers ought to be treated alike and an employee defence would send a wrong signal to the community regarding the seriousness of IP-related crime; and → there was no similar employee defence provision in the copyright legislation of other jurisdictions; → the employee defence would be easily abused and would allow decision-makers increased opportunity to insulate themselves from liability, hence creating more obstacles to IPR enforcement; and → there had been no indication that existing laws operated unduly harshly upon lower-level employees, and that 	<ul style="list-style-type: none"> ● The majority of the respondents objected to the “whistle blower”¹ protection system suggested by the software industry as the system could not adequately protect employees from potential harassment of unfair treatment by their employers and would sow discord between employees and their employers. ● Submissions from the software and game industries, a professional body and a few respondents supported this system as it could encourage employees to assist Customs to take enforcement actions and deter employers from using infringing software. ● One submission objected to the employee defence but suggested that if the defence were to be introduced, the employees should be required to identify the persons who provided the infringing copy to them as a pre-condition for invoking the defence.

¹ The “whistle blower” protection system would prevent an employer from discharging or discriminating against any employee solely on the ground that the latter (a) has filed a complaint or instituted or caused to institute any investigation or proceedings related to an end-user piracy offence; (b) has testified or is about to testify in any proceedings related to an end-user piracy offence; or (c) has provided information or other assistance in connection with an investigation or proceedings related to an end-user piracy offence.

<p>→ Some considered that a director or a secretary of a body corporate should also be allowed to invoke the defence if he did not perform any management functions.</p> <p>→ Some suggested that “middle management” should also be allowed to invoke the defence.</p>	<p>the existing “absence of knowledge”: defence already afforded sufficient protection to all.</p>	
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Proof of Infringing Copies of Computer Programs in End-user Piracy Cases (70 submissions received)

Whether the Ordinance should be amended to facilitate proof of infringing copies of computer programs (e.g. requirements to keep record, presumption of infringement for copies without licences)

Support	Object	Other Views
<ul style="list-style-type: none"> ● Submissions from the software and computer game industries, a few chambers of commerce and trade associations, and a few other organizations supported the proposal to require businesses to keep records of licensed computer programs (albeit for different periods) for the following reasons – → the requirement was consistent with effective software asset management practices and responsible corporate governance; → the requirement would not impose a significant additional burden on businesses as there were already similar obligations under the existing Companies Ordinance, Inland Revenue Ordinance and other relevant legislation; → the requirement would facilitate prosecutions and enforcement actions against business end-user offences; and → it was not technologically or economically feasible for software 	<ul style="list-style-type: none"> ● The majority of the submissions including those from education sector, most chambers of commerce and trade associations, copyright owners' associations, individual members of the public, and a few other organizations objected to the proposal to require businesses to keep records of licences as - → businesses would need to expend tremendous resources and efforts to keep records of all licensed computer programs, resulting in significant cost implications, especially for small and medium enterprises; → the records themselves could not prove the infringing nature of any computer programs without licence records; and → they considered that it was not technically difficult or commercially onerous for the software industry to incorporate technological measures into their computer programs to guard against and prove unlicensed usage. ● They objected strongly to any proposal which may require users to prove the 	<ul style="list-style-type: none"> ● The software industry and individual IT companies remarked that mandatory requirement for computer program users to register with the concerned software companies would cause inconvenience to the users, significantly increase the administrative costs of the industry and such increased costs would be passed on to consumers. ● Two submissions suggested amending the law to the effect that the court should take into account the adequacy of purchase records/licences in software end-user piracy case.

<p>developers to re-engineer all of their products to include anti-piracy technologies and such technologies could not address the piracy problem in relation to products currently on the market.</p> <ul style="list-style-type: none">● Other views include –<ul style="list-style-type: none">→ A fine should only be imposed on any loss of records due to negligence.→ A combination of measures should be adopted to address the issue including legislative amendments and the implementation of software asset management by businesses.	<p>non-infringing nature of their computer programs.</p>	
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Circumvention of Technological Measures for Copyright Protection (63 submissions received)

(a) Views on whether the existing civil rights of copyright owners against circumvention of technological measures used to protect copyright works from copyright infringement should be extended to cover access control measures and the act of circumvention and whether criminal sanctions should be introduced.

Support	Object	Other Views
<ul style="list-style-type: none"> ● Copyright owners unanimously supported the provision of additional civil rights (albeit by varying degree) and introducing criminal sanctions. Some organizations including a few chambers of commerce and a professional body gave similar views as follows – → amendments were necessary to effectively implement the relevant provisions of the WIPO Internet Treaties, and to provide adequate legal protection and effective legal remedies; → control measures were crucial for the development of new business models and deterring piracy in the digital environment, and both access control as well as copy and use control measures should be covered; → technological measures used to protect copyright work could be circumvented despite the best efforts of the right holders and therefore should be adequately protected by law; and → dealing in circumvention devices is a criminal offence in many jurisdictions, including US, UK, Australia and Singapore. 	<ul style="list-style-type: none"> ● A greater number of the submissions including those from the education sector, chambers of commerce, trade associations, professional bodies, other organizations, as well as individual members of the public objected to the provision of additional civil rights and criminal sanctions for the following reasons – → the expansion in restrictions over circumvention of technological measures would promote monopoly, damage end-user’s rights to make backup or personal copies under the fair use principle, and impede development of technology; → the Copyright Ordinance should seek to protect the copyright of a work and not the technology or devices employed to protect the work; → fair dealing could not be exercised if the act of circumvention were prohibited; and → the civil protection afforded to copyright owners under the existing law was already sufficient. ● In particular, the education sector was 	<ul style="list-style-type: none"> ● Submission from the film industry requested that the Ordinance should also be amended to provide both copyright owners and their exclusive licensees with the same civil right against interference with “rights management information” as he has in respect of an infringement of copyright. ● Devices used for legitimate purpose, e.g. all-area-code DVD players, should not be caught under any new provisions.

- Submissions from the computer game industry opined that the criminal provision would be necessary to deter trafficking of circumvention devices, having regard to the prevalence of mod chips and circumvention services in Hong Kong and the difficulties encountered by right holders to seek civil remedies from dealers of circumvention devices. They suggested that criminal provision should also apply to the provision of services to install circumvention devices or the provision of support services to the purchasers or users of circumvention devices, irrespective of whether any commercial advantage was derived, to address the situation where hackers offered their circumvention devices and means to the public for free.
- The broadcasting industry suggested that unauthorized TV decoders should also be covered under the criminal provision. They suggested that the act of circumventing measures which control reproduction of, or access to pay TV broadcasts and cable programs, broadband video, satellite TV and wireless video should attract criminal liability.
- Views from other submissions are mixed –
 - Some opined that if the circumvention was not commercial or profit-making in nature or did not affect prejudicially the interest of copyright owners, the

concerned that the restrictions would hinder scientific research and technological advancement. They requested that the existing provision against circumvention of technological measures in the Copyright Ordinance should be amended so that the provision would only apply to the making of the devices or means or the provision of information on circumvention on a commercial basis.

circumvention should not attract criminal sanctions and only civil liability should apply. One submission pointed out that no restriction should be imposed on those acts which were conducted for private study and research. One submission supported limited exceptions should be given after consultation with copyright owners.

- Some submissions suggested that only civil remedies for the act of circumvention should be introduced at this stage.
- Some supported both civil remedies and criminal sanctions.
- Some suggested that the act of circumvention should attract liability regardless of whether the act was linked with copyright infringement.
- Some suggested that the new provisions should only target at the problem of modified game console or unauthorized TV decoder.

Rental Rights for Films (54 submissions received)

Whether rental rights for copyright owners of films should be provided and whether infringement of such rights should attract civil remedies or criminal sanctions

Support	Object	Other Views
<ul style="list-style-type: none"> ● The majority of the submissions from organizations and some individual members of the public supported or did not object to the introduction of rental rights for films as they recognized that the film rental business had affected the interests of copyright owners. These organizations included copyright owners' associations in local film, music and broadcasting industries, chambers of commerce, individual trade associations, educational bodies, professional bodies and a few other organizations. Their views are summarized as follows -- <ul style="list-style-type: none"> → commercial rental activities seriously affected the sale of newly released VCD/DVD and led to illegal copying of film; → rental income from films should be exploited by copyright owners instead of unlicensed rental shops which had not contributed to the creation of or investment in films; → rental rights for films was available in UK, Scandinavian countries, Germany, Japan, Taiwan and Thailand; and → rental rights for films is essential for 	<ul style="list-style-type: none"> ● The majority of the submissions from individual members of the public, owners of film rental business and a few other organizations objected to the introduction of rental rights for films. ● Some film rental shop owners claimed that their business did not directly affect the film industry as the rental activities were undertaken only after the DVDs/VCDs had been put into circulation. If rental rights for films were given, they considered that copyright owners would charge unreasonably high licence fees and impose unreasonable terms and conditions. This would make small rental shops difficult to survive, resulting in unemployment of low skilled workers currently engaged in the film rental business. ● One submission opined that the introduction of rental rights would result in a higher rental fee for consumers and might even affect the sale of DVDs/VCDs. ● Some submissions pointed out that there was no substantial evidence to indicate that commercial rental of films had led to 	<ul style="list-style-type: none"> ● One submission opined that the Government should facilitate the film industry and film rental trade to agree on a simple licensing scheme with a licensing fee not too high, so that rental shops could continue to operate. ● The comic book industry requested the Government to provide rental rights for comic books. It estimated that there were around 400 comic rental shops in Hong Kong and its annual loss in income caused by such activities was estimated to be over \$250 million, which was more than half of the industry's annual income. Many newspaper stalls also offered commercial rental of comic magazines and books through underground operation and hence the loss should have been much higher.

<p>effective protection of sound recording from being copied from musical visual recordings.</p> <ul style="list-style-type: none">• Nearly all of them considered that the rights should only attract civil remedies. Only two submissions agreed that the rights should attract criminal sanctions.	<p>widespread copying of the films and hence it was not an international requirement to provide rental rights for films. Moreover, most of the common law jurisdictions including Australia, Canada, Singapore and the US did not provide rental rights for films.</p>	
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Issues Relating to the World Intellectual Property Organization Internet Treaties (29 submissions received)

Whether the remaining requirements in the Internet Treaties should be incorporated into the Copyright Ordinance (i.e. to grant commercial rental rights to authors of underlying works in phonograms, to grant moral rights to performers with regard to their live aural performances or performances fixed in phonograms, to grant commercial rental rights to performers over their performances fixed in phonograms, and to amend the definitions of “performer” and “performance” to cover artistic works and expressions of folklore)

Support	Object
<ul style="list-style-type: none">● The film industry, performers’ association, some professional bodies and some chambers of commerce supported the incorporation of the remaining requirements as Hong Kong should follow the latest international standard, and the commercial impact would not be substantial given that in reality the concerned rights should already have been dealt with by way of contract between the relevant parties.● The submissions from the sound recording industry did not object to the introduction of rental rights to authors of underlying works so long as there would be no restriction on the author’s freedom to waive or transfer the rights.● One submission supported implementation of the requirements gradually, taking into account the feedback of the community and that academic and arts exchanges should not be hindered by introduction of the requirements.	<ul style="list-style-type: none">● Some individual members of the public, a few chambers of commerce and the broadcasting industry objected to the incorporation of the remaining requirements for the following reasons –<ul style="list-style-type: none">→ there was no international obligation to do so and Hong Kong’s strength was not to over-regulate; and→ there could be significant implications on the business arrangements of the broadcasting industry, as well as the producers of sound recordings and broadcast programs. <p>However, most of them did not have strong views on clarifying the definition of “performer” and “performance”.</p>

A Summary of the Proposals on Various Copyright-Related Issues

We recommend the following preliminary proposals (with cross reference to the relevant paragraphs in the main paper) on the various issues covered in the consultation document on the review of certain provisions of the Copyright Ordinance –

- (a) to maintain the existing scope of end-user criminal liability relating to the possession of an infringing copy of a copyright work for use in business to the four categories of copyright works, namely, computer programs, movies, television dramas and musical recordings (paragraph 8);
- (b) to introduce a new business end-user criminal offence against significant infringement activities involving the act of copying with a view to distributing or the act of distributing infringing copies of copyright works published in books, newspapers, magazines or periodicals for the purpose of and in the course of business, other than by educational institutions which are non-profit making or subvented by the Government (paragraphs 9 to 15);
- (c) to provide statutory defence against the business end-user criminal liability in (a) and (b) above for employees and certain professionals and persons under specific circumstances (paragraphs 16 and 17);
- (d) to introduce a new criminal offence against the director(s) or partner(s) if a body corporate or partnership has done an act attracting the business end-user criminal liability in (a) or (b) above unless there is evidence proving that the director(s) or partner(s) has not authorized the concerned infringing act to be done (paragraph 18);
- (e) to accumulate more enforcement experience before concluding whether and what legislative means should be introduced to facilitate proof of infringing nature of computer programs in business end-user possession criminal offence (paragraph 19);
- (f) to exempt from copyright restriction ‘fair dealing’ with a copyright work for the purposes of education and public administration (paragraphs 20 to 25 below);
- (g) to extend the scope of some existing ‘permitted acts’ for education (paragraph 26);
- (h) to modify the existing ‘permitted acts’ for research or private study (paragraph 27);

- (i) to prescribe conditions under which libraries may make replacement copies of a copyright work for archiving purposes and involving storing the work in a different medium (medium shifting) (paragraph 28);
- (j) to set aside certain proposals relating to 'permitted acts' the Government put forward in 2002 and to take forward other proposals (paragraphs 29 and 31);
- (k) to extend existing civil rights of copyright owners against circumvention of technological measures used to protect copyright works from copyright infringement to cover access control measures and the act of circumvention (paragraphs 32 to 34);
- (l) to provide that the copyright owner or his exclusive licensee has the same civil right against interference with 'rights management information' as he has in respect of an infringement of copyright (paragraph 35);
- (m) to introduce a new criminal offence against commercial dealing of devices, products or components and the provision of services on a commercial scale which circumvent technological measures applied to a copy of a copyright work (paragraph 36);
- (n) to maintain the existing restrictions on parallel importation of copyright works, but remove the criminal and civil liability for importation and possession of such items by educational establishments and libraries for their educational and library uses (paragraphs 37 and 38);
- (o) to introduce 'rental rights' for films and comic books (paragraphs 39 to 41); and
- (p) to effect those requirements in the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty ("the Internet Treaties") which are not yet incorporated in the Copyright Ordinance (paragraphs 42 and 43).