

An Introduction to the Copyright (Amendment) Bill ———— 2006 ————



Foreword



Copyright protects the skill and effort of authors, artists, composers, as well as the work of musicians, performers, publishers, recording studios and the computer software industry. It allows them to gain a reasonable reward for their efforts, and encourages investment in the creative industries.

Hong Kong is fortunate to have vibrant creative industries. Hong Kong's creative output has gained us a reputation throughout Asia and supports many jobs in the local market. We need good copyright law and enforcement to ensure that our local creative industries can be sustained profitably. A strong copyright regime in Hong Kong also helps to make us Asia's World City for creative investment.

However, copyright law is not all one-sided. In the present Bill, we have set out to strike a balance between enhancing our copyright protection and allowing reasonable flexibility for education, business and the consumer.

Finally, we will continue our public education to bring home the message that copyright works are private property, and infringing copyright is as morally wrong as stealing.

A handwritten signature in black ink, appearing to read 'Wong', with a stylized flourish above the name.

Joseph W P Wong
Secretary for Commerce, Industry and Technology

Introduction

This booklet explains the main proposals incorporated in the Copyright (Amendment) Bill 2006. It is only a general introduction to the Bill. For details of the legal effect of the proposals, you should refer to the Bill itself, which can be downloaded from the website of the Commerce and Industry Branch of Commerce, Industry and Technology Bureau or Intellectual Property Department (details on p.32). As it is only a Bill, it may be subject to changes following further discussions with stakeholders and debate in the Legislative Council.

What does the Bill set out to achieve?

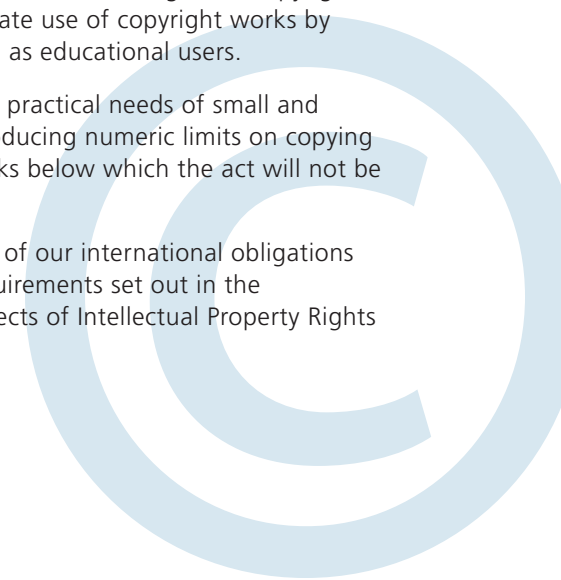
The Government's aim is to provide Hong Kong with a strong system of copyright protection. Strengthening the rights of copyright owners (authors, composers and artists, book and periodical publishers, the movie and music recording industries, the software industry, radio and television broadcasters and creators of Internet content) will assist the development of a knowledge-based economy and creative industries, attracting overseas investment, creating jobs and new economic opportunities.

At the same time, however, we need to ensure that copyright law is sufficiently clear and certain to allow for information to be disseminated confidently in a modern, digital society. It also needs to be flexible enough to deal with new technologies, business and teaching methods as they arise.

This Bill reflects the outcome of two years of extensive consultations. In particular, the Government has sought to achieve a right balance between providing effective protection for the rights of copyright owners and affirming fair, legitimate use of copyright works by certain sectors of the public, such as educational users.

We have also given weight to the practical needs of small and medium enterprises, such as introducing numeric limits on copying and distribution of copyright works below which the act will not be criminalized.

In addition, we need to be aware of our international obligations and ensure that we meet the requirements set out in the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization.

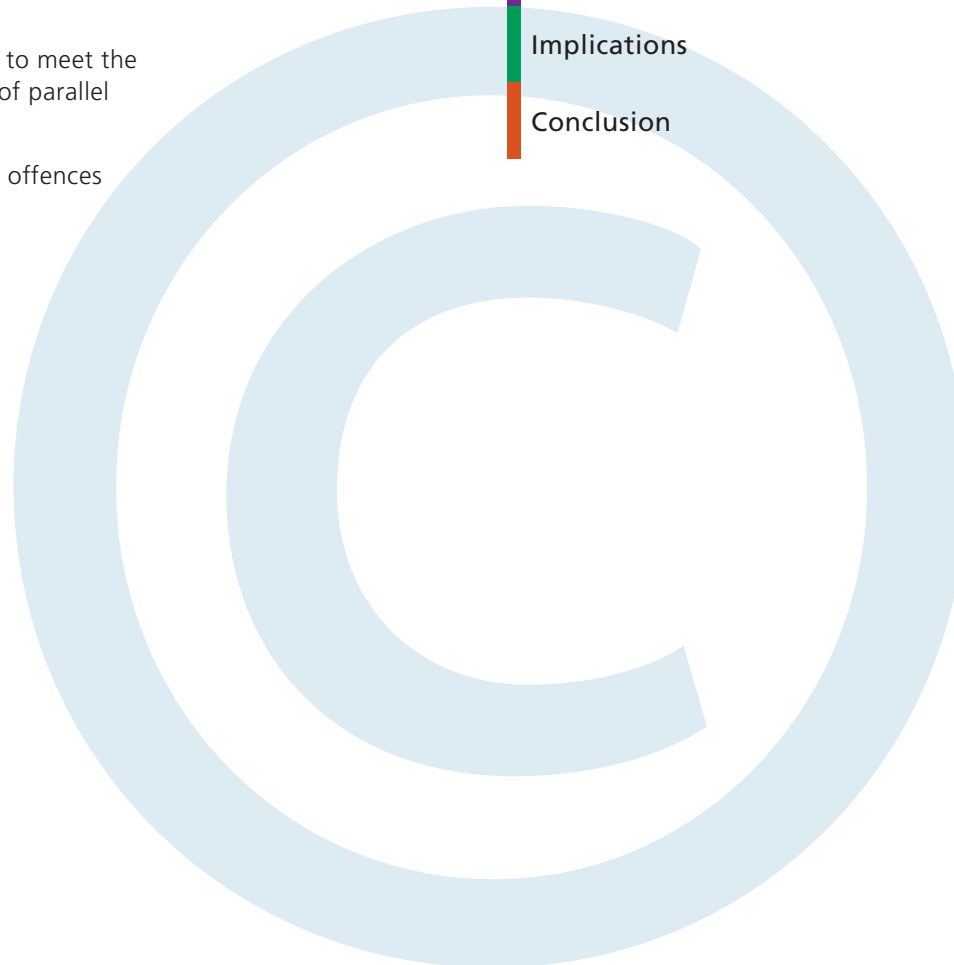


Main Proposals in the Bill

- Maintaining the existing scope of the criminal offence provisions relating to possession of infringing copies of copyright works for use in business and making it a permanent arrangement
- Providing new civil and criminal liability to enhance protection for copyright owners
- Improving the copyright exemption system to add certainty for users and allow them to use copyright works more flexibly under certain circumstances, without unreasonably prejudicing the rights of copyright owners
- Relaxing legal provisions against parallel importation to meet the community's aspirations for free use and circulation of parallel imported copyright works
- Strengthening enforcement efforts against copyright offences

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Copyright Protection

Business end-user criminal liability

There are already temporary provisions *criminalizing* business end-user possession of computer programs, movies, television dramas, and musical recordings. These temporary provisions will be made permanent.

In addition, responding to concerns from the publishing industries, the Bill introduces a *new criminal offence* relating to copying and distribution of copies of printed copyright works. At the same time, we understand that users of copyright works need clear guidance as to the amount of copying that can be done without risking criminal liability. We have therefore introduced numeric limits (called "safe harbours") below which the act will not be criminalized.

Examples of the sorts of activities that would be criminalized:

- a trading company regularly making a large number of photocopies of newspaper articles for distribution within the company every day
- a firm scanning and regularly e-mailing a large number of scanned copies of articles from financial magazines to other staff whenever new editions of the magazines are issued
- a teacher in a profit-making tutorial school regularly distributing photocopies made from books as teaching materials to his students
- an organization organizing seminars on a frequent basis and distributing a large number of photocopies made from books to the participants of the seminars



An important element of the new offence is that it is carried out regularly or frequently and involves a large amount of infringing materials. The copyright materials covered in the new offence are printed books, magazines, periodicals and newspapers.

Non-profit making educational establishments and educational establishments receiving direct recurrent subvention from Government will be *exempted* from the criminal provisions but not the civil ones.

The examples cited already constitute civil infringement under our existing copyright law, but they are not criminal offences. Under the new law proposed in the Bill, they will become *both civil and criminal infringements*.



Directors'/partners' criminal liability

The Bill includes a *new criminal offence* on company directors and partners. It aims to promote corporate accountability and responsible governance to prevent the use of infringing copies of copyright works to generate business output. Since not all directors or partners have control over the day-to-day running of their enterprises, the Bill proposes that only those directors and partners responsible for the internal management of the body corporate or partnership will be responsible. If there are no such directors or partners, any persons responsible for the internal management of the organization under the immediate authority of the directors or partners will be responsible. If they were charged with an offence, they could defend themselves against the charges by showing, for example, that they had introduced policies and practices against using infringing copies or set aside financial resources for acquiring legitimate copies.

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

Employees express concern that they are in a weak position to refuse to commit infringing acts requested by their employers. Furthermore, certain professionals such as lawyers and auditors are worried that they might be required in the normal course of their work to possess/use infringing copies.

The Bill proposes to provide a *defence* for employees who could not influence a decision regarding the acquisition or removal or use of infringing copies of copyright works. Professionals whose investigation, auditing or legal work may put them at risk of liability for possession of infringing copies will be *exempted* under specified circumstances.

Civil remedies for circumvention of technological measures

Copyright owners have the option of using "technological measures" to prevent copyright infringement. Examples could include encryption of data or special chips that prevent unauthorized digital copying.

We need to ensure that the Copyright Ordinance effectively deters people from trying to hack these measures or dealing in modified devices or software that hack these measures. It is already a civil infringement to make or deal in devices to circumvent measures that prevent unauthorized copying of copyright works ("copy-protection measures"). The Bill extends the protection by making it a *civil infringement* to -

- make or deal in circumvention devices which circumvent access control measures (e.g. use of passwords to restrict access to copyright works)
- provide services to circumvent access control measures or copy-protection measures
- do the act of circumventing an access control measure or a copy-protection measure

These acts will only be a civil infringement if the person concerned knows or has reason to believe that the circumvention device or the act of circumvention will lead to copyright infringement.

Examples of the sorts of activities that would attract civil liability:

- a person selling computer source code which enables others to download songs that have been encrypted
- a person offering a service to modify game consoles or selling mod chips for insertion into digital game machines so as to enable others to play pirated computer games (whether the service or sale is for profit or not)
- a person making a device designed to allow unauthorized copying of digitally-protected online movies



Criminal liability relating to circumvention activities

To combat the rampant sale of modified game consoles and other tools which help the public to pirate copyright works, we propose to ***criminalize*** the making, importation or export for sale, or dealing in any circumvention tools. We will also ***criminalize*** the commercial provision of circumvention services.

Exceptions to the civil and criminal provisions

At the same time, we need to consider situations where circumvention of technological measures is done for legitimate aims. The Bill sets out to ***exempt*** the following activities:

- allowing an independently created computer program to work together with other computer programs
- research into cryptography
- identifying and disabling hardware or software which collects or transmits information relating to a person's use of a computer network to protect privacy
- security testing
- gaining access to parallel imported copyright works
- preventing access by minors to harmful materials on the Internet
- law enforcement



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

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). At present, those who provide RMI can take ***civil action*** against anyone who interferes with it. As copyright owners and their exclusive licensees may also be affected by interference with RMI, the Bill extends the right to take legal action to them too.

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

The widespread commercial rental of films (e.g. movies, musical visual recordings) and comic books, which is lawful under present copyright law, is affecting the income of the film, recorded music and comic book industries.

The Bill seeks to make unauthorized commercial rental of films and comic books a *civil infringement* of copyright.

Examples of these activities:

- shops renting out films or comic books to the public without permission from the copyright owner
- a private club offering films or comic books for rental to its members without permission from the copyright owner, as part of the services offered to its members after receipt of membership fees
- a shop selling a film or comic book to its customer on the understanding that the film or comic book concerned can be returned later to the shop at a reduced price



However, other non-commercial lending activities will continue to be lawful:

- library lending
- other lending activities not for direct or indirect commercial advantage
- making available works for on-the-spot reference

The Government will encourage copyright owners to set up licensing schemes so that commercial rental can continue legally with a reasonable return to the copyright owners. To ensure that such licensing is maintained on reasonable commercial terms, the Copyright Tribunal will be given powers to adjudicate in disputes over rental licences. Existing stocks of copyright works held by rental outlets will not be covered by the new rights.

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

The Bill incorporates certain provisions in the World Intellectual Property Organization (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty into our Copyright Ordinance so that our intellectual property protection regime will meet the latest international standards. New *civil law protection* measures include -

- new rental rights for literary, dramatic or musical works included in sound recordings
- new moral rights to performers for their live aural performances or performances fixed in sound recordings
- new rental rights to performers for sound recordings of their performances

Copyright Exemptions

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

Today, teachers use copyright works not only for classroom instruction but also for interactive and project-based teaching. Likewise, public administration has become increasingly complex with stress being placed on a timely response by the Government.

Educational use of copyright works will continue to evolve with changes in teaching methods. The existing permitted acts in the Copyright Ordinance do not adequately cater for new circumstances. We have made special efforts to reflect the needs of the educational sector for reasonable, fair use of copyright works for teaching. Accordingly, we propose to supplement our traditional, item-by-item approach with a **more general exemption** provision (i.e. concept of "fair dealing") for educational purposes. We also propose to make improvements to the existing permitted acts for education.



What is "fair dealing"?

Fair dealing is a principle applied to the fair use of *reasonable portions* of copyright works under *special circumstances*, *without harming the reasonable interests of the copyright owner*.

To decide whether the dealing is "fair" we have to consider

- the purpose and character of the dealing, including whether such dealing is for a non-profit making purpose or of a commercial nature
- the nature of the work
- the amount and substantiality of the portion dealt with in relation to the work as a whole
- the effect of the dealing upon the potential market for or value of the work

The following cases would be considered "fair":

- a student copying a very small portion of certain copyright works for incorporation in his project to illustrate certain important points in the project, acknowledgement of the source of the work is included, the project will be submitted to his teacher and presented to the class as part of a course of study for the purpose of receiving instruction
- a teacher including in a presentation a very short excerpt of a film (but not one that is being currently shown in cinemas) to illustrate certain important points to be brought out in his presentation, the title of the film and acknowledgement of its authors are included, the presentation will be given by the teacher for giving instruction in a course of study to a class of students



The following would **not** be considered "fair":

- students are unable to go outside due to bad weather, their teacher plays a DVD of a current movie to entertain the class
- a student's parents say that a required school textbook is too expensive, the student goes to the library and makes himself a photocopy instead of buying it



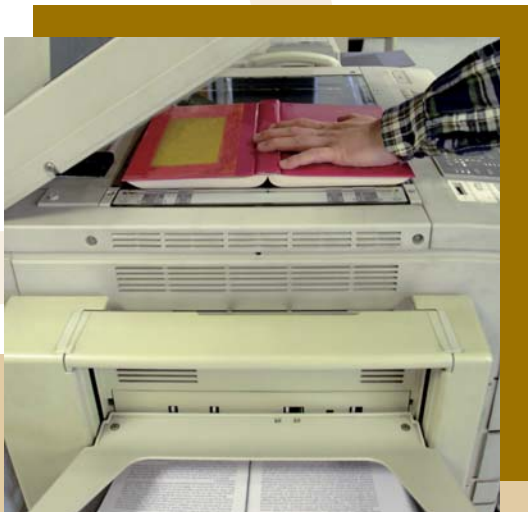
There will be exemptions so that the Government, the Executive Council, the Legislative Council, District Councils and the Judiciary can use or copy copyright materials to a reasonable extent for the purpose of tackling **urgent** matters.

New permitted act for persons with a print disability

People who suffer from sight disabilities or other disabilities that prevent them from readily handling printed materials are said to suffer from a 'print disability'. We propose to introduce a ***new permitted act*** to allow institutions that support such disabled people to produce specially adapted copies of copyright works (e.g. Braille, large-print, electronic version, or sound recording) for their use. We shall extend this exemption to works published in both printed and electronic forms.

New permitted act for playing sound broadcast in vehicles

Drivers of public vehicles will ***not infringe*** copyright when they have radio broadcasts playing in their vehicles, as long as they are doing so to have access to public information (e.g. on road conditions and the weather).



Parallel Importation

Liberalization in the use of parallel imports

Under the existing 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 anywhere in the world for 18 months or less. Furthermore, using or possessing a parallel imported movie, television drama, musical sound or visual recording for business is currently a criminal offence. If a copyright work has been published for more than 18 months, the above acts would only attract civil liability.

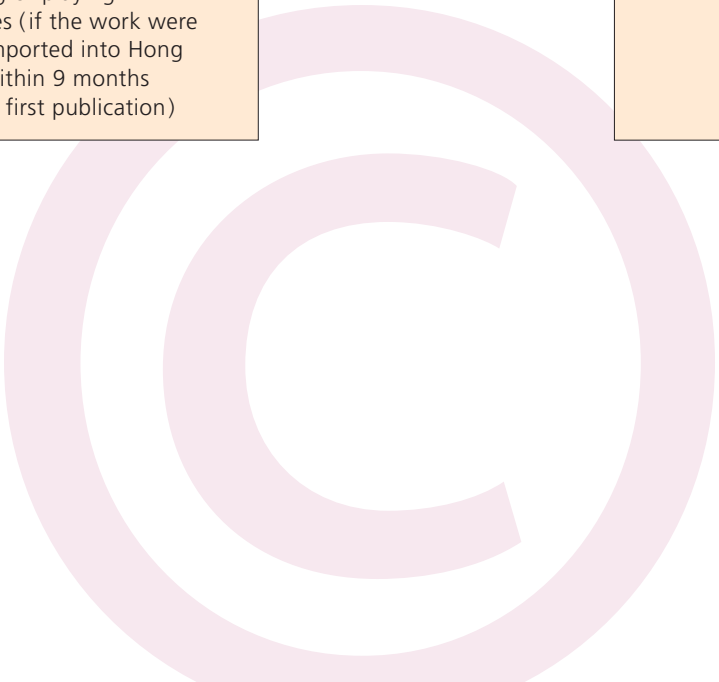
The community and the business sector are largely strongly in favour of liberalizing parallel importation, while some copyright owners remain strongly against it. As a further step towards meeting public expectations, while having regard to the strongly held views of copyright owners, the Bill sets out:

- to **shorten** the period in respect of which it is a criminal offence to deal in or to import (for the purpose of dealing in) a parallel imported copyright work from 18 months to nine months
- to **remove the civil and criminal liability** pertaining to importation and possession of parallel imported copyright works by business end-users, except for commercial dealing in purposes, or for public showing or playing of movies, TV dramas, musical sound recordings, and musical visual recordings by business end-users (other than educational establishments and libraries)

Acts associated with parallel imports attracting no liability	
<p>Existing situation</p> <ul style="list-style-type: none"> • private and domestic use 	<p>After the proposed liberalization</p> <ul style="list-style-type: none"> • private and domestic use • importation or possession by libraries or educational establishments for library or educational uses • importation or possession for other business end-use (except dealing in) unless the work is a parallel imported movie, TV drama, musical sound recording, or musical visual recording for public showing or playing purposes

Acts associated with parallel imports attracting both civil and criminal liability	
<p>Existing situation</p> <ul style="list-style-type: none"> dealing in or importation otherwise than for private and domestic use (if the work were to be imported into Hong Kong within 18 months after its first publication) possession of a parallel imported movie, TV drama, musical visual recording or musical sound recording for business end-use (if the work were to be imported into Hong Kong within 18 months after its first publication) 	<p>After the proposed liberalization</p> <ul style="list-style-type: none"> dealing in or importation for dealing in purposes (if the work were to be imported into Hong Kong within 9 months after its first publication) importation or possession by a business end-user (other than educational establishment or library) of a parallel imported movie, TV drama, musical sound recording, or musical visual recording for public showing or playing purposes (if the work were to be imported into Hong Kong within 9 months after its first publication)

Acts associated with parallel imports attracting civil liability only	
<p>Existing situation</p> <ul style="list-style-type: none"> dealing in or importation otherwise than for private and domestic use (if the work were to be imported into Hong Kong 18 months after its first publication) possession of a parallel imported movie, TV drama, musical visual recording or musical sound recording for business end-use (if the work were to be imported into Hong Kong 18 months after its first publication) 	<p>After the proposed liberalization</p> <ul style="list-style-type: none"> dealing in or importation for dealing in purposes (if the work were to be imported into Hong Kong 9 months after its first publication) importation or possession by a business end-user (other than educational establishment or library) of a parallel imported movie, TV drama, musical sound recording, or musical visual recording for public showing or playing purposes (if the work were to be imported into Hong Kong 9 months after its first publication)



Improving Enforcement Efficiency and Effectiveness

Time limit for prosecutions

The Bill proposes to give the Customs and Excise Department more time to investigate complex cases such as those involving works from overseas or those involving organized crime by amending the present time limit for commencing a prosecution to three years from the date of commission of the offence.

Proof of absence of licence from copyright owner

The Bill proposes to introduce new provisions so that an authorized representative can swear an affidavit on behalf of the copyright owner, stating that the copyright owner has not licensed the defendant in an infringement case to do certain offending acts.

Particulars of the author in affidavit evidence

The Copyright Ordinance presently provides that an affidavit may be sworn on behalf of a copyright owner in infringement proceedings and the information stated in such affidavit shall be prima-facie evidence of copyright subsistence and ownership of the work concerned. The purpose of such provision is to simplify the process of bringing evidence before the courts in copyright cases. The Bill improves the wording of this provision to state clearly the information required to be provided in the affidavit.

Operation of the Ordinance

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

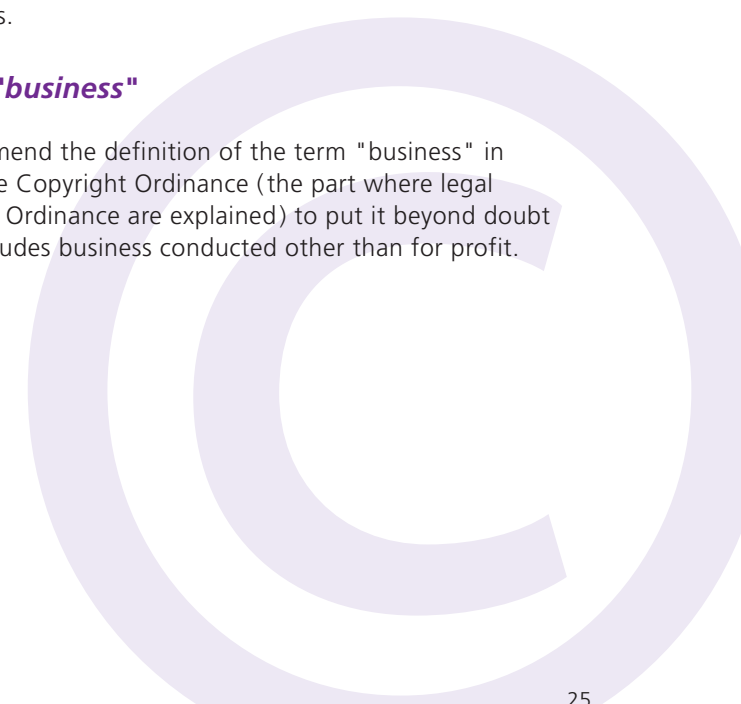
The Copyright Tribunal was established to help resolve disputes between copyright licensing bodies and users of copyright works. The Bill sets out to allow the Tribunal to operate more flexibly, so that it can manage cases efficiently.

Deletion of the phrase "in connection with"

Deleting the phrase "in connection with" from existing provisions of the ordinance concerning infringement of copyright in business will have the effect that activities incidental to or marginally related to business will fall outside the scope of the civil law and criminal offence provisions.

Definition of "business"

We propose to amend the definition of the term "business" in section 198 of the Copyright Ordinance (the part where legal terms used in the Ordinance are explained) to put it beyond doubt that the term includes business conducted other than for profit.



A quick glance at the implications of the Bill for some individual sectors of the community as users of copyright works

Proposals relevant to general business end-users (other than the education sector)	Relevant page(s) containing the gist of the proposals
<ul style="list-style-type: none"> Business end-user possession criminal liability - maintaining the existing scope (i.e. computer programs, movies, television dramas, and musical recordings) 	P.8
<ul style="list-style-type: none"> A new business end-user copying/distribution offence for printed works 	P.8-9
<ul style="list-style-type: none"> A new directors'/partners' liability in business end-user infringement cases 	P.10
<ul style="list-style-type: none"> New employees' defence and exemptions for certain professionals and service providers for business end-user criminal liability 	P.10
<ul style="list-style-type: none"> New civil and criminal liability associated with circumvention of technological measures used for copyright protection 	P.11-12
<ul style="list-style-type: none"> BUT there will be exemptions for the following activities : <ul style="list-style-type: none"> identifying and disabling the function of spyware or other similar technological measure in order to protect privacy security testing of computer system and network 	P.12
<ul style="list-style-type: none"> No more civil or criminal liability associated with the importation and possession of parallel imported copyright works, except for dealing in parallel imported copyright works or public showing or playing of parallel imported movies, TV dramas, musical sound recordings and musical visual recordings 	P.20-23

Proposals relevant to the education sector	Relevant page(s) containing the gist of the proposals
<ul style="list-style-type: none"> Business end-user possession criminal liability - maintaining the existing scope (i.e. computer programs, movies, television dramas, and musical recordings) 	P.8
<ul style="list-style-type: none"> A new business end-user copying/distribution offence for printed works for profit-making educational establishments 	P.8-9
<ul style="list-style-type: none"> A new directors'/partners' liability in business end-user infringement cases 	P.10
<ul style="list-style-type: none"> New employees' defence and exemptions for certain professionals and service providers for business end-user criminal liability 	P.10
<ul style="list-style-type: none"> New civil and criminal liability associated with circumvention of technological measures used for copyright protection 	P.11-12
<ul style="list-style-type: none"> BUT there will be exemptions for the following activities : <ul style="list-style-type: none"> undertaking reverse engineering with a view to achieving interoperability of an independently created computer program research into cryptography identifying and disabling the function of spyware or other similar technological measure in order to protect privacy security testing of computer system and network 	P.12

Proposals relevant to the education sector	Relevant page(s) containing the gist of the proposals
<ul style="list-style-type: none"> • A new exemption provision to the education sector so that "fair dealing" with a work for education purposes will not constitute infringement 	P.16-18
<ul style="list-style-type: none"> • Improvements to the existing permitted acts for education 	P.16
<ul style="list-style-type: none"> • No more civil or criminal liability associated with the importation and possession of any kinds of parallel imported copyright works for education use 	P.20-23

Proposals relevant to specific users of copyright works	Relevant page(s) containing the gist of the proposals
<ul style="list-style-type: none"> • A new permitted act for the making of specialized formats of certain copyright works for persons with a print disability 	P.19
<ul style="list-style-type: none"> • A new permitted act for drivers 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 	P.19

A quick glance at the new copyright protection measures relevant to specific copyright owners

Proposals relevant to all copyright owners	Relevant page(s) containing the gist of the proposals
<ul style="list-style-type: none"> • New civil and criminal liability against circumvention of technological measures used for copyright protection 	P.11-12
<ul style="list-style-type: none"> • Extended civil liability against persons tampering with RMI 	P.13

Proposals relevant to the publishing industry	Relevant page(s) containing the gist of the proposals
<ul style="list-style-type: none"> • A new criminal offence against regular or frequent making for distribution or distributing infringing copies of printed works in business 	P.8-9
<ul style="list-style-type: none"> • A new criminal offence against company directors or partners whose companies have done an act attracting the new business end-user copying/distribution criminal liability 	P.10

Proposals relevant to the music and film industries	Relevant page(s) containing the gist of the proposals
<ul style="list-style-type: none"> • A new criminal offence against company directors or partners whose companies have done an act attracting the business end-user possession criminal liability 	P.10
<ul style="list-style-type: none"> • A new civil liability against persons offering films (e.g. movies, musical visual recordings) for unauthorized commercial rental 	P.14-15

Proposal relevant to the comic book industry	Relevant page(s) containing the gist of the proposal
<ul style="list-style-type: none"> • A new civil liability against persons offering comic books for unauthorized commercial rental 	P.14-15

Proposal relevant to the software industry	Relevant page(s) containing the gist of the proposal
<ul style="list-style-type: none"> • A new criminal offence against company directors or partners whose companies have done an act attracting the business end-user possession criminal liability 	P.10

Proposal relevant to copyright owners of literary, dramatic or musical works included in sound recordings	Relevant page(s) containing the gist of the proposal
<ul style="list-style-type: none"> • A new civil right for copyright owners of literary, dramatic or musical works included in sound recordings against persons offering for unauthorized commercial rental the sound recordings that include their works 	P.15

Proposals relevant to performers	Relevant page(s) containing the gist of the proposals
<ul style="list-style-type: none"> • A new civil right for performers against persons offering for unauthorized commercial rental the sound recordings that include their performances 	P.15
<ul style="list-style-type: none"> • A new civil right for performers against persons who infringe their moral rights 	P.15

For more information about the policy considerations of the proposals and more details of the Bill, please refer to the Legislative Council Brief on the Bill which is available at the following websites -

www.citb.gov.hk

www.info.gov.hk/cib

www.ipd.gov.hk/eng/copyright.htm

An electronic copy of this booklet is also available at the above websites.

Should you have any views on the Bill, please send your views by email at co_review@citb.gov.hk or by post to Level 29, One Pacific Place, 88 Queensway, Hong Kong for the attention of Division 3 of the Commerce and Industry Branch of Commerce, Industry and Technology Bureau.