

**Proposals on various copyright-related issues
Response by the Hong Kong General Chamber of Commerce**

	<i>Government proposal</i>	<i>Considerations</i>	<i>Current Chamber position</i>	<i>Further Considerations</i>
Business end-user criminal liability				
1	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.	This would be implemented by incorporating such provision in the Copyright Ordinance before the current temporary arrangement expires in July 2006.	<i>Feb 05</i> We believe the current limited scope of application (i.e. applying only to computer programmes, visual or audio recordings of music or songs, television dramas and movies) is reasonable and reflects the needs of Hong Kong.	<i>We maintain our current position and support the government proposal.</i> <i>We note that the audio-visual sector has expressed concern that the definition of “television drama” is too narrow and should be broadened to include all television programmes. This should be considered seriously by the Administration.</i>
2	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.	The criminal liability will only apply if the infringing acts are done “on a regular or frequent basis resulting in financial loss to the copyright owner”, in the case of newspapers, magazines or periodicals (excluding academic journals), or done “on a significant scale resulting in financial loss to the copyright owner”, in the case of books and academic journals. In either case, there will be a “safe harbour” against the criminal liability, in the form of a numerical threshold in the law. It is proposed that non-profit making educational establishments and educational establishments	<i>Feb 05, Dec 01</i> Criminal liability, as a very serious legal tool, should be used sparingly and only resorted to in very specific ways to address clearly defined problems of piracy. By implication, criminal liability should apply only when rampant piracy exists. <i>Jan 04</i> If criminalisation were the way to go, then limiting criminality in copying to that which is willful and causes substantial loss would seem a sensible approach. Before that is contemplated, however, two prerequisites will have to be met. (i) Firstly, the case for criminalisation will have to be more convincingly established. There needs to be a stronger body of evidence supporting the assertion that the publishing industry	<i>We maintain the position as elucidated in our previous papers, i.e. while we have no objection to the view that the copying and distribution for commercial gain should be made a criminal act if it is willful and causes substantial loss, we express caution that criminalisation is a very serious legal tool and should only be used to address very specific and clearly defined problems (e.g. shops selling photocopied publications). To introduce a criminal offence that is generally-worded but which has to be supported by all sorts of safeguards (“safe harbour” and various exemptions) is not our preferred route to protect IPR rights. In other words, we need to understand more what the specific problems are for the publishing Industry, and how the proposed new offence can</i>

	subvented by the Government be exempted from the proposed criminal provision to facilitate teaching. Profit-making educational establishments not subvented by the Government will, however, not be exempted.	<p>(ii) is being threatened by photocopying. Secondly, there must be a fair and sensible licensing scheme, with proper government oversight and check-and-balance, to ensure that the licensing body is acting responsibly and not abusing their position.</p> <p>The crux of the matter is to strike a balance of interest between copyright holders and users. We are not convinced yet that the right balance is achieved through introducing criminal sanctions.</p> <p><i>Dec 01</i> There should be no distinction between business organisations and non-profit bodies. Schools and non-profits should abide by the law in the same way as profit making bodies, given the intent of the law to penalise genuinely criminal activities.</p>	<p><i>specifically deal with these problems (and not punish others bona fide activities unintentionally), before we can support introducing the new criminal offence.</i></p> <p><i>With regard to the “safe harbour” provision, it appears to be conceptually similar to that of “fair use”, a principle which we would support. But since criminal sanction is involved, we are not certain if the “safe harbour” should be in the form of a numerical value, rather than left to the court to decide on the basis of reason and common sense. There is some logical difficulty in assigning an arbitrary numerical value (e.g. number of pages photocopied) to determine the criminality of an act.</i></p> <p><i>On the matter of exemption, we do not agree with the discriminatory treatment between commercial and non-profit organizations. Criminal sanctions are to punish “criminals” and the criminality should be determined by the act, rather than by the status of the person committing the act.</i></p>	
3	To provide statutory defence against the business end-user criminal liability in (1) and (2) above for employees and certain professionals and persons under specific circumstances.	<p>The majority of the views received in the consultation exercise supported the introduction of an employee defence.</p> <p>Furthermore, the government proposes to provide a new defence against the business end-user possession criminal liability if the infringing copy is provided by his</p>	<p><i>Feb 05</i> We do not agree with the proposal for specific employee defence. As a matter of principle, both employers and employees should abide by the law and the Government should avoid sending inconsistent signals to the community on the importance of IPR protection.</p> <p>We are not aware of any instance where lower-level employees were unjustly targeted</p>	<p><i>We stand by our view that both employers and employees should abide by the law equally.</i></p> <p><i>The defence proposed (whether for employees or for professionals under specific circumstances) relates to unintentional infringement, i.e. acting on other people’s instruction and not knowingly infringing. There should be</i></p>

		<p>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.</p>	<p>for enforcement or prosecution with respect to copyright infringement, and we do not believe that a specific employee defense should be introduced.</p> <p><i>June 03, Dec 01</i></p> <p>Employees and employers alike should abide by the law and should be treated alike. If employees break the law they should be liable. Although we understand the employee's concern, it is our view that unlawful coercion by employers should not be a ground for breaking the law. If the defence is to provide an additional ground for mitigation, that would have been available as a matter of course, and we do not see why it is necessary to put that into the law.</p>	<p><i>enough ground under the current legal system for such defence. Once a criminal act is known, the influence of others should only be a mitigating factor, not a defence.</i></p>
4	<p>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 (1) or (2) above unless there is evidence proving that the director(s) or partner(s) has not authorized the concerned infringing act to be done.</p>	<p>The proposed directors'/partners' criminal liability is modeled on a similar provision to combat business use of unauthorized decoders in the Broadcasting Ordinance (Cap.562). With the introduction of this proposed offence, businesses are expected to put in place software asset management and better corporate governance which may involve some additional cost of operation.</p>		<p><i>We have no objection to this provision. We recognize that the promotion of corporate governance would require a higher level of responsibility of directors and partners.</i></p> <p><i>However, the proposal should only be implemented on the basis of very clear guidelines as to what will amount to sufficient proof that the directors concerned have not authorized the infringing act.</i></p>

5	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.	In other words, the proposal by software and computer game industries to make it a legal requirement for businesses to keep records of licensed computer programs will not be pursued for the time being.	<i>Feb 05</i> The Chamber is not in favour of heavy-handed measures such as imposing an additional legal requirement for IPR record keeping. It goes against the principle of business-friendly regulation, and will in any case be strongly resisted by small and medium enterprises.	<i>We support shelving the proposal to require businesses to keep records of licensed computer programmes.</i>
Copyright exemption regime				
6	To exempt from copyright restriction 'fair dealing' with a copyright work for the purpose of education and public administration.	A general non-exhaustive fair use regime along the US model would not be introduced. Instead, all the existing copyright permitted act provisions in the Copyright Ordinance should be retained.	<i>Feb 05</i> Quantitative indicators should be part of a non-legal code of practice. This will help illustrate what may be regarded as "reasonable" or "fair", without making them rigid legal standards.	<i>We have no problem with the proposals for educational and public institutions.</i>
7	To extend the scope of some existing 'permitted acts' for education.	However, for education and public administration purposes, a non-exhaustive fair dealing approach is proposed for use of	With technological development, we are doubtful if an exhaustive list can be possible, or even desirable. On the other hand, the introduction of a non-exhaustive general fair	<i>The administration of fair dealing for the business sector is not addressed in the current proposals. We stand by our call for self-regulatory guidelines to be established to help provide guidance to the business sector.</i>
8	To modify the existing 'permitted acts' for research of private study.			

9	<p>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).</p>	<p>copyright works. When considering whether or not certain acts constitute fair dealing, the court should take into account the following factors –</p> <ul style="list-style-type: none"> (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. <p>With regard to (c) 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. The government does not consider a quantitative test appropriate.</p>	<p>use defense would represent a significant shift in Hong Kong’s IPR regime, and might inadvertently create ambiguity in the law. A possible model to explore would be to maintain the list of copyright-exempted acts but to make them a non-exhaustive list, under a non-exhaustive regime.</p> <p>In the meantime, the current exhaustive listing of copyright-exempted acts can be maintained, but with the addition of a “catch-all” provision that takes into account the facts of each case. This will preserve clarity of the current regime while at the same time providing greater flexibility.</p> <p><i>Dec 01</i></p> <p>We support a more liberal approach in considering what is “reasonable”. Such a liberal attitude should be encouraged not only among the education sector but across the board.</p> <p>The Chamber does not support defining “reasonableness” by law. Instead we encourage copyright owners and users such as schools to work out some self-regulatory guidelines on reasonableness.</p>	
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10	To set aside certain proposals relating to 'permitted acts' put forward to the Panel in 2002 and to take forward other proposals.	<p>The following proposals will be taken forward –</p> <ul style="list-style-type: none"> (a) to remove the restriction that the permitted acts (AV recording and photocopying) by educational establishments will not be permitted if there are relevant licensing schemes; (b) to introduce a statutory exemption for the making of specialized books for persons with print disability; and (c) to provide exemption for radio broadcast for vehicles provided the radio broadcast is played predominantly for the drivers to have access to public information. 	<p><i>Dec 01</i></p> <p>We support the exemption being granted for free public showing or playing of broadcast or cable programmes, except where goods or services are supplied at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme.</p>	<p><i>We agree with the government proposals.</i></p>
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Circumvention of technological measures for copyright protection				
11	<p>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.</p>	<p>It is proposed to provide civil remedies against</p> <p>(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;</p> <p>(b) the provision of services on a commercial scale to circumvent effective technological measures; and</p> <p>(c) the act of circumventing effective technological measures.</p> <p>To ensure that the protection will not hinder scientific research, it is proposed that an exemption for research into cryptography should be introduced for the civil liability associated with the act of circumvention.</p>	<p><i>Feb 05</i></p> <p>We do not condone circumvention of legal practices. However, we are not convinced that legal intervention would be necessary to the extent of criminalising the underlying technological development. Although it may be difficult to draw, there is a fine line between the act of circumvention and the technology that bring that about. In our view, the matter should best be left to the market to settle. If legal remedies were to be provided, civil liabilities would provide enough redress.</p> <p><i>Dec 01</i></p> <p>In our view, a deception is involved in fraudulent reception. Moreover, the problem is becoming rampant if not curbed. We thus agree with the view that there should be both civil remedy and criminal sanction against fraudulent reception (the possession of an unauthorised decoder for commercial purposes).</p> <p><i>Apr 99</i></p> <p>In our view, imposing consumer liability will be too extreme a measure and will be counter-productive. In the campaign against IPR infringement, the consumer is the one group which we should not alienate. The battle should be one between society and the criminals, not one between IPR businesses and consumers.</p>	<p><i>We have no objection to imposing civil and criminal liabilities for circumvention for commercial purposes, to protect the audio-visual, music and digital entertainment industries (e.g. against fraudulent reception, illegal downloading of music, or illegal copies of computer games).</i></p> <p><i>We agree that exemption should be provided for bona fide scientific research.</i></p> <p><i>We note that the audio-visual sector has proposed the introduction of criminal sanctions for “cable piracy”, which would cover not just businesses but also consumers. We have some sympathy with this view, as the problem of fraudulent reception is becoming rampant. We call on the Administration to conduct serious consultation on combating the problem of cable piracy.</i></p>

12	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.			
13	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.	<p>The sale of modified game consoles is rather prevalent in Hong Kong, with 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.</p> <p>The music industry has started selling and delivering songs through digital channels. It is thus proposed 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.</p>		

Others: parallel importation, rental rights and WTO provisions				
14	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;	<p>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 by business end-users, while copyright work users advocated for the removal of all restrictions. 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.</p>	<p><i>Feb 05</i> With regard to audio-visual products, we consider that it is time now to take a view on moving forward. We propose a balanced approach. On the one hand, to help the creative industries, we would support the retention of civil and criminal liabilities as currently provided. On the other hand, we propose that the liability-period be shortened from eighteen months to twelve months, to offer more flexibility to end-users.</p> <p><i>June 03</i> For audio-visual products (film and music recording), distribution is time-critical. As parallel importation may affect the exploitation of their intellectual property rights drastically, the Chamber remains open on whether the sanctions should continue to apply to film and music recording.</p>	<p><i>We have no strong views on maintaining the current regulatory regime. However, as a measure of gradual and progressive liberalization, we would still support a shortening of the liability period from 18 months to 12 months.</i></p> <p><i>As a matter of principle, however, we do not support double-standards in applying criminal law. Unless criminal liabilities are removed, we do not support exemption for educational institutions.</i></p>
15	To introduce 'rental rights' for films and comic books.	<p>Civil remedies will be provided for violation of these rights. This is in line with the existing arrangement on rental rights for computer programs and sound recordings.</p> <p>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.</p>	<p><i>Feb 05</i> The rental rights provision should be rationalised, to apply also to audio-visual products (films as well as performance videos). Civil liabilities should be provided. Introducing rental rights to audio-visual products will also help the development of our creative industries.</p> <p><i>Jan 04</i> With the various amendments in the Copyright Ordinance, copyright holders have a very powerful legal instrument to protect</p>	<p><i>We agree with the proposals, and we renew our call for regulation of the copyright licensing bodies.</i></p>

		<p>The Copyright Tribunal will provide the mechanism for safeguard and dispute settlement over licensing schemes.</p>	<p>their rights. But this is not matched by an adequate copyright licensing infrastructure – the institutional structure to support the balance of interest between copyright holders and users.</p> <p><i>Dec 01</i> We welcome greater transparency of licensing bodies. We believe this should be achieved through a requirement in the Registration of Copyright Licensing Bodies Regulation for a code of practice to be established on collection and administration of royalties, which should be made public. This will enable the behaviour of the copyright licensing bodies to be monitored by the public and by users, within a self-regulatory framework.</p>	
16	<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.</p>	<p>With regard to phonograms, the Copyright Ordinance will be amended to grant commercial rental rights to authors of underlying works, and to grant moral rights as well as rental rights to performers for live aural performances or performances fixed in phonograms. The definitions of “performer” and “performance” will also be amended to make clear that they cover artistic works and expressions of folklore.</p>	<p><i>Feb 05</i> The Chamber does not have strong views on these specific issues, other than stating that as a matter of principle, we believe Hong Kong should adopt international best practices.</p>	<p><i>We agree with government proposals.</i></p>