

Paper for the LegCo Subcommittee

Copyright (Suspension of Amendments) Bill 2001

Purpose

This paper provides information on the issues raised by the Subcommittee on 25 April.

Background

2. The use of copyright infringing products in business (for example, pirated computer software) is a serious problem in Hong Kong. According to an unofficial estimate, about 50% of all computer software used in business is pirated.

3. In 1999, in response to wide community concern about rampant piracy of computer software, music and films, we consulted the public on additional legislative measures to combat the problem. One of the proposed measures that gained wide public support was to criminalize the possession of infringing products in the course of business. A main objective of the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 ("the amending Ordinance") is to amend the Copyright Ordinance to implement this proposal.

The Amending Ordinance

4. The amending Ordinance has replaced the phrase "for the purpose of trade or business" with 'for the purpose of, in the course of, or in connection with, any trade or business' in sections 31, 32, 95, 96, 109, 118, 120, 207, 211, 228 and 273 of the Copyright Ordinance. The amending Ordinance also adds to each of the above sections a provision that it is immaterial whether or not the trade or business consists of dealing in infringing copies of copyright works (or other types of infringing articles, or devices for making them).

5. Apart from the above provisions, the amending Ordinance has also amended section 119(1) of the Copyright Ordinance by putting "on

indictment” after “conviction”. This is a technical amendment and does not involve any policy changes.

6. We have compared the various affected criminal and civil provisions in the Copyright Ordinance before and after the implementation of the amending Ordinance. Details are set out in the Annex.

Relationship between Sections 31 and 118(1)(d) of the Copyright Ordinance

7. The amending Ordinance deletes the phrase “for the purpose of trade or business” in sections 31 and 118(1)(d) and replaces it with “for the purpose of, in the course of, or in connection with any trade or business”.

8. After the amendment, section 31(a) provides that the copyright in a work is infringed by a person who, without authorisation, possesses an infringing copy of a copyright work for the purpose of, in the course of, or in connection with any trade or business, knowing or having reason to believe that the copy is an infringing copy of the work. Section 118 (1)(d) stipulates that a person commits an offence if he, without authorisation, possesses an infringing copy of a copyright work for the purpose of, in the course of, or in connection with, any trade or business, with a view to committing any act infringing the copyright.

9. The definition of “infringing copy of a copyright work” referred to in sections 31 and 118 (1)(d) is set out in section 35. An infringing copy of a copyright work is one the making of which infringes the copyright of that work, such as pirated computer program or pirated compact disc.

10. The offence under section 118(1)(d) is made up of two main parts. The first part is the “possession” of an infringing copy of a copyright work. The second part is “with a view to committing any act infringing the copyright”. The acts infringing copyright refer to the acts restricted by copyright under sections 22 to 34, such as –

- copying of a work (section 23)

- showing a work in public (section 27)
- possessing an infringing copy of a copyright work in the course of business, knowing or having reason to believe that it is an infringing copy of a copyright work (section 31(a))

11. Under sections 31 and 118(1)(d), a person commits an offence if he possesses an infringing copy of a copyright work (such as pirated computer software) in the course of business, knowing or having reason to believe that it is an infringing copy of the software (section 31(a)).

Copyright (Suspension of Amendments) Bill 2001

12. The purpose of the Copyright (Suspension of Amendments) Bill 2001 (“the Bill”) is to suspend the implementation of the amending Ordinance insofar as it applies to sections 118 and 120 of the Copyright Ordinance, except where the copyright works concerned are movies, television dramas, sound or video recordings of music, or computer programs. In gist, with respect to all copyright works except computer programs, movies, television dramas or music, a criminal infringing act shall be dealt with in accordance with the provisions of the Copyright Ordinance before the commencement of the amending Ordinance. As for civil liabilities, regardless of whether the copyright works involves the works aforementioned, the amending Ordinance shall remain in force.

13. The Bill does not introduce any amendments to the criminal provisions in the Copyright Ordinance before the commencement of the amending Ordinance. Thus, after the Bill is passed by the Legislative Council, any person engaged in dealing in pirated articles will still commit an offence.

14. After the Bill comes into effect, investigation and prosecution in respect of criminal infringements will be conducted according to the policy prevailing before the commencement of the amending Ordinance. For example, section 118 (1)(d) in the original Ordinance stipulates that a person commits an offence if he possesses an infringing copy of a copyright work for the purpose of trade or business with a view to committing any act infringing the copyright. We shall interpret the phrase ‘for the purpose of trade or business’ narrowly to mean that an

enterprise will be liable to prosecution only if it is engaged in dealing in infringing copies of the work.

Clause 2(2) in the Bill

15. Clause 2(2) stipulates that Clause 2(1) does not apply in relation to an infringing copy of a movie, television drama, video or sound recording of music, or computer program, as described in Clause 2(2).

16. The suspension measures do not apply to works of such kinds because they are not normally "information" disseminated in enterprises or schools. As the authorisation regime of such products is relatively simple and clear, and the Government's determination and measures taken to combat pirated software and compact discs over the past few years have enhanced the public awareness on protection of copyright, there are in general no difficulties encountered by the public in complying with the new Ordinance where these products are involved.

17. Moreover, these products generally have substantial commercial value and the piracy of them, in particular computer software, in Hong Kong and elsewhere is rampant. In the past, the widespread piracy problem has deterred companies from investing in the development of new software to compete with mainstream products in the market. The new Ordinance has the effect of encouraging enterprises to use legitimate software. In the long term, this will attract more investment in the development of new software, promote market competition and offer consumers with better choices at lower prices.

18. It is therefore necessary to continue with the implementation of the new Ordinance in respect of the above products; otherwise, all our previous efforts will count for nothing.

19. The legislative intent of the Government in making the possession of pirated computer software, etc in the course of business a criminal offence has been clear and unambiguous. Both the Legislative Council and the public have understood and agreed with this. In fact, in the consultation document published in early 1999, the Government stated clearly its proposal to make it an offence for the possession of pirated goods such as computer software in the course of business. This proposal gained wide public support. When the results of the public consultation exercise were discussed in June 1999, the Legislative

Council Panel on Trade and Industry also explicitly supported the proposal. When introducing the Bill into the Legislative Council for the First and Second Readings in January 2000, the Government clearly explained the legislative intent. This was later reiterated at the Bills Committee meeting and the Third Reading of the Bill at the Legislative Council in June. It is evident that amending the Ordinance to strengthen the protection for computer software, etc is a fully-fermented and unambiguous move.

20. Thus if an all-embracing suspension approach were adopted hastily without rhyme or reason, it would send a wrong message that Hong Kong takes a retrograde step in the protection of intellectual property. The public and enterprises would be confused. Hong Kong's international image would be seriously damaged, and foreign investors' confidence in Hong Kong would be affected.

21. The Assistant Legal Adviser of the Legislative Council pointed out that granting certain copyright works exceptional treatment in the law might not be consistent with Article 22 of the Bill of Rights ("equality before and equal protection of law"). According to Government's legal advice, provided that there are objective and reasonable grounds for such exceptional treatment, it does not contravene Article 22 of the Bill of Rights. In view of the rampant piracy of such works, it is reasonable to provide a higher level of protection by legislation.

Explanations of terms contained in Clause 2(2)

22. Section 7 of the Copyright Ordinance provides a very broad definition of the word "film", which may include a recording of any moving image. The legislative intent of the Government is to enhance the protection of films with substantial commercial value involving serious piracy, such as films having been or scheduled to be played in cinemas. Clause 2(2)(a) adopts the word "movie", meaning cinema films. That is to say, the film is produced mainly for the purpose of being shown in cinemas. The content of the film can be dramatic, documentary or otherwise.

23. The legislative intent of the Government regarding Clause 2(2)(b) is similar to that regarding Clause 2(2)(a). The term television dramas

used in this clause means drama films produced primarily for television broadcast. Apart from those produced by the local television stations, a significant number of television dramas produced in the Mainland, Taiwan, Japan and even America and Europe have been put into optical media format for sale. Piracy of these works is common. This Clause does not cover non-drama television programmes, such as game programmes, news and information programmes as well as documentary films, etc.

24. Clause 2(2)(c) refers to sound or film recordings generally called "music", including pure music, songs and MTV etc. The definition of the term "musical work" under the Copyright Ordinance means pure music (see section 4(1)), while the term "literary work" (see section 4(1)) covers lyrics in a song.

25. The term "computer program" in Clause (2)(2)(d) is found in the definition of "literary work" under section 4(1) of the Copyright Ordinance. It is also a term commonly used in copyright legislation overseas. Computer programs in a printed form are excluded from sub-clause (2)(d) because the primary purpose of the legislation is to protect commercial computer software. The inclusion of computer programs in a printed form may cause worries among teachers who may wish to make photocopies of a computer program contained in a book for teaching purposes.

Whether the suspension should cover civil provisions

26. The focus of the public concern is on criminal liabilities. The amendments to civil provisions do not affect significantly practical operations in the community. Moreover, as the civil provisions involve the direct benefits of copyright owners, it is not appropriate to change these provisions without careful consultation. We will take into account the views forwarded by various sectors on the civil provisions when working out the long-term solution.

Comparison of the relevant provisions in Copyright Ordinance Before and After Commencement of Amending Ordinance

Sections 31, 32, 95, 96, 109, 118, 120, 207, 211, 228 and 273 of the Copyright Ordinance contain the phrase “for the purpose of trade or business”. The amending Ordinance has replaced this phrase with “for the purpose of, in the course of, or in connection with, any trade or business”. The amending Ordinance also adds to each of the above sections a provision that it is immaterial whether or not the trade or business consists of dealing in infringing copies of copyright works (or other types of infringing articles, or devices for making them).

Amendments to the criminal provisions

2. Of the above provisions, Sections 118 and 120 are criminal provisions (see Appendix A for the specific provisions). Amendments to Sections 118(1)(d), (e) and (f) by the amending Ordinance concern the acts of possessing, selling, letting for hire, exposing or distributing infringing copies of copyright works respectively.

3. Before the amending Ordinance came into effect on 1 April, Section 118(1)(d) stipulated that a person committed an offence if he possessed an infringing copy of a copyright work for the purpose of trade or business with a view to committing any act infringing the copyright. Section 118(1)(e) stipulated that a person committed an offence if he sold, let for hire, exposed or distributed an infringing copy of a copyright work. Based on the Government’s legal advice, we interpreted the phrase “for the purpose of trade or business” narrowly to mean that an enterprise would be liable to prosecution only if it was engaged in dealing in the infringing copies of copyright works. For example, a firm that engaged in manufacturing optical disks containing pirated computer software would commit an offence whereas a firm engaged in garment manufacturing and which used pirated accounting software in its business would not, according to our interpretation of the law, be prosecuted.

4. After the commencement of the amending Ordinance, the phrase “for the purpose of trade or business” in Sections 118(1)(d) & (e) has been replaced by “for the purpose of, in the course of, or in connection with, any trade or business”. The garment manufacturing firm in the

above paragraph, though not engaged in pirated software business, would clearly commit an offence and be liable to prosecution for having used pirated accounting software in the course of business.

5. The amendments made by the amending Ordinance to Section 118(1)(f) relate to the amendments to subsection 1(e) which concerns the distribution of infringing copies of copyright works. They are consequential amendments.

6. The amending Ordinance also introduces similar amendments to Sections 118(4)&(8) and 120(2), which are related to the making, importing, exporting, selling, letting for hire, or possessing of devices or articles designed for making infringing articles. Before the amending Ordinance came into effect, the making of this kind of device or article would be subject to criminal liabilities only when it was intended for the making of infringing articles “for the purpose of trade or business”. After the commencement of the amending Ordinance, the making of such a device will be subject to criminal liabilities so far as the device is used for the making of infringing articles “for the purpose of, in the course of, or in connection with, any trade or business”.

Amendments to civil provisions

7. Where civil liabilities are concerned, the amending Ordinance has introduced amendments described in paragraph 1 to Sections 31, 32, 95, 96, 109, 207, 211, 228 and 273 of the Copyright Ordinance (see Appendix B for the specific provisions), which are related to the acts listed below:

- (Section 31): possessing, exhibiting in public or distributing infringing copies of a copyright work;
- (Section 32): possessing an article specifically designed or adapted for making copies of a work;
- (Section 95): possessing or exhibiting in public or distributing infringing articles;
- (Section 96): possessing a copy of a work containing a false attribution or dealing with an artistic work which has been altered or with a copy of such an altered work;
- (Section 109): possessing, has in custody or control of an infringing copy of a copyright work;
- (Section 207): possessing, making available to the public, selling

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or letting for hire, offering or exposing for sale or hire, or distributing an infringing fixation, and therefore infringing a performer's rights;

- (Section 211): possessing, making available to the public, selling or letting for hire, offering or exposing for sale or hire, or distributing an infringing fixation, and therefore infringing the rights of a person having fixation rights in relation to the performance;
- (Section 228): possessing, in custody or control of an infringing fixation of a performance;
- (Section 273): making, importing, exporting, selling or letting for hire, offering or exposing for sale or hire, advertising for sale or hire, any device or means specifically designed or adapted to circumvent the form of copy-protection employed.

Relevant Criminal Provisions of the Copyright Ordinance as of 31 March 2001

Chapter: 528	Title: COPYRIGHT ORDINANCE	Gazette Number:
Section: 118	Heading: Criminal liability for making or dealing with infringing articles, etc.	Version Date: 30/06/1997

Expanded Cross Reference:
Sections 115, 116, 117

Offences

(1) A person commits an offence if he, without the licence of the copyright owner-

- (a) makes for sale or hire;
- (b) imports into Hong Kong otherwise than for his private and domestic use;
- (c) exports from Hong Kong otherwise than for his private and domestic use;
- (d) possesses for the purpose of trade or business with a view to committing any act infringing the copyright;
- (e) for the purpose of trade or business-
 - (i) sells or lets for hire;
 - (ii) offers or exposes for sale or hire;
 - (iii) exhibits in public; or
 - (iv) distributes; or
- (f) distributes otherwise than for the purpose of trade or business to such an extent as to affect prejudicially the owner of the copyright,

an infringing copy of a copyright work.

(2) Subsections (1)(b) and (c) and (4)(b) and (c) do not apply to an article in transit.

(3) It is a defence for the person charged with an offence under subsection (1), to prove that he did not know and had no reason to believe that the copy in question was an infringing copy of the copyright work.

(4) A person commits an offence if he-

- (a) makes;
- (b) imports into Hong Kong;
- (c) exports from Hong Kong;
- (d) possesses; or
- (e) sells or lets for hire, or offers or exposes for sale or hire,

an article specifically designed or adapted for making copies of a particular copyright work which article is used or intended to be used to make infringing copies of the copyright work for sale or hire or for use for the purpose of trade or business.

(5) It is a defence for the person charged with an offence under subsection (4) to prove that he did not know and had no reason to believe that the article was used or was intended to be used to make the infringing copies for sale or hire or for use for the purpose of trade or business.

(6) For the purpose of subsections (1)(b) and (3), where a person is charged with an offence under subsection (1) in respect of a copy of a copyright work which is an infringing copy by virtue only of section 35(3) and not being excluded under section 35(4), if he proves that-

- (a) he had made reasonable enquiries sufficient to satisfy himself that the copy in question was not an infringing copy of the work;
- (b) he had reasonable grounds to be satisfied in the circumstances of the case that the copy was not an infringing copy;
- (c) there were no other circumstances which would have led him reasonably to suspect that the copy was an infringing copy,

he has proved that he had no reason to believe that the copy in question was an infringing copy of the copyright work.

(7) In determining whether the person charged has proved under subsection (6) that he had no reason to believe that the copy in question was an infringing copy of the work, the court may have regard to, including but not limited to, the following-

- (a) whether he had made enquiries with a relevant trade body in respect of that category of work;
- (b) whether he had given any notice drawing attention of the copyright owner or exclusive licensee to his interest to import and to sell the copy of the work;
- (c) whether he had complied with any code of practice that may exist in respect of the supply of that category of work;
- (d) whether the response, if any, to those enquiries made by the defendant was reasonable and timely;
- (e) whether he was provided with the name, address and contact details of the copyright owner or exclusive licensee (as the case may be);
- (f) whether he was provided with the date of first day of publication of the work;
- (g) whether he was provided with proof of any relevant exclusive licence.

(8) A person commits an offence if he has in his possession an article knowing or having reason to believe that it is used or is intended to be used to make infringing copies of any copyright work for sale or hire or for use for the purpose of trade or business.

(9) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section. <*Note-Exp. X-Ref.: Sections 115, 116, 117*>

[cf. 1988 c. 48 s. 107 U.K.]

Chapter: 528	Title: COPYRIGHT ORDINANCE	Gazette Number:
Section: 120	Heading: Making infringing copies outside Hong Kong, etc.	Version Date: 30/06/1997

Expanded Cross Reference:
Sections 115, 116, 117

(1) A person commits an offence if he makes outside Hong Kong, for export to Hong Kong otherwise than for his private and domestic use, any article that he knows would, if it were made in Hong Kong, constitute an infringing copy of a copyright work.

(2) A person commits an offence if he makes outside Hong Kong an article specifically designed or adapted for making copies of a particular copyright work knowing or having reason to believe that it is to be used or is intended to be used in Hong Kong for making an infringing copy of the copyright work for sale or hire or for use for the purpose of trade or business.

(3) A person commits an offence if he makes outside Hong Kong or exports from Hong Kong an article specifically designed or adapted for making copies of a particular copyright work, knowing or having reason to believe that-

- (a) the article is to be used or is intended to be used outside Hong Kong for making another article for export to Hong Kong; and
- (b) the latter article mentioned in paragraph (a) would, if it were made in Hong Kong, constitute an infringing copy of the copyright work.

(4) A person who, in Hong Kong or elsewhere, aids, abets, counsels or procures the commission by another person of an offence under subsection (1), (2) or (3) commits that offence as a principal.

(5) The offences under subsections (1), (2) and (3) are without prejudice to the offences under section 118.

(6) A person who commits an offence under subsection (1), (2) or (3) is liable on conviction on indictment to a fine of \$500000 and to imprisonment for 8 years.

(7) For the purpose of this section, "article" (物品) does not include an article in transit.

(8) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section. <*Note-Exp. X-Ref.: Sections 115, 116, 117*>

Relevant Criminal Provisions of the Copyright Ordinance as of 1 April 2001

Chapter: 528	Title: COPYRIGHT ORDINANCE	Gazette Number: L.N. 46 of 2001
Section: 118	Heading: Criminal liability for making or dealing with infringing articles, etc.	Version Date: 01/04/2001

Expanded Cross Reference:
115, 116, 117

Offences

- (1) A person commits an offence if he, without the licence of the copyright owner-
 - (a) makes for sale or hire;
 - (b) imports into Hong Kong otherwise than for his private and domestic use;
 - (c) exports from Hong Kong otherwise than for his private and domestic use;
 - (d) possesses for the purpose of, in the course of, or in connection with, any trade or business with a view to committing any act infringing the copyright; (Amended 64 of 2000 s.7)
 - (e) for the purpose of, in the course of, or in connection with, any trade or business- (Amended 64 of 2000 s.7)
 - (i) sells or lets for hire;
 - (ii) offers or exposes for sale or hire;
 - (iii) exhibits in public; or
 - (iv) distributes; or
 - (f) distributes (otherwise than for the purpose of, in the course of, or in connection with, any trade or business) to such an extent as to affect prejudicially the owner of the copyright, (Amended 64 of 2000 s.7)
an infringing copy of a copyright work.
- (2) Subsections (1)(b) and (c) and (4)(b) and (c) do not apply to an article in transit.
- (3) It is a defence for the person charged with an offence under subsection (1), to prove that he did not know and had no reason to believe that the copy in question was an infringing copy of the copyright work.
- (4) A person commits an offence if he-
 - (a) makes;
 - (b) imports into Hong Kong;
 - (c) exports from Hong Kong;
 - (d) possesses; or
 - (e) sells or lets for hire, or offers or exposes for sale or hire, an article specifically designed or adapted for making copies of a particular copyright work which article is used or intended to be used to make infringing copies of the copyright work for sale or hire or for use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s.7)
- (5) It is a defence for the person charged with an offence under subsection (4) to prove that he did not know and had no reason to believe that the article was used or was intended to be used to make the infringing copies for sale or hire or for use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s.7)
- (6) For the purpose of subsections (1)(b) and (3), where a person is charged with an offence under subsection (1) in respect of a copy of a copyright work which is an infringing copy by virtue only of section 35(3) and not being excluded under section 35(4), if he proves that-
 - (a) he had made reasonable enquiries sufficient to satisfy himself that the copy in question was not an infringing copy of the work;

- (b) he had reasonable grounds to be satisfied in the circumstances of the case that the copy was not an infringing copy;
- (c) there were no other circumstances which would have led him reasonably to suspect that the copy was an infringing copy, he has proved that he had no reason to believe that the copy in question was an infringing copy of the copyright work.

(7) In determining whether the person charged has proved under subsection (6) that he had no reason to believe that the copy in question was an infringing copy of the work, the court may have regard to, including but not limited to, the following-

- (a) whether he had made enquiries with a relevant trade body in respect of that category of work;
- (b) whether he had given any notice drawing attention of the copyright owner or exclusive licensee to his interest to import and to sell the copy of the work;
- (c) whether he had complied with any code of practice that may exist in respect of the supply of that category of work;
- (d) whether the response, if any, to those enquiries made by the defendant was reasonable and timely;
- (e) whether he was provided with the name, address and contact details of the copyright owner or exclusive licensee (as the case may be);
- (f) whether he was provided with the date of first day of publication of the work;
- (g) whether he was provided with proof of any relevant exclusive licence.

(8) A person commits an offence if he has in his possession an article knowing or having reason to believe that it is used or is intended to be used to make infringing copies of any copyright work for sale or hire or for use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s.7)

(8A) It is immaterial for the purpose of subsections (1)(d) and (e), (4) and (8) whether or not the trade or business consists of dealing in infringing copies of copyright works. (Added 64 of 2000 s.7)

(9) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section. <*Note - Exp. X-Ref.: Sections 115, 116, 117

[cf. 1988 c. 48 s. 107 U.K.]

Chapter: 528	Title: COPYRIGHT ORDINANCE	Gazette Number: L.N. 46 of 2001
Section: 120	Heading: Making infringing copies outside Hong Kong, etc.	Version Date: 01/04/2001

Expanded Cross Reference:
115, 116, 117

(1) A person commits an offence if he makes outside Hong Kong, for export to Hong Kong otherwise than for his private and domestic use, any article that he knows would, if it were made in Hong Kong, constitute an infringing copy of a copyright work.

(2) A person commits an offence if he makes outside Hong Kong an article specifically designed or adapted for making copies of a particular copyright work knowing or having reason to believe that it is to be used or is intended to be used in Hong Kong for making an infringing copy of the copyright work for sale or hire or for use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s.9)

(2A) It is immaterial for the purpose of subsection (2) whether or not the trade or business consists of dealing in infringing copies of copyright works. (Added 64 of 2000 s.9)

(3) A person commits an offence if he makes outside Hong Kong or exports from Hong Kong an article specifically designed or adapted for making copies of a particular copyright work, knowing or having reason to believe that-

- (a) the article is to be used or is intended to be used outside Hong Kong for making another article for export to Hong Kong; and
- (b) the latter article mentioned in paragraph (a) would, if it were made in Hong Kong, constitute an infringing copy of the copyright work.

(4) A person who, in Hong Kong or elsewhere, aids, abets, counsels or procures the commission by another person of an offence under subsection (1), (2) or (3) commits that offence as a principal.

(5) The offences under subsections (1), (2) and (3) are without prejudice to the offences under section 118.

(6) A person who commits an offence under subsection (1), (2) or (3) is liable on conviction on indictment to a fine of \$500000 and to imprisonment for 8 years.

(7) For the purpose of this section, "article" (物品) does not include an article in transit.

(8) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section. <*Note - Exp. X-Ref.: Sections 115, 116, 117*>

Relevant Civil Provisions of the Copyright Ordinance as of 31 March 2001**31. Secondary infringement: possessing or dealing with infringing copy**

The copyright in a work is infringed by a person who, without the licence of the copyright owner—

- (a) possesses for the purpose of trade or business;
- (b) sells or lets for hire, or offers or exposes for sale or hire;
- (c) for the purpose of trade or business, exhibits in public or distributes; or
- (d) distributes otherwise than for the purpose of trade or business to such an extent as to affect prejudicially the owner of the copyright,

a copy of a work which is, and which he knows or has reason to believe to be, an infringing copy of the work.

[cf. 1988 c. 48 s. 23 U.K.]

32. Secondary infringement: providing means for making infringing copies

(1) Copyright in a work is infringed by a person who, without the licence of the copyright owner—

- (a) makes;
- (b) imports into Hong Kong or exports from Hong Kong;
- (c) possesses for the purpose of trade or business; or
- (d) sells or lets for hire, or offers or exposes for sale or hire,

an article specifically designed or adapted for making copies of that work, knowing or having reason to believe that it is to be used to make infringing copies.

(2) Copyright in a work is infringed by a person who, without the licence of the copyright owner, transmits the work by means of a telecommunications system (otherwise than by broadcasting or inclusion in a cable programme service), knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission in Hong Kong or elsewhere.

[cf. 1988 c. 48 s. 24 U.K.]

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

(1) The right conferred by section 92 (right to object to derogatory treatment of work) is also infringed by a person who—

- (a) possesses for the purpose of trade or business;
- (b) sells or lets for hire, or offers or exposes for sale or hire;
- (c) for the purpose of trade or business exhibits in public or distributes; or
- (d) distributes otherwise than for the purpose of trade or business so as to affect prejudicially the honour or reputation of the author or director,

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

(2) An "infringing article" (侵犯權利物品) means a work or a copy of a work which—

- (a) has been subjected to derogatory treatment within the meaning of section 92; and
- (b) has been or is likely to be the subject of any of the acts mentioned in that section in circumstances infringing that right.

96. False attribution of work

- (1) A person has the right in the circumstances mentioned in this section—
- (a) not to have a literary, dramatic, musical or artistic work falsely attributed to him as author; and

- (b) not to have a film falsely attributed to him as director,

and in this section an "attribution" (署名), in relation to such a work, means a statement (express or implied) as to who is the author or director.

- (2) The right is infringed by a person who—

- (a) issues or makes available to the public copies of a work of any of those descriptions in or on which there is a false attribution; or

- (b) exhibits in public an artistic work, or a copy of an artistic work, in or on which there is a false attribution.

- (3) The right is also infringed by a person who—

- (a) in the case of a literary, dramatic or musical work, performs the work in public, broadcasts it or includes it in a cable programme service as being the work of a person; or

- (b) in the case of a film, shows it in public, broadcasts it or includes it in a cable programme service as being directed by a person,

knowing or having reason to believe that the attribution is false.

(4) The right is also infringed by a person who issues or makes available to the public or displays in public material containing a false attribution in connection with any of the acts mentioned in subsection (2) or (3).

(5) The right is also infringed by a person who for the purpose of trade or business—

- (a) possesses or deals with a copy of a work of any of the descriptions mentioned in subsection (1) in or on which there is a false attribution; or

- (b) in the case of an artistic work, possesses or deals with the work itself when there is a false attribution in or on it,

knowing or having reason to believe that there is such an attribution and that it is false.

(6) In the case of an artistic work the right is also infringed by a person who for the purpose of trade or business—

- (a) deals with a work which has been altered after the author parted with possession of it as being the unaltered work of the author; or

- (b) deals with a copy of such an altered work as being a copy of the unaltered work of the author,

knowing or having reason to believe that that is not the case.

(7) References in this section to dealing are to selling or letting for hire, offering or exposing for sale or hire, exhibiting in public, or distributing.

- (8) This section applies where, contrary to the fact—

- (a) a literary, dramatic or musical work is falsely represented as being an adaptation of the work of a person; or

- (b) a copy of an artistic work is falsely represented as being a copy made by the author of the artistic work,

as it applies where the work is falsely attributed to a person as author.

[*cf.* 1988 c. 48 s. 84 U.K.]

109. Order for delivery up

- (1) Where a person—
 - (a) has an infringing copy of a work in his possession, custody or control for the purpose of trade or business; or
 - (b) has in his possession, custody or control an article specifically designed or adapted for making copies of a particular copyright work, knowing or having reason to believe that it has been or is to be used to make infringing copies,

the owner of the copyright in the work may apply to the court for an order that the infringing copy or article be delivered up to him or to such other person as the court may direct.

(2) An application must be made before the end of the period specified in section 110 (period after which remedy of delivery up not available); and the court shall not make an order under this section unless the court also makes, or it appears to the court that there are grounds for making, an order under section 111 (order as to disposal of infringing copy or other article).

(3) A person to whom an infringing copy or other article is delivered up in pursuance of an order under this section shall, if an order under section 111 is not made, retain it pending the making of an order, or the decision not to make an order, under that section.

- (4) Nothing in this section affects any other power of the court.

[*cf.* 1988 c. 48 s. 99 U.K.]

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

(1) A performer's rights are infringed by a person who, without the performer's consent—

- (a) imports into Hong Kong or exports from Hong Kong, otherwise than for his private and domestic use; or
- (b) for the purpose of trade or business possesses, makes available to the public, sells or lets for hire, offers or exposes for sale or hire, or distributes,

a fixation of a qualifying performance which is, and which that person knows or has reason to believe is, an infringing fixation.

(2) Where in an action for infringement of a performer's rights brought by virtue of this section a defendant shows that the infringing fixation was innocently acquired by him or a predecessor in title of his, the only remedy available against him in respect of the infringement is damages not exceeding a reasonable payment in respect of the act complained of.

(3) In subsection (2) "innocently acquired" (不知情地取得) means that the person acquiring the fixation did not know and had no reason to believe that it was an infringing fixation.

[*cf.* 1988 c. 48 s. 184 U.K.]

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

(1) A person infringes the rights of a person having fixation rights in relation to a performance who, without the latter's consent or, in the case of a qualifying performance, that of the performer—

- (a) imports into Hong Kong or exports from Hong Kong, otherwise than for his private and domestic use; or
- (b) for the purpose of trade or business possesses, makes available to the public, sells or lets for hire, offers or exposes for sale or hire, or distributes,

a fixation of the performance which is, and which that person knows or has reason to believe is, an infringing fixation.

(2) Where in an action for infringement of those rights brought by virtue of this section a defendant shows that the infringing fixation was innocently acquired by him or a predecessor in title of his, the only remedy available against him in respect of the infringement is damages not exceeding a reasonable payment in respect of the act complained of.

(3) In subsection (2) "innocently acquired" (不知情地取得) means that the person acquiring the fixation did not know and had no reason to believe that it was an infringing fixation.

[cf. 1988 c. 48 s. 188 U.K.]

228. Order for delivery up

(1) Where a person has in his possession, custody or control for the purpose of trade or business an infringing fixation of a performance, a person having performer's rights or fixation rights in relation to the performance under this Part may apply to the court for an order that the fixation be delivered up to him or to such other person as the court may direct.

(2) An application may not be made after the end of the period specified in section 230; and the court shall not make an order unless the court also makes, or it appears to the court that there are grounds for making, an order under section 231 (order as to disposal of infringing fixation).

(3) A person to whom a fixation is delivered up in pursuance of an order under this section shall, if an order under section 231 is not made, retain it pending the making of an order, or the decision not to make an order, under that section.

(4) Nothing in this section affects any other power of the court.

[cf. 1988 c. 48 s. 195 U.K.]

273. Devices designed to circumvent copy-protection

(1) This section applies where—

- (a) copies of a copyright work are issued or made available to the public; or
- (b) an unfixed performance is made available to the public or copies of a fixation of a performance are issued or made available to the public,

by or with the licence of the copyright owner, the performer or the person having fixation rights in relation to the performance, as may be appropriate, in any form which is copy-protected.

(2) The person issuing or making available the copies or the unfixed performance to the public has the same rights and remedies against a person who, knowing or having reason to believe that it will be used to make infringing copies or infringing fixations—

- (a) makes, imports, exports, sells or lets for hire, offers or exposes for sale or hire, advertises for sale or hire, or possesses for the purpose of trade or business, any device or means specifically designed or adapted to circumvent the form of copy-protection employed; or
- (b) publishes information intended to enable or assist persons to circumvent that form of copy-protection,

as a copyright owner has in respect of an infringement of copyright.

(3) Further, the person issuing or making available the copies or the unfixed performance to the public has the same rights and remedies under section 109 (delivery up) in relation to any such device or means which a person has in his possession, custody or control with the intention that it should be used to make infringing copies of copyright works or infringing fixations of performances, as a copyright owner has in relation to an infringing copy.

(4) References in this section to copy-protection include any device or means specifically intended to prevent or restrict copying of a work or fixation of a performance or to impair the quality of copies or fixations made.

(5) Sections 115 to 117 (presumptions as to certain matters relating to copyright) apply in relation to proceedings under this section as they do in relation to proceedings under Part II (copyright), and section 111 applies, with the necessary modifications, in relation to the disposal of anything delivered up by virtue of subsection (3).

[cf. 1988 c. 48 s. 296 U.K.]

Relevant Civil Provisions of the Copyright Ordinance as of 1 April 2001

Chapter: 528 Title: COPYRIGHT ORDINANCE Gazette Number: L.N. 46 of 2001
Section: 32 Heading: Secondary infringement providing means for making infringing copies Version Date: 01/04/2001

- (1) Copyright in a work is infringed by a person who, without the licence of the copyright owner-
- (a) makes;
 - (b) imports into Hong Kong or exports from Hong Kong;
 - (c) possesses for the purpose of, in the course of, or in connection with, any trade or business; or (Amended 64 of 2000 s. 3)
 - (d) sells or lets for hire, or offers or exposes for sale or hire, an article specifically designed or adapted for making copies of that work, knowing or having reason to believe that it is to be used to make infringing copies.
- (2) Copyright in a work is infringed by a person who, without the licence of the copyright owner, transmits the work by means of a telecommunications system (otherwise than by broadcasting or inclusion in a cable programme service), knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission in Hong Kong or elsewhere.
- (3) It is immaterial for the purpose of subsection (1)(c) whether or not the trade or business consists of dealing in articles specially designed or adapted for making copies of copyright works. (Added 64 of 2000 s. 3)

[cf. 1988 c. 48 s. 24 U.K.]

Chapter: 528 Title: COPYRIGHT ORDINANCE Gazette Number: L.N. 46 of 2001
Section: 31 Heading: Secondary infringement providing means for making infringing copies Version Date: 01/04/2001

- (1) The copyright in a work is infringed by a person who, without the licence of the copyright owner- (Amended 64 of 2000 s. 2)
- (a) possesses for the purpose of, in the course of, or in connection with, any trade or business; (Replaced 64 of 2000 s. 2)
 - (b) sells or lets for hire, or offers or exposes for sale or hire;
 - (c) exhibits in public or distributes for the purpose of, in the course of, or in connection with, any trade or business; or (Replaced 64 of 2000 s. 2)
 - (d) distributes (otherwise than for the purpose of, in the course of, or in connection with, any trade or business) to such an extent as to affect prejudicially the owner of the copyright, (Amended 64 of 2000 s. 2) a copy of a work which is, and which he knows or has reason to believe to be, an infringing copy of the work.
- (2) It is immaterial for the purpose of subsection (1)(a) and (c) whether or not the trade or business consists of dealing in infringing copies of copyright works. (Added 64 of 2000 s. 2)

[cf. 1988 c. 48 s. 23 U.K.]

Chapter:	528	Title:	COPYRIGHT ORDINANCE	Gazette Number:	L.N. 46 of 2001
Section:	95	Heading:	Infringement of right by processing or dealing with infringing article	Version Date:	01/04/2001

- (1) The right conferred by section 92 (right to object to derogatory treatment of work) is also infringed by a person who-
- (a) possesses for the purpose of, in the course of, or in connection with, any trade or business; (Replaced 64 of 2000 s. 4)
 - (b) sells or lets for hire, or offers or exposes for sale or hire;
 - (c) exhibits in public or distributes for the purpose of, in the course of, or in connection with, any trade or business; or (Replaced 64 of 2000 s. 4)
 - (d) distributes (otherwise than for the purpose of, in the course of, or in connection with, any trade or business) so as to affect prejudicially the honour or reputation of the author or director, (Amended 64 of 2000 s. 4)
- an article which is, and which he knows or has reason to believe is, an infringing article.
- (1A) It is immaterial for the purpose of subsection (1)(a) and (c) whether or not the trade or business consists of dealing in infringing articles. (Added 64 of 2000 s. 4)
- (2) An "infringing article" (侵犯權利物品) means a work or a copy of a work which-
- (a) has been subjected to derogatory treatment within the meaning of section 92; and
 - (b) has been or is likely to be the subject of any of the acts mentioned in that section in circumstances infringing that right.

[cf. 1988 c. 48 s. 83 U.K.]



Chapter: 528 Title: COPYRIGHT ORDINANCE Gazette Number: L.N. 46 of 2001
Section: 96 Heading: **False attribution of work** Version Date: 01/04/2001

False attribution of work

- (1) A person has the right in the circumstances mentioned in this section-
- (a) not to have a literary, dramatic, musical or artistic work falsely attributed to him as author; and
 - (b) not to have a film falsely attributed to him as director,
- and in this section an "attribution" (署名), in relation to such a work, means a statement (express or implied) as to who is the author or director.
- (2) The right is infringed by a person who-
- (a) issues or makes available to the public copies of a work of any of those descriptions in or on which there is a false attribution; or
 - (b) exhibits in public an artistic work, or a copy of an artistic work, in or on which there is a false attribution.
- (3) The right is also infringed by a person who-
- (a) in the case of a literary, dramatic or musical work, performs the work in public, broadcasts it or includes it in a cable programme service as being the work of a person; or
 - (b) in the case of a film, shows it in public, broadcasts it or includes it in a cable programme service as being directed by a person,
- knowing or having reason to believe that the attribution is false.
- (4) The right is also infringed by a person who issues or makes available to the public or displays in public material containing a false attribution in connection with any of the acts mentioned in subsection (2) or (3).
- (5) The right is also infringed by a person who for the purpose of, in the course of, or in connection with, any trade or business-(Amended 64 of 2000 s.5)
- (a) possesses or deals with a copy of a work of any of the descriptions mentioned in subsection (1) in or on which there is a false attribution; or
 - (b) in the case of an artistic work, possesses or deals with the work itself when there is a false attribution in or on it,
- knowing or having reason to believe that there is such an attribution and that it is false.
- (6) In the case of an artistic work the right is also infringed by a person who for the purpose of, in the course of, or in connection with, any trade or business-(Amended 64 of 2000 s.5)
- (a) deals with a work which has been altered after the author parted with possession of it as being the unaltered work of the author; or
 - (b) deals with a copy of such an altered work as being a copy of the unaltered work of the author, knowing or having reason to believe that that is not the case.
- (6A) It is immaterial for the purpose of subsections (5) and (6) whether or not the trade or business consists of dealing in-
- (a) works or copies of works in or on which there are false attributions; or
 - (b) altered works or copies of altered works. (Added 64 of 2000 s.5)
- (7) References in this section to dealing are to selling or letting for hire, offering or exposing for sale or hire, exhibiting in public, or distributing.
- (8) This section applies where, contrary to the fact-
- (a) a literary, dramatic or musical work is falsely represented as being an adaptation of the work of a person; or
 - (b) a copy of an artistic work is falsely represented as being a copy made by the author of the artistic work,
- as it applies where the work is falsely attributed to a person as author.

[cf. 1988 c. 48 s. 84 U.K.]

Chapter: 528 Title: COPYRIGHT ORDINANCE Gazette Number: L.N. 46 of 2001
 Section: 109 Heading: Order for delivery up Version Date: 01/04/2001

- (1) Where a person-
- (a) has an infringing copy of a work in his possession, custody or control for the purpose of, in the course of, or in connection with, any trade or business; or (Amended 64 of 2000 s. 6)
 - (b) has in his possession, custody or control an article specifically designed or adapted for making copies of a particular copyright work, knowing or having reason to believe that it has been or is to be used to make infringing copies,
- the owner of the copyright in the work may apply to the court for an order that the infringing copy or article be delivered up to him or to such other person as the court may direct.
- (1A) It is immaterial for the purpose of subsection (1)(a) whether or not the trade or business consists of dealing in infringing copies of copyright works. (Added 64 of 2000 s. 6)
- (2) An application must be made before the end of the period specified in section 110 (period after which remedy of delivery up not available); and the court shall not make an order under this section unless the court also makes, or it appears to the court that there are grounds for making, an order under section 111 (order as to disposal of infringing copy or other article).
- (3) A person to whom an infringing copy or other article is delivered up in pursuance of an order under this section shall, if an order under section 111 is not made, retain it pending the making of an order, or the decision not to make an order, under that section.
- (4) Nothing in this section affects any other power of the court.

[cf. 1988 c. 48 s. 99 U.K.]

Chapter: 528 Title: COPYRIGHT ORDINANCE Gazette Number: L.N. 46 of 2001
 Section: 207 Heading: Infringement of performer's rights by importing, exporting, possessing or dealing with infringing fixation Version Date: 01/04/2001

- (1) A performer's rights are infringed by a person who, without the performer's consent-
- (a) imports into Hong Kong or exports from Hong Kong, otherwise than for his private and domestic use; or
 - (b) for the purpose of, in the course of, or in connection with, any trade or business- (Replaced 64 of 2000 s. 12)
 - (i) possesses;
 - (ii) makes available to the public;
 - (iii) sells or lets for hire;
 - (iv) offers or exposes for sale or hire; or
 - (v) distributes, (Added 64 of 2000 s. 12)
- a fixation of a qualifying performance which is, and which that person knows or has reason to believe is, an infringing fixation.
- (1A) It is immaterial for the purpose of subsection (1)(b) whether or not the trade or business consists of dealing in infringing fixations. (Added 64 of 2000 s. 12)
- (2) Where in an action for infringement of a performer's rights brought by virtue of this section a defendant shows that the infringing fixation was innocently acquired by him or a predecessor in title of his, the only remedy available against him in respect of the infringement is damages not exceeding a reasonable payment in respect of the act complained of.
- (3) In subsection (2) "innocently acquired" (不知情地取得) means that the person acquiring the fixation did not know and had no reason to believe that it was an infringing fixation.

[cf. 1988 c. 48 s. 184 U.K.]



Chapter: 528 Title: COPYRIGHT ORDINANCE Gazette Number: L.N. 46 of 2001
Section: 211 Heading: **Infringement of fixation rights by importing, exporting, possessing or dealing with infringing fixation** Version Date: 01/04/2001

(1) A person infringes the rights of a person having fixation rights in relation to a performance who, without the latter's consent or, in the case of a qualifying performance, that of the performer-

(a) imports into Hong Kong or exports from Hong Kong, otherwise than for his private and domestic use; or

(b) for the purpose of, in the course of, or in connection with, any trade or business-(Replaced 64 of 2000 s.13)

(i) possesses;

(ii) makes available to the public;

(iii) sells or lets for hire;

(iv) offers or exposes for sale or hire; or

(v) distributes, (Added 64 of 2000 s.13)

a fixation of the performance which is, and which that person knows or has reason to believe is, an infringing fixation.

(1A) It is immaterial for the purpose of subsection (1)(b) whether or not the trade or business consists of dealing in infringing fixations. (Added 64 of 2000 s.13)

(2) Where in an action for infringement of those rights brought by virtue of this section a defendant shows that the infringing fixation was innocently acquired by him or a predecessor in title of his, the only remedy available against him in respect of the infringement is damages not exceeding a reasonable payment in respect of the act complained of.

(3) In subsection (2) "innocently acquired" (不知情地取得) means that the person acquiring the fixation did not know and had no reason to believe that it was an infringing fixation.

[cf. 1988 c. 48 s. 188 U.K.]

Chapter: 528 Title: COPYRIGHT ORDINANCE Gazette Number: L.N. 46 of 2001
Section: 228 Heading: **Order for delivery up** Version Date: 01/04/2001

Delivery up of infringing fixation

(1) Where a person has in his possession, custody or control for the purpose of, in the course of, or in connection with, any trade or business an infringing fixation of a performance, a person having performer's rights or fixation rights in relation to the performance under this Part may apply to the court for an order that the fixation be delivered up to him or to such other person as the court may direct. (Amended 64 of 2000 s.14)

(1A) It is immaterial for the purpose of subsection (1) whether or not the trade or business consists of dealing in infringing fixations. (Added 64 of 2000 s.14)

(2) An application may not be made after the end of the period specified in section 230; and the court shall not make an order unless the court also makes, or it appears to the court that there are grounds for making, an order under section 231 (order as to disposal of infringing fixation).

(3) A person to whom a fixation is delivered up in pursuance of an order under this section shall, if an order under section 231 is not made, retain it pending the making of an order, or the decision not to make an order, under that section.

(4) Nothing in this section affects any other power of the court.

[cf. 1988 c. 48 s. 195 U.K.]

▼	Chapter:	528	Title:	COPYRIGHT ORDINANCE	Gazette Number:	L.N. 46 of 2001
	Section:	273	Heading:	Devices designed copy-protection	Version Date:	01/04/2001

Expanded Cross Reference:
115, 116, 117

PART IV

TECHNOLOGICAL MEASURES AND GENERAL

Devices designed to circumvent copy-protection

- (1) This section applies where-
- (a) copies of a copyright work are issued or made available to the public; or
- (b) an unfixed performance is made available to the public or copies of a fixation of a performance are issued or made available to the public,
- by or with the licence of the copyright owner, the performer or the person having fixation rights in relation to the performance, as may be appropriate, in any form which is copy-protected.
- (2) The person issuing or making available the copies or the unfixed performance to the public has the same rights and remedies against a person who, knowing or having reason to believe that it will be used to make infringing copies or infringing fixations-
- (a) makes, imports, exports, sells or lets for hire, offers or exposes for sale or hire, advertises for sale or hire, or possesses for the purpose of, in the course of, or in connection with, any trade or business, any device or means specifically designed or adapted to circumvent the form of copy-protection employed; or (Amended 64 of 2000 s.17)
- (b) publishes information intended to enable or assist persons to circumvent that form of copy-protection, as a copyright owner has in respect of an infringement of copyright.
- (3) Further, the person issuing or making available the copies or the unfixed performance to the public has the same rights and remedies under section 109 (delivery up) in relation to any such device or means which a person has in his possession, custody or control with the intention that it should be used to make infringing copies of copyright works or infringing fixations of performances, as a copyright owner has in relation to an infringing copy.
- (4) References in this section to copy-protection include any device or means specifically intended to prevent or restrict copying of a work or fixation of a performance or to impair the quality of copies or fixations made.
- (5) Sections 115 to 117 (presumptions as to certain matters relating to copyright) apply in relation to proceedings under this section as they do in relation to proceedings under Part II (copyright), and section 111 applies, with the necessary modifications, in relation to the disposal of anything delivered up by virtue of subsection (3). <*Note - Exp. X-Ref.: Sections 115, 116, 117*>
- (6) It is immaterial for the purpose of subsection (2)(a) whether or not the trade or business consists of dealing in devices or means specifically designed or adapted to circumvent forms of copy-protection. (Added 64 of 2000 s.17)
- (7) In subsection (6), "dealing in" (經營) includes buying, selling, letting for hire, importing, exporting and distributing. (Added 64 of 2000 s.17)

[cf. 1988 c. 48 s. 296 U.K.]
