

TVB's submission on the "Enforcement Action taken by the Government following the commencement of the Intellectual Property (Miscellaneous Amendments) Ordinance 2000"

The Amended Copyright Ordinance

1. Section 31 of the Copyright Ordinance as amended by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 ("the Ordinance") stipulated that the copyright in a work is infringed by a person who, without the licence of the copyright owner, possesses for the purpose of, in the course of, or in connection with, any trade or business, a copy of the work which is an infringing copy of the work. The amended law covers an unauthorised copying of all copyright works such as software, videos, books, magazines, newspapers and publications, and unauthorised recordings of videos, broadcasts and cable programmes etc. Possessing infringing copies for the purpose of, and in the course of, or in connection with any trade or business also constitutes criminal offence with maximum penalty of 4 years imprisonment and a fine of HK\$50,000 per infringing copy.

Effects of Amended Copyright Ordinance

2. We fully support the good legislative intent to combat the use of copyright-infringing products directly for the purpose of, in the course of, or in connection with any trade or business whether or not the trade or business consists of dealing in infringing copies of copyright works. For example, infringing copies of software, video, CD, VCD etc. should not be allowed to be used in the course of any trade or business where such use may assist in the normal operation or generation of profits for the trade or business.
3. However, it appears that the resulting effect of the Ordinance has other implications which were not anticipated during the process of legislation. The Ordinance also catches the copying of articles from newspapers, magazines and other publications that are reporting and commenting on matters that are of interests to trade or business or the society at large. In many cases, such copying activities are not for any commercial purposes and are not necessary for the trade or business in their normal operation or for the generation of profits.
4. Before 1st April 2001, the commencement date of the Ordinance, copying articles from newspapers, magazines and other publications had been widely practice, not only in the trade or business sectors, but in many other public and private organizations and educational institutions. These activities were carried out purely for the purposes of distributing and disseminating public information more quickly and efficiently internally for reference rather than having to cut and paste each article from publications.

5. As the original cuttings require more time and resources to produce and are more difficult to keep for internal circulation and reference, the ability to make copies (hard or soft) greatly reduces unnecessary cost and resources and at the same time enable information to be distributed and kept in a more efficient way.
6. The amended law seriously interferes with the efficient dissemination of news and current events information amongst the business communities. The amended law in effect prevents any trade or business to copy any materials that are relevant to their business for internal disseminating and reference which they do not use for any commercial purpose or for any profit making whatsoever. This greatly hinders news and information to be distributed quickly and efficiently throughout an organization particularly when the number of employees are large. This would affect the ability of an organization to respond quickly to any public concern or matters relating to its business.

Limited Exception is Appropriate

7. We believe an appropriate balance can be strike to protect the legitimate interests of the copyright owners on the one hand and the interests of the society to have ready access and to use news and information in the most efficient manner on the other hand. We would propose that the Copyright Ordinance could be amended to include a limited exception similar to those in Division III of the Copyright Ordinance.
8. A limited exception is justifiable for the following reasons :
 - (i) the nature of newspapers, magazines and many other publications are primarily reporting and commenting on matters of public interest, in particular, news items are merely describing the occurrence of public events where the creative elements cannot be possibly compared with that required in other literary, artistic or dramatic works etc. The creative efforts in news reporting and commentary are limited;
 - (ii) trade or business that makes and uses copies of articles from newspapers, magazines or other publications purely for the purpose of disseminating information more efficiently for internal reference and the use of which are not necessary for its normal operation or generating of profits should be regarded as fair dealing and be permitted under the Copyright Ordinance;
 - (iii) the activities described in (ii) above do not conflict with a normal exploitation of the work by the copyright owner and do not unreasonably prejudice the legitimate interests of the copyright owner.

9. We recommend that amendments be made to the Copyright Ordinance to permit fair dealing of works which are not used for sale or let for hire or offered or exposed for sale or hire.

No Enforcement Action

10. Pending further legislation to amend the Copyright Ordinance and in the absence of any licensing schemes, the Government should not take any enforcement action against trade or business in respect of copying articles that are not subsequently dealt with on a commercial basis.