

Legislative Council Bills Committee
Copyright (Amendment) Bill 2003

Proposed Way Forward and Relevant Committee Stage Amendments

Purpose

This paper proposes the way forward for the Copyright (Amendment) Bill 2003 (“the Bill”) and sets out the Committee Stage Amendments (CSAs) necessary to give effect to the proposal.

Background

2. The Administration reported at the last meeting (28 January 2004) that copyright users and owners in the publication sector were unlikely to reach a consensus on the scope of end-user liability in the near future (see item 1.1 of the tables submitted for the last meeting). In the light of this, we indicated that there are two options for taking forward the Bill -

Option A - Continue to process the Bill in its present form including provisions relating to criminal liability for end-users with a view to enacting the Bill within this legislative session. In parallel, the Administration will continue to discuss with copyright work owners and users to explore the possibility of extending the scope of criminal liability for end use to cover other categories of works such as printed works. The discussion will also cover the issues of adopting the US model of fair use and drawing up of detailed guidelines to supplement the fair use provisions. Depending on the outcome of these discussions, we will review the scope of criminal end-user liability and introduce relevant legislative amendment proposals.

Option B – Delete all provisions in the Bill related to criminal liability for end-users with a view to enacting only the copyshop offence provisions within this legislative session. The Administration will continue to discuss with the copyright work owners and users to explore the possibility of extending the currently proposed scope of end-user liability. Pending the outcome of the

discussion, the effective period of the Copyright (Suspension of Amendments) Ordinance 2001 (“the Suspension Ordinance”) which is due to expire on 31 July 2004 will need to be extended. This will mean that the criminal liability for end use under the existing Copyright Ordinance as read together with the Suspension Ordinance will remain intact for a further period of time following the extension.

3. Whilst some Bills Committee Members indicated at the meeting on 28 January 2004 their preference for option B, the Administration was requested to sound out other Members and submit a proposal together with the necessary Committee Stage Amendments at the next meeting.

Proposal

4. The results of our sounding out suggest that option B has Members’ general support. Hence, we propose that all the provisions related to end-user liability be deleted from the Bill and that the effective period of the Suspension Ordinance should be extended. As regards the period of extension, we propose 24 months because we expect the discussions with copyright owners and users to be controversial and complicated. For example, on fair use alone, we will need to consult not only the publishing industry but also copyright owners and users in other areas. Besides, the adoption of the US fair use provisions may require an overhaul of the structure of our Copyright Ordinance as the US open-ended approach to exempting copyright infringement is very different from the current exhaustive approach under our Copyright Ordinance. In fact, the target of drawing the discussions with owners and users to a conclusion, submitting a fresh bill to the Legislative Council and having the bill enacted within 24 months is a very ambitious one. However, provided that there is best endeavour and compromise on the part of all parties concerned, we feel that the target is still a feasible one.

Extension of the Suspension Ordinance

5. According to section 3(2) of the Suspension Ordinance, the Secretary for Commerce, Industry and Technology may, by notice published in the Gazette, vary the expiry date with the approval of the Legislative Council. We have prepared the draft Copyright (Suspension of Amendments) Ordinance 2001 (Amendment) Notice 2004 to effect the proposed 24-month extension. This is at Annex A for Members' consideration.

Committee Stage Amendments to the Bill

6. Deleting all provisions relating to end-user liability will effectively mean that only the copyshop offence will be retained in the Bill. A set of draft CSAs which will achieve this effect and introduce some technical amendments to the Copyright Ordinance is at Annex B for Members' consideration. The following paragraphs explain the CSAs.

Amendments to Long Title

7. Under our proposal, the effective period of the Suspension Ordinance will be extended. The reference in the Long Title that the Bill seeks to repeal the Suspension Ordinance should therefore be deleted.

Amendments to Clause 1(2)

8. Instead of empowering the Secretary for Commerce, Industry and Technology to appoint the commencement date in a separate notice, we propose to specify the commencement date in the Bill. The proposed amendments to Clause 1(2) seek to effect the proposal.

Amendments to Clauses 2 and 3

9. The policy intention behind Clauses 2 and 3 is to remove end-user liability associated with parallel-imported copies. Since we now propose to review the end-user liability with copyright work owners and

users in a separate exercise, the subject matter of these Clauses should also be considered in that exercise, hence the proposed deletion of the Clauses.

Addition of Clause 3A

10. This is a purely technical amendment. The amendment seeks to add a new clause to the Bill which modifies the existing wording of the Chinese text of section 119(1) so as to reflect more accurately the intended meaning.

Amendments to Clause 4

11. The amendments seek to remove all provisions relating to end-user liability and retain the copyshop offence in order to give effect to our proposed way forward. With the amendments, section 118C, under which the copyshop offence is provided, is renumbered to become section 119A. The newly added sections 119A(6) and (7) are transposed from Clauses 5(1) and 7 of the Bill to the extent that these Clauses relate to section 118C.

Amendments to Clauses 5, 6, 7, 8, 9, 10, 11

12. These are consequential amendments following the deletion of the provisions relating to end-user liability. Only Clauses 5(1) and 7 are retained to the extent that they relate to section 118C, which provides the copyshop offence. Please see paragraph 11 above for details.

13. We consider it unnecessary to retain the reference to section 118C under Clause 6(3). The sub-clause as it relates to section 118C seeks to extend the application of section 120(5) to section 118C. The effect is that the offences under sections 120(1), (2) and (3), which generally concerns making infringing copies outside Hong Kong, are without prejudice to the offence under section 118C, namely the copyshop offence. On reflection, we take the view that it is hard to imagine how sections 120(1), (2) and (3) can apply to the copyshop offence, which concerns criminal sanctions against possession of infringing copies of relevant copyright works produced by local copying

service businesses. As such, we propose to remove Clause 6(3) altogether, including its reference to section 118C.

Clause 12 and Schedules 1 and 2

14. Clause 12 of the Bill provides two Schedules in which miscellaneous and consequential amendments to the Copyright Ordinance and other ordinances are set out. As a result of the removal of the provisions relating to end-user liability, only sections 5, 6 and 7 of Schedule 1 and section 2 of Schedule 2 need to be retained to the extent that they relate to section 118C. To simplify the structure, we propose to delete the Clause and the two Schedules, and transpose the provisions associated with section 118C to Clauses 7A, 7B, 7C and 14.

Clause 13

15. Clause 13 of the Bill seeks to repeal the Suspension Ordinance. Now that we propose to extend the effective period of the Suspension Ordinance, this Clause should be deleted.

Consultation on the CSAs

16. We have in total issued nearly 200 letters to shops which offer copying service to the public, based on a list supplied by the Hong Kong Reprographic Rights Licensing Society (HKRRLS). We have also arranged meetings with them to explain the revised wording of the proposed copyshop offence. Since the last Bills Committee meeting, we have met representatives from some more copyshops. In total, we have met representatives from 25 shops since December 2003. We have also received one written submission after the last Bills Committee meeting.

17. In general, copyshops consulted did not comment specifically on the proposed new offence. Many of them indicated that they would like to discuss with the HKRRLS to ensure that the copying service they provide is properly licensed and will not be illegal. They also commented on the licensing fee and the actual administration of the schemes. HKRRLS have undertaken to consider their views and revert to them as soon as possible.

18. A few copyshops at a recent meeting and the written submission mentioned in paragraph 16 above commented on the offences under the existing Copyright Ordinance, holding the view that they should not bear the liabilities for making infringing copies, since it is the customers who order the reproductions of such copies. Criminal liability, if any, should fall on those who place the reproduction order. The written submission further suggested that criminal sanctions against provision of copying service are not appropriate as copyright owners can already enforce their rights through civil proceedings. It suggested that the criminal liability be imposed only when more than one infringing copy was made, and when both the copyshop and the customer know that they were making infringing copies.

19. We wish to point out that criminal offences under the Copyright Ordinance generally target at commercial dealings of infringing copies, with criminal liability imposed on end-users only in limited context (business end-use for certain categories of works). For example, when a shop provides service to make an infringing copy of an optical disc in which a copyright work such as a sound recording is embedded, the shop would be criminally liable whilst the end-user would be criminally liable only if the disc is used for the purpose of or in the course of trade or business. By targeting the supply side of infringing copies and imposing liability on end users in business context for certain categories of works, we consider that we have struck a sensible balance between combating against piracy and not making the law too onerous on individuals.

20. As for the proposal to confine criminal offences to situations where both the customer and the shop know that an infringing copy would be made, we would like to point out that under both the existing Copyright Ordinance and the proposed new offence, a person charged would have a defence if he can prove he did not know and had no reason to believe that the copy involved is an infringing copy. This arrangement has been in operation for many years and effective in tackling copyright offences. We consider it appropriate to continue to adopt the current approach.

21. A few copyshops at a recent meeting suggested that the Government should draw up guidelines to define more clearly what constitutes an infringing copy as it may be difficult for copyshops to ascertain whether or not a copy is an infringing one. As mentioned in paragraph 2 above, we would initiate discussions with copyright work owners and users on adopting the US model of fair use and drawing up detailed guidelines to supplement the fair use provisions. We will consider the suggestion of copyshops in this context. In the meantime, we are preparing some more frequently asked questions which relate to the photocopying service and will put them on the web-page of the Intellectual Property Department.

Advice Sought

22. Members are requested to consider the above proposals and related CSAs. Subject to Members' agreement, we intend to resume second reading of the Bill and to move a resolution to extend the effective period of the Suspension Ordinance at the same sitting of the Legislative Council on 24 March 2004.

Commerce and Industry Branch
Commerce, Industry and Technology Bureau
February 2004

**COPYRIGHT (SUSPENSION OF AMENDMENTS)
ORDINANCE 2001 (AMENDMENT)
NOTICE 2004**

(Made under section 3 of the Copyright (Suspension of Amendments)
Ordinance 2001 (Cap. 568) subject to the approval
of the Legislative Council)

1. Lifting of suspension

Section 3(1) of the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568) is amended by repealing "2004" and substituting "2006".

Secretary for Commerce, Industry and
Technology

2004

Explanatory Note

This Notice amends the expiry date under section 3(1) of the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568) from 31 July 2004 to 31 July 2006.

DRAFT

COPYRIGHT (AMENDMENT) BILL 2003

COMMITTEE STAGE

Amendments to be moved by the Secretary for Commerce,
Industry and Technology

<u>Clause</u>	<u>Amendment Proposed</u>
Long title	By deleting "and to repeal the Copyright (Suspension of Amendments) Ordinance 2001".
1	By deleting subclause (2) and substituting – "(2) This Ordinance shall come into operation on [##] [month] 2004."
2	By deleting the clause.
3	By deleting the clause.
New	By adding – "3A. Penalties for offences under section 118 Section 119(1) is amended, in the Chinese text, by repealing everything after "定罪，" and substituting "可處監 禁4年，並可就每份侵犯版權複製品處第5級罰款。".
4	By deleting the clause and substituting – "4. Section added

The following is added –

"119A. Offence in relation to possession of infringing copies by a copying service business

(1) In this section –

"copying service business" () means a business, conducted for profit, that includes the offering of reprographic copying services to the public and, in the case of a business that includes the offering of reprographic copying services to the public at more than one place, means any part of the business carried on at such a place;

"reward" () means reward other than reward of a nominal value.

(2) A person commits an offence if, for the purpose of or in the course of a copying service business, he possesses a reprographic copy of a copyright work as published in a book, magazine or periodical, being a copy that is an infringing copy of the copyright work.

(3) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that the infringing copy of a copyright work in question was not made for the purpose of and was not made in the course of the copying service business.

(4) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that the infringing copy

of a copyright work in question was not made for profit and was not made for reward.

(5) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that he did not know and had no reason to believe that the copy of a copyright work in question was an infringing copy of the copyright work.

(6) A person who commits an offence under subsection (2) is liable on conviction on indictment to a fine at level 5 in respect of each infringing copy and to imprisonment for 4 years.

(7) Sections 115, 116 and 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under subsection (2).".".

5 By deleting the clause.

6 By deleting the clause.

7 By deleting the clause.

New By adding –

"7A. Seized articles, etc. liable to forfeiture

Section 131 is amended –

- (a) in subsection (1), by adding "
119A" after "118";

- (b) in subsection (7), by adding ",
119A" after "118".

**7B. Disposal of articles, etc. where
a person is charged**

Section 132 is amended by adding ", 119A" after
"118".

**7C. Determination of application
for forfeiture**

Section 133 is amended –

- (a) in subsection (5), by adding ",
119A" after "118";
- (b) in subsection (6), by adding ",
119A" after "118".

8 By deleting the clause.

9 By deleting the clause.

10 By deleting the clause.

11 By deleting the clause.

12 By deleting the clause.

13 By deleting the clause.

New By adding –

"Consequential Amendments

Prevention of Copyright Piracy Ordinance

14. Seized optical discs, etc., liable to forfeiture

Section 34(3)(a) of the Prevention of Copyright Piracy Ordinance (Cap. 544) is amended by adding ", 119A" after "118".

Schedules
1 and 2

By deleting the Schedules.