

Legislative Council Bills Committee

Copyright (Amendment) Bill 2001

Draft Committee Stage Amendments

Purpose

This paper sets out the revised draft Committee Stage Amendments (“CSAs”) (at Annex) to the Copyright (Amendment) Bill 2001 (“Bill”) to be moved by the Secretary for Commerce, Industry and Technology.

2. At the meeting of 7 April, Members asked that amendments of purely drafting nature proposed under the Copyright (Amendment) Bill 2003 (“2003 Bill”) be included in the Bill. A number of the amendments described below are for this purpose, and these are indicated by the heading “(2003 Bill amendment)”. If these proposed CSAs are enacted, the corresponding provisions in the 2003 Bill will be amended or deleted as appropriate.

Amendment to Clause 1

3. The reference to “Secretary for Commerce and Industry” is replaced by “Secretary for Commerce, Industry and Technology”.

Amendment to Clause 2

Section 35(9) (2003 Bill Amendment)

4. The definition of “lawfully made” in section 35(9) is to be transposed to section 198 (see paragraph 8 below). Section 35(9) is accordingly repealed.

Amendments to Clause 3

5. We have adopted a new approach to achieve our policy objective of liberalising the parallel importation of computer software. Detailed explanations for the new approach are set out in a separate paper titled “Copyright (Amendment) Bill 2001 - New formulation to define the scope of liberalisation”. To give effect to the new approach, the original proposed section 35A is replaced by a revised one.

Amendments to Clause 4

Section 118A

6. The wording of this section has been tidied up following comments made by the Assistant Legal Adviser, and further changes have been made consequent on the revised wording of proposed section 35A (including the deletion from that section of reference to "associated works"). There is no change of legal effect.

Addition of Clause 4A

Section 198(1) (2003 Bill amendment)

7. The definitions of "movie", "musical sound recording", "musical visual recording" and "television drama" are provided under this subsection.

New Section 198(3) (2003 Bill amendment)

8. The definition of "lawfully made" is transposed from existing section 35(9) to this section (see paragraph 4 above).

Addition of Clause 4B

Section 199 (2003 Bill amendment)

9. These are consequential amendments to reflect the amendments to section 198(1) and section 198(3) (see paragraphs 7 and 8 above).

Amendments to Clause 5

New section 282 (2003 Bill amendment)

10. A new section 282 is added to provide for all transitional provisions arising from this Bill and any future Bill to be located in a schedule to the Ordinance (namely, new Schedule 6).

Addition of Clause 6

New Schedule 6 (2003 Bill amendment)

11. A new Schedule 6 is added, and the transitional provisions are transposed from proposed sections 199A and 199B (under Clause 5 of the Bill) to the new Schedule as described in paragraph 10 above.

12. The transitional provisions themselves have been revised to make the provisions clearer and easier to understand (but without change in legal effect), and their order has been rearranged as follows –

<u>Proposed</u>	<u>Existing</u>
Schedule 6, section 1	Section 199A(1), 199B(1)
Schedule 6, section 2	Section 199B
Schedule 6, section 3	Section 199A(2)
Schedule 6, section 4	Section 199A(3)

Commerce and Industry Branch
Commerce, Industry and Technology Bureau
June 2003

A BILL
To

Amend the Copyright Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Copyright (Amendment) Ordinance 2001.

(2) This Ordinance shall come into operation on a day to be appointed by the ~~Secretary for Commerce and Industry~~ Secretary for Commerce, Industry and Technology by notice published in the Gazette.

2. Meaning of “infringing copy”

(1) Section 35(3) of the Copyright Ordinance (Cap. 528) is amended by repealing “A” and substituting “Except as provided in section 35A, a”.

~~(2) Section 35(9) is amended by repealing “subsections (4) and (5)” and substituting “this section and section 35A”.~~

~~(2) Section 35(9) is repealed.~~

3. Section added

The following is added immediately after section 35 –

~~“35A. Computer program as “infringing copy”
under section 35~~

~~(1) For the purposes of section 35(3) –~~

~~(a) a copy of a work that is a computer program is not an infringing copy if it was lawfully made in the country, territory or area where it was made; and~~

~~(b) a copy of an associated work is not an infringing copy if it was lawfully made in the country, territory or area where it was made.~~

~~(2) For the purposes of this section, where –~~

~~(a) an article that has embodied in it a copy of a work that is a computer program is or is proposed to be imported into Hong Kong; and~~

~~(b) at the time it is so imported or proposed to be imported, there is also embodied in the article a copy of any other work (other than a copy specified in subsection (3)),~~

~~that other work is to be regarded as associated with the computer program; and in this section the copy of the other work embodied in the article is referred to as a “copy of an associated work”.~~

~~(3) — A copy of a work that is embodied in an article is not to be regarded as a copy of an associated work for the purposes of subsection (2) if —~~

~~(a) — the copy is a copy of a feature film or part of a feature film, and its duration when viewed (as embodied in the article) is more than 20 minutes; or~~

~~(b) — the copy is a copy of a musical sound recording or a musical visual recording, and the economic value of the article is predominantly attributable to the economic value of the copy, or to the combined economic value of all such copies, as embodied in the article.~~

~~(4) — In subsection (3) —~~

~~“feature film” (影視片) means a film commonly known as a movie or a television drama;~~

~~“musical sound recording” (音樂聲音紀錄) means a sound recording the whole or a predominant part of which consists of a musical work and any related literary work;~~

~~“musical visual recording” (音樂視像紀錄) means a film the whole or a predominant part of which consists of a musical work and any related literary work.”~~

"35A. Copy of a computer program, and of a work embodied in the same article as a computer program, not an “infringing copy” for the purpose of section 35(3)

(1) This section applies to a copy of a work that -

(a) is a copy of a computer program; or

(b) except as provided in subsection (3) or (4), is a copy of a work other than a computer program, that is embodied in an article in which is also embodied a copy of a computer program,

and that, but for this section, would be an infringing copy for the purposes of section 35(3).

(2) A copy of a work to which this section applies is not an infringing copy for the purposes of section 35(3) if it was lawfully made in the country, territory or area where it was made.

(3) A copy of a movie or a television drama that is embodied in an article in which is also embodied a copy of a computer program (including any such copy forming part of an e-book for illustrative purposes), is not a copy of a work to which this section applies if —

(a) the copy is a copy of a movie or a television drama in its entirety or substantially in its entirety; or

(b) where the copy is a copy of part only of a movie or a television drama —

- (i) all those parts of the movie or television drama copies of which are embodied in the article together constitute the movie or television drama in its entirety or substantially in its entirety; or
- (ii) the viewing time of all those parts of the movie or television drama copies of which are embodied in the article is more than 15 minutes in aggregate, in the case of a movie, or 10 minutes in aggregate, in the case of a television drama,

and in paragraphs (a) and (b)(i), reference to a television drama, in the case of a television drama comprising one or more episodes, is reference to an episode of the television drama.

(4) A copy of a work other than a computer program, that is embodied in an article in which is also embodied a copy of a computer program, is not a copy of a work to which this section applies if –

- (a) the copy of the work is or forms part of –
 - (i) an e-book;
 - (ii) a copy of a movie (other than a copy to which subsection (3) applies);
 - (iii) a copy of a television drama (other than a copy to which subsection (3) applies);
 - (iv) a copy of a musical sound recording; or
 - (v) a copy of a musical visual recording; and
- (b) the article is an article that, if acquired by a person for his own use, is likely to be acquired for the purpose of acquiring the copies of works to which paragraph (a) applies more so than for the purpose of acquiring the copies of other works that are embodied in the article.

and in considering for the purposes of paragraph (b) the extent to which an article is likely to be acquired for the purpose of acquiring copies of works other than works to which paragraph (a) applies, no regard shall be had to those functions of any copy of a computer program that provide a means of viewing or listening to a copy of a work to which paragraph (a) applies (and, where the copy of the work is in encrypted form, of any decrypting that is necessary to enable such viewing or listening), or for searching for any specific part of such copy of a work.

(5) In this section, "e-book" means a combination of copies of works comprising –

(a) one or more copies of each of –

(i) a computer program; and

(ii) a literary work (other than a computer program), a dramatic work, a musical work or an artistic work ("main work"),

so arranged as to provide for the copy of the main work to be presented in the form of an electronic version of a book, magazine or periodical; and

(b) where a main work is accompanied for illustrative purposes by any copy or copies of films or sound recordings, that copy or those copies."

4. Section added

The following is added immediately after section 118 –

~~"118A. Application of sections 60 and 61 to offences under section 118(1)~~

~~(1) For the purpose of any proceedings for an offence under section 118(1), sections 60 and 61 have effect subject to the following modifications, namely—~~

~~(a) where a person has a contractual right to use a computer program but that contractual right is subject to terms that have the effect of restricting or prohibiting the use of the program in Hong Kong then, despite that restriction or prohibition, the person is to be taken as having a contractual right to use the program in Hong Kong for the purposes of section 60(2); and~~

~~(b) sections 60 and 61 apply in relation to a copy of an associated work as they apply in relation to a copy of a computer program and, accordingly, any act that may under those sections be done in relation to a copy of a computer program without infringing the copyright in the program may be done in relation to a copy of an associated work without infringing the copyright in the work.~~

~~(2) In this section, "copy of an associated work" (有聯繫作品複製品) has the same meaning as in section 35A."~~

"118A. Application of sections 60 and 61 to offences under section 118(1)

For the purpose of any proceedings for an offence under section 118(1)–

- (a) a person is a lawful user of a computer program for the purposes of sections 60 and 61 if he has a contractual right to use the program in any place in or outside Hong Kong, and section 60(2) shall have effect accordingly; and
- (b) sections 60 and 61 apply in relation to a copy of a work specified in section 35A(1)(b) as they apply in relation to a copy of a computer program and, accordingly, any act that may under section 60 or 61 be done in relation to a copy of a computer program without infringing the copyright in the program may be done in relation to a copy of a work specified in section 35A(1)(b) without infringing the copyright in the work."

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4A. Minor definitions

(1) Section 198(1) is amended by adding –

““movie” () means a film of the kind commonly known as a movie;

“musical sound recording” () means a sound recording the whole or a predominant part of which consists of the whole or any part of a musical work and of any related literary work;

“musical visual recording” () means a film with an accompanying sound-track, the whole or a predominant part of which sound-track consists of the whole or any part of a musical work and of any related literary work;

“television drama” () means a film of the kind commonly known as a television drama;”.

(2) Section 198 is amended by adding –

“(3) A copy of a work that is made in a country, territory or area where there is no law protecting copyright in the work or where the copyright in the work has expired is not a copy that is lawfully made for the purposes of this Part.”.

4B. Index of defined expressions

Section 199 is amended in the Table by adding –

“lawfully made	section 198(3)
movie	section 198(1)
musical sound recording	section 198(1)
musical visual recording	section 198(1)
television drama	section 198(1)”.”

5. Sections added

~~The following are added immediately after section 199—~~

~~“Transitional provisions and application—
Copyright (Amendment) Ordinance 2001 (— of 2001)~~

**199A. Offences under section 118(1) committed before
—the commencement of the amendment
—Ordinance of 2001**

~~—(1)— In this section—~~

~~“amendment Ordinance of 2001” (《2001年修訂條例》) means the Copyright
(Amendment) Ordinance 2001 (— of 2001);~~

~~“copy of an associated work” (有聯繫作品複製品) has the meaning given in section
35A to the same term appearing in that section;~~

~~“relevant copy work” (有關作品複製品) means—~~

~~(a)— a copy of a work that is a computer program; or~~

~~(b)— a copy of an associated work.~~

~~—(2)— As from the commencement of the amendment Ordinance of 2001, no
proceedings for an offence under section 118(1) committed before that
commencement shall be instituted or continued where the infringing copy is a
relevant copy work and where—~~

~~(a)— the relevant copy work is an infringing copy by virtue of section
35(3) as that section applied at the time the relevant copy work
was or was proposed to be imported into Hong Kong; and~~

~~(b)— had the relevant copy work been or been proposed to be
imported into Hong Kong immediately after the commencement
of the amendment Ordinance of 2001, it would not have been an
infringing copy under section 35(3) as that section then applied.~~

~~—(3)— As from the commencement of the amendment Ordinance of 2001, no
proceedings for an offence under section 118(1) committed before that
commencement shall be instituted or continued—~~

~~(a)— where—~~

~~(i)— the infringing copy is an infringing copy by virtue of
having been made as a back-up copy of a relevant copy
work; and~~

(ii) had that back-up copy been made immediately after the commencement of the amendment Ordinance of 2001 then, for the purposes of any proceedings for an offence under section 118(1), the making of the copy would not have infringed the copyright in the copyright work, having regard in particular to section 60(1) (as modified by section 118A); or

(b) where —

(i) the infringing copy is an infringing copy by virtue of having been copied or adapted from a relevant copy work; and

(ii) had that copying or adapting been done immediately after the commencement of the amendment Ordinance of 2001 then, for the purposes of any proceedings for an offence under section 118(1), the copying or adapting would not have infringed the copyright in the copyright work, having regard in particular to section 61(1) (as modified by section 118A).

(4) For the avoidance of doubt, nothing in this section affects any proceedings in which before the commencement of the amendment Ordinance of 2001 a person was convicted of an offence under section 118(1), nor any conviction entered in such proceedings.

199B. Application of section 35A to existing imported copies

(1) In this section —

“amendment Ordinance of 2001” (《2001年修訂條例》) means the Copyright (Amendment) Ordinance 2001 (————— of 2001);

“copy of an associated work” (有聯繫作品複製品) has the meaning given in section 35A to the same term appearing in that section;

“relevant copy work” (有關作品複製品) means —

(a) a copy of a work that is a computer program; or

(b) a copy of an associated work.

(2) Section 35A has effect in relation to a relevant copy work that was imported into Hong Kong before the commencement of the amendment Ordinance of 2001 as it has effect in relation to a relevant copy work that is imported into Hong Kong after that commencement.

(3) Accordingly, for the purpose of any act done after the commencement of the amendment Ordinance of 2001 (including any act alleged to constitute an infringement of copyright or an offence under section 118(1)), a relevant copy work that —

(a) was imported into Hong Kong before the commencement of the amendment Ordinance of 2001 and was, immediately before that commencement, an infringing copy under section 35(3) as it then applied; and

(b) had it been imported into Hong Kong immediately after the commencement of the amendment Ordinance of 2001, would

~~not have been an infringing copy under section 35(3) as it then applied,
is not to be regarded as an infringing copy under section 35(3).~~

~~(4) For the avoidance of doubt, it is declared that nothing in this section or in the amendment Ordinance of 2001 affects any right of action in relation to an infringement of copyright that occurred before the commencement of the amendment Ordinance of 2001.”.~~

5. Section added

The following is added –

“282. Transitional provisions and savings

Schedule 6 contains transitional provisions and savings in relation to certain amendments made to the Ordinance.”.

6. Schedule 6 added

The following is added –

“SCHEDULE 6 [s. 282]

TRANSITIONAL PROVISIONS AND SAVINGS

Transitional provisions and savings in relation to amendments effected by the
Copyright (Amendment) Ordinance 2003 (_____ of 2003)

1. Interpretation

(1) In this Schedule, unless the context otherwise requires –

“amendment Ordinance of 2003” (《2003 年修訂條例》) means the Copyright
(Amendment) Ordinance 2003 (_____ of 2003);

“Suspension Ordinance” (《暫停條例》) means the Copyright (Suspension of
Amendments) Ordinance 2001 (Cap. 568).

(2) In this Schedule, a reference to this Ordinance as it applied
immediately before the commencement of the amendment Ordinance of 2003 is a
reference to this Ordinance as read together with the Suspension Ordinance, as those
Ordinances applied immediately before that commencement.

2. Application of section 35A of this Ordinance to previously imported copies

(1) This section applies to a copy of a work that is an infringing copy for the purposes of section 35(3) of this Ordinance as it applied immediately before the commencement of the amendment Ordinance of 2003, and is such an infringing copy by virtue only of an importation into Hong Kong that occurred before that commencement.

(2) For the purpose of any act done after the commencement of the amendment Ordinance of 2003 in relation to a copy of a work to which this section applies (including any act alleged to constitute an infringement of copyright or an offence under this Ordinance), section 35A of this Ordinance shall have effect as if it had been enacted before the occurrence of the importation referred to in subsection (1) and, accordingly, the copy is not to be regarded as an infringing copy unless, having regard to section 35A of this Ordinance, it would also be an infringing copy for the purposes of section 35(3) of this Ordinance if the importation into Hong Kong had occurred immediately after that commencement.

(3) For the avoidance of doubt, nothing in this section or in the amendment Ordinance of 2003 affects any right of action in relation to an infringement of copyright that occurred before the commencement of the amendment Ordinance of 2003.

3. Exemption from criminal liability previously incurred in respect of “parallel-imported” copies of works to which section 35A of this Ordinance applies

(1) This section applies to a copy of a work that is an infringing copy for the purposes of section 35(3) of this Ordinance as it applied immediately before the commencement of the amendment Ordinance of 2003, and is such an infringing copy by virtue only of an importation or proposed importation into Hong Kong that occurred before that commencement.

(2) As from the commencement of the amendment Ordinance of 2003, a person shall not be liable to conviction for an offence under section 118(1) of this Ordinance, as that section applied immediately before that commencement, in respect of an act done before that commencement in relation to a copy of a work to which

this section applies unless, having regard to section 35A of this Ordinance, the copy would also be an infringing copy of the work for the purposes of section 35(3) of this Ordinance if the importation or proposed importation into Hong Kong had occurred immediately after that commencement.

(3) For the avoidance of doubt, nothing in this section affects any conviction for an offence that was entered before the commencement of the amendment Ordinance of 2003.

4. Exemption from criminal liability previously incurred in respect of a back-up copy of, or necessary copying or adapting of, a copy of a work to which section 35A of this Ordinance applies

(1) This section applies to a copy of a work to which section 35A of this Ordinance applies, where the copy –

(a) was made before the commencement of the amendment Ordinance of 2003; and

(b) is an infringing copy by virtue only of the fact that it was made by a person who did not have a contractual right to use the computer program or other work for the purposes of sections 60 and 61 of this Ordinance.

(2) As from the commencement of the amendment Ordinance of 2003, no person shall be liable to conviction for an offence under section 118(1) of this Ordinance, as that section applied immediately before that commencement, in respect of a copy of a work to which this section applies unless, for the purposes of proceedings for an offence under section 118(1) of this Ordinance, and having regard to section 118A of this Ordinance, the same copy made immediately after that commencement would be a copy made by a person who did not have a contractual right to use the computer program or other work for the purposes of sections 60 and 61 of this Ordinance.

(3) For the avoidance of doubt, nothing in this section affects any conviction for an offence that was entered before the commencement of the amendment Ordinance of 2003.”.”.