

Legislative Council Bills Committee

Copyright (Amendment) Bills 2001

Administration's Response to the Submission by the Hong Kong Bar Association

Purpose

At the meeting of 16 June, Members requested the Administration to further study the submission by the Hong Kong Bar Association (“HKBA”) and revise the Committee Stage Amendments (CSAs) to the Copyright (Amendment) Bill 2001 (“Bill”) as appropriate. This paper sets out our responses to the comments from the HKBA. The revised CSAs at Annex have incorporated a number of comments from the HKBA. These are marked in revision mode and italic. The rest of the amendments are mainly to improve the drafting aspect and take into account the comments of the Assistant Legal Adviser of the Legislative Council. These are marked in revision mode only.

Our responses

2. For easy reference, the comments from the HKBA and our respective responses are set out in the table below -

Item	Relevant paragraphs of HKBA's submission	Our responses
1.	<p><u>Paragraphs 5 and 7</u> Suggest reversing the order of the proposed sections 35A(1) and section 35A(2).</p>	<p><u>Accepted</u> The draft CSAs are amended accordingly. Please see the revised section 35A(1) and 35A(2) of the attached draft CSAs.</p>
2.	<p><u>Paragraph 6</u> Suggest amending the proposed section 35A(1) as follows- “(1) <u>(2)</u> This section applies to a copy of a work that – (a) is a copy of a computer program; or (b) except as provided in <u>subsection (3)</u> or (4), is a copy of a</p>	<p><u>Partly accepted</u> Most of the proposed textual changes have been incorporated. Please see the revised section 35A(2) of the attached draft CSAs. HKBA proposes to remove the viewing duration test for movie and television drama (subsection</p>

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	<p>work other than a computer program, that <u>which copy</u> is embodied in an article in which is also embodied in a copy of a computer program,</p> <p>and that, but for this section, would be an infringing copy for the purposes of section 35(3).”</p>	<p>3) and renumber the existing subsection 4 as subsection 3, hence the deletion of the reference “or (4)”. We do not accept the proposed deletion. The reasons are set out in our response in item 5 below.</p>
3.	<p><u>Paragraph 8</u> HKBA is of the view that the rationale and mechanism of the proposed section 35A(3) are unsatisfactory for the following reasons:-</p> <ul style="list-style-type: none"> • In the case of parallel import, the goods involved would be lawfully made overseas and it is unlikely that one would import an article containing only parts of a movie or television drama (as opposed to the entire movie or television drama) in reality. • It is also unrealistic to expect the users to import parts only of movies of the length of 15 minutes or television dramas of the length of 10 minutes. • A part may not constitute a substantial part of the copyright work and hence may not be an infringement. 	<p><u>Not accepted</u></p> <p><u>The first two bullet points</u> While the scenarios outlined there may be regarded as unlikely or unrealistic, nevertheless their possibility cannot be totally discounted and must be allowed for in the drafting.</p> <p><u>The third bullet point</u> A copy of “not a substantial part of the copyright work and hence not an infringement” will not fall within the ambit of proposed section 35A. This section applies to copies that are infringing copies for the purpose of section 35(3).</p>

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4.	<p><u>Paragraph 9</u></p> <p>Considers that it is difficult to understand why the proposed s.35A(3) refers to the concept of “substantially in its entirety”.</p> <ul style="list-style-type: none"> • The proposed s.35A(3)(a) contains the reference “the copy is a copy of a movie or a television drama in its entirety or substantially in its entirety”. • The proposed s.35A(3)(b) also contains the reference “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”. • The HKBA is of the view that such references are superfluous. By virtue of ss.22(3)(a) and 23 of the Copyright Ordinance, Cap.528, a copy needs not be an exact copy of the copyright work, and it includes the reproduction of a substantial part of the copyright work. 	<p><u>Not accepted</u></p> <p>The purpose of the reference to a copy of the whole or substantially the whole of a movie or television drama is to catch within the ambit of subsection (3) the copy of a work which constitutes the whole or substantially the whole of a movie or a television drama, and the viewing duration of which is less than the stipulated 15 or 10 minutes.</p> <p>Regarding the third bullet point, while it is true that reproduction of a substantial part of a movie or a television drama constitutes an infringement of the work involved, it is not intended to exempt from liberalisation all copies of a substantial part which may be constituted by a relatively small proportion of the whole work. Exemption from liberalisation will apply if the substantial parts are the whole or substantially the whole of the relevant copyright work (section 35A(3)(a)), or over 15 minutes (for movies), or over 10 minutes (for television dramas) (section 35A(3)(b)).</p>
5.	<p><u>Paragraph 10</u></p> <p>Works like movies and television dramas are also covered under the proposed s.35A(4). We suggest that the proposed s.35A(3) should</p>	<p><u>Not accepted</u></p> <p>The targets of the two subsections are different. Subsection (3) applies to: (a) a copy of a movie or a</p>

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	be deleted.	<p>television drama the viewing duration of which exceeds 15 or 10 minutes respectively; or</p> <p>(b) when the viewing duration is less than the stated threshold in (a) above, a copy of the whole or substantially the whole of a movie or a television drama.</p> <p>On the other hand, subsection (4) applies to a copy of a movie or a television drama other than those movies or television dramas to which subsection (3) applies.</p>
6.	<p><u>Paragraph 11</u></p> <p>HKBA suggests that the concluding sentence of the proposed s.35A(3), namely, "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" should be incorporated into the definition of "television drama".</p>	<p><u>Not accepted</u></p> <p>Under the draft, the passage in question is not applied to references in subsection (3)(b)(ii). If the suggested amendments are followed, the passage will apply to subsection (3)(b)(ii) and to do so would materially affect the threshold applying under the subsection. To illustrate, under the existing wording a television drama clipping will be caught by subsection 3(b)(ii) (and therefore subject to restriction) in two scenarios: (a) it is a clipping of <u>one</u> episode with a viewing duration exceeding 10 minutes; and (b) it is a clipping of many episodes with the viewing duration exceeding 10 minutes when added together. Under</p>

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		HKBA's suggestion, the scenario in (b) will not be caught and will not therefore be subject to restriction. This will in effect expand the scope of liberalization.
7.	<p><u>Paragraph 12</u></p> <p>With respect to the proposed s.35A(4)(a), HKBA of the view that the reference to "forms part of" the specified excepted works is not necessary.</p> <ul style="list-style-type: none"> • HKBA does not think that one would import the various works specified therein in part in reality. • A part may not constitute a substantial part of the copyright work and hence may not be an infringement. 	<p><u>Partially accepted</u></p> <p>The reference to "forms part of" is meant to make it clear that underlying works (e.g. musical work in a movie) are also covered in the test in subsection (4). We have now proposed a clearer way through section 35A(5)(b) to reflect this intention.</p>
8.	<p><u>Paragraph 13 and 14</u></p> <p>HKBA is of the view that the concluding part of the proposed s.35A(4) is not appropriate.</p> <ul style="list-style-type: none"> • The objective of the concluding part of the proposed s.35A(4) is to assess the purchaser's purpose of acquiring the article concerned. • The suggested test is whether the purchaser buys the article for the purpose of acquiring the computer programs <i>simpliciter</i> or for the purpose of acquiring the 	<p><u>The first bullet point</u> This is a factual statement. We note the point.</p> <p><u>The second bullet point</u> <u>Not Accepted.</u> The suggested test is whether a hypothetical purchaser of the article would purchase it for the purpose of acquiring the specified works (i.e. a movie, television drama, musical visual/sound recording and e-book) or for the purpose of acquiring <u>all other works</u> embodied in the article, not just to the computer program. The proposed replacement of the</p>

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	<p>other substantive work embodied in the article. (The HKBA has suggested to amend the following part of subsection 4 accordingly: “more so than for the purpose of acquiring a copy of the computer program the copies of other works that are embodied in the article,”)</p> <ul style="list-style-type: none"> • However, the concluding part of the proposed s.35A(4) asks the court to ignore the functions of the computer programs of enabling the purchasers to view or listen to or search any specific part of the substantive work embodied in the article. • The suggested test does not work if it seeks to disregard the purchaser's purpose of acquiring the computer program <i>simpliciter</i>. HKBA has suggested to delete the concluding part of section 35A(4) accordingly. 	<p>reference “the copies of other works that are embodied in the article” by the reference “a copy of the computer program” is therefore not appropriate.</p> <p><u>The third and the fourth bullet points</u> <u>Accepted.</u> We originally suggested disregarding the viewing, listening and searching function of a computer program for the specified works when determining the purpose of acquiring the specified works. The rationale is that such functions should not be counted on the side against the specified works.</p> <p>On reflection, we think that it is more appropriate for the viewing, listening and searching function to be weighed on the side of the specified works.</p> <p>The CSAs are amended accordingly. Please see [section 35A(4)] of the attached draft CSAs. HKBA has also suggested some textual amendments to simplify the section 35A(4). These have been suitably incorporated.</p>

DRAFT

COPYRIGHT (AMENDMENT) BILL 2003

COMMITTEE STAGE AMENDMENTS

(Moved by: Secretary for Commerce, Industry and Technology)

DRAFT

COPYRIGHT (AMENDMENT) BILL 2003

COMMITTEE STAGE

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

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AMENDMENTS

1. *Amendment to clause 1(2)*

By deleting “Secretary for Commerce and Industry” and substituting “Secretary for Commerce, Industry and Technology”.

2. *Amendment to clause 2*

By deleting clause 2(2) and substituting –
“(2)Section 35(9) is repealed.”.

3. *Amendment to clause 3*

By deleting proposed section 35A and substituting –

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

(1) *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.*~~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) *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, which copy is embodied in an article that also embodies a copy of a computer program.

and that, but for this section, would be an infringing copy for the

~~purposes of section 35(3). 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 work that is~~ a movie or a television drama ~~(including any such copy forming part of an e-book for illustrative purposes), that~~ which copy is embodied in an article ~~that in which is~~ also embodied ~~a~~ 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 the whole or substantially the whole of a movie or a television drama; or
- (b) where the copy is a copy of a part 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 whole or substantially the whole of the movie or television drama; or
 - (ii) the viewing time of all those parts of the movie or television drama copies of which are embodied in the article is, in the case of a movie, more than 15 minutes in aggregate or, in the case of a television drama, 10 minutes in aggregate,

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 that is any of the following, namely ~~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) a copy of a movie or a television drama (other than a copy to which subsection (3) applies); the copy of the work—
- (b) a copy of a musical sound recording or a musical visual recording; or
- (c) a copy that forms part of an e-book,

(i) ~~forms part of a copy of an e-book;~~

(ii) ~~is a copy of a movie (other than a copy to which subsection (3) applies);~~

(iii) ~~is a copy of a television drama (other than a copy to which subsection (3) applies);~~

(iv) ~~is or forms part of a copy of a musical sound recording; or~~

(v) ~~forms part of a copy of a musical visual recording; and~~

~~(b) —~~

(a “specified copy of a work”), which copy is embodied in an article that also embodies a copy of a computer program, is not a copy of a work to which this section applies if the article is likely an article that, in being acquired by a person for his own use, is likely to be acquired for the purpose of acquiring the specified copies of works that are embodied in it to which paragraph (a) applies more so than for the purpose of acquiring the other

copies of ~~other~~ works that are embodied in ~~it~~ the article,

(5) In considering for the purpose of subsection (4) the extent to which an article is likely to be acquired for the purpose of a particular copy of a work that is embodied in the article –

(a) if the work is a computer program, those parts of the computer program the function of which is to provide a means of –

(i) viewing or listening to a specified copy of a work that is embodied in the article (or, where the work in question is in encrypted form, a means of decrypting the work so as to enable such viewing or listening), or

(ii) a means of searching for any specific part of a specified copy of the work

shall be regarded as part of the specified copy of a work;

(b) where the work in question includes copies of other works, regard shall also be had to those other works as if they were part of the copy of the work that is 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.~~

(65) In this section, "e-book" means a combination of copies of works embodied in a single article and 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. *Amendment to clause 4*

By deleting proposed section 118A and substituting –

"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."

5. *New clauses (clauses 4A and 4B)*

By adding –

“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 or a musical work and arelated 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 or a musical work and arelated 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)”.’.

6. *Amendments to clause 5 (clauses 5 and 6)*

By deleting the clause and substituting –

“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 or proposed 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 or proposed 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 or proposed 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, subsection (2) applies in relation to an offence under section 118(1) of this Ordinance in respect of which proceedings had been begun before the commencement of the amendment Ordinance of 2003, as it applies in relation to an offence~~

~~under section 118(1) of this Ordinance in respect of which no
proceedings had been begun before that commencement.~~

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 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, subsection (2) applies in relation to an offence under section 118(1) of this Ordinance in respect of which proceedings had been begun before the commencement of the amendment Ordinance of 2003, as it applies in relation to an offence~~

~~under section 118(1) of this Ordinance in respect of which no proceedings had been begun before that commencement.”.”.~~