

COPYRIGHT (AMENDMENT) BILL 2003

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A BILL

To

Amend the Copyright Ordinance and to repeal the Copyright (Suspension of Amendments) Ordinance 2001 and for related purposes.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Copyright (Amendment) Ordinance 2003.

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

2. Secondary infringement: importing or exporting infringing copy

(1) Section 30 of the Copyright Ordinance (Cap. 528) is amended by renumbering it as section 30(1).

(2) Section 30 is amended by adding –

"(2) The copyright in a work is not infringed for the purposes of subsection (1) if –

(a) the infringing copy is an infringing copy by virtue only of section 35(3), and was lawfully made in the country, territory or area where it was made; and

(b) the person importing the infringing copy does so other than for the purpose of –

(i) selling or letting for hire; or

(ii) distributing for profit or financial reward, or to such an extent as would affect prejudicially the owner of the copyright,

the infringing copy."

3. Secondary infringement: possessing or dealing with infringing copy

Section 31 is amended by adding –

"(3) The copyright in a work is not infringed for the purposes of subsection

(1)(a) if –

- (a) the infringing copy is an infringing copy by virtue only of section 35(3), and was lawfully made in the country, territory or area where it was made; and
- (b) the person possessing the infringing copy does so other than for the purpose of –
 - (i) selling or letting for hire; or
 - (ii) distributing for profit or financial reward, or to such an extent as would affect prejudicially the owner of the copyright,the infringing copy.

(4) The copyright in a work is not infringed for the purposes of subsection (1)(c) by reason of the exhibiting in public of an infringing copy of the work if –

- (a) the infringing copy is an infringing copy by virtue only of section 35(3), and was lawfully made in the country, territory or area where it was made; and
- (b) the person exhibiting in public the infringing copy does so other than for the purpose of selling or letting for hire the infringing copy or any other infringing copy of a copyright work.

(5) The copyright in a work is not infringed for the purposes of subsection (1)(c) by reason of the distributing of an infringing copy of the work if –

- (a) the infringing copy is an infringing copy by virtue only of section 35(3), and was lawfully made in the country, territory or area where it was made; and
- (b) the person distributing the infringing copy does so other than for profit or financial reward, or to such an extent as to affect prejudicially the owner of the copyright."

4. Sections substituted

Section 118 is repealed and the following substituted –

"118. Offences in relation to infringing copies generally

- (1) A person commits an offence if, without the licence of the copyright owner –
- (a) he makes for sale or hire, or makes for profit or financial reward, an infringing copy of a copyright work;
 - (b) he imports an infringing copy of a copyright work into Hong Kong otherwise than for his private and domestic use;
 - (c) he exports an infringing copy of a copyright work from Hong Kong otherwise than for his private and domestic use;
 - (d) he –
 - (i) sells or lets for hire;
 - (ii) offers or exposes for sale or hire;
 - (iii) transports or stores for profit or financial reward;
 - (iv) distributes for profit or financial reward; or
 - (v) for the purpose of selling or letting for hire any infringing copy of a copyright work, exhibits in public, an infringing copy of a copyright work;
 - (e) he possesses an infringing copy of a copyright work with a view to –
 - (i) selling or letting for hire;
 - (ii) transporting or storing for profit or financial reward; or
 - (iii) distributing for profit or financial reward, the infringing copy;
 - (f) he distributes (otherwise than for profit or financial reward) an infringing copy of a copyright work to such an extent as to affect prejudicially the owner of the copyright.
- (2) A person does not commit an offence under subsection (1)(b) if –
- (a) the infringing copy is an infringing copy by virtue only of section 35(3), and was lawfully made in the country, territory or area where it was made; and
 - (b) he imports the infringing copy other than for the purpose of –
 - (i) selling or letting for hire; or

(ii) distributing for profit or financial reward, or to such an extent as would affect prejudicially the owner of the copyright,

the infringing copy.

(3) Subsection (1)(b), (c), (d)(iii) and (e)(ii) does not apply to an article in transit.

(4) For the purposes of any proceedings for an offence under subsection (1)(d)(iii), where a person transports or stores an infringing copy of a copyright work in circumstances that give rise to a reasonable suspicion that the person is transporting or storing the infringing copy for profit or financial reward, the person is presumed in the absence of evidence to the contrary to be transporting or storing the infringing copy for profit or financial reward.

(5) For the purposes of any proceedings for an offence under subsection (1)(e)(ii), where a person possesses an infringing copy of a copyright work with a view to transporting or storing the infringing copy in circumstances that give rise to a reasonable suspicion that the person is possessing the infringing copy with a view to transporting or storing the infringing copy for profit or financial reward, the person is presumed in the absence of evidence to the contrary to be possessing the infringing copy with a view to transporting or storing the infringing copy for profit or financial reward.

118A. Offences in relation to infringing copies of particular categories of works

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

(a) for the purpose of or in the course of any trade or business, he possesses an infringing copy of a copyright work that is a computer program, ~~feature film~~ movie, musical sound recording, musical visual recording or television drama; and

(b) he so possesses the infringing copy with a view to the copyright work being used in doing any act for the purpose of or in the course of the trade or business.

(2) Subsection (1) does not apply in relation to an infringing copy that is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made.

(3) In proceedings for an offence under subsection (1), it is a defence for the person charged to prove that his possession of the infringing copy occurred in the course of his employment and that the infringing copy was provided to him by or on behalf of his employer for use in the course of his employment.

(4) Subsection (3) does not apply in the case of an employee who –

- (a) where the employer is a body corporate, is a director, manager, secretary or other similar officer of the body corporate or is a person purporting to act in any such capacity or, where the affairs of a body corporate are managed by its members, is a member with functions of management as if he were a director of the body corporate;
- (b) where the employer is a partnership, is concerned in the management of the partnership;
- (c) where the employer is a sole proprietorship, is concerned in the management of the proprietorship; or
- (d) in any other case, is concerned in the management of the employer's business.

(5) This section does not apply to a copy of a copyright work that is a computer program if –

- (a) the copy is in a printed form; or
- (b) the computer program incorporates the whole or any part of another work, not being a computer program itself, and is technically required for the viewing or listening to of the other work by a member of the public to whom a copy of that work is made available.

118B. Defences to criminal liability under sections 118 and 118A Provisions supplementary to sections 118 and 118A

(1) In proceedings for an offence under section 118(1) or 118A(1), it is a

defence for the person charged 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.

(2) For the purposes of subsection (1), where the charge relates to an offence 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), a person charged has proved that he had no reason to believe that the copy in question was an infringing copy of the copyright work 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; and
- (c) there were no other circumstances which would have led him reasonably to suspect that the copy was an infringing copy.

(3) In determining for the purposes of subsection (2) whether a person charged has proved any of the matters specified in paragraphs (a), (b) and (c) of that subsection, and without limiting the effect of that subsection, the court may have regard to the following matters, namely –

- (a) whether the person charged had made enquiries with a relevant trade body in respect of that category of work;
- (b) whether the person charged had given any notice drawing to the attention of the copyright owner or exclusive licensee his interest in importing and selling the copy of the work;
- (c) whether the person charged had complied with any code of practice that may have existed in respect of the supply of that category of work;
- (d) the reasonableness and timeliness of the response, if any, to enquiries made by the person charged;
- (e) whether the person charged had been provided with the name, address and contact details of the copyright owner or exclusive licensee (as the case may be);
- (f) whether the person charged had been provided with the date of

the first day of publication of the work;

- (g) whether the person charged had been provided with proof of any relevant exclusive licence.

(4) For the purposes of proceedings for an offence under section 118(1) or 118A(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 other than a computer program to which section 35A(1) applies as those section 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 other than a computer program to which section 35A(1) applies without infringing the copyright in the work.

118C. Offence in relation to possession of infringing copies by a copying service

- (1) In this section –

"business that includes the providing of a copying service" (包括提供複製服務的業務) means business, conducted for profit, that includes the offering of reprographic copying services to the public.

(2) A person commits an offence if, for the purpose of or in the course of a business that includes the providing of a copying service, he possesses 2 or more substantially identical reprographic copies of a copyright work as published in a book, magazine or periodical, being copies that are infringing copies of the copyright work.

(3) 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 copies in question were infringing copies of the copyright work.

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

- (a) he possessed the infringing copies by virtue only of the fact that he possessed reprographic copies of another work ("principal work"), in which reprographic copies the copyright work to which the charge relates forms part of the principal work; and
- (b) works as published in a book, magazine or periodical constitute not more than 20% of the contents of each of the reprographic copies of the principal work.

(5) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that copies of the book, magazine or periodical in question (not being infringing copies) are available free of charge to members of the public who wish to acquire their own copy.

118D. Offences in relation to articles for use in making infringing copies

- (1) A person commits an offence if he –
- (a) makes;
 - (b) imports into Hong Kong;
 - (c) exports from Hong Kong;
 - (d) sells or lets for hire;
 - (e) offers or exposes for sale or hire; or
 - (f) possesses,

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 profit or financial reward.

(2) 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 profit or financial reward.

- (3) Subsection (1)(b) and (c) does not apply to an article in transit.

(4) In proceedings for an offence under subsection (1), it is a defence for the person charged 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 infringing copies of the copyright work, or to make the infringing copies for sale or hire or for profit or financial reward."

4A. Section repealed

Section 118A is repealed.

5. Penalties for offences under sections 118, 118A, 118C and 118D

(1) Section 119(1) is amended by adding ", 118A(1) or 118C(2)" after "118(1)".

(2) Section 119(2) is amended by repealing "118(4) or (8)" and substituting "118D(1) or (2)".

6. Making infringing copies outside Hong Kong, etc.

(1) Section 120(2) is amended by repealing everything after "in Hong Kong" and substituting "for making an infringing copy of the copyright work for sale or hire or for profit or financial reward."

(2) Section 120(2A) is repealed.

(3) Section 120(5) is amended by repealing "section 118" and substituting "section 118, 118A, 118C or 118D".

(4) Section 120(8) is repealed.

7. Section added

The following is added immediately after section 120A –

"120B. Presumptions in relation to offence provisions

Sections 115, 116 and 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under sections 118, 118A, 118C, 118D and 120."

8. Section added

The following is added –

"196A. Meaning of "for the purpose of or in the course of trade or business"

In this Part, a reference to a person doing an act for the purpose of or in the course of a trade or a business is a reference to –

- (a) a person who is engaged in a trade or a business of any description or nature whatsoever, who does the act for the purpose of or in the course of the trade or business in which he is engaged; or
- (b) an employee of a person who is engaged in a trade or a business of any description or nature whatsoever, who does the act for the purpose of or in the course of that employment."

9. Minor definitions

(1) Section 198(1) is amended by repealing the definition of "business" and substituting –

"business" (業務) includes business conducted otherwise than for profit;".

~~_(2) Section 198(1) is amended by adding—~~

~~"feature film" (電影片) means a film of the kind commonly known as a movie;~~

~~"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 with an accompanying sound track, the whole or a predominant part of which sound track consists of a musical work and any related literary work;~~

~~"television drama" (電視劇或電視電影) means a film of the kind commonly known as a television drama;".~~

(3) Section 198(2) is repealed.

~~(4) 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."~~

10. — 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."

11. — 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.

(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
Schedule.

2. — Exemption from certain criminal liability previously incurred

(1) — As from the commencement of the amendment Ordinance of 2003, no

~~person shall, by virtue of the importing of an infringing copy into Hong Kong before that commencement, be liable to conviction for an offence under section 118(1)(b) of this Ordinance as that section applied immediately before that commencement unless the importing of the same infringing copy into Hong Kong immediately after the commencement would, having regard to section 118(2) of this Ordinance, constitute an offence under section 118(1)(b) of this Ordinance.~~

~~(2) — As from the commencement of the amendment Ordinance of 2003, no person shall, by virtue of any act done before the commencement of the amendment Ordinance of 2003 in respect of a copy of a work that —~~

~~(a) — was an infringing copy by virtue only of section 35(3) of this Ordinance; and~~

~~(b) — was lawfully made in the country, territory or area where it was made,~~

~~be liable to conviction for an offence under section 118(1)(d), (e)(iii) or (e)(iv) of this Ordinance as that section applied immediately before that commencement, unless the doing of the same act in relation to the same infringing copy on or after that commencement would constitute an offence under section 118(1)(d), (e) or (f) 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.~~

~~**3. — Retrospective application of the defence as provided under section 118A(3) and (4) of this Ordinance**~~

~~(1) — This section applies to proceedings for an offence under section 118(1)(d) of this Ordinance as that section applied immediately before the commencement of the amendment Ordinance of 2003, in a case where the infringing copy to which the charge relates is an infringing copy of the kind described in section 2(2), (3), (4) or (5) of the Suspension Ordinance.~~

~~(2) — Except as provided in subsection (3), section 118A(3) and (4) of this Ordinance applies in proceedings specified in subsection (1) (being proceedings for an offence committed before the commencement of the amendment Ordinance of~~

~~2003) as it applies in proceedings for an offence under section 118A(1) of this Ordinance (being proceedings for an offence committed after that commencement).~~

~~(3) — Subsection (2) does not apply in proceedings —~~

~~(a) — for an offence committed before 1 April 2001; or~~

~~(b) — in which the prosecution relies on allegations that, if proved in relation to the period after the commencement of the amendment Ordinance of 2003, would constitute an offence under section 118(1)(e) of this Ordinance.~~

~~(4) — For the avoidance of doubt, it is irrelevant for the purposes of subsection (2) whether the proceedings specified in subsection (1) were begun before or after the commencement of the amendment Ordinance of 2003."~~

11. Transitional provisions and savings

~~(1) Schedule 6 is amended by adding "Part 1" immediately before the heading "Transitional provisions and savings in relation to amendments effected by the Copyright (Amendment) Ordinance 2003 (of 2003)".~~

~~(2) In section 1 of Part 1 of Schedule 6, subsections (1) and (2) are amended by deleting "Schedule" and substituting "Part".~~

~~(3) Section 4(2) of Part 1 of Schedule 6 is amended by repealing "section 118A" and substituting "section 118B(4)".~~

~~(4) Schedule 6 is amended by adding —~~

~~"Part 2~~

~~Transitional provisions and savings in relation to~~

~~amendments effected by the Copyright~~

~~(Amendment)(No. 2) Ordinance 2003~~

~~(of 2003)~~

1. Interpretation

~~(1) In this Part, unless the context otherwise requires —~~

~~"amendment Ordinance No. 2 of 2003" (《2003年修訂條例》) means the Copyright~~

~~(Amendment) (No. 2) Ordinance 2003 (of 2003);~~

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

(2) In this Part, a reference to this Ordinance as it applied immediately before the commencement of the amendment Ordinance No. 2 of 2003 is a reference to this Ordinance as read together with the Suspension Ordinance, as those Ordinances applied immediately before that commencement.

(3) For the purposes of this Part, "lawfully made", in relation to a copy of a work, does not include a copy that was 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.

2. Exemption from criminal liability previously incurred in respect of "parallel-imported" copies of works

(1) As from the commencement of the amendment Ordinance No. 2 of 2003, no person shall be liable, by virtue of the importing of an infringing copy into Hong Kong before that commencement, to conviction for an offence under section 118(1)(b) of this Ordinance as that section then applied unless the importing of the same infringing copy into Hong Kong immediately after that commencement would, having regard to section 118(2) of this Ordinance, constitute an offence under section 118(1)(b) of this Ordinance.

(2) As from the commencement of the amendment Ordinance No. 2 of 2003, no person shall be liable, by virtue of any act done before that commencement in respect of a copy of a work that –

(a) was an infringing copy by virtue only of section 35(3) of this Ordinance; and

(b) was lawfully made in the country, territory or area where it was made,

to conviction for an offence under section 118(1)(d), (e)(iii) or (e)(iv) of this Ordinance as that section then applied, unless the doing of the same act in relation to the same infringing copy after that commencement would constitute an offence under section 118(1)(d), (e) or (f) of this Ordinance.

3. Retrospective application of the defence provided under section 118A(3) and (4) of this Ordinance

(1) Section 118A(3) and (4) of this Ordinance (which establishes a defence for the person charged in proceedings for an offence under section 118A(1) of this Ordinance, and which applies in respect of offences committed after the commencement of the amendment Ordinance No. 2 of 2003) shall apply in proceedings for an offence committed before the commencement of the amendment Ordinance No. 2 of 2003 under section 118(1)(d) of this Ordinance (as that section then applied) in a case where the infringing copy to which the charge relates is an infringing copy of the kind described in section 2 (2), (3), (4) or (5) of the Suspension Ordinance (as that section then applied).

(2) Subsection (1) does not apply to proceedings –

(a) for an offence committed before 1 April 2001; or

(b) in which the prosecution relies on allegations that, if proved in relation to the period after the commencement of the amendment Ordinance No. 2 of 2003, would constitute an offence under section 118(1)(e) of this Ordinance.

(3) For the avoidance of doubt, it is irrelevant for the purposes of subsection (1) whether the proceedings for an offence committed before the commencement of the amendment Ordinance No. 2 of 2003 under section 118(1)(d) of this Ordinance (as that section then applied) were begun before or after that commencement."

12. Miscellaneous and consequential amendments

(1) The provisions of the Copyright Ordinance (Cap. 528) specified in Schedule 1 are amended as set out in that Schedule.

(2) The enactments specified in Schedule 2 are amended as set out in that Schedule.

13. Repeal

The Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568) is repealed.

SCHEDULE 1

[s. 12(1)]

MISCELLANEOUS AND CONSEQUENTIAL AMENDMENTS
TO THE COPYRIGHT ORDINANCE (CAP. 528)**1. Repeal of "in connection with"**

(1) Sections 31(1)(a) and (c), 32(1)(c), 95(1)(a) and (c), 96(5) and (6), 109(1)(a), 207(1)(b), 211(1)(b) and 228(1) are amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

(2) Section 31(1)(d) is amended by repealing "otherwise than for the purpose of, in the course of, or in connection with, any trade or business" and substituting "otherwise than for the purpose of or in the course of any trade or business".

(3) Section 95(1)(d) is amended by repealing "otherwise than for the purpose of, in the course of, or in connection with, any trade or business" and substituting "otherwise than for the purpose of or in the course of any trade or business".

(4) Section 273(2)(a) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

2. Repeals consequent on the addition of section 196A

Sections 31(2), 32(3), 95(1A), 96(6A) and 109(1A) are repealed.

~~**3. Meaning of "infringing copy"**~~~~Section 35(9) is repealed.~~**4. Use of typeface in ordinary course of printing**

Section 62(2) is amended by repealing "118(4)" and substituting "118D(1)".

5. Seized articles, etc. liable to forfeiture

Section 131 is amended –

- (a) in subsection (1), by repealing "section 118 or 120" and substituting "section 118, 118A, 118C, 118D or 120";
- (b) in subsection (7), by repealing "section 118 or 120" and substituting "section 118, 118A, 118C, 118D or 120".

6. Disposal of articles, etc. where a person is charged

Section 132 is amended by repealing "section 118 or 120" and substituting "section 118, 118A, 118C, 118D or 120".

7. Determination of application for forfeiture

Section 133 is amended –

- (a) in subsection (5), by repealing "section 118 or 120" and substituting "section 118, 118A, 118C, 118D or 120";
- (b) in subsection (6), by repealing "section 118 or 120" and substituting "section 118, 118A, 118C, 118D or 120".

8. Index of defined expressions

Section 199 is amended, in the Table –

- (a) by repealing the entry relating to "dealing in";

~~(b) by adding –~~

~~"feature film" section 198(1)~~
~~"lawfully made" section 198(3)~~
~~"musical sound recording" section 198(1)~~
~~"musical visual recording" section 198(1)~~
~~"television drama" section 198(1)".~~

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

Section 207(1A) is repealed.

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

Section 211(1A) is repealed.

11. **Order for delivery up**

Section 228(1A) is repealed.

12. **Expressions having same meaning as in copyright provisions**

Section 238(1A) is repealed and the following substituted –

"(1A) In this Part, a reference to a person doing an act for the purpose of or in the course of a trade or a business shall be construed in the manner provided for in section 196A."

13. **Index of defined expressions**

Section 239 is amended, in the Table, by repealing the entry relating to "dealing in".

14. **Devices designed to circumvent copy-protection**

Section 273 is amended –

- (a) by repealing subsection (6);
- (b) by repealing subsection (7) and substituting –

"(7) In this section, a reference to a person doing an act for the purpose of or in the course of a trade or a business shall be construed in the manner provided for in section 196A."

SCHEDULE 2

[s. 12(2)]

CONSEQUENTIAL AMENDMENTS TO
OTHER ORDINANCES

Organized and Serious Crimes Ordinance

1. **Offences relevant to definitions of "Organized Crime" and "Specified Offence"**

Paragraph 18 of Schedule 1 to the Organized and Serious Crimes Ordinance (Cap. 455) is repealed and the following substituted –

"18. Copyright Ordinance
(Cap. 528)

section 118(1)	offences relating to making or dealing with infringing copies of copyright works
section 118D(1) and (2)	offences relating to articles for use in making infringing copies of copyright works
section 120(1), (2), (3) and (4)	offences relating to making infringing copies of copyright works outside Hong Kong".

(provided that for the purpose of this Ordinance, "infringing copy" referred to in sections 118(1), 118D(1) and 120(1) and (3) of the Copyright Ordinance does not include a copy of a work which is an infringing copy by virtue only of section 35(3) of that Ordinance)

Prevention of Copyright Piracy Ordinance

2. **Seized optical discs, etc., liable to forfeiture**

Section 34(3)(a) of the Prevention of Copyright Piracy Ordinance (Cap. 544) is amended by repealing "section 118 or 120" and substituting "section 118, 118A, 118C, 118D or 120".

Explanatory Memorandum

The main purpose of this Bill is to amend the Copyright Ordinance (Cap. 528) ("the principal Ordinance") to allow for the repeal of the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568) ("the Suspension Ordinance"). The Suspension Ordinance, which was enacted in June 2001, provides for the suspension of the operation of certain amendments to the principal Ordinance that were effected by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (64 of 2000).

2. A further purpose of this Bill is to remove certain criminal and civil liability under the principal Ordinance in relation to so-called "parallel-imported" infringing copies. These are copies that were lawfully made in the country or place where they were made but are nonetheless infringing copies by virtue of section 35(3) of the principal Ordinance.
3. Clause 2 adds a new subsection to section 30 of the principal Ordinance ("Secondary infringement: importing or exporting infringing copy") to remove from the scope of infringing acts under that section the importation of parallel-imported infringing copies where done otherwise than for certain purposes of a commercial nature specified in the new subsection.
4. Clause 3 adds new subsections to section 31 of the principal Ordinance ("Secondary infringement: possessing or dealing with infringing copy") to remove from the scope of infringing acts under subsection (1)(a) (possession) or subsection (1)(c) (exhibiting in public or distributing) of that section the possession, exhibiting in public or distribution of parallel-imported infringing copies where done otherwise than for certain purposes of a commercial nature specified in the new subsections.
5. Clause 4 repeals section 118 of the principal Ordinance ("Criminal liability for making or dealing with infringing articles, etc.") and replaces it with new sections 118 to 118D. Details of the main changes effected by this replacement are set out in paragraphs 6

to 12 that follow.

6. The offence under new section 118(1)(a) in clause 4 expands the offence under existing section 118(1)(a) to include the making of an infringing copy for profit or financial reward.

7. Under new section 118(1)(b), it will be an offence to import an infringing copy of a copyright work otherwise than for private and domestic use. New section 118(2) in clause 4 removes from the scope of that offence the importation of parallel-imported infringing copies where done otherwise than for certain purposes of a commercial nature specified in the provision.

8. (1) The offences under existing section 118(1)(d) and (e) are replaced by offences under new sections 118(1)(d) and (e) and 118A in clause 4.

(2) Existing section 118(1)(e) is replaced by new section 118(1)(d). Under section 118(1)(e) as read together with section 2(1) of the Suspension Ordinance, it is an offence to do certain acts specified in the provision relating to an infringing copy, if the acts are done for the purpose of trade or business. In new section 118(1)(d), the reference to trade or business is omitted, the scope of the existing specified acts is modified, and new specified acts relating to the transporting and storing of infringing copies are added.

(3) Existing section 118(1)(d) is replaced in part by new section 118(1)(e). Under section 118(1)(d) as read together with section 2(1) of the Suspension Ordinance, it is an offence to possess for the purpose of trade or business an infringing copy of a copyright work with a view to committing an infringing act. Under new section 118(1)(e), it will be an offence to possess an infringing copy with a view to doing certain acts as specified in the provision (being acts that are also acts specified in the offence under new section 118(1)(d)).

(4) Existing section 118(1)(d) is also replaced in part by new section 118A. Under section 118(1)(d) as read together with section 2(7) of the Suspension Ordinance, it is an offence to possess for the purpose of or in the course of any trade or business an infringing copy of a copyright work that is a computer program, feature film, television drama or musical (sound or visual) recording (the "4 categories of works") with a view to

committing an infringing act. Under new section 118A(1), it will be an offence to possess an infringing copy of any of the 4 categories of works for the purpose of or in the course of any trade or business where the possession is with a view to the work being used to do any act for the purpose of or in the course of the trade or business. New section 118A(2), however, removes from the scope of liability under new section 118A(1) the possession of parallel-imported infringing copies.

9. Subsections (4) and (5) of new section 118 in clause 4 introduce presumptions to facilitate proof of offences under subsection (1)(d)(iii) and (e)(ii) of that section.

10. New section 118B in clause 4 provides a defence in proceedings for an offence under new section 118(1) or 118A(1) where the defendant proves that he had no knowledge of the infringing nature of the copy. This replicates the defence under existing section 118(3), (6) and (7) in relation to offences under existing section 118(1).

11. New section 118C in clause 4 introduces a new offence in relation to copying service businesses. Under subsection (2) of that section, a person commits an offence if, for the purpose of or in the course of a business that includes the providing of a copying service, he possesses 2 or more substantially identical infringing copies of a copyright work as published in a book, magazine or periodical. Certain defences are provided to the new offence, including the defence of having no knowledge of the infringing nature of the copy.

12. New section 118D in clause 4 replicates, subject to certain modifications, the offences under existing section 118(4) and (8), and the defence provided under existing section 118(5), relating to articles used or intended to be used in making infringing copies of copyright works.

13. Clause 5 amends section 119 to provide for penalties for the offences contained in new sections 118A to 118D.

14. Clause 6 amends section 120(2) to reflect the amendments made to the offences now provided for under new section 118D(1) and (2), and to make other consequential amendments to section 120.

15. Clause 7 adds new section 120B. This section replaces existing sections 118(9)

and 120(8), without change in legal effect.

16. Clause 8 adds new section 196A. This section gives a specific meaning to the expression "for the purpose of or in the course of a trade or a business".

17. Clause 9 makes a number of amendments to section 198 of the principal Ordinance, which contains definitions for terms appearing in Part II of the principal Ordinance.

Clause 9(1) amends the definition of "business" in section 198(1) to provide that "business" includes "not-for-profit" business. Clause 9(2) adds to section 198(1) definitions relevant to the 4 categories of works mentioned in new section 118A(1). Clause 9(3) repeals section 198(2) consequent on the introduction of new section 196A and other related amendments. Clause 9(4) adds a new subsection to amplify the meaning of references to a copy of a work that is "lawfully made". These references appear in new sections 30(2), 31(3) to (5), 118(2) and 118A(2) and in existing section 35(4) and (5) (existing section 35(9), which provides a similar gloss for the expression "lawfully made", will be repealed).

18. (1) Clauses 10 and 11 add to the principal Ordinance new section 282 and Schedule 6 providing for transitional matters.

(2) Section 2 of new Schedule 6 has the effect of removing any liability incurred before the commencement of this Bill as enacted for an offence under existing section 118(1)(b), (d), (e)(iii) or (e)(iv) in relation to a parallel-imported infringing copy unless the same act done after that commencement would also constitute an offence under new section 118(1)(b), (d), (e) or (f).

(3) Section 3 of new Schedule 6 provides that the defence under new section 118A(3) and (4) shall have effect in proceedings for an offence under existing section 118(1)(d) committed before the commencement of the amendments, retrospective to 1 April 2001, other than where the offence committed would also be an offence under new section 118(1)(e) if committed after that commencement.

19. (1) Clause 12 adds 2 schedules providing for miscellaneous and consequential amendments.

(2) Schedule 1 makes miscellaneous and consequential amendments to the

principal Ordinance. Section 1 of Schedule 1 amends the expression "for the purpose of, in the course of, or in connection with, any trade or business" wherever it appears throughout the principal Ordinance (other than in the offence provisions, which are amended elsewhere in the Bill) by repealing the phrase "in connection with". This reflects and modifies the application of the principal Ordinance as read together with the Suspension Ordinance. The remaining provisions of Schedule 1 make other amendments consequent on these amendments, on the introduction of new section 196A and on other provisions of this Bill.

(3) Schedule 2 makes consequential amendments to Ordinances other than the principal Ordinance.

20. Clause 13 repeals the Suspension Ordinance.

21. The table below shows the new numbering of the sections of the principal Ordinance dealing with criminal offences, and the numbering of the existing sections of the principal Ordinance which, when read together with the Suspension Ordinance, are of similar or comparable effect to those new sections.

Copyright Ordinance (Cap. 528)
Sections dealing with criminal offences

New section number	Existing section number
118(1)(a)	118(1)(a)
118(1)(b)	118(1)(b)
118(1)(c)	118(1)(c)
118(1)(d)	118(1)(e)
118(1)(e)	118(1)(d)

New section number	Existing section number
118(1)(f)	118(1)(f)
118(2)	–
118(3)	118(2)
118(4)	–
118(5)	–
118A(1)	118(1)(d)
118A(2)	–
118A(3)	–
118A(4)	–
118A(5)	118(1)(d)
118B(1)	118(3)
118B(2)	118(6)
118B(3)	118(7)
118C	–
118D(1)	118(4)
118D(2)	118(8)

New section number	Existing section number
118D(3)	118(2)
118D(4)	118(5)
120B	118(9), 120(8)
196A	118(8A), 198(2)