

## **LEGISLATIVE COUNCIL BRIEF**

Copyright Ordinance  
(Chapter 528)

### **COPYRIGHT (AMENDMENT) BILL 2001**

#### **INTRODUCTION**

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At the meeting of the Executive Council on 4 December 2001, the Council ADVISED and the Chief Executive ORDERED that the Copyright (Amendment) Bill 2001, at Annex A, should be introduced into the Legislative Council to remove the civil and criminal liabilities related to parallel importation of and subsequent dealings in computer software under the Copyright Ordinance.

#### **BACKGROUND AND ARGUMENT**

##### **Legal Restrictions on Parallel Importation**

2. Parallel importation of a copyright work (such as a computer program) usually means the importation into Hong Kong without the permission of the copyright owner, of a copy of that work which was lawfully made in the country of origin.
3. Under section 35(3) of the Copyright Ordinance (the Ordinance), a copy of a copyright work which is parallel imported and which, if made in Hong Kong, would have either infringed the copyright in that work, or breached an exclusive licence agreement relating to that work, is regarded as an infringing copy.
4. Under section 35(4) of the Ordinance, for a copyright work that has been published for 18 months or less, it is a criminal offence, inter alia, to import (otherwise than for private and domestic use) or sell a copy of that work which is an infringing copy by virtue of its parallel importation. The maximum penalty is \$50,000 per infringing copy and four years' imprisonment.

5. In general, the parallel importation or subsequent sale of a copy of a work which has been published for more than 18 months will not attract any criminal liability<sup>1</sup> but civil remedies (for example, injunction, delivery up and damages) are still available to the copyright owner.

### **Removal of Restrictions on Computer Software**

6. The Legislative Council and users of computer software have expressed the strong view that the current restrictions on parallel importation of computer software should be removed. They believe that allowing parallel importation of computer software would increase competition and availability of products in the market, resulting in more choices and lower prices for consumers. This would help to ease the financial burden especially of small and medium enterprises in replacing their pirated computer software with legitimate products to comply with the new end-user criminal provisions<sup>2</sup> in the Ordinance that came into effect on 1 April 2001.

7. We endorse the proposed liberalization, which is in line with our free-market philosophy and our policy to facilitate the free flow of genuine goods. It is also in step with the growing popularity of purchases through the Internet.

### **Other Types of Copyright Work**

8. While our policy in paragraph 7 above applies to all types of copyright work, we note the intense opposition from the local movie and music industries against lifting the restrictions for movies and music recordings. Taking account of the advice of the Legislative Council Panel on Commerce and Industry, we have decided to concentrate on computer software in the current exercise. We have included the subject of parallel importation of other types of copyright work in the consultation exercise on a wider review of the Ordinance currently underway.

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<sup>1</sup> Under s. 35(9) of the Ordinance, no time limit applies to copies of a computer program made in a country where there is no law protecting copyright in the program or where the copyright in the program has expired.

<sup>2</sup> With effect from 1 April 2001, anyone who knowingly possesses an infringing copy of a computer program for the purpose of, or in the course of, any trade or business may be liable to a maximum penalty of a fine of \$50,000 per infringing copy and four years' imprisonment (sections 118(1) (d) of the Ordinance to be read in conjunction with sections 2(3), (4) and (5) of the Copyright (Suspension of Amendments) Ordinance 2001, and section 119(1) of the Ordinance).

## **Scope of Proposed Liberalization**

9. Technological convergence is creating computer software that contains both computer programs and other copyright works such as audio-visual materials. Common examples are computer software for educational and recreational purposes. The scope of the proposed liberalization should be wide enough to cover such other copyright works that may be embodied in computer software. On the other hand, movies and music recordings are increasingly packaged and sold as digital multimedia products that can be shown or played in a computer. It is necessary to circumscribe the scope of the proposed liberalization carefully, in order to avoid unintentionally lifting the restrictions on parallel importation of movies and music recordings.

10. Our proposal is to remove the civil and criminal liabilities related to parallel importation of and subsequent dealings in computer software, with the exception of those whose principal use is to be viewed or played as a movie, a television drama, or a musical audio or visual recording.

## **Geographical Restriction on Use of Computer Software**

11. The use of computer software usually requires the installation of the software into the user's computer in the first place. This often involves the copying of the whole or part of the software into the computer's hard disk. Copying is an act restricted by copyright and requires permission from the copyright owner. In practice, the permission is granted in the end-user licence agreement related to the software.

12. Developers of computer software may possibly defeat the effect of the proposed liberalization by imposing a condition in the end-user licence agreement prohibiting the use of the software in Hong Kong. If such a restriction is imposed, the copying of the software (which is an essential step in using it) in Hong Kong will be unauthorized, and any copies thus made will be infringing copies. Under the Ordinance, the possession of an infringing copy of a computer program in the course of business is a criminal offence.

13. To ensure that the objective of the liberalization will not be defeated by such a geographical restriction, we propose to remove the end-user criminal liability that arises as a result of the violation of any such restriction. We do not recommend the removal of civil liability in relation to such a violation because this would be an intervention into a private contract between the copyright owner and the end user. This is a very serious matter that may

not be fully justified at this stage, since no evidence of such a practice is found in the market now.

### **Transitional Arrangements**

14. As far as criminal liability is concerned, we propose to apply the new law retrospectively to acts done before its commencement, where no conviction has yet been recorded. This means the removal of outstanding criminal liabilities related to parallel importation of, and hence subsequent dealings in, copies of computer software that occurred prior to the commencement of the amendments. We also propose to remove outstanding end-user criminal liabilities arising from the making of copies from such computer software in violation of the geographical restriction condition in the end-user licence agreement.

15. As regards civil liability, we propose that copyright owners should retain all their rights under the prevailing law in relation to any infringing acts committed before the commencement of the amendments. However, the question as to whether an act committed after the commencement is an infringing act should be determined according to the Ordinance as amended.

### **THE BILL**

16. **Clause 3** adds a **new Section 35A** to the Ordinance to exclude copies of computer programs and their associated works from the scope of section 35(3) of the Ordinance. The effect of this will be that, after the commencement, parallel imported copies of computer programs and associated works that would otherwise be infringing copies by virtue of section 35(3) of the Ordinance will no longer be infringing copies under that subsection. Accordingly, neither the importation nor the sale of such copies will attract civil or criminal liability under the Ordinance. (Paragraph 10 above refers).

17. **Subsection 35A(1)** provides that an imported copy of a computer program or associated work is not an infringing copy under section 35(3) of the Ordinance, provided that it was lawfully made in the country, territory or area where it was made.

18. **Subsection 35A(2)** defines a copy of an associated work as a copy of a work (other than a copy specified in subsection 35A(3)) which is embodied in an article containing a copy of a computer program at the time when the article is imported or is proposed to be imported into Hong Kong. In practice,

the article may be an optical disk containing computer software which comprises a copy of a computer program and copies of some other copyright works such as sound recordings or films.

19. **Subsection 35A(3)** exempts certain copies of works from being copies of associated works. One such copy is a copy of a feature film or part of a feature film embodied in the article, the duration of which is more than 20 minutes. **Subsection 35A(4)** defines a feature film as a film commonly known as a movie or a television drama. The purpose of these two provisions is to prevent a copy of a full length movie or television drama disguised as computer software from being lawfully parallel imported into Hong Kong under the proposed liberalization.

20. For a similar reason, **subsection 35A(3)** also excludes from the definition of a copy of an associated work a copy of a musical sound or musical visual recording the economic value of which is such that the economic value of the article is predominantly attributable to the economic value of the copy or the combined economic value of all such copies embodied in the article. **Subsection 35A(4)** defines “musical sound recording” and “musical visual recording” as a sound recording or a film the whole or a predominant part of which consists of a musical work and any related literary work.

21. **Clause 4** adds a **new section 118A** to the Ordinance to provide that, for the purposes of any proceedings for an offence under section 118 (1) of the Ordinance, the acts permitted under sections 60 and 61 will be permitted in relation to a copy of a computer program or an associated work despite any term of the end-user licence agreement prohibiting or restricting the use of the program or the copy of the associated work in Hong Kong. Section 60 provides that a lawful user of a computer program may make a back-up copy of the program if it is necessary for his lawful use. Section 61 provides that the lawful user may copy or adapt the program if it is necessary for his lawful use. (Paragraph 13 above refers).

22. **Clause 5** adds **new sections 199A** and **199B** to provide for transitional arrangements and the application of the amendments to existing parallel imported copies. For criminal prosecutions, **new subsections 199A(2) and (3)** provide that no proceedings shall be instituted or continued in respect of an offence committed before the commencement in relation to a parallel-imported infringing copy of a computer program or an associated work unless such a copy is also an infringing copy after the commencement (subsection 199A(2)), or in relation to an infringing copy that was made as a back-up copy of, or by copying or adapting the copyright work, unless such a copy is also an

infringing copy after the commencement (subsection 199A(3)). It thus has the effect of applying the Ordinance as amended retrospectively to acts done before the commencement unless, as provided in **subsection 199A(4)**, a conviction has already been recorded. (Paragraph 14 above refers).

23. For both criminal prosecutions and civil claims, **new section 199B** stipulates that for the purpose of alleged infringing acts done after the commencement, the question of whether a copy of a computer program or an associated work that was imported before the commencement is to be regarded as an infringing copy is to be decided under the Ordinance as amended. For the avoidance of doubt, **subsection 199B(4)** provides that the rights of action available to copyright owners in relation to any infringing acts done before the commencement are not affected. (Paragraph 15 above refers).

24. The relevant provisions of the Ordinance affected by the Bill are at Annex B.

## **PUBLIC CONSULTATION**

25. We have consulted the computer software industry and other interested parties. There is overwhelming support for the proposed liberalization. A few are concerned about the interests of computer software distributors who have invested resources in providing value-added services such as training. Some also worry that the proposal will make investigation and prosecution of computer software piracy difficult. The film and music industry associations are content with the general approach of the Bill in excluding movies and music recordings from the liberalization.

26. The Legislative Council Panel on Commerce and Industry supports the proposal.

## **BASIC LAW IMPLICATIONS**

27. The Department of Justice advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

## **HUMAN RIGHTS IMPLICATIONS**

28. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

## **BINDING EFFECT OF THE LEGISLATION**

29. The Bill will not affect the current binding effect of the Ordinance.

## **FINANCIAL AND STAFFING IMPLICATIONS**

30. There are no financial or staffing implications for Government.

## **ECONOMIC IMPLICATIONS**

31. Removing legal restrictions on parallel importation of computer software would increase competition and availability of products in the market, resulting in more choices and lower prices for consumers. It will bring more business opportunities for parallel importers. It will also help to ease the financial burden especially of small and medium enterprises in replacing their pirated computer software with legitimate products.

32. The liberalization may affect the interests of copyright owners, exclusive licensees and sole distributors. It would limit the ability of copyright owners in adopting different pricing for different markets and therefore making less profit from their products. Exclusive licensees and sole distributors may face competition from parallel importers once the restrictions are lifted. However, such impacts should not be significant.

33. The proposal does not entail any compliance burden on business.

## **LEGISLATIVE TIMETABLE**

34. The legislative timetable will be as follows –

Publication in the Gazette	7 December 2001
First Reading and commencement of Second Reading debate	19 December 2001
Resumption of Second Reading debate, committee stage and Third Reading	to be advised

## **PUBLICITY**

35. We have issued a Legislative Council brief and a press release. A spokesman will be available to answer enquiries.

## **ENQUIRIES**

36. Enquiries on this brief should be referred to Mr. Philip Chan, Principal Assistant Secretary for Commerce and Industry, on telephone number 2918 7480.

Commerce and Industry Bureau  
5 December 2001

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 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”.

**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 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.”.

#### **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.”.

#### **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.”.

## **Explanatory Memorandum**

The purpose of this Bill is to amend the Copyright Ordinance (Cap. 528) (“the principal Ordinance”) to exclude from the class of “infringing copies” of works under section 35(3) of the principal Ordinance any copy of a computer program that has been brought into Hong Kong as a parallel import (clause 3, new section 35A). The term “parallel import” in this context refers to a copy of a computer program that was lawfully made in the place outside Hong Kong where it was made but was imported into Hong Kong without the permission of the copyright owner.

2. The exclusion mentioned in paragraph 1 also applies to a copy of any other work that was embodied in the same article as the copy of a computer program at the time of its importation into Hong Kong. Such copy of another work is referred to as a “copy of an associated work”.

3. For the purpose of any criminal liability under section 118(1) of the principal Ordinance, the exclusion mentioned in paragraphs 1 and 2 applies regardless of any term of a licence agreement that has the effect of prohibiting or restricting the use of the copy of a computer program, or the copy of an associated work, in Hong Kong (clause 4, new section 118A).

4. Clause 5 makes transitional arrangements in relation to certain criminal proceedings under the principal Ordinance (new section 199A) and elaborates on the application of the amendments effected by new section 35A in relation to copies of computer programs and copies of associated works that were imported into Hong Kong before the commencement of this Ordinance (new section 199B). Specifically –

- (a) new section 199A (“Offences under section 118(1) committed before the commencement of the amendment Ordinance of 2001”) operates as a bar to prosecution for an offence under section 118(1) of the principal Ordinance committed before the commencement of this Ordinance in relation to a copy of a computer program or a copy of an associated work that was an infringing copy under or by reference to section 35(3), 60 or 61 of the principal Ordinance as it then applied, unless the copy would also be an infringing copy under or by reference to those sections (as amended by this Ordinance) had the same act been done immediately after the commencement of this Ordinance;
- (b) new section 199B (“Application of section 35A to existing imported copies”) provides that, as from the commencement of this Ordinance, a copy of a computer program or a copy of an associated work that was brought into Hong Kong as a parallel import before that commencement, and was therefore an infringing copy under section 35(3) of the principal Ordinance as it then applied, is no longer to be regarded as an infringing copy under that section unless it would also be an infringing copy under that section (as amended by this Ordinance) had it been brought into Hong Kong immediately after the commencement of this Ordinance.

## Annex B

Chapter:	528	Title:	COPYRIGHT ORDINANCE	Gazette Number:	
Section:	35	Heading:	Meaning of "infringing copy"	Version Date:	30/06/1997

### Expanded Cross Reference:

Sections 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133

### Infringing copy

(1) In this Part "infringing copy" (侵犯版權複製品), in relation to a copyright work, is to be construed in accordance with this section.

(2) A copy of a work is an infringing copy if its making constituted an infringement of the copyright in the work in question.

(3) A copy of a work other than a copy of an accessory work is also an infringing copy if-

- (a) it has been or is proposed to be imported into Hong Kong; and
- (b) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

(4) For the purposes of sections 118 to 133 (criminal provisions) "infringing copy" (侵犯版權複製品) does not include a copy of a work- <\* Note-Exp. X-Ref.: Sections 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133\*>

- (a) that was lawfully made in the country, territory or area where it was made;
- (b) that has been or is proposed to be imported into Hong Kong at any time after the expiration of 18 months beginning on the first day of publication of the work in Hong Kong or elsewhere; and
- (c) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work,

or a copy of an accessory work-

- (i) that was lawfully made in the country, territory or area where it was made;
- (ii) that has been or is proposed to be imported into Hong Kong; and
- (iii) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

(5) For the purposes of Division VII (proceedings relating to importation of infringing articles), "infringing copy" (侵犯版權複製品) does not include a copy of a work or a copy of an accessory work-

- (a) that was lawfully made in the country, territory or area where it was made;
- (b) that has been or is proposed to be imported into Hong Kong; and
- (c) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

(6) Where in any proceedings the question arises whether a copy of a work is an infringing copy and it is shown-

- (a) that it is a copy of the work; and
- (b) that copyright subsists in the work or has subsisted at any time,

it shall be presumed until the contrary is proved that the copy was made at a time when copyright subsisted in the work.

(7) In this Part "infringing copy" (侵犯版權複製品) includes a copy which is to be treated as an infringing copy by virtue of any of the following provisions-

- section 41(5) (copies made for purposes of instruction or examination);

section 44(3) (recordings made by educational establishments for educational purposes);  
 section 45(3) (reprographic copying by educational establishments for purposes of instruction);  
 section 46(4)(b) (copies made by librarian or archivist in reliance on false declaration);  
 section 64(2) (further copies, adaptations, etc. of work in electronic form retained on transfer of principal copy);  
 section 72(2) (copies made for purpose of advertising artistic work for sale); or  
 section 77(4) (copies made for purpose of broadcast or cable programme).

(8) For the purpose of subsections (3), (4) and (5), "accessory work" (附屬作品) means a work incorporated in or consisting of-

- (a) a label affixed to, or displayed on, an article;
- (b) the packaging or container in which an article is packaged or contained;
- (c) a label affixed to, or displayed on, the packaging or container in which an article is packaged or contained;
- (d) a written instruction, warranty or other information incidental to an article and provided with the article on its sale; or
- (e) an instructional sound recording or film incidental to an article and provided with the article on its sale,

and the economic value of the article (inclusive of the label, packaging, container, instruction, warranty, other information, sound recording or film, as the case may be) is not predominantly attributable to the economic value of the work.

(9) For the purpose of subsections (4) and (5), "lawfully made" (合法地製作) does not include the making of a copy of a work 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.

[cf. 1988 c. 48 s. 27 U.K.]

Chapter:	528	Title:	COPYRIGHT ORDINANCE	Gazette Number:
Section:	<b>60</b>	Heading:	<b>Lawful user may make back-up copy of computer program</b>	Version Date: 30/06/1997

#### Computer programs: Lawful users

(1) A lawful user of a copy of a computer program may make a back-up copy of the program without infringing the copyright in the program if it is necessary for him to have the back-up copy for the purposes of his lawful use.

(2) For the purposes of this section and section 61 a person is a lawful user of a computer program if he has a contractual right to use the program.

(3) This section has effect subject to any agreement to the contrary.

[cf. 1988 c. 48 s. 50A U.K.]

Chapter:	528	Title:	COPYRIGHT ORDINANCE	Gazette Number:
Section:	<b>61</b>	Heading:	<b>Lawful user may copy or adapt computer program</b>	Version Date: 30/06/1997

(1) A lawful user of a copy of a computer program may copy or adapt the program without infringing the copyright in the program if the copying or adapting is necessary for his lawful use.

(2) A lawful user of a copy of a computer program may, in particular, if it is necessary for the lawful use of the program, copy the program or adapt it for the purpose of correcting errors in it.

(3) This section does not apply to any copying or adapting permitted under section 60.

[cf. 1988 c. 48 s. 50C U.K.]

Chapter:	528	Title:	COPYRIGHT ORDINANCE	Gazette Number:	L.N. 46 of 2001
Section:	<b>118</b>	Heading:	<b>Criminal liability for making or dealing with infringing articles, etc.</b>	Version Date:	01/04/2001

Expanded Cross Reference:  
115, 116, 117

Remarks:

The Copyright (Suspension of Amendments) Ordinance (Cap 568) provides for the suspension of the operation of certain amendments in relation to this section effected by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (64 of 2000).

#### Offences

- (1) A person commits an offence if he, without the licence of the copyright owner-
  - (a) makes for sale or hire;
  - (b) imports into Hong Kong otherwise than for his private and domestic use;
  - (c) exports from Hong Kong otherwise than for his private and domestic use;
  - (d) possesses for the purpose of, in the course of, or in connection with, any trade or business with a view to committing any act infringing the copyright; (Amended 64 of 2000 s. 7)
  - (e) for the purpose of, in the course of, or in connection with, any trade or business- (Amended 64 of 2000 s. 7)
    - (i) sells or lets for hire;
    - (ii) offers or exposes for sale or hire;
    - (iii) exhibits in public; or
    - (iv) distributes; or
  - (f) distributes (otherwise than for the purpose of, in the course of, or in connection with, any trade or business) to such an extent as to affect prejudicially the owner of the copyright, (Amended 64 of 2000 s. 7)an infringing copy of a copyright work.
- (2) Subsections (1)(b) and (c) and (4)(b) and (c) do not apply to an article in transit.
- (3) It is a defence for the person charged with an offence under subsection (1), 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.
- (4) A person commits an offence if he-
  - (a) makes;
  - (b) imports into Hong Kong;
  - (c) exports from Hong Kong;
  - (d) possesses; or
  - (e) sells or lets for hire, or offers or exposes for sale or hire,

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 use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s. 7)

(5) It is a defence for the person charged with an offence under subsection (4) 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 the infringing copies for sale or hire or for use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s. 7)

(6) For the purpose of subsections (1)(b) and (3), where a person is charged with an offence under subsection (1) 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), 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;
- (c) there were no other circumstances which would have led him reasonably to suspect that the copy was an infringing copy,

he has proved that he had no reason to believe that the copy in question was an infringing copy of the copyright work.

(7) In determining whether the person charged has proved under subsection (6) that he had no reason to believe that the copy in question was an infringing copy of the work, the court may have regard to, including but not limited to, the following-

- (a) whether he had made enquiries with a relevant trade body in respect of that category of work;
- (b) whether he had given any notice drawing attention of the copyright owner or exclusive licensee to his interest to import and to sell the copy of the work;
- (c) whether he had complied with any code of practice that may exist in respect of the supply of that category of work;
- (d) whether the response, if any, to those enquiries made by the defendant was reasonable and timely;
- (e) whether he was provided with the name, address and contact details of the copyright owner or exclusive licensee (as the case may be);
- (f) whether he was provided with the date of first day of publication of the work;
- (g) whether he was provided with proof of any relevant exclusive licence.

(8) 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 use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s. 7)

(8A) It is immaterial for the purpose of subsections (1)(d) and (e), (4) and (8) whether or not the trade or business consists of dealing in infringing copies of copyright works. (Added 64 of 2000 s. 7)

(9) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section. <\* Note - Exp. X-Ref.: Sections 115, 116, 117 \*>

[cf. 1988 c. 48 s. 107 U.K.]