

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.