

Consumer Council
Response to Consultation Document
'Review of Certain Provisions of Copyright Ordinance'

1. The Consumer Council welcomes the opportunity to provide comments to the Commerce and Industry Bureau in relation to the various issues raised in its Consultation Document. Given the Council's role in protecting and promoting the interests of consumers of goods and services, this submission will address those issues that affect the rights of consumers in the marketplace. On the other hand, it will also address the concerns of business entities where the proper balance between the interest of copyright owners and users of copyright works is in issue.
2. At the outset the Council wishes to state that it supports in general the application of safeguards to protect copyright holders, and recognizes that the abuse of those rights (through piracy) is a problem that needs to be addressed.
3. However, in addressing the issues that have arisen from the Consultation Document, the Council believes that a sense of balance needs to be introduced into the legislative safeguards that exist in the market place. In particular, what measures there are to :-
 - (a) protect consumers (included within this definition would be members of the business community); in addition to
 - (b) protecting the holders of copyright.
4. The Consultation Document has raised a number of specific questions concerning copyright. This submission will cover consumer protection and competition issues as matters of broad principles affecting the interests of consumers, with particular reference made to consultation questions which cast into issue the proper balance between the interest of copyright owners and members of the business community as users of copyright works. The submission therefore addresses the following parts of the Consultation Document:
 - (a) Criminal Provisions related to End-user Piracy;
 - (b) Permitted Acts related to Free Public Showing or Playing of Broadcast or Cable Programme;
 - (c) Parallel Importation of Copyright Works other than Computer Software;
 - (d) Unauthorised Reception of Subscription Television Programmes; and
 - (e) Licensing Bodies.

Criminal provisions related to End User Piracy

5. The amendments to the Copyright Ordinance, introduced by the Intellectual Property (Amendments Ordinance) 2000, were clearly made with the interests of property right holders in mind. The Copyright (Suspension of Amendments) Ordinance 2001 that suspended some of the provisions was, in the Council's opinion, a recognition of the difficulty in achieving that balance and the need to ensure that consumers' interests are equally served.

6. The extension of criminal provisions raises a number of issues for the public to consider. First, what safeguards should be in place to protect consumers from misleading and deceptive practices in the marketplace, where infringing articles may be sold. Second is the issue of the extent to which criminal provisions should be imposed on persons, given the different contexts in which they may be found to be using infringing articles.

Misleading and deceptive conduct

7. The first point to make is that the question as to what is an infringing article is a complex question of law. The law does not prevent copying *per se*, but only illegal copying. Given that it is difficult to both understand what is illegal copying, and to detect that there has been illegal copying, the Consumer Council would pose the question - how is a consumer to know what is an infringing copy?
8. There may be circumstances where some consumers have a reasonable belief that they are purchasing infringing articles and they actively procure the sale of infringing articles. However, it cannot be assumed that this is the case in all circumstances. It is unlikely that any trader publicly advertises or proclaims that articles for sale are infringing copyright. In addition, infringing articles are not confined to the types of goods that often receive the most publicity, such as pirated music, where a law abiding consumer might be especially cautious. In circumstances where an article is not readily perceived as a possible infringing article, and the consumer in all innocence is not aware that it is an infringing article, he/she may in fact be a victim of deception.
9. For example, where articles for sale are indistinguishable from legitimate articles and a trader who knows the articles infringe copyright does not declare that the articles are not legitimate, the trader may be engaging in misleading and deceptive conduct by omitting a material fact.
10. A consumer in these circumstances, where there is a reasonable belief that the articles are genuine, would be a victim of an unfair trading practice. In other jurisdictions there are general consumer protection laws, administered by a consumer protection enforcement agency, prohibiting misleading and deceptive conduct where consumers have rights to protect themselves from such unscrupulous behavior.
11. In Hong Kong, there is no general legislative prohibition against misleading and deceptive conduct, and consumers have to rely on specific legislative provisions that are enforced by the Commissioner of Customs and Excise under Section 7 of the Trade Descriptions Ordinance. The provisions of this Ordinance are not as comprehensive for consumer protection as found in other comparable advanced economies, and the provisions in the Ordinance are enforced as offences, under the criminal onus of proof, making the achievement of market place remedies difficult to achieve.
12. The Council recommends that in striving for a balance between serving the interests of copyright holders and consumers, that consideration should also be given to strengthening consumer protection legislation¹.

Extent of criminal liability to be imposed

13. The Council feels that it is a draconian measure to impose criminal sanction against copyright infringement without regard to whether the relevant activities of a "business" is commercial in nature or not and whether the works to be protected are afflicted by rampant piracy. As noted above, the laws to protect consumers against misleading and

¹ The Council recently released a report entitled 'Regulating Deceptive, Misleading and Unfair Practices in Consumer Transactions'. The report examined the levels of safeguards currently existing to protect consumers and made a number of recommendations.

deceptive conduct are inadequate to redress the imbalance inherent in the approach the Government is taking to protect copyright owners. Moreover, there is no general competition law in Hong Kong to protect consumers, including businesses, against abuses by copyright owners with market power, or by collectives of copyright owners who accrue market power through their aggregations.

14. The Council believes it would be an excessive misapplication of the criminal provisions, and a serious imbalance in favour of copyright owners, to prescribe criminal liability on users over and above existing civil claims which copyright owners can use when their interests are jeopardized.

Council recommendation

15. The Council is therefore in favour of retaining the current provision of restricting criminal sanctions to persons dealing in an infringing copy of copyright work. The Council recommends that no criminal sanction should attach to the infringement of copyright simply for the purpose of, in the course of, or in connection with, any trade or business.

Permitted Acts related to Free Public Showing or Playing of Broadcast or Cable Programme

Council recommendation

16. The Council shares the view expressed by users in the Consultation Paper, that copyright holders of underlying works when licensing their works would have been aware that their works would be accessible to the general public, in the same way as those who have rights to performance. The Council is therefore of the view that all the works in a broadcast or programme should be treated the same. As a consequence, the Council recommends that the statutory exemption in the Copyright Ordinance should be extended to cover all underlying copyright works.
17. The Consultation paper also raises a question as to whether the exemption should be extended to cover all public places where a broadcast or cable programme is shown or played 'except where goods or services are supplied at prices which are *substantially attributable* to the facilities afforded for seeing or hearing the broadcast or programme'.
18. The Council is of the view that the protection afforded to copyright owners should not be extended beyond what can be reasonably contemplated at the time the copyright owners licenced their works to radio or television network operators. Owners of copyright works would be aware that their works would be accessible to the general public by way of broadcast or cable programme. Accordingly, the fact that the general public would have access to copyrighted works in many varied circumstances would be already be factored into the license fee that is extracted from radio or television network operators.
19. Moreover, the circumstances in which the general public would have access to copyrighted works would often be in circumstances of purchasing another good or service, such as eating in a restaurant. In these circumstances consumers exercise no choice in the matter and the copyright works have little or no importance on the goods or services supplied.
20. The Council would therefore like to see the existing condition for exemption relaxed so that the general public, when paying for some purpose other than watching or listening to music or a programme, such as eating in a restaurant, will not have to bear the cost of copyright royalty beyond that already extracted from a radio or television network operator.

21. The Council therefore recommends that the exemption should be extended to cover all public places where a broadcast or programme is shown or played except where goods or services are supplied at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme.

Parallel Importation of Copyright Works other than Computer Software

22. The Council advocates the permissibility of parallel importation. Hong Kong's economic success has been largely built on its reputation of a free port and a marketplace that has not been distorted through Government intervention that puts barriers in the way of access to Hong Kong markets. Hong Kong has a tradition of being able to adapt and lead the way as far as international competitiveness and liberalization is concerned. This has had benefits not only for consumers, through wider choices and low prices, but also for the business community which in the process of having to work within a strong competitive environment, has been fortified by the process.
23. It is a matter of record that the Hong Kong economy has successfully made the transition from a manufacturing, to a services based economy, to the point where the major economic activity in Hong Kong is now engaged in services. Many products previously manufactured in Hong Kong are now produced elsewhere and are imported into the SAR. The consequences of the shift have clearly demonstrated the ability of the Hong Kong economy to successfully adapt to a changing environment and to lead the way in terms of market liberalization. This is both a healthy sign and one to safeguard.
24. The ability for Hong Kong to successfully make the transition from a predominance of manufacturing to that of services provision, has been due largely to the discipline that an open domestic market has engendered within the Hong Kong economy. This discipline of liberalized markets has enabled it to adapt to changing economic circumstances easier and quicker than many other nations, and will, if maintained and allowed to evolve at a faster pace than found elsewhere, serve Hong Kong equally well into the future.

Council's recommendation

25. The Council therefore recommends that civil liability and criminal sanction against parallel importation of and subsequent dealing in all types of copyright work should be removed, without exception.

Unauthorised Reception of Subscription Television Programmes

26. The Council is concerned with practical problems that may arise from imposing end-user criminal liability in relation to unauthorized reception of subscription television programmes, and the lack of balance in providing protection to relevant parties.
27. In the case of reception for private and domestic purposes, it may not be easy to attribute liability to a person culpable out of a whole family that is watching a subscription service, i.e., whether the acquirer, the owner of the premises or the viewer should be liable. There is also the possibility that a family acquires a reception device from a door-to-door promoter without realizing the illicit nature of the device and under a misrepresentation of the device by the promoter. On the other hand, the device might be unwittingly taken over from a previous occupier of premises.
28. It is arguable whether the problem is so severe as to justify criminal sanction against consumers with the possibility of intrusive entry into premises to facilitate investigation of a suspected violation, when:

- (a) there are existing remedies to protect business, i.e., service providers and copyright owners under the Broadcasting and Copyright Ordinances; yet
- (b) consumers have only scant protection against misleading and deceptive business conduct (as noted in paragraphs 11 and 12).

Council's recommendation

29. The Council is of the view that the problem with unauthorized reception may well be overcome by service providers employing digital transmission and advanced encryption technology rather than resorting to imposing end-user criminal liability. Increasing action through imposing existing sanctions against the possession of an unauthorized decoder for commercial purposes would also help in curbing the problem of unauthorized reception.

Licensing Bodies

30. The consultation paper poses the question of whether the Copyright Tribunal should be replaced with an arbitration system to adjudicate disputes between copyright users and licensing bodies; and whether licensing bodies should be mandated to be registered and to publish their scales of royalty charges.

Tribunal versus arbitration system

Council recommendation

31. The Council considers that the Copyright Tribunal is an option with less cost implications when compared to an arbitration system, under which the costs for venue and adjudicator have to be borne by the parties. Since arbitration is a means of dispute resolution that parties can adopt by agreement, the Council is of the view that the Copyright Tribunal should be retained, leaving parties to agree to arbitration if deemed appropriate.

Mandating licensing bodies and scales of royalty charges

32. The Council is concerned at the limited safeguards that are in place to protect consumers, or traders generally, against the collective actions of property right holders who in the circumstances of criminal provisions, may use the confusion and fear that arises from the provisions to extract excessive fees from the community. Chapter 7 of the Consultation Document suggests a possible option to require compulsory registration of 'licensing bodies'.

33. The core issue in regard to collective actions by copyright holders that have formed a licensing body, is one of competition. In the normal course of events it would be expected that competition should play its part in determining the level at which licence fees should be set by individual copyright holders. Collective actions by a dominant group of copyright holders who own the majority of copyright works, are in effect price fixing agreements between competitors using their market power to extract monopoly rents. As such they are a concern for the general public, hence the question posed by the Consultation Paper on mandatory registration. However, other owners of copyright works may form a 'licensing body' (that does not belong to the dominant group) As such the fees they obtain would not cause a major competition concern.

34. The extent to which the actions of collective groups of competitors are a concern is normally considered in other comparable advanced economies, under competition law administered by a competition authority. In these circumstances a copyright licensing body that has market power would be the only one to raise a concern with the fees it extracts. Mandating the registration of all 'licensing bodies', as suggested in the consultation paper, could be seen as excessive interference in the market, given that it is conceivable that in some areas of copyrighted work, competition could arise between

different groups of persons who are copyright holders. In the circumstances of a competitive market, competition between copyright holders should be allowed to play its part in setting fees and the Copyright Tribunal should have no role to play.

Council recommendation

35. However, in the absence of a general competition law administered by a competition authority, that could act as a 'filter' to identify licensing bodies with market power, and because safeguards are clearly required to protect consumers/business users against collective groups of copyright holders with market power, and bearing in mind Government's sector specific approach to competition oversight problems, the Council recommends:
 - (a) that all copyright licensing bodies should be required to be registered and therefore come under the jurisdiction of the Tribunal; and
 - (b) the functions of the Copyright Tribunal be extended.
36. The extended functions of the Tribunal should give it the power and resources to provide the necessary oversight on the fees demanded and conduct engaged in by a licensing body that has market power.
37. The Council also suggests that in carrying out its functions of oversight of the sector, the Tribunal develop a code of practice for copyright licensing bodies to follow under the mandatory registration scheme. The code should, amongst other things, govern the manner in which licensing bodies represent their rights to collect fees.
38. The Council would be willing to assist in the development of such a code, taking into account the complaints and representations that have been made to it in the past regarding the actions of copyright licensing bodies.