

Legislative Council Panel on Commerce and Industry

Draft Copyright (Amendment) Bill 2002

Purpose

This paper seeks Members' views on the draft Copyright (Amendment) Bill 2002 at the Annex.

Background

End-user criminal liability

2. We amended the Copyright Ordinance ("the Ordinance") with effect from 1 April 2001 to introduce criminal liability for business end-users of copyright infringing products. While the original aim of the amendments was to combat rampant piracy in computer software and audio-visual products, the new law applied also to photocopying of printed works as well as downloading of information from the Internet. The public generally felt that the scope of the new criminal law was too wide.

3. In June 2001, with the enactment of the Copyright (Suspension of Amendments) Ordinance 2001, we suspended¹ the amendments except as they applied to computer programs, movies, television dramas, and musical recordings ("the Four Categories"). We also suspended application to the new criminal law of the phrase 'in connection with' in the expression 'for the purpose of, in the course of, or in connection with, any trade or business' where this appeared in the Ordinance, so that activities incidental to or marginally related to business would be outside the scope of the end-user criminal liability. We undertook to formulate a long-term solution after wide public consultation.

Public consultation

4. In November 2001, we issued a document entitled 'Review of Certain Provisions of the Copyright Ordinance' for a two-month public

¹ The suspension will expire on 31 July 2002 but may be extended with the approval of the Legislative Council. We will seek the Legislative Council's approval to extend the suspension to 31 July 2003.

consultation. In the light of the results of the public consultation and having consulted this Panel, the Government decided that -

- (a) the suspension should be made permanent;
- (b) the phrase 'in connection with' should also be removed from the expression 'for the purpose of, in the course of, or in connection with, any trade or business' where it appears in the civil provisions of the Ordinance;
- (c) a new defence against criminal liability should be provided for employees possessing infringing copies of works belonging to the Four Categories supplied by their employers, and that this defence should take retrospective effect from 1 April 2001; and
- (d) to combat more effectively illicit reproduction of books by copy-shops for commercial purposes, the relevant criminal provisions in the Ordinance and the enforcement procedure should be reviewed.

Proposed legislative amendments

Making the suspension permanent

5. We propose to implement the decision in paragraph 4(a) above broadly by –

- (a) limiting the scope of the offences in sections 118(1)(d) and (e) of the Ordinance to situations where the criminal acts are done for the purpose of or in the course of dealing in (e.g. buying and selling) copyright infringing products as part of any trade or business. At present, these two sub-sections criminalise both pirates dealing in copyright infringing products, as well as business end-users of those products. After the proposed amendment, they will no longer cover end-users. See proposed sections 118A(1)(d) and (e) (clause 2 of the draft Bill); and
- (b) adding to the Ordinance a new provision to deal with end-user criminal liability specifically. Under this provision, a person will commit an offence if he possesses, for the purpose of or in the course of any trade or business, a copyright infringing

product which belongs to the Four Categories, with a view to using it in doing any act for the purpose of or in the course of that trade or business. See proposed section 118A(2) (clause 2 of the draft Bill).

The combined effect of the above proposals is that end-user criminal liability will be applicable only in relation to copyright works belonging to the Four Categories, and the criminal act involved will be confined to possession of an infringing copy with a view to using it in business.

6. In addition to the above, we propose to make similar or consequential changes to sections 118(1)(f), (4), (5), (8) and (8A) and 120(2) and (2A) of the Ordinance. See proposed sections 118A(1)(f), 118C(1) and (2) and 118C(5) and (6) (clause 2 of the draft Bill) as well as sections 120(2) and (2A) (clause 3 of the draft Bill).

7. While the suspension is not applicable to computer programs generally, certain types² of infringing copies of computer programs are covered by the suspension. This arrangement, with one exception, will be maintained in amending the Ordinance (see section 118A(4) in clause 2 of the draft Bill). The exception is parallel-imported computer programs. As the removal of criminal and civil liability in relation to parallel importation of computer programs is dealt with by the Copyright (Amendment) Bill 2001 introduced into the Legislative Council last December, no further action is required in the draft Bill.

Deletion of the phrase ‘in connection with’

8. In the criminal provisions under the proposed sections 118A to 118C and clause 3 of the draft Bill, we have not used the phrase “in connection with”. To implement the decision set out in paragraph 4(b) above, we propose to delete the phrase ‘in connection with’ from the expression ‘for the purpose of, in the course of, or in connection with, any trade or business’, where this expression appears in the civil provisions of the Ordinance. See clause 5 of the draft Bill.

New defence for employees

9. We propose that it will be a defence for an employee charged with an offence described in paragraph 5(b) above if he could prove that the

² These include, for example, infringing copies in printed form, and infringing copies which were parallel imported and which were legally made outside Hong Kong.

infringing copy was provided to him by his employer, or that the possession of the infringing copy was necessary to carry out instructions from his employer. See proposed section 118B(2)(b) (clause 2 of the draft Bill).

10. To avoid abuse, we propose that the defence should not be available to certain senior officers of a company. We are considering drafting a provision to the effect that only those senior officers with functions of management and who have given consent or connivance to the use of the infringing product concerned are ineligible for the defence.

11. The proposed defence will be available to defendants with retrospective effect from 1 April 2001, provided that no conviction is recorded before the commencement of the amending legislation. See items 3 and 4 of the proposed Schedule 6 (clauses 6 and 7 of the draft Bill).

Tightening criminal sanction against illicit copy-shops

12. We propose to add a new offence targeting illicit copy-shops. Our current thinking is that this offence will include the following elements -

- (a) the offender is engaged in a commercial business providing a copying service to the public;
- (b) the offender possesses in the course of that business infringing copies of a copyright work in printed form;
- (c) had those infringing copies in (b) been [distributed] [sold] to the public by the offender, it would prejudicially affect the copyright owner; and
- (d) with respect to (b) and (c), we are considering the inclusion of a specific presumption that, for example, if the offender possesses two substantially identical infringing copies of a book, magazine or periodical, or of an extract thereof, it will be presumed that (c) is satisfied unless proven to the contrary.

13. We are conscious of the need to ensure that the offence is narrowly targeted at illegal copy-shops which make infringing copies of published materials, while not adversely affecting honest businesses which provide a convenient and legitimate copying service.

14. As the offence is similar to other offences of dealing in infringing copies of copyright works, we propose to set the maximum penalty on a par with those offences, i.e. imprisonment of four years and a fine of \$50,000 per infringing copy.

15. We wish to seek the views of Members on the concept outlined above before drafting the legal provision.

Other related amendments

16. We propose to amend the definition of the word 'business' to put it beyond doubt that it includes non-commercial business. This will be reflected in the proposed amendment to section 198(1) (clause 4 of the draft Bill). We also propose to amend the definition of the expression 'dealing in' so that the act must be for profit.

Way Forward

17. Subject to Members' views, we will refine the Bill and introduce it into the Legislative Council early in the next session.

COPYRIGHT (AMENDMENT) BILL 2002

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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 2002.

(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. Criminal liability for making or dealing with infringing articles, etc.

The Copyright Ordinance (Cap. 528) is amended by repealing section 118 and substituting the following –

“118. Interpretation (offences provisions)

In this section and sections 118A to 120A–

“feature film” () means a film commonly known as a movie or a television drama;

“musical sound recording” () 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” () means a film the whole or a predominant part of the soundtrack of which consists of a musical work, and

any related literary work.”.

118A. Criminal liability for making or dealing with etc. infringing copies

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

- (a) makes an infringing copy of a copyright work for sale or hire;
- (b) imports an infringing copy of a copyright work into Hong Kong otherwise than for his private and domestic use;
- (c) exports an infringing copy of a copyright work from Hong Kong otherwise than for his private and domestic use;
- (d) possesses an infringing copy of a copyright work for the purpose of or in the course of dealing in that infringing copy as part of any trade or business;
- (e) for the purpose of or in the course of dealing in an infringing copy of a copyright work as part of any trade or business –
 - (i) sells or lets for hire;
 - (ii) offers or exposes for sale or hire;
 - (iii) exhibits in public; or
 - (iv) distributes,
the infringing copy; or
- (f) distributes (otherwise than for the purpose of or in

the course of dealing in the infringing copy as part of any trade or business) an infringing copy of a copyright work to such an extent as to affect prejudicially the owner of the copyright.

(2) A person also commits an offence if he, without the licence of the copyright owner, for the purpose of or in the course of any trade or business, possesses an infringing copy of a copyright work that is a computer program, feature film, musical sound recording or musical visual recording with a view to using the infringing copy in doing any act for the purpose of or in the course of the trade or business.

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

(4) For the purposes of subsection (2), “infringing copy of a copyright work that is a computer program” does not include an infringing copy of a computer program –

(a) that is in a printed form; or

(b) that –

(i) incorporates the whole or any part of a work, not being a computer program itself; and

(ii) is technically required for the viewing or listening to of the work mentioned in subparagraph (i) by a member of the public to whom a copy of that work is made available.

(5) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence

under this section.

118B. Defences to criminal liability under section 118A

(1) It is a defence for the person charged with an offence under section 118A (1) or (2), 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) Except as provided in subsection (3), it is a defence for the person charged with an offence under section 118A (2) to prove –

(a) that he was an employee of the trade or business and was in possession of the infringing copy for the purpose of or in the course of that employment; and

(b) that –

(i) the infringing copy was provided to him by or on behalf of his employer; or

(ii) his possession of the infringing copy was reasonably necessary for carrying out instructions given by his employer for doing the act referred to in section 118A (2).

(3) [*Defence under subsection (2) not to be available to employees who are senior staff with functions of management*].

(4) For the purpose of subsection (1), where a person is charged with an offence under section 118A(1) or (2) 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.

(5) In determining whether the person charged has proved under subsection (4) 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.

118C. Further criminal liability in relation to infringing copies

(1) A person commits an offence if –

- (a) he–
 - (i) makes;
 - (ii) imports into Hong Kong;
 - (iii) exports from Hong Kong;
 - (iv) possesses; or
 - (v) 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; and
- (b) the article referred to in paragraph (a) 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 or in the course of dealing in the infringing copies concerned as part of any trade or business.

(2) A person also commits an offence if –

- (a) he–
 - (i) makes;

- (ii) imports into Hong Kong;
- (iii) exports from Hong Kong;
- (iv) possesses; or
- (v) 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 that is a computer program, feature film, musical sound recording or musical visual recording; and

- (b) the article referred to in paragraph (a) is used or intended to be used to make infringing copies of the copyright work for use for the purpose of or in the course of any trade or business.

(3) Subsections (1)(a)(ii) and (iii) and (2)(a)(ii) and (iii) do not apply to an article in transit.

(4) It is a defence for the person charged with an offence under subsection (1) or (2) to prove that he did not know and had no reason to believe that the article was used or was intended to be used in the manner specified in paragraph (b) of that subsection.

(5) 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 or in the course of dealing in the infringing copies concerned as part of any trade or business.

(6) A person also 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 that is a computer program, feature film, musical sound recording or musical visual recording for use for the purpose of or in the course of any trade or business.

(7) [*New offence of providing a commercial service for the reproduction of infringing copies of copyright works in printed form*]

(8) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section.”.

3. Making infringing copies outside Hong Kong, etc.

Section 120(2) and (2A) are repealed and the following substituted –

“(2) A person commits an offence if –

- (a) he makes outside Hong Kong an article specifically designed or adapted for making copies of a particular copyright work; and
- (b) he so makes the article knowing or having reason to believe that it is to be used or is intended to be used in Hong Kong for making an infringing copy of the copyright work for sale or hire or for use for the purpose of or in the course of dealing in the infringing copies concerned as part of any trade or business.

(2A) A person also commits an offence if –

- (a) he makes outside Hong Kong an article specifically designed or adapted for making copies of a particular copyright work that is a computer program, feature film,

- musical sound recording or musical visual recording; and
- (b) he so makes the article knowing or having reason to believe that it is to be used or is intended to be used in Hong Kong for making an infringing copy of the copyright work for use for the purpose of or in the course of any trade or business.”.

4 Minor definitions

- (1) [*Amendment to the definition of “business” in section 198(1) to –*
- (a) clarify that “business” includes a ‘non-commercial’ business; and*
- (b) to tidy up the reference to “trade or profession” in the existing definition.]*

- (2) [*Amendment to section 198(2) to tidy up definition of “dealing in”*]

5. Repeal of “in connection with”

Sections 31(1)(a), (c) and (d), 32(1)(c), 95(1)(a), (c) and (d), 96(5) and (6), 109(1)(a), 207(1)(b), 211(1)(b), 228(1) and 273(2)(a) 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”.

6. Section added

The following is added –

“282. Transitional and savings

Schedule 6 contains transitional provisions and savings in relation to amendments made to the Ordinance after its enactment.”.

7. Schedule 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 (2002) (## of 2002)

1. In this schedule, unless the context otherwise requires –

“amendment Ordinance of 2002” means the Copyright (Amendment) Ordinance 2002 (## of 2002).

2. The amendments effected by section 5 of the amendment Ordinance of 2002 to sections 31(a), (c) and (d), 32(1)(c), 95(1)(a), (c) and (d), 96(5) and (6), 109(1)(a), 207(1)(b), 211(1)(b), 228(1) and 273(2)(a) of this Ordinance do not affect any cause of action under this Ordinance that arose before the commencement of the amendment Ordinance of 2002.

3. Section 118B(2) of this Ordinance as added by section 2 of the amendment Ordinance of 2002 shall be deemed to have effect in relation to proceedings for an offence where the act in question was done on or after 1 April 2001 and before the commencement of the amendment Ordinance of 2002 as it has effect in relation to proceedings for an offence where the act in question was done after that commencement.

4. Section 118B(2) of this Ordinance as added by section 2 of the amendment Ordinance of 2002 shall be deemed to have effect in relation to proceedings brought before the commencement of the amendment Ordinance of 2002 as it has effect in relation to proceedings brought after that commencement; but nothing in this section or in section 2 of the amendment Ordinance of 2002 affects anything done before the commencement of the amendment Ordinance of 2002 in any proceedings and, in particular, nothing in those sections affects the validity of any conviction entered or recorded before the commencement of the amendment Ordinance of 2002 in any proceedings.”.

8 Consequential amendments

The consequential amendments set out in the Schedule have effect.

9. Repeal

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

Schedule

[s.8]

Consequential Amendments

[Any necessary amendments to cross-references, in Cap. 528 itself or elsewhere in the statute book, to provisions amended by this Bill. For example, within Cap. 528 references to section 118 appear in sections 35(4), 62(2), 119(1), 119(2), 120(5), 131(1), 131(7), 132, 133(5) and 133(6), and section 14(5) of Schedule 2.]