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Bills Committee on Copyright (Amendment) Bill 2006

**Background brief on
Review of certain provisions of Copyright Ordinance**

Purpose

This paper summarizes the views and concerns raised by the Panel on Commerce and Industry (CI Panel) on the Administration's review of certain provisions of the Copyright Ordinance (Cap. 528) ("CO") concerning copyright infringement liability and the Administration's proposals on various copyright-related issues.

Background

2. The CO was amended in 2000 to make possession of an infringing copy of any type of copyright works for use in business a criminal offence. While the principal objective of the amendments was to combat rampant piracy in computer software and audio-visual products, the new criminal provisions also applied to photocopying of printed works, including newspapers and downloading of information from the Internet. The public in general considered that the scope of the new criminal provisions was too wide, and hence could hamper the dissemination of information in enterprises and teaching/educational activities in schools. In view of the widespread community concern, the Copyright (Suspension of Amendments) Ordinance 2001 (the Suspension Ordinance) was enacted in June 2001 to suspend temporarily the criminalization of business end-user possession of copyright works except with respect to computer programs, movies, television dramas and musical recordings. Also, the phrase "in connection with" in the expression "for the purpose of, in the course of, or in connection with, any trade or business" was removed from the application of the criminal provisions wherever it appeared in the CO, so that activities incidental to or marginally related to business would fall outside the scope of criminal liability for using infringing copies of copyright works in business. The Administration undertook to consult the community and formulate a long-term solution while the Suspension Ordinance was in force. It introduced the Copyright (Amendment) Bill 2003 ("the 2003 Bill") on 12 February 2003.

3. Following scrutiny by a Bills Committee, provisions in the 2003 Bill relating to criminal sanctions against illicit copy shops were enacted on 24 March 2004 and came into force on 1 September 2004. Given the divided views expressed by copyright owners and users of copyright works, the other provisions in the 2003 Bill were not enacted. The Administration undertook to further consult the stakeholders and the community at large before formulating fresh proposals. The effective period of the Suspension Ordinance was also extended to 31 July 2006.

4. The Administration published the Consultation Document on Review of Certain Provisions of Copyright Ordinance on 9 December 2004 and sought the community's views on the following issues –

- (a) the scope of business end-user criminal liability;
- (b) whether an exhaustive or non-exhaustive approach should be adopted in providing for copyright infringement exemption;
- (c) end-user liability associated with parallel imported copies of copyright works;
- (d) circumvention of technological measures for copyright protection;
- (e) defence provision for employees against end-user criminal liability;
- (f) proof of infringing copies of computer programs in end-user piracy cases;
- (g) rental rights for films; and
- (h) issues relating to the World Intellectual Property Organization Internet Treaties

Concerns and views raised by Members

Past deliberations

5. At the meeting on 18 January 2005, the CI Panel was briefed on the issues covered in the Consultation Document. On 21 June 2005, the Administration reported to the CI Panel on the results of the public consultation on the review of certain provisions of the Copyright Ordinance and the Administration's preliminary proposals concerning end-user criminal liability for copyright infringements and other copyright-related matters. Members noted that the Administration would proceed to draft an amendment bill to give effect to the proposals and stressed the need for early introduction of the bill so as to allow sufficient time for LegCo's scrutiny, given that the validity of the Suspension Ordinance would expire on 31 July 2006, unless further extended by resolution of the Council.

6. The CI Panel held a meeting on 19 July 2005 to receive views from deputations on the Administration's proposals and noted the differences in views expressed by groups representing the interests of copyright owners and those of copyright users. There was considerable discussion on the proposed business end-user possession criminal liability, notably the thresholds for the proposed business end-user copying/distribution offence and the need for balancing the interests of owners and users of copyright works. The major views of the deputations included the following –

- (a) Copyright owners groups considered that a proper legislative framework providing for criminal sanctions should be put in place for Hong Kong's development into a knowledge-based economy and an information technology (IT) hub.
- (b) The publishing industry urged that the scope of business end-user criminal liability should be extended to cover copyright printed works to safeguard the interests of authors and publishers. On the other hand, copyright works user groups were concerned that any extension of the business end-user criminal liability would hamper dissemination of information and impede normal operation of their business.
- (c) Some deputations cast doubt on the introduction of an employees' defence as successful prosecution was already rare and difficult.
- (d) There were strong calls, mostly from copyright owner groups, to retain the restrictions on parallel importation of copyright works because any relaxation would jeopardize the interests of copyright owners, drive away foreign investors and encourage pirated copies disguised as parallel imported copies. User groups however demanded for further liberalization.
- (e) User groups from the education sector expressed concern that the proposed civil and criminal liability against circumvention of technological measures used for copyright protection might affect users' legitimate interests to use copyright works and advances in technology. They suggested that appropriate exemptions should be provided under the law to allow for legitimate activities that might involve circumvention.
- (f) There were divided views on the proposal to adopt a non-exhaustive fair dealing approach on the use of copyright works for education and public administration purposes.

7. The Administration undertook to report to the Panel on its refined proposals, taking into consideration the views received during consultation.

Refined proposals considered by the CI Panel on 15 November 2005

Proposed criminal liability for copying/distribution of copyright infringing printed works

8. On the new business end-user criminal offence for significant infringements involving copying with a view to distributing or distributing infringing copies of copyright works published in newspapers, magazines, periodicals and books, in the course of and for the purpose of business, to staff or participants of activities organized by the business, the Administration revised its previous proposal to limit the proposed copying/distribution criminal offence to regular or frequent infringements only, and to lay down numerical perimeters within which the concerned infringing acts would not attract criminal liability (the "safe harbour" perimeters).

9. On whether copying/distribution of copyright works covered by the new offence included electronic distribution of copyright works, the Administration clarified that the proposed copying/distribution criminal liability would apply to printed copyright works only and would exclude digital versions of books, reference materials and academic journals. It further explained that presently, the CO contains provisions dealing with distribution of infringing copyright works on the Internet. However, the Administration would need to further discuss with the publishing industry and other stakeholders on how to deal with distribution of copyright materials via the Intranet of a company.

10. Academic journals, like newspapers, magazines and periodicals, may contain separate and independent articles, each being a copyright work itself. However, the Administration has proposed to exclude academic journals from the "safe harbour" perimeters for distribution applicable to printed copyright works in newspapers, magazines and periodicals (namely 1 000 copies in any 14-day period), but to use the total retail value of the infringing copies made for distribution or distributed within a specified period as the perimeter. The Administration was asked to re-consider the appropriateness or otherwise of this "safe harbour" formulation.

Directors/partners' criminal liability in business end-user infringements

11. One of the Administration's preliminary proposals was that if a body corporate or a partnership committed an act attracting the business end-user criminal liability, the director(s) of the body corporate or the partner(s) of the partnership would be equally liable in the same case unless there was evidence showing that the director(s)/partner(s) had not authorized the infringing act to be done. The Administration has revised the proposal to limit the scope of the proposed criminal liability to cover only those directors, partners or persons who carry out chief executive functions.

12. Some members were concerned that placing the burden of proof on the defendant directors/partners was not consistent with the well-established principle of presumed innocence in criminal prosecutions, which required that the burden should be on the prosecution to prove the guilt. The Administration advised that the proposal aimed at promoting corporate accountability and responsible governance to prevent business end-user piracy. Moreover, the proposed offence would only place an evidential burden of proof, rather than a legal burden of proof, on the defendant, and the defendant would absolve his liability if he could adduce sufficient evidence to show that he did not authorize the infringing act in question. However, some members queried what would constitute sufficient evidence for directors/partners to absolve their criminal liability. It is noted that the Administration has included in the Bill some factors for the court to consider whether sufficient evidence has been adduced.

13. The Administration has been requested to provide information on overseas practice on how other jurisdictions dealt with the issue of directors'/partners' liabilities over copyright infringing acts in their copyright legislation. The reply is still pending.

14. It was also pointed out that the revised proposal to limit the scope of the proposed criminal liability to cover only those directors, partners or persons carrying out chief executive functions was likely to create enforcement difficulties as it would be difficult to define "chief executive functions" and ascertain the particular directors or partners or persons performing such functions. The Administration was urged to reconsider the relevant provisions to provide for greater certainty.

15. It is noted that the Administration has further revised its proposal under the Copyright (Amendment) Bill 2006. Instead of the directors, partners or persons carrying out chief executive functions, the proposed offence would target at the directors or partners responsible for the internal management of the companies (or if there are no such directors or partners, the persons under the immediate authority of the directors or partners responsible for the internal management of the companies would then be liable).

Latest position

16. The Copyright (Amendment) Bill 2006 was introduced into the Legislative Council on 29 March 2006. A Bills Committee on Copyright (Amendment) Bill 2006 was formed at the House Committee meeting on 31 March 2006 to scrutinize the Bill. The Administration has indicated in the Legislative Council Brief on the Bill that depending on the progress of discussion at the Bills Committee, it may need to seek the Council's approval of another extension of the Suspension Ordinance, the validity of which will expire on 31 July 2006.

References

17. A list of relevant papers is in the **Annex**.

Council Business Division 1
Legislative Council Secretariat
18 April 2006

Review of certain provision of Copyright Ordinance**List of relevant papers**

Committee	Paper	LC Paper No.
Bills Committee on Copyright (Amendment) Bill 2001 and Copyright (Amendment) Bill 2003	● Report of the Bills Committee for the Council meeting on 24 March 2004	CB(1)1259/03-04
Meeting of Panel on Commerce and Industry on 18 January 2005	● Consultation Document on Review of certain provisions of Copyright Ordinance issued in December 2004 ● Administration's paper : "Consultation Document on Review of Certain Provisions of the Copyright Ordinance" ● Minutes of meeting	CB(1)448/04-05 CB(1)661/04-05(01) CB(1)863/04-05
Meeting of Panel on Commerce and Industry on 21 June 2005	● Administration's paper : "Proposals on various copyright-related issues" ● Minutes of meeting	CB(1)1792/04-05(05) CB(1)2052/04-05
Meeting of Panel on Commerce and Industry on 19 July 2005	● Minutes of meeting	CB(1)2270/04-05
Meeting of Panel on Commerce and Industry on 15 November 2005	● Administration's paper : "Refined proposals on various copyright-related issues" ● Minutes of meeting	CB(1)260/05-06(03) CB(1)499/05-06