

**Copyright (Amendment) Bill 2006**  
**Comments by the Hong Kong General Chamber of Commerce**  
**May 2006**

The Chamber welcomes the Copyright (Amendment) Bill 2006 and would like to offer our comments on some aspects of the Bill, as follows.

**1. Scope of end-user criminal liability**

We support the government's proposal to maintain the existing scope of end-user criminal liability regarding possession of infringing copy for use in business, namely, limiting it to four specific categories of copyright works including computer programs, movies, television dramas and musical recordings.

**2. New business end-user criminal offence**

*Government proposal*

The government proposes to introduce a new business end-user criminal offence against significant infringement activities involving the act of copying with a view to distributing or the act of distributing infringing copies of copyright works published in books, newspapers, magazines or periodicals for the purpose of and in the course of business.

To address concerns about possible adverse impact on business, there will be a numerical limits ("safe harbour") within which no criminal liability will be incurred. Furthermore, educational institutions which are non-profit making or subvented by the Government will be exempted.

*Current Chamber position*

It is a long-held position of the Chamber that criminalisation is a very serious legal tool and should only be used to address very specific and clearly defined problems, e.g. shops selling photocopied publications. We need to understand more what the specific problems are before we can support introducing the new criminal offence.

On the "safe harbour" provision, the principle is supported as it is conceptually similar to that of "fair use". But we are not certain if the "safe harbour" should be in the form of a numerical value, rather than left to the court to decide on the basis of reason and common sense. We have pointed out that there is some logical difficulty in assigning an arbitrary numerical value (e.g. number of pages photocopied) to determine the criminality of an act.

On exemption, the Chamber does not agree with the discriminatory treatment between commercial and non-profit organizations. Criminality should be determined by the act, rather than by the status of the person committing the act.

#### *Comment on the Bill*

Now that government has decided, we do not oppose the creation of the new criminal offence. However, we reinforce our view that criminal sanction is a serious matter and care must be taken in the implementation of this provision, so as not to punish bona fide users. Education will remain a key and we call on the government to mount an effective education and publicity campaign on intellectual property rights before enforcing it.

On the safe harbour provision, the specific limits provided in Annex C of the Bill for photocopying of newspaper and periodicals appears acceptable for SMEs in general but would be grossly inadequate for large users. While some large firms will find their own solutions (e.g. summarizing instead of copying newspaper and periodicals for internal circulation), there may be smaller companies which are nevertheless large-volume users which will not be covered by the safe harbour. For these companies a fair and balanced copyright licensing regime will be very important.

On exemptions for educational institutions, we stand by the view that the discriminatory treatment is unfair and may give the impression that it would be all right for educational institutions to break the law – precisely the wrong kind of message in the promotion of intellectual property rights.

### **3. Directors' liability**

#### *Government proposal*

The government proposes to introduce a new criminal offence against the director(s) or partner(s) if a body corporate or partnership has done an act attracting the business end-user criminal liability, unless there is evidence proving that the director(s) or partner(s) has not authorized the concerned infringing act to be done.

#### *Current Chamber position*

Being a champion of good corporate governance, the Chamber has no objection to the principle that directors and partners should assume a higher level of corporate responsibility. However, this provision should only be implemented on the basis of very clear guidelines on what will amount to sufficient proof that the directors concerned have not authorized the infringing act.

### *Comment on the Bill*

We do not object to the provision. However, we recognize that some SME's are concerned that the Bill may amount to having the directors or partners "deemed guilty unless proven innocent". This is a concern which should be addressed, although a closer look at the Bill suggests that it should remain the prosecution's duty to prove offence.\*

Again, public education is critically important before such a provision is enforced. Government should work with industry to provide clear guidance for SME directors and partners on what and what not to do in the course of business, in order to avoid committing this offence.

## **4. Defence for employees and professionals**

### *Government proposal*

The Bill proposes to provide statutory defence against the business end-user criminal liability for employees who commit an infringing act under instruction from employers. Certain professionals will also be exempt under specific circumstances, e.g. doing legal or audit work.

### *Current Chamber position*

The Chamber's position is that both employers and employees should abide by the law. If it is a case of unintentional infringement, i.e. acting on other people's instruction and not knowingly infringing, there should be enough ground under the current legal system for defence. Once a criminal act is known, the influence of others should only be a mitigating factor, not a defence

### *Comment on the Bill*

We stand by our position against this provision. The fact that an employee acted under instruction should be a mitigating factor in sentencing, but not a defence, as a crime has been knowingly committed. Unintentional infringement by the employee should be a different matter, for which a valid defence is already provided for under the Bill. In other words, when an infringing act has been knowingly committed by an employee, both the infringer (the employee) and the director or partner authorizing the infringement should be guilty.

## **5. Circumvention of technological measures**

### *Government proposal*

The government proposes to extend existing civil rights of copyright owners against circumvention of technological measures. A new criminal offence will be introduced against commercial dealing of devices, products or components and the provision of services on a commercial scale which circumvent technological measures applied to a copy of a copyright work.

### *Current Chamber position*

The Chamber has no objection to imposing civil and criminal liabilities for circumvention for commercial purposes, to protect the audio-visual, music and digital entertainment industries (e.g. against fraudulent reception, illegal downloading of music, or illegal copies of computer games).

### *Comment on the Bill*

The Chamber supports the intention of the Bill to extend civil rights against circumvention, and create a new criminal offence against circumvention for commercial purposes. We understand that the cable and satellite broadcasters have expressed concerns over the “time-shifting” exemptions, and we ask the government to note these concerns and work out a satisfactory solution with industry.

## **6. Rental rights for films/comic books**

### *Government proposal*

Under the Bill rental rights will be introduced for films and comic books, with civil remedies provided for violation of these rights.

### *Current Chamber position*

The Chamber agrees, with the proviso that there should be a well-established copyright licensing system to facilitate effective administration of rental rights.

### *Comment on the Bill*

As rental rights for these sectors become enshrined in law, we urge the government to improve the regulatory regime for copyright licensing. Although the Copyright Tribunal provides the ultimate judgement, it should be supported by a well-developed structure of self-regulatory industry bodies to administer licensing of copyrights.

## **7. Fair dealing for education and public administration**

### *Government proposal*

Under the Bill, “fair dealing” with a copyright work for the purpose of education and public administration will be exempt from copyright restriction. A list of non-exhaustive factors on fair dealing will be provided for the court to consider.

### *Current Chamber position*

The Chamber has no problem with this provision. However, we note that this applies to educational institutions only, and the administration of fair dealing for the business sector is not addressed.

### *Comment on the Bill*

While supporting this provision, we emphasise that the “fair dealing” concept should apply also to the business sector. We encourage guidelines to be established to give guidance to the business sector on what constitutes fair practice.

## **8. New permitted acts**

The government proposes to introduce a statutory exemption for the making of specialized books for persons with print disability; and to provide exemption for radio broadcast for vehicles for drivers to have access to public information. The Chamber supports this provision.

## **9. Parallel imports**

### *Government proposal*

Under the government proposal, criminal and civil liability for parallel importation will be removed except for audio-visual products, for which the period for attracting liability will be shortened from 18 months to 9 months.

### *Current Chamber position*

The Chamber’s view is that as a measure of gradual and progressive liberalization, we would support a shortening of the liability period from 18 months to 12 months.

### *Comment on the Bill*

There is only a minor difference of three months between the government proposal and the Chamber position. We have no objection to the Bill.

- \* As stated in Clause 24.(7)(b) of the Bill, “a defendant charged with [the] offence... is taken to have proved that he did not authorize the act in question to be done if... the contrary is not *proved by the prosecution beyond reasonable doubt.*” Furthermore, the alleged fact of a director having authorized the act of infringement is rebuttable by, among other things, the introduction of “policies or practices against the making and distribution of infringing copies (Clause 24.(8)(a)).”