

For discussion on
19 February 2008

Legislative Council Panel on Commerce and Industry

Follow-up to the Copyright (Amendment) Ordinance 2007 –

Publicity and Public Education Activities and Commencement Timetable

Introduction

This paper briefs Members on the publicity and public education activities that have been launched in relation to the Copyright (Amendment) Ordinance 2007 (“the Amendment Ordinance”). It also presents for Members’ consideration the proposed commencement timetable for provisions that are yet to come into operation.

Background

2. The Amendment Ordinance was passed by the Legislative Council on 27 June 2007. It (a) provides new civil and criminal liability to enhance copyright protection (including the new business end-user copying/distribution criminal liability for four types of printed works¹ as well as civil and criminal liability against activities relating to circumvention of technological measures used for copyright protection); (b) makes our copyright exemption regime more flexible; (c) relaxes the restrictions on parallel importation of copyright works; and (d) strengthens enforcement of rights.

3. Certain provisions (notably those relating to copyright exemptions and liberalisation of parallel imports) came into force upon the enactment of the Amendment Ordinance.

4. The remaining provisions (notably the new liabilities) are to come into operation at future dates to allow time for suitable publicity and public education programmes to be rolled out, and for stakeholders in the relevant sectors to get prepared. The proposed commencement dates are discussed in this paper.

¹ They are books, magazines, periodicals and newspapers.

5. Separately, we are working on two subjects arising from the new civil/criminal liability under the Amendment Ordinance :

- (a) the new business end-user “copying/distribution offence” for four types of printed works will not take effect until we have prescribed, by regulations, a set of numerical limits within which the infringing acts would not attract criminal liability (i.e. the “safe harbour”); and
- (b) the new civil liability for the act of circumvention will not come into operation until we have consulted the public on the need for additional exemptions (i.e. the “first list of exceptions”).

They are the subject of a separate Panel paper.

Publicity and Public Education Activities

6. The Administration has organised a series of publicity and public education activities since July 2007 to enhance public awareness and understanding of the new provisions under the Amendment Ordinance. These include TV and radio Announcements of Public Interest (APIs), advertisements, posters, leaflets, web-based information packs, direct mailing/emailing, tele-marketing as well as seminars and other presentations. An account of the Administration’s publicity work in the past few months is attached at Annex together with samples of the publicity materials.

7. In the publicity and public education programmes, we have placed emphasis on provisions that involve criminal liability, so as to help users to avoid inadvertent breaches. For example, in publicising the new criminal offence relating to making and dealing in circumvention devices, we have distributed posters and leaflets at the major computer shopping centres in addition to the broadcasting of APIs on TV, radio, the bus network as well as outdoor TV panels.

8. To maximise the impact of our publicity programmes in the business community, we have worked in collaboration with major stakeholders and trade associations² in publicising the business end-user piracy offences and the related directors’/partners’ liability. Furthermore, the Administration and the relevant stakeholders have earmarked \$5.3 million to launch a free Software Asset Management (SAM) Consultancy Programme in October 2007 to help the

² They include the Trade Development Council, Business Software Alliance, Hong Kong General Chamber of Commerce, Federation of Hong Kong Industries, the Chinese Manufacturers Association of Hong Kong, etc.

business community, in particular the small and medium enterprises, better manage their software assets and ensure compliance with new provisions in the Amendment Ordinance. In addition to direct mailing/emails/seminars etc aimed at informing directors and partners of the new provisions, we published in early 2008 a Guidance Note on Prevention of End-User Piracy in Business. The Guidance Note includes draft staff circulars that the business community may use to minimise the risk of inadvertent piracy in the workplace and to help fulfill the obligations of directors and company management.

Rental Licensing Schemes

9. The provisions relating to rental rights for films and comic books are to come into effect at such time as a reasonable period has been allowed for rental licensing schemes to become available. Since the enactment of the Amendment Ordinance, the Administration has been encouraging copyright owners to negotiate early with rental shops for a rental licensing scheme such that upon commencement of the provision the rental shops could carry on with their business lawfully whilst copyright owners could obtain a reasonable return.

10. It is noted that the Hong Kong Video Development Foundation Ltd (HKVDF) has written to all known rental shops to brief and consult them on the proposed licensing arrangement. Two briefing sessions were held in August and December 2007 respectively to introduce to rental shop operators the proposed rental licensing scheme. Operators of the rental shops have raised some concerns over the licensing scheme. We have sought to facilitate dialogue between the two sides by providing a liaison platform. The two sides together with a representative from the Consumer Council met in our office on 31 January 2008. Through constructive engagement, the differences between the two sides had been narrowed. At the time of finalising this paper, the engagement process is still on-going. At the Panel meeting on 19 February 2008, we will brief Members on the latest state of play.

11. The Hong Kong Comics & Animation Federation Limited has also started its discussion with rental shops. The first briefing session was held in late January 2008.

Proposed Commencement Timetable

12. Having taken into account relevant factors (including the historical background leading to the enactment of the various provisions, the on-going and future publicity public education programmes, and the progress made in setting up licensing schemes etc.) the Administration proposes that the provisions in the

Amendment Ordinance that are yet to come into force should commence operation according to the following timetable :

Timing for the Provisions to commence	Remarks
<p><u>25 April 2008</u></p> <ul style="list-style-type: none"> • Moral and related rights for performers of aural performances and for underlying works in sound recordings - (<i>sections 49, 51, 53, 54, 58, 60, 66, 75 (Part 3 and 4)</i>) • Provisions that introduce new criminal and civil liability in relation to making and dealing in circumvention devices (<i>sections 67, 68 and 69</i>) • Rental rights for films (<i>sections 6(1), 47(2) and 75 (Part 3)</i>) • Provision on rights management information (<i>section 70</i>) 	
<p><u>4 July 2008</u></p> <ul style="list-style-type: none"> • Directors/partners' liability in relation to the business end-user "possession offence" regarding the following four categories of work, i.e. computer programs, movies, television dramas and musical recordings (sound or visual) (<i>sections 31(5)</i>) • Provisions that introduce civil remedies in relation to the act of circumvention (<i>the remaining part of sections 68 and 69</i>) 	<p><i>Subject to conclusion of action surrounding enactment of the "first list of exceptions" (please see paragraph 5(b)).</i></p>

Timing for the Provisions to commence	Remarks
<ul style="list-style-type: none">Rental rights for comics (<i>remaining part of sections 6(1), 47(2) and 75 (Part 3)</i>)	<p><i>Subject to progress made in drawing up the licensing scheme.</i></p> <p><i>We will closely monitor the on-going discussions between copyright owners and prospective licensees.</i></p>
<p><u>4th Quarter 2008</u></p> <ul style="list-style-type: none">Business end-user “copying/distribution offence” regarding printed works and the related directors/partners’ liability (<i>sections 33, 36(7),(8),(9),(10),(12), 37, 38 and 39</i>)	<p><i>Subject to the passage of the “safe harbour regulations” (please see paragraph 5(a)).</i></p> <p><i>The subsidiary legislation on the “safe harbour” is expected to be tabled before the Legislative Council in April 2008, in time for it to be vetted and passed by the current legislature. Upon its passage, we will launch another round of publicity programmes and public education before firming up the date for bringing the “copying/distribution offence” and the related directors/partners’ liability into effect.</i></p>

Advice Sought

13. Members are invited to (a) note the publicity and public education activities in relation to the Amendment Ordinance, as set out in the Annex; and (b) give their views on the proposed commencement timetable as set out in paragraph 12 above.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
February 2008

**Summary of the Publicity and Public Education Activities for
the Copyright (Amendment) Ordinance 2007**

(As at January 2008)

Items	Remarks
<u>I. General</u>	
Overview of the Copyright (Amendment) Ordinance 2007	<ul style="list-style-type: none">● A dedicated webpage was created in the website of the Intellectual Property Department (IPD) since July 2007 to inform the general public of the major provisions in the Amendment Ordinance. (http://www.ipd.gov.hk/eng/intellectual_property/copyright/copyright_bill.htm)
<u>II. Provisions that came into effect on 6 July 2007</u>	
Provisions on (a) fair dealing for education; and (b) improvements to existing permitted acts for education	<ul style="list-style-type: none">● Three seminars targeted at teachers and headmasters were organized on 12 & 13 July 2007. About 300 participants attended the seminars.● Leaflets and video were distributed to around 750 primary schools, 550 secondary schools, and other educational establishments.● A seminar targeted at computer teachers is scheduled to be held on 22 February 2008.
Fair dealing for public administration	<ul style="list-style-type: none">● A circular was issued to the relevant bureaux/departments and posted on IPD's website.
Permitted act for visually impaired persons	<ul style="list-style-type: none">● A seminar for relevant stakeholders was organised on 4 August 2007.
Liberalisation of parallel imports for business end-users	<ul style="list-style-type: none">● Advertised in 2 newspapers and 3 business magazines from July to August 2007.

Items	Remarks
	<ul style="list-style-type: none"> ● Email sent to small and medium enterprises (SMEs) through the Trade and Industry Department (TID), and other stakeholders including the Chinese Manufacturers Association of Hong Kong (CMA), and Federation of Hong Kong Industries (FHKI) (over 28 000 SMEs). ● Direct mailing of leaflets to offices in commercial buildings through HKPost in July and August 2007 (around 85 000 copies). ● In July and August 2007, distributed leaflets to SMEs and business organisations through the newsletters and the counters of TID and other stakeholders including Hong Kong General Chamber of Commerce (HKGCC), Hong Kong Chinese Importer's and Exporter's Association, FHKI, CMA and the Trade Development Council (TDC) (16 000 copies).
Moral rights for performers	<ul style="list-style-type: none"> ● Letters on moral rights for performers were sent to two performer groups, twenty broadcasting organisations, six telecom/internet service providers associations and IFPI in September 2007.
<u>III. Provisions that have not yet come into effect</u>	
New liability in relation to making and dealing in circumvention devices	<ul style="list-style-type: none"> ● Posters and leaflets were posted and distributed in major computer shopping centres (particularly those in Sham Shui Po). Around 1,400 copies of leaflets and 160 copies of posters were posted and distributed to shop vendors.

Items	Remarks
	<ul style="list-style-type: none"> ● A consultation paper on the provision of additional exemptions on circumvention of technological measures was issued for public consultation (and sent to about 200 targeted recipients) in December 2007. ● TV API: <ul style="list-style-type: none"> - Start broadcasting on TV from 14 January 2008 for 6 months - Advertised in the bus network (RoadShow) from 6 February to 31 March 2008. - Advertised in selected outdoor TV panels <ul style="list-style-type: none"> (i) Times Square, Causeway Bay (18 February to 31 March 2008) (ii) Broadway, Mongkok (18 February to 16 March 2008) (iii) MK1, Mongkok (14 January to 31 March 2008)
<p>Directors/Partners' liability in relation to -</p> <p>(a) the business end-user "possession offence" regarding the following four categories of works, namely computer programs, movies, television dramas and musical recordings (sound or visual); and</p> <p>(b) the business end-user "copying and distribution" offence regarding printed works</p>	<ul style="list-style-type: none"> ● Targeted at SMEs, the free "Software Asset Management" (SAM) programme would run from October 2007 to April 2008. Over 50 000 organisations will be approached through various channels, including telemarketing, emails and leaflets (including inserts in newspapers and trade magazines). ● Luncheon-cum-seminar co-organised with HKGCC was held on 2 November 2007. ● Presentation at TDC's Innovation and Design Expo on 14 December 2007.

Items	Remarks
	<ul style="list-style-type: none"><li data-bbox="756 371 1353 573">● 20 000 direct mails were sent in December 2007 to company directors to alert them of the new liability and invite them to a SME Seminar scheduled for 23 January 2008.<li data-bbox="756 622 1353 904">● Advertised the SME Seminar (a) in 4 newspapers and Business Software Alliance (BSA)'s website; and (b) through email to around 1 000 company directors using the network of the Hong Kong Institute of Directors.<li data-bbox="756 954 1353 1115">● SME Seminar co-organised with TID, FHKI and TDC held on 23 January 2008 (over 330 attendees, mostly from SMEs).<li data-bbox="756 1164 1353 1447">● API on business end-user possession offence regarding computer programs and SAM programme (Radio API broadcast from end October 2007 – 23 January 2008; TV API broadcast from 11 December 2007 – 10 April 2008).<li data-bbox="756 1496 1353 1778">● Direct mailing of the Guidance Note on Prevention of End-User Piracy in Business to SMEs through trade associations (such as HKGCC, TID, FHKI, TDC, The CMA) from late January 2008 onwards. Over 12 000 copies distributed so far.

Hong Kong's Amended Copyright Law

Guidance Note on Prevention of End-User Piracy in Business

A dark silhouette of a person standing and holding a tablet or document. The background features a stylized globe with grid lines and a pattern of small white squares on an orange-to-yellow gradient.

Intellectual Property

- * **Corporate Accountability**
- * **Responsible Governance**

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Introduction

To prevent the use of pirated copies in business and in the interest of promoting corporate accountability and responsible governance, the Copyright (Amendment) Ordinance 2007¹ (“Amendment Ordinance”) imposes certain responsibilities on directors and partners who are responsible for the internal management of their organisations.

Proper management of copyright assets (including but not limited to computer software asset) not only improves productivity and enhances system security; it can be an effective measure to prevent inadvertent piracy in business. To help businesses to manage their copyright assets better and to guard against inadvertent end-user piracy, this Guidance Note offers a reference for directors, partners and persons who are responsible for internal management of any body corporate or partnership.

This Guidance Note outlines —

- i. the types of business end-user piracy which may attract criminal liability under the Copyright Ordinance;
- ii. the responsibilities of directors/partners of a business; and
- iii. some suggested good practices that organisations and their senior management can adopt to help guard against business end-user piracy.

Please note that the content of this Guidance Note is provided for reference only. Compliance with this Guide does not automatically exempt an organisation or its senior management from liability in relation to business end-user piracy activities. Readers are encouraged to seek independent legal advice if in doubt.

1. For more details, please see the Copyright (Amendment) Ordinance 2007 gazetted on 6 July 2007 which is available at <http://www.gld.gov.hk/cgi-bin/gld/egazette/index.cgi?lang=e&agree=1>.

What is “business end-user piracy”?

In broad terms, the use of infringing materials in a business context may attract legal (civil and/or criminal) liabilities. Specifically, there are two types of business end-user piracy which may attract criminal liability –

<p>Applicable copyright works</p>	<ul style="list-style-type: none"> • Computer programs • Movies • Television dramas • Musical (sound or visual) recordings 	<ul style="list-style-type: none"> • Books (including comic books) • Newspapers • Magazines • Periodicals
<p>Offence</p>	<p>Without the copyright owner’s authorisation, possessing an infringing copy of a copyright work for use in business</p>	<p>Without the copyright owner’s authorisation, doing the following acts on a <i>regular or frequent</i> basis and the acts <i>result in financial loss to the relevant copyright owners</i> —</p> <ul style="list-style-type: none"> • <i>making</i> an infringing copy of a copyright work for distribution² for the purpose or in the course of any trade or business; or • <i>distributing</i>² an infringing copy of a copyright for the purpose or in the course of any trade or business³
<p>Effective date</p>	<p>Already in force (since 2001)</p>	<p>To come into effect on a date to be appointed by the Secretary for Commerce and Economic Development (<i>Note: the target effective date for this offence has been set for 2nd half of 2008</i>)</p>

2. The offence applies to distribution of infringing copies by means of email or uploading to private network (such as an Intranet) of the organisation, in addition to the distribution of hard copies.

3. The new criminal provision does not apply to non-profit making educational establishments. However, there may be civil liability for such acts, subject to certain permitted acts set out in the Copyright Ordinance.

Examples	<ul style="list-style-type: none"> • Possession of pirated software for use in business • Use of pirated musical CDs / karaoke discs / MP3s for entertaining customers in shop / restaurant / karaoke establishments 	<ul style="list-style-type: none"> • On a regular or frequent basis and without proper licence/authorisation, making a large number of photocopies of newspaper articles for distribution, in hard copies or through email, within the company • On a regular or frequent basis and without proper licence/authorisation, distributing a large number of photocopies made from books to participants in seminars
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Related Questions

Is a parallel imported copy considered as “infringing copy” for the purpose of the above criminal offences?

A parallel imported copy that is not used by a business for trading is normally not considered as an “infringing copy” for the purpose of the two offences, except where —

- (i) the parallel imported copy concerned is a movie, television drama or musical (sound or visual) recording;
- (ii) the copy is imported into Hong Kong within 15 months from the first publication of the work anywhere in the world; and
- (iii) the copy is intended for public playing or showing.

Will copying or distribution of copies of books/ newspapers/ magazines/periodicals without authorisation on an ad-hoc basis attract criminal liability?

Frequent or regular copying or distribution of infringing copies of books/ newspapers/magazines/periodicals for use in business could be subject to criminal sanctions. Where the number of copies involved does not exceed the numeric limits (“safe harbour”) specified in subsidiary legislation to be made by the Secretary for Commerce and Economic Development, copying or distribution of such copies on an ad-hoc basis would not attract criminal sanctions. Such copying and distribution activities, however, remain actionable in court as *civil infringement* under the *Copyright Ordinance*.

What are the responsibilities of directors/partners of a business in guarding against piracy?

To prevent the use of infringing copies in business, and in the interest of promoting corporate accountability and responsible governance, the Amendment Ordinance imposes criminal liability against directors/partners in business end-user piracy case.⁴ Directors/partners may be subject to criminal liability if their bodies corporate/partnerships have done an infringing act stated in page [2] and [3] that attracts business end-user criminal liability. Hence, directors/partners are well advised to take prudent steps to guard against business end-user piracy activities.

Who would be liable?

The directors'/partners' liability provision apply to –

- Company directors or partners who are responsible for the internal management of their organisations; or
- If there is no such director or partner, the person who is responsible, under the immediate authority of the director(s)/partner(s), for the internal management of the body corporate or partnership at the time when the infringing act is done.

The above personnel should be regarded as having the overall responsibility for managing the use of copyright works in business even if they delegate the matters to other staff. Hence they should maintain supervision over the matters even where delegation is made.

⁴ The new criminal provisions on directors'/partners' liability will come into force on a date to be appointed by the Secretary for Commerce and Economic Development. The target effective date has been set for the 2nd half of 2008.

What defences are available to a director/partner charged with the new offence?

When a director, partner or any other person responsible for the internal management of the organisation is charged under the above provision of the Copyright Ordinance, he or she may defend himself or herself by putting forward **sufficient evidence** to show that he or she did not authorise the infringing act.

Evidence that could convince the court of either of the following matters would be taken as “sufficient evidence” -

- the defendant has caused the body corporate or partnership to set aside financial resources and has directed the use of the resources for buying a sufficient number of genuine copies of the copyright work involved or appropriate licences for use by the organisation; *or*
- the organisation has actually incurred the expenditure for buying a sufficient number of genuine copies of the copyright work involved or appropriate licences for use by the organisation.

In addition, the court may take other relevant factors into account, such as –

- whether the defendant has introduced policies or practices against the use of, making or distribution of infringing copies of copyright in his or her organisation; and
- whether the defendant has taken action to prevent the use, making or distribution of infringing copies of copyright works in his or her organisation.

Related Question

What would happen after a director or partner has put forward “sufficient evidence” to the court’s satisfaction?

Then, the burden will be on the prosecution to prove beyond reasonable doubt that the director/partner/person has authorised the concerned infringing act. If the prosecution fails to prove the above, the director/ partner/person would be absolved from liability.

Good Practices Guide

This part suggests good practices that a director/partner may adopt for the purpose of guarding against business end-user piracy. Evidence of prudent steps and reasonable efforts having been taken to guard against business end-user piracy would be useful evidence to show that the director/partner concerned did not authorise business end-user piracy activities.

General Guidelines

Company Policy & Staff Awareness

The director, partner or any other person responsible for internal management of the company (“the responsible personnel”) should set out clearly the company’s policy –

- on the proper use of legitimate software, including their installation, use and disposal;
- against unauthorised⁵ making and distribution of copies of copyright works published in a book, newspaper, magazine or periodical; and
- on the use of non-infringing copies of movies, television dramas, musical sound recordings and musical visual recordings.

The policy should be properly documented and made known to all employees, including new recruits. The responsible personnel should ensure that the policy is brought to the attention of all employees periodically. The employees may also be asked to signify their understanding of the policy by signing on a copy of the policy, which should be retained. In devising the policy, companies may make reference to the template on “Compliance with the Copyright Ordinance” posted on the website of the Intellectual Property Department (www.ipd.gov.hk).

5. “Unauthorised” means “without the authorisation of the relevant copyright owners or exceeding the terms of the licences for copying/distribution”.

Record-keeping

Records of purchases of genuine copies or appropriate licences would be useful for the following purposes –

- to keep track of whether the copies in use in business are genuine or properly licensed; and
- to serve as evidence to show that expenditure has been incurred for purchasing genuine copies or appropriate licence (*reference: “sufficient evidence” on page [5]*).

Type(s) of copyright works	Records to be retained
Software	<ul style="list-style-type: none">• all records of purchases of software in use (such as receipt and invoice), the respective software licences, and the original copies of software• an accurate and updated inventory or software register for all installed software, with installations of all the software in specific computers accurately registered
Copyright works published in books, newspapers, magazines or periodicals	<ul style="list-style-type: none">• all records of purchases/subscriptions of the copyright works and/or appropriate licences• an accurate inventory or register for all purchased publications• a record of the copying and distribution activities that have been carried out in relation to published copyright works
Movies, television dramas, musical sound recordings or musical visual recordings	<ul style="list-style-type: none">• all records of purchases and an inventory of the purchased copies

Checking

To find out if infringing copies are being used in business inadvertently, the responsible personnel should conduct periodic (announced and/or unannounced) checks. The checking should seek to identify discrepancies between (a) the inventory and copies of copyright work actually in use, and (b) the terms of the relevant licences and the actual use of the copyright works. Where infringing copies are discovered, staff should immediately stop using the infringing copies. Remedial action, including purchase of the required genuine copies or acquisition of the appropriate licences, should be taken immediately. Results of the checking and the remedial action taken (if applicable) should be reported to management and recorded.

Monitoring the Usage Requirements for Copyright Works and Keeping Records of Procurement

Records of procurement taken together with records showing that the usage requirements for copyright works within the organisation are being monitored would be useful evidence to show that the organisation has actually incurred expenditure for buying sufficient number of genuine copies of the copyright work or acquiring appropriate licences for use by the organisation.

The responsible personnel should conduct regular reviews covering the current and forecast needs of the company in the use of copyright works (such as software and publications). Such needs should be compared with the existing inventory/software register. Where it is decided that additional copies/licences are or will be needed for use in business, the responsible personnel should –

- direct the setting aside of financial resources (and use of the resources) for buying the required copies/licences;
- document the budget and the directions given; and
- record all the purchases properly, with invoices or sales receipts retained as proof of the expenditure incurred.

Computer Software

The guidelines below apply specifically to the use of **computer programs** in business.

It is advisable for the responsible personnel to appoint a staff member, preferably with IT knowledge to assist him/ her in managing software assets.

Company Policy & Staff Awareness

It should be clearly set out in the company policy on the use of software that, among other things, that —

- the use of unlicensed software (including those downloaded from the Internet without authorisation of the copyright owner) in business is strictly prohibited; and
- where staff members need to bring their own laptops or software for use in business, they should ensure that these are genuine copies and licensed for business use⁶.

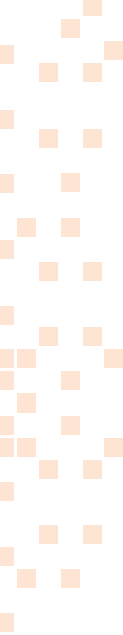
In addition to setting out the relevant policies, the responsible personnel should also ensure that staff members comply with the policies. Measures to ensure compliance may include requiring permission to be sought from the responsible officer before staff members are allowed to bring/install software for use in business, and conducting regular software audits to identify any unauthorised software.

Management of Software Assets

To facilitate the keeping of a clear record/registry of the organisation's software assets, it is advisable that –

- the responsible officer or IT Manager should set out the organisation's procedure for acquiring software;
- all purchases of software be centrally processed and approved by the responsible officer or IT Manager;

6. Bringing privately-owned personal computers to and from the office for work purposes involves a high degree of risk, not *only* in terms of copyright infringement, but also for a business's data security and preventing the spread of computer viruses. It is preferable for businesses that require their staff to work outside the office to provide them with portable computers specifically for business use.

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- installation of software be carried out by designated staff, with all installations in specific computers recorded in the inventory or software register; and
 - when acquiring computer hardware with pre-installed software, the responsible officer or IT Manager should ascertain that all pre-installed software are properly licensed and take steps to retain the licence documents properly.

The responsible officer or IT Manager should arrange to conduct *software audits* periodically to –

- (a) identify software assets in use;
- (b) verify the software assets with reference to licences, usage and rights;
- (c) identify any discrepancies that may exist between installations, the acquired licences and the terms of licences, e.g. the situation of under-licence;
- (d) look for unauthorised copies of software;
- (e) take immediate action to rectify any identified discrepancies, including the purchase of required licences. Staff should immediately stop using the unauthorised software; and
- (f) record the results of the audit and the remedial actions, e.g. proof of purchase and report them to the responsible officer.

Useful information on software asset management (SAM) may be found at the website of the Business Software Alliance (<http://w3.bsa.org/hongkong/antipiracy>).

Movies, Television Dramas, Musical Sound or Visual Recordings

The guidelines below apply specifically to the use of **movies, television dramas, musical recordings (sound or visual)** in business.

Company Policy & Staff Awareness

Companies should clearly set out in their policies on the use of movies, television dramas or musical recordings (sound or visual) that –

- the use of pirated copies (including pirated discs and copies downloaded illegally from Internet) in business is strictly prohibited; and
- the use of parallel imported copies for public playing or showing is prohibited (*reference: “parallel imported copy” on page [3]*). It should be noted that “public playing” include the playing of music within the business premises in areas to which the public have access, as well as for the enjoyment of groups of employees.

Seeking Authorisation for Public Performance

Organisations that need to play or show movies, television dramas, musical recordings (sound or visual) in public or for the benefit of their staff in the course of their business should observe that, apart from using non-infringing copies, they should also acquire appropriate licences from the copyright owners or the relevant licensing bodies for the public playing or showing of such works⁷. Such ‘public performance’ includes the playing of unauthorised music or movie clips inserted into business presentations.

7. Licensing bodies, including Composers and Authors Society of Hong Kong Ltd. (CASH) (www.cash.org.hk) and Phonographic Performance (South East Asia) Limited (PP(SEA)L) (www.ppseal.com), grant public performance licences for musical works or recordings in their repertoire.

Books, Magazines, Newspapers, Periodicals

The guidelines below apply specifically to **a book, a magazine, a periodical or a newspaper** used in business. This part is of particular relevance to organisations that use newspapers, periodicals, magazines and books in the course of business, such as the circulation of news articles for internal reference or using materials extracted from books for provision of training.

Meaning of Copying and Distribution

Copying is not restricted to the making of photocopies. It includes copying by electronic means, e.g. scanning of printed works for storing into any hardware. Transmission of materials by fax is also considered as “copying”.

Distribution of a copy of a work includes distribution by hard copy, electronic mail and the posting of a copy on the Intranet for access by designated users⁸.

Whilst the “copying and distribution” offence does not apply to the distribution of infringing copies through the Internet, it is important to note that where a person distributes an infringing copy of a work (e.g. through the Internet) to such an extent as to affect prejudicially the copyright owner, he renders himself to criminal liability under an existing offence in our copyright law⁹.

Licensing Agreements

For organisations that need to copy and distribute copyright works contained in books, newspapers, periodicals and magazines in the course of their business, the responsible officer should ensure that appropriate licences have been obtained from the relevant copyright owners or licensing bodies representing the owners, such as the Hong Kong Reprographic Rights Licensing Society Limited which grants licences for the copying of copyright works published in printed form (www.hkrrls.org) and the Hong Kong Copyright Licensing Association which grants licences for copying and distribution of articles from a number of local newspapers (www.hkcla.org.hk).

8. The Government has proposed that the “copying and distribution” offence should not apply to distribution of infringing copies through the Intranet for the time being until appropriate licensing schemes covering this mode of distribution are available to users.

9. Section 118(1)(g) of the Copyright Ordinance.

Company Policy & Staff Awareness

It should be clearly set out in the company policy that

- where appropriate licences have been obtained from the copyright owners or licensing bodies to authorise copying or distribution of copies of printed publications, employees must comply with the terms of the licences in making copies or distributing copies of such publications; and
- in the absence of appropriate licences, employees should not make for distribution or distribute any infringing copies of printed publications.

The terms of the licences acquired by the organisation should be publicised and made known to the staff to facilitate observance of the limit of copying/distribution under the licences.

Related Question

Isn't our company allowed to make and distribute copyright works for the purpose of training or educating our staff?

Permitted acts in the Copyright Ordinance are restricted to limited copying for educational purposes within bona fide educational establishments. They are not available in the general business environment.

Further questions?

An introduction to the Copyright Ordinance, the Copyright (Amendment) Ordinance 2007 and some frequently asked questions related thereto could be found at <http://www.ipd.gov.hk/eng/faq/copyright.htm>

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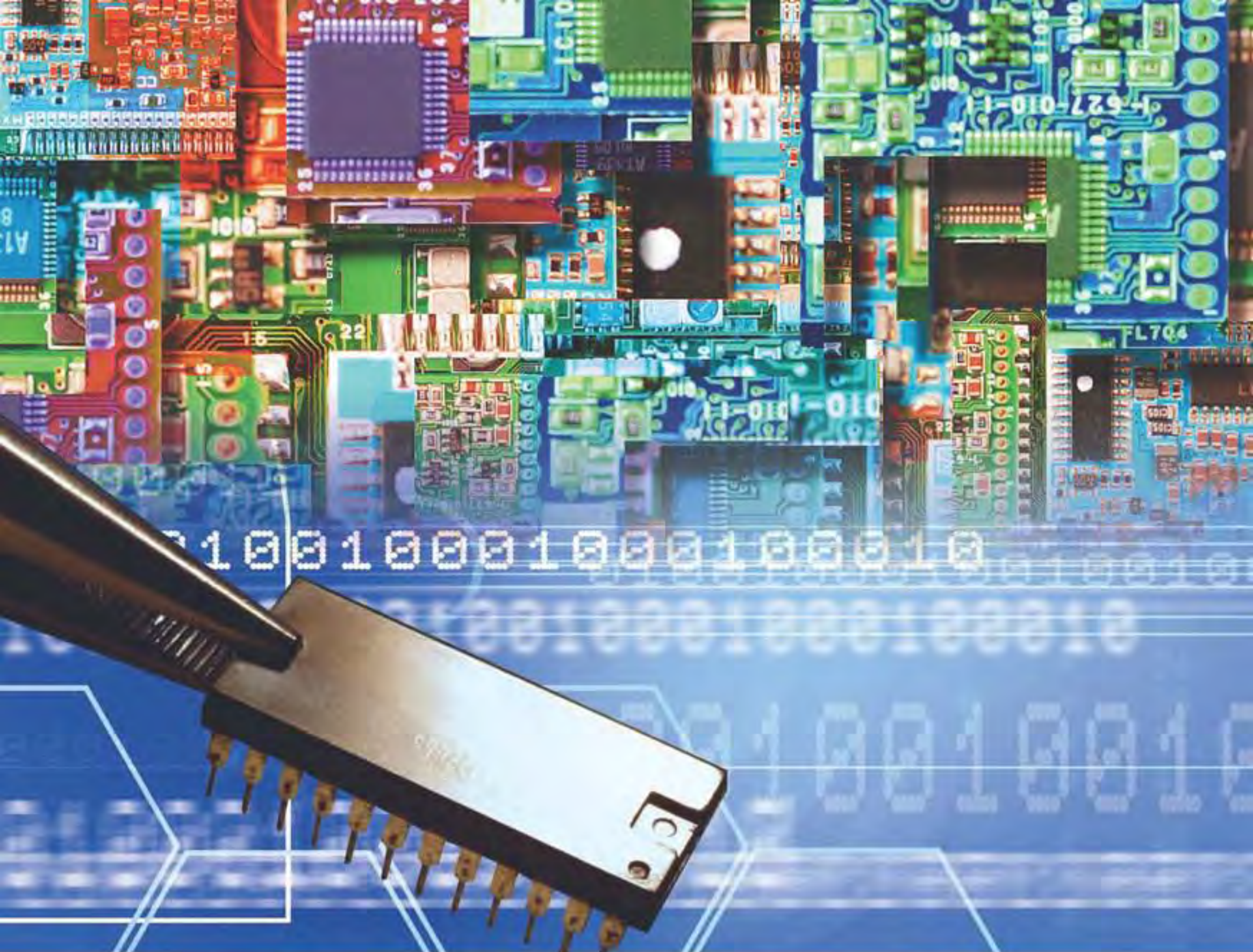
January 2008

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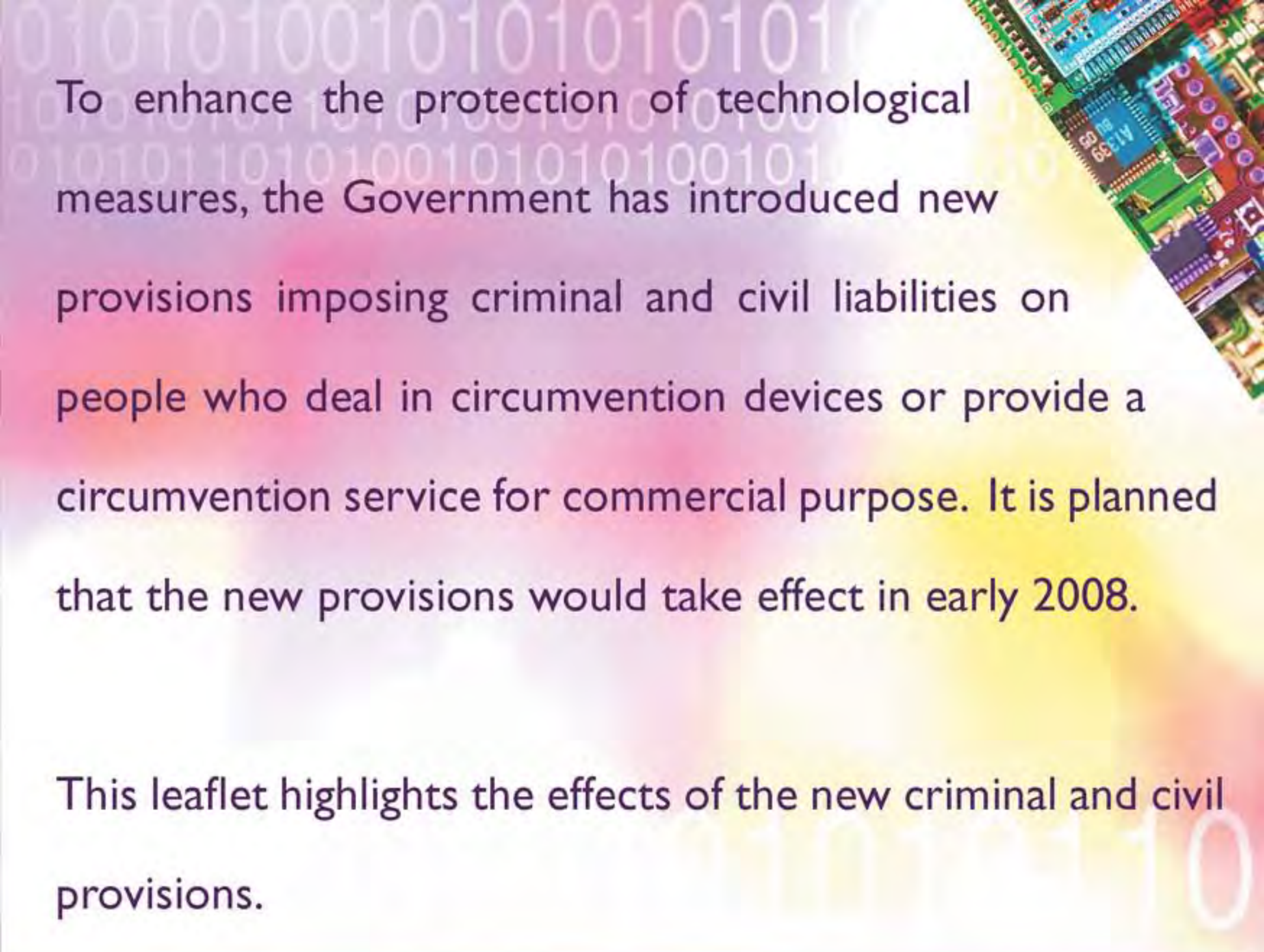
Hong Kong's Amended Copyright Law

Prohibitions on

Circumvention Devices



香港特別行政區政府知識產權署
The Government of the Hong Kong Special Administrative Region
Intellectual Property Department



To enhance the protection of technological measures, the Government has introduced new provisions imposing criminal and civil liabilities on people who deal in circumvention devices or provide a circumvention service for commercial purpose. It is planned that the new provisions would take effect in early 2008.

This leaflet highlights the effects of the new criminal and civil provisions.

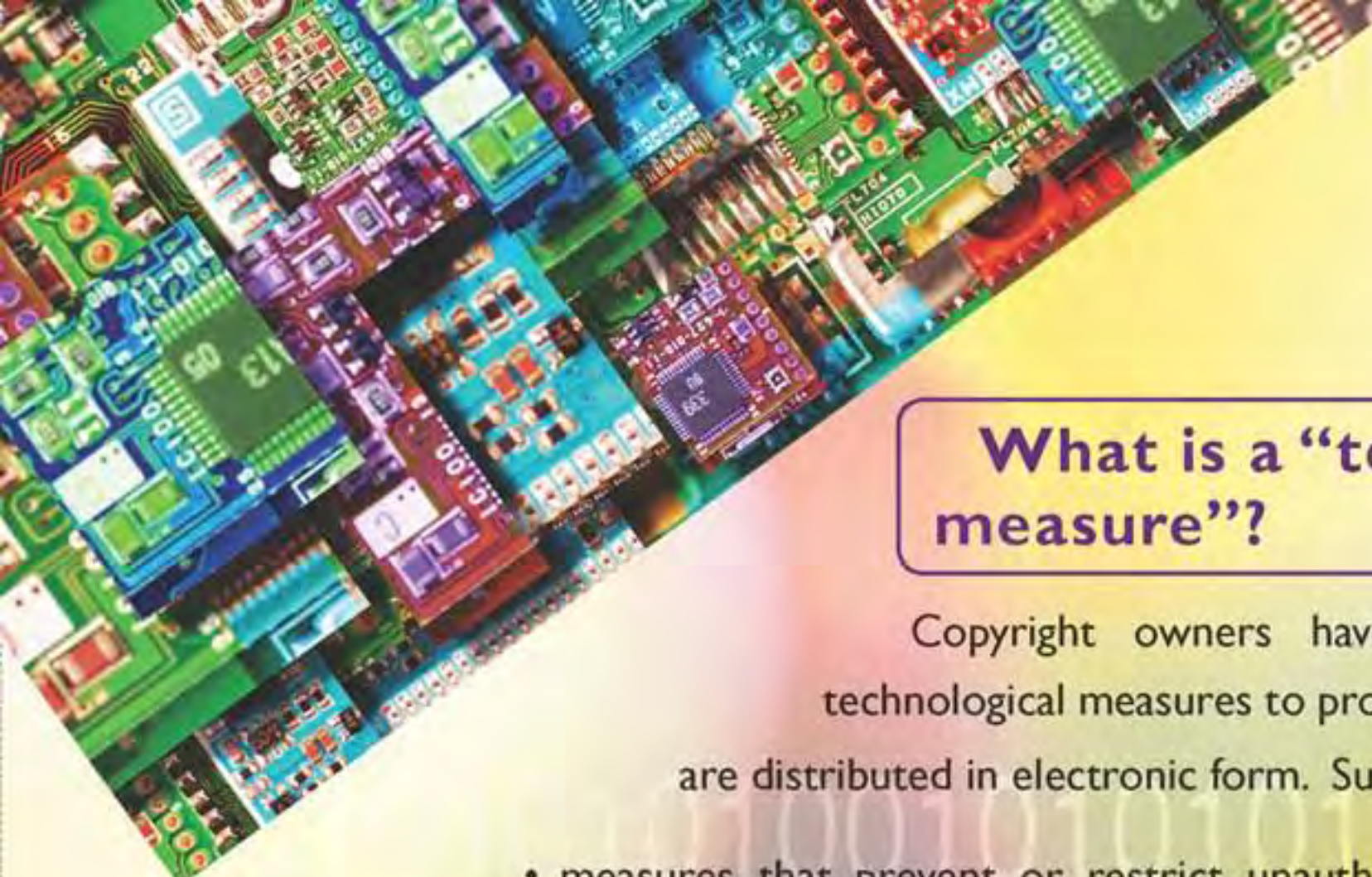
Prohibited activities

Under the Copyright (Amendment) Ordinance 2007, the following activities will be subject to civil **and** criminal sanctions :

- making circumvention device for sale or hire
- importing or exporting circumvention devices for sale or hire
- dealing in circumvention devices (including selling, letting, exhibiting in public or distributing in the course of trade or business)
- providing a commercial circumvention service which enables customers to circumvent technological measures used to protect copyright works

Penalties

A person convicted of the above offences could be liable to a fine of \$500,000 and to imprisonment for up to 4 years. In addition, he or she may be subject to civil claims from copyright owners.



What is a “technological measure”?

Copyright owners have the option of using technological measures to protect copyright works that are distributed in electronic form. Such measures include :

- measures that prevent or restrict unauthorised copying of works (“copy protection measures”). Examples include the copy protection mechanism commonly found in computer games that prevents unauthorised copying; or
- measures that protect copyright works from unauthorised access (“access control measures”). Examples include the encryption of copyright works placed on websites so that only authorised persons could gain access to such works by using a password.

What is a circumvention device / service?

Circumvention devices are devices that are primarily designed or used for hacking or bypassing technological measures (irrespective of whether they are copy protection measures or access control measures). Examples include :

- modified chips or devices installed in game consoles to allow playing of pirated computer games ;
- unauthorised software that disables password protection so that users could gain access to copyright works without authorisation.

Circumvention services refer to any services performed for the purpose of enabling or facilitating the circumvention of technological measures. An example is the offering of a service to modify game consoles to enable people to play pirated computer games on them.

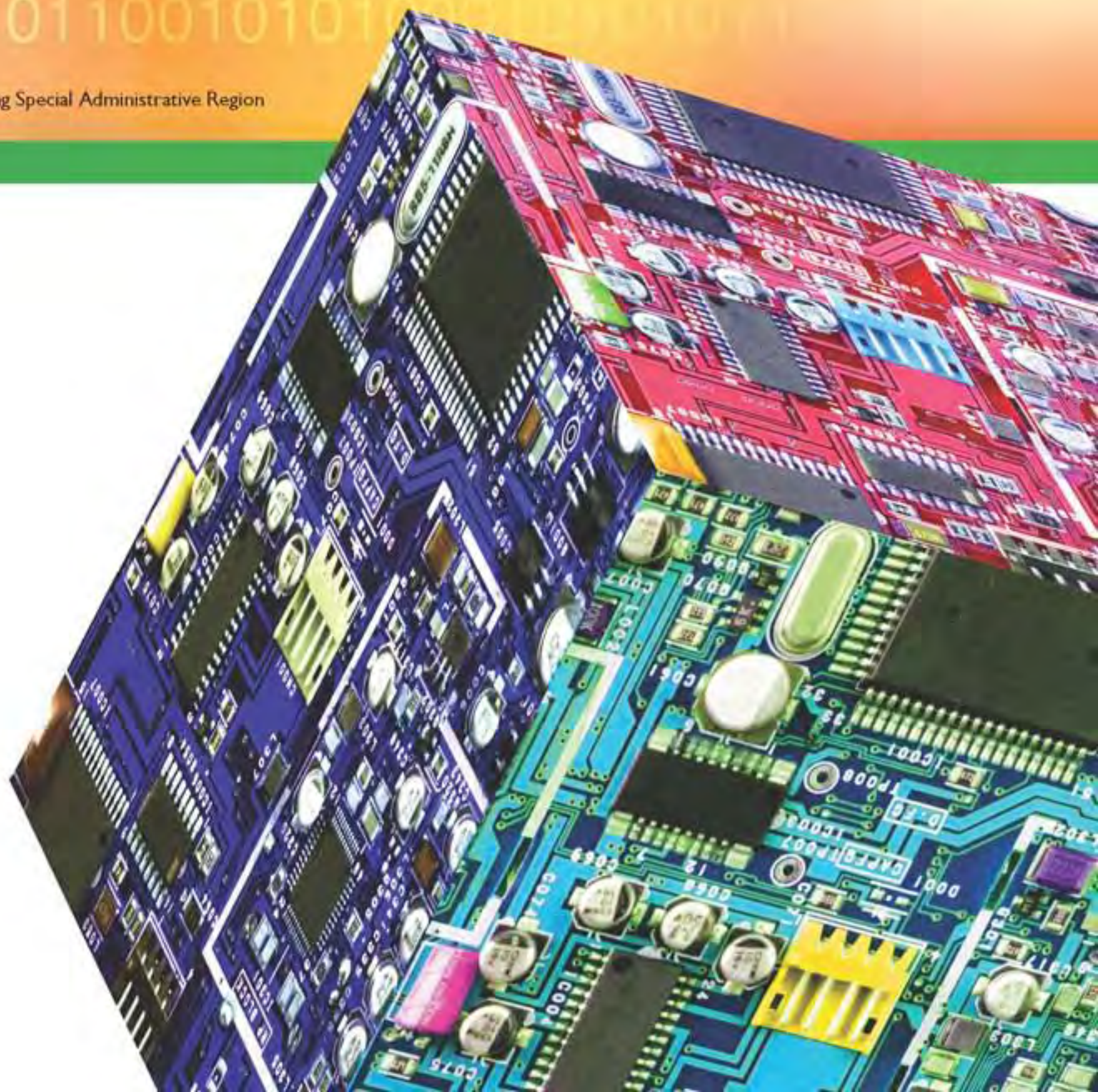
Exceptions

The above prohibitions do not apply to the devices specified below (as well as the related circumvention services) as long as they do not contain other functions :

- devices used to identify or disable spyware (spyware is a device or software that collects or disseminates information relating to the manner of a person's use of a computer network);
- devices used to prevent access of minors to harmful materials on the Internet; and
- devices used to circumvent regional coding to enable users to gain access **only** to parallel imported works (**note:** devices which enable users to gain access to both pirated copyright works and parallel imported copyright works are **illegal**).

In relation to computer games, this means that you should **not** deal in modified game consoles or chips that enable users to gain access to **both** pirated **and** parallel imported computer games. However, if the modified game consoles allow users to gain access to genuine parallel imported works **only**, the new civil liability and criminal liability will not arise.

Details of the Copyright Ordinance and FAQs on the anti-circumvention provisions could be found on the website of the Intellectual Property Department at www.ipd.gov.hk.





香港特別行政區政府
知識產權署

Intellectual Property Department
the Government of the HKSAR



Hong Kong's Amended Copyright Law
A Guide to

Parallel Imports



This leaflet highlights some of the changes to Hong Kong's copyright law relating to the importation and use of parallel imported copies of copyright works in business. The changes have come about as a result of the Copyright (Amendment) Ordinance 2007, which came into force on 6 July 2007.

What are parallel imports?

Parallel imported copies of copyright works are genuine copies that are originally made and destined for a market outside Hong Kong, but are subsequently imported into Hong Kong without the consent of the copyright owner.

The law before 6 July 2007

The following acts were prohibited under the previous version of our copyright law:

- * importation of parallel imported copies for any business purpose;
- * dealing in (i.e. selling, hiring or distributing for profit) parallel imported copies; and
- * use or possession of parallel imported copies of movies, television dramas, musical sound recordings or musical visual recordings in business.

A person who did the above acts would commit a criminal offence if the copyright work had been first published anywhere in the world within 18 months. If the work has been published for more than 18 months, the person would still be subject to civil liability.

The law after 6 July 2007

The amended Copyright Ordinance has relaxed some of the restrictions relating to parallel imports:

(a) Liberalization for business end-users

You may now import or possess parallel imported copies of copyright works for use in your business **as an end-user**. Civil and criminal sanctions for end-users have both been abolished. However, you are **NOT** allowed to import or use the parallel imported copies for the following purposes:

- * dealing in (i.e. selling, hiring or distributing for profit) the copies; or
- * playing or showing the works in public if the copies concerned are movies, television dramas, musical sound recordings or musical visual recordings.

If you import or use parallel imported copies of copyright works for the above prohibited purposes, you could be liable to civil or even criminal sanctions (see paragraph (c) below).

(b) Liberalization for educational establishments

If you are an educational establishment or a library within such establishment, you may now import or possess parallel imported copies of copyright works for educational purpose or for use of your library. Moreover, the playing or showing of parallel imported copies of movies, television dramas, musical sound recordings and musical visual recordings for educational or library use is also permitted. However, you are **NOT** allowed to deal in (i.e. sell, hire or distribute for profit) the copies.

(c) Shorter period for criminal sanction in relation to prohibited acts

Under the amended Copyright Ordinance, it is a criminal offence for you to

- * deal in (i.e. sell, hire or distribute for profit) parallel imported copies of any copyright work (except computer software products);
- * import parallel imported copies of any copyright work (except computer software products) for dealing in the copies; or
- * import or possess parallel imported copies of movies, television dramas, musical sound recordings or musical visual recordings for playing or showing in public.

if the copyright work has been first published anywhere in the world within 15 months. Where the work has been published for more than 15 months, you will still be subject to civil liability.

(d) As under the previous version of the Copyright Ordinance, you may do the following acts without restrictions under our copyright law:

- * import or use parallel imported copies of computer software for business purposes (including dealing in such copies); and
- * import or use parallel imported copies of any copyright work for your private and domestic use.

Examples of acts that the law allows:

- (a) You may buy genuine copies of any copyright works (e.g. books or musical CDs) overseas and bring them back to Hong Kong for your personal use.
- (b) You may buy parallel imported copies of any copyright work (e.g. books) directly from an overseas supplier and use them in your business as internal reference material for your staff.
- (c) You may source parallel imported computer software products directly from an overseas supplier for sale or internal use in your business.

Examples of acts that the law does not allow:

- (a) You must not import any parallel imported copies of copyright works (except computer software products) into Hong Kong for the purpose of sale, hire or distribution for profit.
- (b) You must not import or possess any parallel imported copies of movies, television dramas or musical recordings for playing or showing in your karaoke establishment, restaurant or shop.

If you do any of the above acts, you could be liable to civil or even criminal sanctions. (With regard to the above acts, certain defences are available. [▲])

[▲] Our copyright law provides a defence to a person who does certain prohibited acts in relation to parallel imported copies of a copyright work where the work is not available in Hong Kong and the person has conducted the necessary investigations before doing the prohibited acts. Any person who intends to rely on the defence should consult their legal advisor in order to understand it fully.

For further details of the Copyright Ordinance,
please refer to the website of the Intellectual Property Department at

www.ipd.gov.hk





香港特別行政區政府
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Intellectual Property Department
the Government of the HKSAR



Hong Kong's Amended Copyright Law



a Guide for Teachers and Students

This leaflet highlights some of the changes brought to our Copyright Ordinance ("the Ordinance") that affect teachers and students. The changes have come about as a result of the Copyright (Amendment) Ordinance 2007, which came into force on 6 July 2007. They aim to help teachers and students to make reasonable and fair use of copyright works for teaching and learning purposes in appropriate circumstances without infringing copyright.

"Fair dealing"

41A

A new "fair dealing" exemption aimed at facilitating modern teaching methods has been added to our copyright law. The exemption is found in Section 41A of the Ordinance. It applies not only to works in printed form but also to works made available on the Internet. The objective is to allow **teachers and students** to use or deal with **reasonable portions of copyright works** in a **fair** manner for **teaching and learning in a specified course of study**.

A specified course of study is a course provided by an educational establishment, which has the following characteristics:

- * the course is developed on the basis of curriculum guidelines endorsed by the Curriculum Development Council; or
- * the course consists of an assessment of a student's ability and skills that leads to an award of qualification.

To decide whether an act of dealing with a copyright work is "fair", you need to consider all the circumstances, in particular:

- * the purpose and nature of the dealing, including whether such dealing is for non profit-making purpose and whether it is of a commercial nature;
- * the nature of the work;
- * the amount and substantiality of the portion dealt with in relation to the work as a whole; and
- * the effect of the dealing on the potential market for or value of the work.

The following examples would be considered "fair":

- * a student copying a small portion of a copyright work and incorporating it in his project for illustration with acknowledgement of the source of the work.
- * a teacher including a short clip of a film, which is not being currently shown in cinemas, for illustration in his teaching presentation. The title of the film, the producer and the principal director must be acknowledged.

The following examples would NOT be considered "fair":

- * a student copying the whole or a large portion of a textbook because he believes the textbook is too expensive (this is not fair dealing because the amount is too great and the market for the book was adversely affected).
- * a teacher playing a DVD of a currently shown movie in class for students' entertainment after exams were over (this is not fair dealing because it is a currently shown movie and it was not used for an educational purpose).

The amended Ordinance specifically addresses the issue of placing copyright works on an Intranet; however, in addition to the general considerations relating to “fair dealing”, further special restrictions apply:

An educational establishment which makes available copies of a copyright work through its Intranet for teaching purpose in a specified course of study **MUST:**

- * adopt appropriate security measures, such as requiring login username and password, so that access to the work would be restricted to the users who need to use it for teaching or learning in a specified course of study and persons who need to maintain or manage the network; and
- * ensure the work is only stored for a period of time which is just long enough for the intended teaching or learning purpose. In any event, 12 months is the maximum duration allowed.

Scanning and photocopying by teachers and students

All along, **educational establishments** have been allowed to make reprographic copies (e.g. scans and photocopies) of literary, dramatic, artistic or musical works, **to a reasonable extent**, for teaching purpose. The exception can be found in Section 45 of the Ordinance. This exemption has now been extended to **students**. Students are now allowed to make copies of such works **to a reasonable extent** for learning purpose in a specified course of study.

However, this exemption is only applicable to educational establishments and students if there is no licensing scheme authorizing the copying in question. In fact, most educational establishments including subsidized schools, government schools, special schools, grant schools and caput schools have already entered into licence agreements with the Hong Kong Reprographic Rights Licensing Society (HKRRLS). The agreements allow their teachers, staff or students (upon instruction by teachers) to make copies of printed works in **hardcopy form** for teaching and learning purpose under certain limits. On the other hand, not-for-profit educational establishments which have not entered into any licence agreement with HKRRLS may photocopy limited portions of printed works for instruction purposes according to the “Guidelines for Photocopying of Printed Works by Not-for-profit Educational Establishments”.

Furthermore, the Hong Kong Copyright Licensing Association Limited has granted a licence to kindergartens, primary and secondary schools for making photocopies of certain newspapers and magazines for internal reference and instruction purposes subject to certain limits.

For details of the above licences and guidelines, please refer to the webpage of the Intellectual Property Department at www.ipd.gov.hk/eng/education.htm

The exemptions under Sections 41A and 45 of the Ordinance operate independently of each other. For example, an act of copying by an educational establishment or by a student that is not exempted by the reprographic copying provision under Section 45 could still be covered by the “fair dealing” exemption under Section 41A if all the criteria for “fair dealing” are satisfied.

Performance, playing of audio and video recordings at an educational establishment

43

All along, the following activities that take place at an educational establishment have been permitted under copyright law:

- * performance of a literary, dramatic or musical work by teachers or students or by any other person for teaching purposes; or
- * playing or showing of a sound recording, film, broadcast or cable programme for teaching purposes.

The exemption is contained in Section 43 of the Ordinance. However, before the Ordinance was amended, these activities were only exempted if the audience consisted of teachers, students and the parents or guardians of the students.

The scope of the audience has now been extended. The audience can now consist **wholly** or **mainly** of teachers, students, parents or guardians of the students and **other persons directly connected with the activities of the educational establishment**. For example, near relatives of students may accompany the students to attend school activities in the place of their parents or guardians. The audience may also include School Management Committee members.

However, if an educational establishment organizes an activity which is open to **all** the friends and relatives of its students or to the general public, the educational establishment cannot rely on this exemption. Instead, an appropriate licence should be obtained in advance for the public performance to take place.

Liberalization in the use of parallel imports

35B

Parallel imported copies of copyright works are genuine copies that are originally made and destined for a market outside Hong Kong, but are subsequently imported into Hong Kong without the consent of the copyright owner.

Before the Ordinance was amended, importation of (except for private and domestic use) or dealing in a parallel imported copy of a copyright work was prohibited under our law. Moreover, a person risked being found liable for using or possessing a parallel imported movie, television drama, musical sound recording or musical visual recording in business (which may include some educational uses).

The amended Ordinance has relaxed this restriction. The amendments are set out in Section 35B of the Ordinance. Educational establishments (including their libraries) may now import or possess for use parallel imported copies of copyright works without resulting in any liability. However, the copies must only be used by the educational establishments for their own internal educational or library purpose. They are not allowed to use the copies for selling, hiring, offering for sale or distributing for profit. If an educational establishment deals in parallel imported copies, it could become liable to civil or even criminal sanctions.

For details of the Ordinance, please refer to the website of the Intellectual Property Department at www.ipd.gov.hk

For discussion on
19 February 2008

Legislative Council Panel on Commerce and Industry

Follow-up to the Copyright (Amendment) Ordinance 2007 –

Proposed “Safe Harbour” Regulation and the First List of Exceptions on Act of Circumvention

Introduction

This paper (a) briefs Members on the proposed “safe harbour” regulation in relation to the new business end-user copying and distribution offence; and (b) reports the outcome of a recent public consultation exercise on the need for additional exception(s) on circumvention of technological measures.

Background

2. The Copyright (Amendment) Ordinance 2007 (“the Amendment Ordinance”) was passed by the Legislative Council on 27 June 2007. The Amendment Ordinance, among other things, introduces (a) a new offence (section 119B(1) of the Copyright Ordinance (Cap 528)) in relation to the making for distribution and distributing infringing copies of four types of printed works¹ for the purpose of or in the course of any trade or business on a regular and frequent basis² without the licence of the copyright owner; and (b) a new civil liability (section 273A of the Copyright Ordinance) for the act of circumvention against a technological measure applied to a copyright work or performance.

3. Before the relevant provisions are brought into operation, we need to further discuss with stakeholders with a view to prescribing, by way of subsidiary legislation :

- (a) a set of numeric limits within which the copying and distribution offence does not apply (known as the “safe harbour”); and
- (b) where necessary, a list of exception(s) (known as the “first list of exceptions”) specifying the act(s) of circumvention that will not attract civil liability, in

¹ They are books, magazines, periodicals and newspapers.

² The new offence does not apply to bona-fide non-profit making educational institutions.

addition to the specific exceptions provided in section 273D of the Copyright Ordinance.

Our discussions with the relevant copyright owners on (a) above are by and large complete. We have also consulted the public on (b) above. The outcome of the relevant discussions/consultation is set out below.

The Safe Harbour Regulation

Initial proposal

4. When proposals in the relevant Amendment Bill were first presented to the Legislative Council in November 2005, the following initial proposal for the safe harbour formulation was mentioned :

- for newspapers, magazines and periodicals (excluding academic journals), ***a maximum of 1,000 infringing copies within any 14-day period***; and
- for books (***including*** academic journals), ***a maximum total retail value of \$8,000 within any 180-day period***, where the retail value of books would be counted towards the total value when the user makes for distribution or distributes more than 15% of the number of pages of a book on each occasion or more than 50% cumulatively within any 180-day period.

5. Copyright owners, including the Hong Kong Copyright Licensing Association (HKCLA)³ and the Hong Kong International Publishers' Alliance (HKIPA)⁴, generally considered the proposed perimeters too lax and called for tightening up the perimeters. HKCLA considered that the numerical perimeter should be set at 300 infringing copies (instead of 1,000 copies) within any 14-day period. HKIPA counter-proposed that the maximum total retail value should be set at \$2,000 and subsequently \$3,000 (as opposed to \$8,000); and that infringing copies made or distributed exceeding 30% cumulatively (instead of 50%) should be counted for the calculation of the total retail value.

³ HKCLA is a licensing body for photocopying of newspapers and magazines. It has been authorised by 16 Hong Kong newspapers and 20 Hong Kong magazines to issue photocopying licences.

⁴ HKIPA represents major trade associations of the book publishing industry in Hong Kong, US and UK. The Hong Kong Reprographic Rights Licensing Society, which is the secretariat of HKIPA, is a licensing body for about 1.7 million publications published in Hong Kong and overseas.

Discussions with HKCLA

6. When discussing the safe harbour formulation regarding newspapers, magazines and periodicals in further detail, both HKCLA and the Administration recognised that it would not be easy for general users to know with certainty what amounted to an “article” or a “copy”⁵. To ensure that the formulation would be easy to understand and to apply, we agreed that the perimeter should be set on a “per-A4 page” basis instead. In other words, the copying (for distribution) and distribution of infringing copies would not attract criminal liability unless the number of infringing copies made/distributed, counted on A4-page basis, exceeds a certain threshold.

7. HKCLA conducted a survey and found that while an article in a magazine or periodical might extend over one to several A4 pages, a newspaper article on average covered around half of an A4 page. On this basis, HKCLA suggested that the perimeter could reasonably be set at 400 A4 pages. Nevertheless, noting that newspapers are the major source of copying in the business sector, and that the Administration’s policy intention was to criminalise only those serious infringing acts done on a regular or frequent basis, HKCLA eventually agreed to the Administration’s proposal to set the perimeter at **500 A4 pages for any 14-day period** (*roughly equivalent to 900 to 1,000 “articles” according to HKCLA’s statistics*).

Discussions with HKIPA

8. As regards the safe harbour formulation for books (including academic journals), HKIPA considered the threshold too high. Drawing reference from a similar threshold⁶ (US\$1,000) provided in the US Copyright Act, and noting that the average book price in Hong Kong was relatively lower⁷ than that in the US, they considered that the threshold should be lowered accordingly. They were also worried that setting the cumulative threshold at 50% might send the wrong message that businesses were allowed to make copy of books freely up to 50%. In response, the Administration explained that the policy intention was to criminalise only those serious infringing acts done on a regular or frequent basis. Hence the threshold could not be set at too low a level. Besides, to avoid misunderstanding, the Administration would publicise the “safe harbour” among the business end-users to ensure that the business community

⁵ For example, while related passages under a headline may be considered as separate “articles”, general users may view all related passages under one headline as one article only. Moreover, different typographical arrangements may also lead to different perceptions about the number of “articles” involved.

⁶ Section 506(a)(1)(B) of the US Copyright Act for the numeric limit for end-user criminal liability.

⁷ According to HKIPA, the average price for reference books in Hong Kong was about one-third of that in the US.

generally understand the formulation before the relevant provisions come into effect.

9. After further deliberations with HKIPA, the Administration revised its proposal as follows-

A maximum total retail value of \$6,000 within any 180-day period, where the retail value of books (or academic journals) would be counted towards the total value when the user makes for distribution or distributes:

- (a) more than 15% of the number of pages of the book on one occasion or for use on one occasion;
- (b) more than 40% of the number of pages of the book cumulatively; or
- (c) complete article(s) in academic journals on one occasion or for use at on one occasion.

10. HKIPA found the revised proposal not unacceptable. They urged the Administration to review the propriety of the thresholds having regard to enforcement experience in due course. We have no objection to HKIPA's proposal. We recognise the need to review the "Safe Harbour" periodically to ensure that a reasonable balance is maintained between protecting the interests of copyright owners and minimising any adverse impact on business operation, having regard to changes in circumstances.

First List of Exceptions

The Consultation

11. The Administration consulted the public on the need for additional exemptions on circumvention of technological measures in December 2007. About 30 submissions, mostly from copyright owners and professional groups, were received. Apart from a few who commented on the overseas exceptions⁸ cited in the consultation document, most of the respondents commented on the procedures for granting and reviewing any additional exemptions locally.

⁸ Examples of overseas exemptions include allowing the circumvention of access controls of (a) literary works distributed in e-book format so as to enable persons who are visually impaired to activate the book's read-aloud function, or (b) audiovisual works included in the educational library of a college or university's film or media studies department for the purpose of making compilations of portions of those works for educational use in the classroom by film or media studies professors etc.

12. To ensure that the legitimate interest of stakeholders would not be adversely impaired or affected as a result of the anti-circumvention provisions, we further approached some stakeholder groups such as the Hong Kong Society for the Blind, Hong Kong Blind Union, Leisure and Cultural Services Department and the Government Records Service, to solicit their views on the subject.

13. At the end of the consultation exercise, the Administration did not receive any concrete evidence that justifies the grant of any additional exemption.

14. The provision that empowers the granting of additional exemptions (section 273H of the Copyright Ordinance) specifies, among other things, that the exemptions should be given where the legitimate use of copyright works or performances has been (i.e. current need), or is likely to be (i.e. likely future need) adversely impaired or affected. Hence, the Administration does not see a mandate for granting additional exemptions solely on the basis of overseas experience, especially where the circumstances in overseas jurisdictions were different from those in Hong Kong. In view of the above, we recommend that there is no need to introduce any additional exemptions before the commencement of the provisions that prohibit the act of circumvention against a technological measure applied to a copyright work or performance.

Proposed Procedure for Granting Additional Exemptions

15. The Administration, however, appreciates that legitimate needs for additional exemption may arise in future due to changes in circumstances. In this regard, stakeholders are welcome to forward to us new proposals as and when necessary. Having regard to overseas experience and the comments made by some respondents, we propose that any such proposal should be processed along the following lines -

- (a) *proposals by users*: a proponent writes to the Administration demonstrating that there is a need to circumvent a technological measure for legitimate use of the relevant copyright work or performance;
- (b) *discussions with copyright owners*: the Administration will consult the relevant copyright owners to determine whether there is any alternative solution (e.g. the grant of licence by copyright owners);
- (c) *making of subsidiary legislation*: if an additional exemption is considered necessary to protect the interest of the user, we would seek to put it into the “list of

exceptions” by introducing the subsidiary legislation into the Legislative Council after consulting relevant stakeholder groups, as appropriate; and

- (d) *review of the continued need for exemption(s) included in the list:* the Administration will consult the relevant stakeholders (including the original proponent and the copyright owners) to review the continued need for any such exemption(s) at regular intervals.

16 To facilitate users in putting up proposals for additional exemption, we will provide a guidance note in the web pages of the Commerce and Economic Development Bureau and the Intellectual Property Department in due course.

Way Forward

17. We aim to table the “Safe Harbour” Regulation before the Legislative Council in April 2008, in time for it to be vetted and passed by the current legislature.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
February 2008