

## **Bills Committee on the Copyright (Amendment) Bill 2009**

### **Elements of the Copying and Distribution Offence and Other Related Matters**

#### **Introduction**

At the Bills Committee meeting on 22 June 2009, Members requested the Administration to explain –

- (a) the different elements of the copying and distribution offence (“**the offence**”) under section 119B of the Copyright Ordinance, Cap 528 (“**the Ordinance**”);
  - (b) whether persons providing reprographic copying services would be caught by the offence; and
  - (c) the meaning of the terms “qualifying copy” and “comparable copy” in the Copyright (Amendment) Bill 2009 (“**the Bill**”).
2. This paper provides the information requested.

#### **Elements of the offence**

3. Under section 119B(1) and (2) of the Ordinance, a person commits the offence if he makes for distribution or distributes an infringing copy<sup>1</sup> of a copyright work in a printed form that is contained in a book, a magazine, a periodical or a newspaper –

- (a) without the licence of the copyright owner of the copyright work;
- (b) on a regular or frequent basis;
- (c) for the purpose of or in the course of any trade or business; and
- (d) resulting in a financial loss to the copyright owner of the copyright work.

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<sup>1</sup> Under section 35(2) of the Ordinance, a copy of a work is an infringing copy if its making constituted an infringement of the copyright in the work in question.

4. The offence seeks to impose criminal liability against business end-users. It does not apply to non-profit making educational establishments.<sup>2</sup>

5. We propose, in clause 3 of the Bill, that the offence should not apply to –

- (a) the making or distribution of infringing copies which does not exceed the prescribed numeric limits, as described in the proposed Schedule 1AA to the Ordinance; or
- (b) the distribution of infringing copy via an Intranet (except electronic mail and facsimile distribution), as described in the proposed Schedule 1AB to the Ordinance.

6. The prosecution has to prove different elements of the offence beyond reasonable doubt. In other words, the prosecution has to prove that –

- (a) the defendant had knowingly, without licence, made (for distribution) or distributed one or more infringing copies of any copyright work in a printed form as contained in a book, a magazine, a periodical or a newspaper on a regular or frequent basis for the purpose of or in the course of his trade or business thereby resulting a financial loss to the copyright owner; and
- (b) the defendant knew that the extent of his making or distribution of such infringing copies at the material time had exceeded the relevant numeric limit.

The mental elements of the defendant would be established from the surrounding circumstances of the offence.

7. To ensure that business operations would not be unreasonably and adversely affected, the Ordinance also provides certain statutory defences<sup>3</sup> for business end-users under section 119B(14).

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<sup>2</sup> See section 119B(4) of the Ordinance.

<sup>3</sup> The statutory defences are available to the defendant if he can prove that –

- (a) he took adequate and reasonable steps to obtain a licence, but failed to receive a timely response;
- (b) he could not, after making reasonable efforts, obtain commercially available copies and could not obtain a licence on reasonable commercial terms;
- (c) he did not know and had no reason to believe that the copies he made or distributed infringed copyright; or
- (d) he could not, after making reasonable enquiries, ascertain the identity and contact details of the copyright owners.

### **Liability of persons providing reprographic copying services under the offence**

8. As explained in paragraphs 3 and 6 above, the prosecution must prove, among other things, that the defendant had *made (for distribution)* or *distributed* infringing copies of copyright works for the purpose of or in the course of any trade or business.

9. The offence may, depending on the circumstances of the case, apply to photocopying shops if there is evidence showing that they are involved in making (for distribution) or the distribution of infringing copies in the course of their business. For instance, the photocopying of a textbook based on the order of a student for distribution to his twenty classmates may constitute making (for distribution) and also distribution of infringing copies.

10. We wish to reiterate that the offence seeks to impose criminal liability against blatant infringing acts committed by **business end-users**, rather than commercial entities such as photocopying shops. In fact, there are existing provisions in the Ordinance which criminalize infringing activities of photocopying shops regardless of the quantity/value of the infringing copies made/distributed by them. In particular, under section 119A of the Ordinance, it is an offence for a person who, for the purpose of or in the course of a reprographic copying service business conducted for profit, possesses an infringing reprographic copy of a copyright work as published in a book, magazine or periodical. In addition, photocopying shops may also commit another offence under section 118(1)(a) of the Ordinance, which criminalizes making for sale or hire an infringing copy of a copyright work without the licence of the copyright owner.

11. As for the cases where photocopying facilities are provided in certain premises (such as public libraries) for use by others, it will depend on the evidence available as to whether there was making (for distribution) or distribution of infringing copies in the course of business by the persons providing such facilities. In the majority of cases, it seems unlikely that persons providing such facilities *per se* will be found to be involved in making (for distribution) and distributing infringing copies for the purpose of the offence.

## **Meaning of “qualifying copy” and “comparable copy”**

### Qualifying copy

12. In section 1(1) of the proposed Schedule 1AA, the term “qualifying copy” is defined as follows –

- “(a) in relation to a book, it means a set of pages, whether in a printed or electronic form, that embodies, whether in whole or in part, an infringing copy of any copyright work in a printed form that is contained in a copy of the book, and corresponds to more than 25% of the printed pages of that copy of the book; or
- (b) in relation to a specified journal, it means –
  - (i) a set of pages, whether in a printed or electronic form, that embodies, whether in whole or in part, an infringing copy of any copyright work in a printed form that is contained in a copy of an issue of the journal, and corresponds to more than 25% of the printed pages of that copy of the issue; or
  - (ii) a set of pages, whether in a printed or electronic form, that embodies an infringing copy made from the whole of an article in a printed copy of an issue of the journal, and corresponds to not more than 25% of the printed pages of that copy of the issue.”

13. Section 3(3), (4), (5) and (6) of the proposed Schedule 1AA provides that the offence does not apply to the making (for distribution) or distribution of infringing copies of books or specified journals if the set of pages embodying such infringing copies does not fall within the meaning of “qualifying copy”.

14. For example, if a person makes an infringing copy from a copy of a book which comprises the content as contained in less than 25% of the printed pages of that copy of the book (say 20%), the infringing copy so made does not fall within the meaning of “qualifying copy” in relation to books (i.e. paragraph (a) of the definition) and would not be counted towards the numeric limit for the purpose of the offence.

15. As for specified journals, we are aware that some articles, which may in terms of content take up less than 25% of the printed pages of an issue of a specified journal, are offered for sale individually. Noting the nature of

the specified journals and the way in which their articles are offered for sale, we think added protection to “articles” is justified. We therefore propose, in paragraph (b)(ii) of the definition for “qualifying copy”, that even if an infringing copy comprises the content as contained in not more than 25% of the printed pages of a copy of a specified journal (say 20%), it may still be a qualifying copy if it is made from the whole of an article in that copy of the specified journal.

16. For the avoidance of doubt, where the infringing copy so made/distributed exceeds 25% of the overall contents of the issue of specified journal and contains one or more than one complete article in that issue of the journal, section 6 of the proposed Schedule 1AA in effect provides that only one qualifying copy (in relation to the issue of the specified journal) would be counted for the purpose of calculating the value of the qualifying copy.

17. It must be noted that there are other criminal provisions in the Ordinance currently in force that deal with massive and blatant infringement in different circumstances. Therefore, even though the copying and distribution offence (the subject of the Bill) may not apply where all the infringing copies made or distributed are not qualifying copies (e.g. where all the infringing copies correspond to less than 25% of the printed pages of the books or specified journals concerned), other criminal provisions already in force, such as those pertaining to “dealing in” or “prejudicial distribution” of infringing copies under section 118 of the Ordinance, may still come into play depending on the circumstances.

#### Comparable copy

18. In sections 5(2), 7(2) and 8(2) of the proposed Schedule 1AA, it is provided that a qualifying copy (in relation to books or specified journals) is taken to have the same value as a copy of a book, an issue of a specified journal or an article in an issue of a specified journal (i.e. the comparable copy), as the case may be, that –

- (a) is not an infringing copy; and
- (b) contains the copyright work that is the subject of the qualifying copy.

19. We propose that the value of a qualifying copy should be determined by reference to its comparable copy because –

- (a) it is anticipated that the enforcement agency may not always be able to locate the exact copy of the book (i.e.

the source book) from which the qualifying copy is made;  
and/or

- (b) the source book itself may be an infringing copy (e.g. a reprographic copy of a genuine book) which may not have a retail price at all.

By qualifying what is meant by “comparable copy”, we wish to ensure that both users and the prosecution would be referring to a common reference point in determining the value of the qualifying copy.

Commerce and Economic Development Bureau  
Intellectual Property Department  
Department of Justice  
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