

Bills Committee on the Copyright (Amendment) Bill 2009

Defendant's Knowledge in relation to the Numeric Limits and Penalty Level for the Copying and Distribution Offence

Introduction

At the Bills Committee meeting on 7 July 2009, Members requested the Administration to –

- (a) clarify, with reference to the provisions under section 119B of the Copyright Ordinance, Cap 528 (“**the Ordinance**”) governing the copying and distribution offence (“**the Offence**”), whether the defendant's knowledge of the extent of his making or distribution of infringing copies at the material time in excess of the prescribed numeric limit(s) is an element of the Offence;
 - (b) provide examples of the penalty levels for “white-collar offences” (such as default in payment of Mandatory Provident Fund contribution) in the relevant legislation, as compared with the penalty level for the Offence under section 119B(17) of the Ordinance; and
 - (c) provide information on the penalty level for similar copyright offence in overseas jurisdictions such as the United States.
2. This paper provides the information requested.

Defendant's knowledge in relation to the numeric limits

3. Under section 119B(1) and (2) of the Ordinance, a person commits the Offence if he, without the licence of the copyright owner and for the purpose of or in the course of any trade or business, makes for distribution or distributes on a regular or frequent basis an infringing copy of a copyright work in a printed form that is contained in a book, a magazine, a periodical or a newspaper, resulting in a financial loss to the copyright owner of the copyright work.

4. Clause 3(1) of the Copyright (Amendment) Bill 2009 provides that the Offence does not apply to, among other things, the making or distribution of infringing copies which does not exceed the numeric limits, as prescribed in the proposed Schedule 1AA to the Ordinance (“**the numeric limits**”).

5. We have consulted the Prosecutions Division of the Department of Justice again as regards the burden of proof borne by the prosecution in establishing the Offence. We are given to understand that –

- (a) it is trite law that the prosecution bears the burden to prove every element of the Offence. This includes proof of the defendant's *mens rea* unless the Offence is regarded as a strict liability offence;
- (b) as a matter of construction, Clause 3(1) together with sections 2 and 3 of Schedule 1AA to the Bill are considered as part of the elements of the Offence rather than a defence. Accordingly, the burden is on the prosecution to prove that the number or value of infringing copies made or distributed has exceeded the relevant numeric limit(s); and
- (c) in addition, the Offence is not construed as a strict liability offence. In the circumstances, even though the provisions do not expressly require proof of *mens rea*, the prosecution has to prove that the defendant has intended to do the act that constitutes the Offence under section 119B. In other words, insofar as the defendant's knowledge in relation to the numeric limits is concerned, the prosecution has to prove, amongst others, the defendant's knowledge that the extent of his making or distribution of such infringing copies at the material time had exceeded the relevant numeric limit(s). In this regard, ignorance of the law is no defence, and similar to other criminal offences that require proof of intention/knowledge on the defendant's part, the surrounding circumstances of the Offence would provide evidential basis for inferring/establishing the defendant's requisite knowledge about the numeric limits. It would be eventually for the court to decide, based on all evidence available, whether the defendant had the requisite knowledge when committing the acts charged by the prosecution.

Penalty Level for the Offence

Penalty Level for Existing Offences under the Ordinance

6. Under section 119B(17) of the Ordinance, a person who commits the Offence is liable on conviction on indictment to a fine at level 5 (i.e.

HK\$50,000) in respect of each infringing copy and to imprisonment for 4 years.

7. The Offence carries the same penalty level as a number of existing offences under the Ordinance, as cited below –

- (a) the offence relating to possession of infringing copies of computer programs, movies, television dramas or musical recordings for use in business [section 118(2A)];
- (b) several offences relating to “dealing in” and “prejudicial distribution” of infringing copies etc [section 118(1)(a) to (g)]; and
- (c) the offence relating to possession of infringing copies in a copying service business [section 119A(2)].

8. There are other offences under the Ordinance the penalty for which is pitched at different severity levels, including –

- (a) a maximum fine of \$500,000 and a term of imprisonment for 8 years, applicable to the offences relating to making, importing into Hong Kong, selling, possession of etc. an article specifically designed or adapted for making infringing copies of a particular copyright work for sale, hire, or use in the course of any trade or business [section 118(4) and (8)]; and
- (b) a maximum fine of \$500,000 and a term of imprisonment for 4 years, applicable to several offences relating to commercial dealing of circumvention devices or the provision of circumvention services [section 273C(1)(a) to (g)].

9. The penalty provisions above reflect the serious view that has been taken by the Government and society at large about the need to rigorously combat copyright piracy.

10. Similar to the position for most statutory offences, the aforesaid penalty levels as prescribed under the Ordinance are the maximum penalty that may be imposed against an offender. Taking the business end-user “possession” offence (which carries the same maximum penalty level as the Offence) as an example, the court had deemed fit to impose a fine in the majority (more than 90%) of the cases so far. The fine ranges from \$1,000 to \$235,000. As regards convicted cases in which the defendants have been

sentenced to imprisonment, the longest term that has been imposed so far is 5 months.

Penalty Level for Other “White Collar Crimes”

11. The term “white collar crime” was once defined as “crime committed by a person of respectability and high social status in the course of his occupation” and is now generally understood to encompass “a variety of non-violent crimes usually committed in commercial situations for financial gain”¹. The more common white-collar crimes include environmental law violations, tax evasion, various kinds of fraud, bribery, insider trading, antitrust violations, money laundering etc.

12. The Annex shows the penalty level for some “white collar crimes” in Hong Kong. We wish to point out that it might not be appropriate to directly compare the penalty level for these “white collar crimes” with that for the Offence. This is because the nature, culpability and criminality of these “white collar crimes” may vary considerably. Moreover, the penalty level for individual offence is usually determined by reference to a host of factors (such as the prevalence of the misconduct/improper practices in society, the harm/damage done to the relevant stakeholders and society as a whole, and the need to deter future commission of such misconduct/practices etc.), and the significance borne by each of these factors often varies amongst different offences.

Penalty Level for Similar Copyright Offences in the US

13. **§506(a)(1), Title 17 of the United States Code** (US Copyright Law) imposes criminal sanction on, amongst others, willful copyright infringement by the reproduction or distribution, including by electronic means, during any 180-day period, of one or more copies or phonorecords of one or more copyrighted works, which have a total retail value of more than US\$1,000.

14. Upon conviction, the court has the power to impose the following penalties –

- (a) the forfeiture, destruction or other disposition of all infringing copies and all devices/equipment used for manufacturing such infringing copies²; and

¹ Source : Legal Information Institute of the Cornell University Law School for (http://topics.law.cornell.edu/wex/White-collar_crime).

² See § 506(b), Title 17, US Code.

- (b) a term of imprisonment for up to 6 years and/or a maximum fine of US\$250,000 per individual; or US\$500,000 per organisation³.

15. It also appears that the court may, subject to specified conditions, impose an alternative fine against the defendant based on the pecuniary gain made by a person from the offence, or the pecuniary loss caused by the offence to a person other than the defendant.⁴

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³ See § 2319(c) and 3571, Title 18, US Code.

⁴ See § 3571(d), Title 18, US Code.

Annex

Penalty Levels of Some “White Collar Crimes”

| Relevant Ordinance | Description of Offence | Maximum Penalty |
|---|---|---|
| Employment Ordinance (Cap. 57) | Default in timely payment of wage (s. 23) | - A fine of \$350,000 and imprisonment for 3 years |
| Mandatory Provident Fund Schemes Ordinance (Cap. 485) | Default in timely payment of contributions to the relevant registered scheme (s. 7A(1)) | - A fine at level 6 (i.e. \$100,000) and imprisonment for 6 months on first occasion - A fine of \$200,000 and an imprisonment for 12 months on each subsequent occasion |
| Water Pollution Control Ordinance (Cap. 358) | Discharge of any waste or polluting matter into a water control zone (s. 8(1)(a)) | - A fine of \$200,000 for a first offence and \$400,000 for a second or subsequent offence and imprisonment for 6 months - An additional fine of \$10,000 per day for a continuing offence |
| | Discharge of any poisonous or noxious matter into the waters of Hong Kong (s. 8(1A)) | - A fine of \$400,000 and imprisonment for 1 year for a first offence - A fine of \$1,000,000 and imprisonment for 2 years for a second or subsequent offence - An additional fine of \$40,000 per day for a continuing offence |
| Inland Revenue Ordinance (Cap. 112) | Tax evasion by omitting information or making false statements/entry in any return, or by preparing or maintaining any false books of accounts, or by making use of any fraud, art or contrivance etc (s. 82) | - A fine at level 3 (i.e. \$10,000), a further fine of treble the amount of the undercharged tax and imprisonment for 6 months on summary conviction - A fine at level 5 (i.e. \$50,000), a further fine of treble the amount of the undercharged tax and imprisonment for 3 years on conviction on indictment |

| Relevant Ordinance | Description of Offence | Maximum Penalty |
|---|--|---|
| Prevention of Bribery Ordinance (Cap. 201) | Offer of advantages to a public servant for inducing/rewarding him to perform, expedite, delay, hinder, or prevent his/other public servants' any act in the capacity of public servants etc (s. 4(1)) | <ul style="list-style-type: none"> - A fine of \$100,000 and imprisonment for 3 years on summary conviction - A fine of \$500,000 and imprisonment for 7 years on conviction on indictment |
| Securities and Futures Ordinance (Cap. 571) | Insider dealing (s. 291) | <ul style="list-style-type: none"> - A fine of \$1,000,000 and imprisonment for 3 years on summary conviction - A fine of \$10,000,000 and imprisonment for 10 years on conviction on indictment - Additional orders that (a) prohibit the person to be a director/liquidator/receiver/manager of a listed corporation for a period not exceeding 5 years; (b) prohibit the person from acquiring, disposing of or otherwise dealing in any securities, futures or leveraged foreign exchange contract for a period not exceeding 5 years; and (c) recommend a body to take disciplinary action against the person |
| Organised and Serious Crimes Ordinance (Cap. 455) | Money laundering (dealing with property that a person knows or has reasonable grounds to believe representing any person's proceeds of an indictable offence) (s. 25) | <ul style="list-style-type: none"> - A fine of \$500,000 and imprisonment for 3 years on summary conviction - A fine of \$5,000,000 and imprisonment for 14 years on conviction on indictment |

| Relevant Ordinance | Description of Offence | Maximum Penalty |
|-------------------------------|---|---|
| Theft Ordinance (Cap. 210) | Theft (s. 9) | - Imprisonment for 10 years on conviction upon indictment |
| N/A | Conspiracy to defraud (common law offence) | - Imprisonment for 14 years (by virtue of s. 159C of Crimes Ordinance (Cap. 200)) |