

For discussion on
16 December 2008

Legislative Council Panel on Commerce and Industry

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

- (i) refined proposals in relation to the copying and distribution offence under section 119B of the Copyright Ordinance; and**
- (ii) rental rights for comics**

Introduction

This paper briefs Members on (i) the Administration's refined proposals in relation to the new business end-user copying and distribution offence; and (ii) the progress of licensing in relation to the rental rights for comics.

The Copyright (Amendment) Ordinance 2007

2. The Copyright (Amendment) Ordinance 2007 (the Amendment Ordinance) was enacted on 5 July 2007. It (i) 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 circumvention of technological measures that protect copyright); (ii) makes the copyright exemption regime more flexible; (iii) relaxes the restrictions on parallel importation of copyright works; and (iv) strengthens the enforcement of rights.

3. Certain provisions (including those relating to copyright exemptions and liberalization of parallel imports) came into force upon enactment of the Amendment Ordinance. The remaining provisions, except for those relating to the two subjects set out below, came into operation by phases in 2008, after allowing time for rolling out suitable publicity/public education programmes and for relevant stakeholders to get prepared –

¹ They are books, magazines, periodicals and newspapers.

- (a) the business end-user copying and distribution offence; and
- (b) rental rights for comics.

----- The Annex summarises the major provisions under the Amendment Ordinance that have already been brought into operation.

4. The ensuing paragraphs report the latest state of play in preparing for the commencement of the provisions pertaining to paragraph 3(a) and (b) above.

Business end-user copying and distribution offence

Background

5. Under sections 119B(1) and (2) of the Copyright Ordinance (Cap.528), a person commits an offence² if he, for the purpose of or in the course of any trade or business and on a regular or frequent basis, without the licence of the copyright owner, makes for distribution or distributes an infringing copy of a copyright work in a printed form contained in a book, a magazine, a periodical or a newspaper resulting in a financial loss to the copyright owner. To ensure that business operations would not be adversely affected, statutory defences are provided under section 119B(14)³. In addition, the Secretary for Commerce and Economic Development (SCED) is empowered to prescribe numeric limits (hitherto commonly referred to as the “safe harbour”) within which the copying/distribution offence will not apply.

6. Before the offence provisions are brought into operation, we need to prescribe the extent of copying and distribution within which the offence does not apply (“the numeric limits”). At the Panel meeting held in February 2008, we briefed Members on the proposed formulation of the numeric limits after consulting the relevant stakeholders, as follows –

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

³ The statutory defences available include the following –

- (a) the user made adequate and reasonable steps to obtain a licence, but failed to receive a timely response;
- (b) the user could not obtain commercially available copies and could not obtain a licence on reasonable commercial terms;
- (c) the user did not know that the copies he made or distributed infringed copyright; or
- (d) the user could not ascertain the identity and contact details of the copyright owners.

- (a) for newspapers, magazines and periodicals (excluding academic journals), *a maximum of 500 A4-size pages within any 14-day period*; and
- (b) for books (including academic journals), *a maximum total retail value of \$6,000 within any 180-day period*, where the retail value of a book (or an academic journal) or an article of an academic journal would be counted towards the total retail value when the user makes for distribution or distributes –
 - (i) more than 15% of the number of pages of the book (or the academic journal) or the complete article on one occasion or for use on one occasion; or
 - (ii) more than 40% of the number of pages of the book (or the academic journal) cumulatively.

LC Paper No. CB(1)803/07-08(03) is relevant. After receiving general support from Members present, the Administration proceeded to prepare the relevant Regulation.

The issue of vires

7. During the drafting stage, the Department of Justice (DoJ) advised us that the aforesaid proposed formulation of the numeric limits might be inconsistent with the enabling provisions in sections 119B(19) and (20)⁴. Specifically, we were advised that –

- (a) the enabling provisions, as currently worded, would require that the numeric limits applicable to each type of printed work should refer to *both* the *number* and the *value* of infringing copies. In other words, our proposed formulation of numeric limits for books/academic journals (which only relate to the value of infringing copies) and for newspapers, magazines and periodicals (which only relate

⁴ Section 119B(20) reads –

“The Secretary for Commerce and Economic Development may, in the regulations made under subsection (19) specify the extent referred to in that subsection by reference to –

(a) the number of infringing copies made or distributed;

(b) the value of those infringing copies; and

(c) any other factors that he may consider relevant,

to the number of infringing copies, expressed in terms of A4-size pages) is beyond the scope of the enabling provisions;

- (b) the enabling provisions, as currently worded, refer to *copyright* work(s) (which may take the form of an artistic work, a literary work, or a typographical arrangement etc.) but not those *printed* work(s) listed under section 119B(2). Since no distinction is drawn between copyright works contained in different types of printed works, it could be argued that for the purpose of the numeric limits the same copyright work should be counted on a similar footing, regardless of whether it appears in a book or a magazine (or other types of printed works). It follows that our proposed formulation of two separate numeric limits for different types of printed works (books and academic journals on the one hand and newspapers, magazines and periodicals on the other) might also be beyond the scope of the enabling provisions; and
- (c) due to the same constraint as explained in point (b) above, our proposal to count the aggregate number of A4-size pages containing infringing materials in the case of newspapers, magazines and periodicals might not be a reliable method for determining the total number of infringing copies of one or more than one copyright works, for the reason that one A4-size page may contain less than or more than one infringing copy of a copyright work.

8. All along, it has been our policy intent to provide for separate numeric limits (on the basis of either the number or the value of infringing copies) for different printed works. Nonetheless, the way the enabling provisions are currently worded is such that we must make reference to both factors in formulating the numeric limits. Within the confines as we know them today, we have attempted to find ways to accommodate the framework that we have hitherto agreed with stakeholders but to no avail. In particular, given the difference in

nature and mode of infringements involving different printed works⁵, it is not practicable to prescribe a set of numeric limits which cover both the value and the quantity of infringing copies of copyright works, irrespective of the type of printed works that is carrying these copyright works.

The Administration's Proposal

9. We propose to introduce certain technical amendments to the Ordinance for rectifying the vires issue raised above. Under our proposal, SCED may prescribe the numeric limits by reference to (i) the quantity of copies containing infringing copies of copyright works, *and/or* (ii) the value of the copies containing infringing copies, as well as (iii) other relevant factors. In addition, to tackle the problem as set out in paragraph 7(b) above, we propose to put it beyond doubt that SCED may prescribe separate numeric limits for different types of printed works (such as books, magazines) as opposed to different types of copyright works (such as artistic work, literary work, typographical arrangements etc).

10. We have also taken the opportunity to examine whether the formulation of the numeric limits could be further streamlined and improved. While we do not see a need to change the numeric limits as set out in bold print in paragraph 6 above, we recommend replacing the *two-tier* system for calculation of the total retail value (as per paragraph 6 (b)(i) and (ii) above) by a *single tier*, i.e. the retail value of a book (or an academic journal) or an article of an academic journal would be counted towards the total retail value when the user makes for distribution or distributes more than 25% of the book (or the academic journal) or a complete article of an academic journal. This will make the relevant numeric limit more easily comprehensible to business end-users.

⁵ We believe that two separate numeric limits should be prescribed in relation to (i) books and certain journals (i.e. academic journals being more akin to books in nature), and (ii) newspapers, magazines and periodicals due to the difference in nature and mode of infringements involving the two categories of printed works. For example, in terms of mode of infringements, while it is more common for business end-users to copy a large portion of a book, it is less likely for them to make extensive copies from a newspaper. Instead, business end-users may make clippings of articles relevant to their trade or practice from different newspapers and periodicals.

Reactions from Stakeholders

11. We have sounded out the stakeholders concerned (i.e. (i) the Hong Kong Copyright Licensing Association (HKCLA), representing major newspaper and magazine publishers, and (ii) the Hong Kong Reprographic Rights Licensing Society (HKRRLS), representing major book and journal publishers). HKCLA was supportive of our proposal and urged for early action. HKRRLS welcomed the proposed simplification and, whilst preferring to further lower the threshold to 20%, found the proposed 25% threshold not unacceptable.

Next Steps

12. We propose to introduce an amendment bill into the Legislative Council in early 2009 to tackle the vires issue as explained in paragraph 7 and pave the way for the prescription of the numeric thresholds proposed in paragraph 10. In the amendment bill, we intend to prescribe the numeric limits as a schedule to the principal legislation for consideration by the Legislative Council in one go. After the enactment of the amendment bill, the Administration will roll out suitable publicity and public education activities before bringing the provisions into operation.

Rental Rights for Comics

Background

13. The provisions covering the rental rights for comics are to come into effect after allowing a reasonable period for rental licensing schemes to become available.

14. The Hong Kong Comics & Animation Federation Limited (HKCAF) represents major comics publishers in Hong Kong. Since the latter half of 2007, HKCAF has been making preparations for introducing a rental licensing scheme. As at November 2008, HKCAF has secured authorisation for rental licensing from all local comics copyright owners and owners of more than 40 percent of the Japanese comics titles that are available locally. As Japanese comics account for a substantial share of the local comics rental market, HKCAF will continue to work on their Japanese counterparts with a view to securing authorisation from a clear majority.

Latest Developments

15. In November 2008, HKCAF engaged the operators of a number of rental shops (including the major chain shops) to gauge their views on the proposed rental licensing scheme. While all the operators were supportive of the new rental rights for comics, they were wary of the possible introduction of the scheme in the near future, having regard to the current economic situation. Noting the concerns of the rental shops and the fact that it might still take them some time to secure authorisation from Japanese copyright owners, HKCAF agreed to further engage the rental shops to iron out the details of the licensing scheme. We hope that such dialogue could clear the way for reaching mutually acceptable licensing agreements in due course.

16. The Administration will continue to monitor developments including the readiness on the part of relevant stakeholders to roll out appropriate licensing arrangements, before appointing a date for bringing the rental rights for comics into operation.

Advice sought

17. Members are invited to (i) note and give their views on the proposed amendments to section 119B of the Copyright Ordinance and the revised formulations of the numeric limits as set out in paragraphs 9 and 10 above, and (ii) note the progress of discussions in relation to the rental rights for comics as set out in paragraphs 14 to 15.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
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Commencement of Major Provisions under the Amendment Ordinance

Provisions which have taken effect
<p><u>Upon enactment of the Amendment Ordinance (i.e. 6 July 2007)</u></p> <ul style="list-style-type: none">• Provisions on (a) fair dealing for education; and (b) improvements to existing permitted acts for education• Fair dealing for public administration• Permitted act for visually impaired persons• Liberalisation of parallel imports for business end-users• Measures to facilitate enforcement against copyright offences
<p><u>On 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• Provisions that introduce new criminal and civil liability in relation to making and dealing in circumvention devices• Rental rights for films• Provision on rights management information
<p><u>On 11 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)• Provisions that introduce civil remedies in relation to the act of circumvention