

LEGISLATIVE COUNCIL BRIEF

Organized and Serious Crimes Ordinance (Chapter 455)

ORGANIZED AND SERIOUS CRIMES ORDINANCE (AMENDMENT OF SCHEDULE 1) ORDER 1999

INTRODUCTION

At the meeting of the Executive Council on 12 October 1999, the Council ADVISED and the Chief Executive ORDERED that, subject to the approval of the Legislative Council, the Organized and Serious Crimes Ordinance (Amendment of Schedule 1) Order 1999, at Annex A, should be made under section 31 of the Organized and Serious Crimes Ordinance (OSCO), to add certain offences under the Trade Descriptions Ordinance and the Copyright Ordinance into Schedule 1 to the OSCO.

Annex A

BACKGROUND AND ARGUMENT

General Background

2. Hong Kong is committed to maintaining a robust regime for the protection of intellectual property rights, without which we cannot develop into a centre for technology and innovation. Our approach has been to maintain a comprehensive legal framework, to take vigorous and sustained enforcement action, to step up education and publicity and to liaise with other law enforcement agencies and rights owners.

3. We issued a public consultation paper, "Combating Intellectual Property Rights Infringement in the HKSAR: Possible Additional Legal Tools", in February 1999 to seek views on various options to further enhance

Annex B

our intellectual property laws. The consultation period ended on 30 April 1999. A summary of the submissions received is at Annex B.

4. Taking into account the results of the public consultation exercise, we propose to proceed with the following three relatively straightforward legislative amendments as a first step –

- (a) inclusion of piracy and counterfeiting offences in Schedule 1 to the Organized and Serious Crimes Ordinance (OSCO);
- (b) prevention of bootlegging by creating an offence of unauthorized possession of video recording equipment in a cinema or concert venue; and
- (c) clarification of the law to facilitate prosecution of end-user corporate intellectual property rights offenders, for example, firms producing their goods or services using infringing copies of computer software.

5. In the medium term, we will formulate legislative measures to streamline the processing of copyright piracy cases by allowing a sampling of suspected infringing goods, for example, 10%, to be conclusive evidence in a criminal case. We will also ask the Court of Appeal to hand down sentencing guidelines for the lower courts to follow as and when suitable cases arise. We are also exploring the application of closure orders to premises used for piracy activities.

6. This brief deals with the proposal at paragraph 4(a) above. Other legislative proposals will be submitted separately.

The Proposal

7. The lucrative profits involved in piracy and counterfeiting activities could make them attractive to criminal syndicates. Should this happen, the present laws relating to intellectual property do not provide sufficient powers to tackle the problem. We therefore **propose** that the special investigation and enforcement powers available under the OSCO should be used to deal with piracy and counterfeiting offences where organized crime may be involved.

THE ORDER

8. The Organized and Serious Crimes Ordinance (Amendment of Schedule 1) Order 1999 specifies the additional offences to be included under Schedule 1 to OSCO. **Section 1(a)** deals with offences on the infringement of trade mark rights and the import or export of goods bearing a forged trade mark under sections 9, 12 and 22 of the Trade Descriptions Ordinance, whereas **section 1(b)** specifies offences related to the making or dealing with infringing copies of copyright works under sections 118 and 120 of the Copyright Ordinance. The existing offences specified under Schedule 1 to OSCO are at Annex C for Members' reference.

Annex C

9. As a result of the Order, the following additional legal powers would be available to Customs and Excise officers to investigate certain piracy and counterfeiting offences –

(a) production order

Under section 4 of OSCO, the Secretary for Justice or an “authorized officer” (including any member of the Customs and Excise Service established by section 3 of the Customs and Excise Service Ordinance) may make an *ex parte* application to the Court of First Instance for an order to require a person to produce or to grant access to material specified in the order which is likely to be relevant to the investigation.

(b) restraint order and charging order on crime proceeds

Under section 15 of OSCO, the Court of First Instance may issue a restraint order to prohibit any person from dealing with any realisable property, subject to such conditions and exceptions specified in the order. Under section 16 of OSCO, the Court of First Instance may make a charging order on realisable property for securing the payment of money to the Government.

(c) enhanced sentencing

Section 27 of OSCO enables the prosecution to furnish information to the court regarding the prevalence of the offence, its financial rewards to the defendant, the nature and extent of its impact on the community and the victim(s), and its

connection with the activities of a triad society. Having regard to the information, the Court of First Instance or the District Court may pass an enhanced sentence which is subject to the statutory maximum penalty for the offence in question.

10. It should be noted that the powers under sections 4, 15, 16 and 27(2) are available once an offence is included in Schedule 1 of OSCO, irrespective of whether organized crime is involved. “Organized crime” is defined in section 2 of OSCO. It means a “Schedule 1 offence” that –

- (a) is connected with the activities of a particular triad society; or
- (b) is related to the activities of two or more persons associated together solely or partly for the purpose of committing two or more acts, each of which is a Schedule 1 offence and involves substantial planning and organization; or
- (c) is committed by two or more persons, involves substantial planning and organization and involves –
 - (i) loss of the life of any person, or a substantial risk of such a loss; or
 - (ii) serious bodily or psychological harm to any person, or a substantial risk of such harm; or
 - (iii) serious loss of liberty of any person.

11. Where organized crime is involved, two additional powers are available. Under section 8 of OSCO, the Court of First Instance or the District Court may, upon the application of the prosecution, make a confiscation order to recover proceeds of offences if they are at least \$100,000 in total. Under section 3 of OSCO, the Secretary for Justice may make an *ex parte* application to the Court of First Instance for an order to require a person who is believed to have information relevant to an investigation to answer questions or furnish material that reasonably appears to an authorized officer to be relevant to the investigation of an organized crime. The removal of the right to silence would force the frontline men to identify the mastermind.

LEGISLATIVE TIMETABLE

12. We intend to introduce the Order into the Legislative Council on 3 November 1999 for approval in accordance with section 31 of OSCO.

BASIC LAW IMPLICATIONS

13. The Department of Justice advises that the Order does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

14. The Department of Justice advises that the Order is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

15. The amendments will not affect the current binding effect of the Ordinance.

FINANCIAL AND STAFFING IMPLICATIONS

16. The additional resources arising from the investigation of organized and serious crime in relation to piracy and counterfeiting offences will require eight additional posts at an annual staff cost of \$5.35 million. This requirement will be absorbed by internal redeployment of resources within the Customs and Excise Department.

PUBLIC CONSULTATION

17. We have received more than 500 submissions in response to the public consultation exercise conducted in February 1999, the majority of which are from individual members of the public. There is general support for most of the options presented in the public consultation paper, including the use of enhanced investigative and enforcement powers available under the OSCO. Most professional and trade organizations have also expressed

their general support for more stringent enforcement powers and higher penalties against infringing activities. The Legislative Council Panel on Trade and Industry has been consulted and expressed support for most of the options presented.

PUBLICITY

18. A Legislative Council brief and a press release will be issued on 14 October 1999. A spokesman will be available to handle media enquiries.

ENQUIRIES

19. Enquiries on this brief could be referred to Mr Philip Chan, Principal Assistant Secretary for Trade and Industry, on telephone number 2918 7480.

Trade and Industry Bureau
File Reference : TIB 09/46/12 (27)

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LEGISLATIVE COUNCIL BRIEF

**Organized and Serious Crimes Ordinance
(Chapter 455)**

**ORGANIZED AND SERIOUS CRIMES ORDINANCE
(AMENDMENT OF SCHEDULE 1) ORDER 1999**

- Annex A Organized and Serious Crimes Ordinance (Amendment of Schedule 1) Order 1999
- Annex B Summary of Responses Received Public Consultation on Possible Additional Legal Tools to Combat IPR Infringement
- Annex C Existing Offences Specified under Schedule 1 to the Organized and Serious Crimes Ordinance

**ORGANIZED AND SERIOUS CRIMES ORDINANCE
(AMENDMENT OF SCHEDULE 1) ORDER 1999**

(Made by the Chief Executive in Council under
section 31 of the Organized and Serious
Crimes Ordinance (Cap. 455) subject
to the approval of the
Legislative Council)

**1. Offences relevant to definitions
of "organized crime" and
"specified offence"**

Schedule 1 to the Organized and Serious Crimes Ordinance (Cap. 455) is amended -

(a) by adding -

"14A. Trade Descriptions Ordinance (Cap. 362) section 9(1) and (2)	offences in respect of infringement of trade mark rights
section 12 (provided that for the purpose of this Ordinance, an offence under section 12 of the Trade Descriptions Ordinance does not include an offence	import or export of goods bearing forged trade mark

relating only to false
trade description)

section 22

(provided that for the
purpose of this
Ordinance, "offence
under this Ordinance".
referred to in section
22 of the Trade
Descriptions Ordinance
only means an offence
under -

- (a) section
9(1) or (2)
of that
Ordinance;
or
- (b) section 12
of that
Ordinance,
excluding
any
offence
relating
only to

being

accessory to
certain offences
committed
outside Hong
Kong";

false trade
description)

(b) by adding -

"18. Copyright Ordinance
(Cap. 528)

section 118(1), (4) and (8)
(provided that for the
purpose of this
Ordinance, "infringing
copy" referred to in
section 118(1) and (4) of
the Copyright Ordinance
does not include a copy
of a work which is an
infringing copy by virtue
only of section 35(3) of
that Ordinance)

offences relating to
making or
dealing with
infringing
copies

section 120(1), (2), (3) and
(4) (provided that for the
purpose of this
Ordinance,

offences relating to
making
infringing
copies

"infringing copy" referred to in section 120(1) and (3) of the Copyright Ordinance does not include a copy of a work which is an infringing copy by virtue only of section 35(3) of that Ordinance) outside Hong Kong".

Clerk to the Executive Council

COUNCIL CHAMBER

1999

Explanatory Note

This Order amends Schedule 1 to the Organized and Serious Crimes Ordinance (Cap. 455) ("the Ordinance") to add certain offences under the Trade Descriptions Ordinance (Cap. 362) and the Copyright Ordinance (Cap. 528). Once added to the Ordinance, such offences will be subject to the provisions of the Ordinance which provide for additional powers of investigation into certain crimes

and proceeds of crime, the confiscation of proceeds of crime and related matters.

Summary of Responses Received
Public Consultation on Possible Additional Legal Tools to Combat IPR Infringement

(as at the deadline of the consultation period on 30.4.99¹)

I. Numerical Analysis

(Basic Assessment Criteria)

- each signed letter or e-mail will be counted as one submission
- general statements on the legal or administrative IPR regime are not counted as opinions in favour of or against a particular option

Total Number of Submissions: 518¹

(411 from private individuals and 107 from organisations or other bodies)

<u>Option</u>	<u>In Favour</u>	<u>Against/ Reservations</u>	<u>No Comment/ Not Indicated</u>
1. To include IPR offences as Organised and Serious Crimes	270	31	217
2. To amend the IP laws to incorporate special investigation and enforcement powers under OSCO.	250	11	257
3. To impose minimum or standard sentences for IPR offences	233	35	250

¹This figure does not include the late submissions.

<u>Option</u>	<u>In Favour</u>	<u>Against/ Reservations</u>	<u>No Comment/ Not Indicated</u>
4. To impose closure orders following the model of the Crimes Ordinance	261	13	244
5. To impose immediate closure orders following 1st conviction of IPR offences	240	40	238
6. To ban unauthorised recording in cinemas and concert venues	250	22	246
7. To ban recording equipment in cinemas and concert venues	251	30	237
8a. To introduce fixed penalties for consumers of infringing goods	226 ²	153 ³	139
8b. To introduce offence for import or export of even a small quantity of infringing goods for private use	218 (please also see footnote 2)	42	258
8c. To re-cast the offence of possessing of infringing articles	218 (please also see footnote 2)	34	266

² It should be noted that there are more than 240 submissions from employees or organisations directly related to the movie or cinema industries, and the majority supports the "consumer liability" concept.

³ Including one submission attaching 1,238 signatures objecting to the options on banning

recording equipment in cinemas or other places or public performances; fixed penalty for consumers of pirated materials; and the introduction of an offence for import or export of even a small quantity of infringing goods for private use.

Chapter:	455	Title:	ORGANIZED AND SERIOUS CRIMES ORDINANCE	Gazette Number:	45 of 1999
Schedule:	1	Heading:	OFFENCES RELEVANT TO DEFINITIONS OF "ORGANIZED CRIME" AND "SPECIFIED OFFENCE"	Version Date:	16/07/1999

[sections 2 & 31]

Common law offences

1. murder
2. kidnapping
3. false imprisonment
4. conspiracy to pervert the course of justice

Statutory offences

Offence	Description*
5. Import and Export Ordinance (Cap 60)	
section 6A	import or export of strategic commodities
section 6C	import of certain prohibited articles
section 6D(1) and (2)	export of certain prohibited articles
section 6E	carriage, etc. of prescribed articles in Hong Kong waters
section 18	importing or exporting unmanifested cargo
6. Immigration Ordinance (Cap 115)	
section 37D(1)	arranging passage to Hong Kong of unauthorized entrants
section 38(4)	carrying an illegal immigrant
section 42(1) and (2)	false statements, forgery of documents and use and possession of forged documents
7. Dangerous Drugs Ordinance (Cap 134)	
section 4(1)	trafficking in dangerous drugs
section 4A(1)	trafficking in purported dangerous drugs
section 6(1)	manufacturing a dangerous drug
8. Gambling Ordinance (Cap 148)	
section 5	operating, managing or controlling gambling establishment
section 7(1)	bookmaking
9. Societies Ordinance (Cap 151)	
section 19	penalties on an office-bearer, etc. of an unlawful society
section 21	allowing a meeting of an unlawful society to be held on premises
section 22	inciting etc., a person to become a member of an unlawful society
10. Money Lenders Ordinance (Cap 163)	
section 24(1)	lending money at an excessive interest rate
11. Crimes Ordinance (Cap 200)	

section 24	threatening a person with intent
section 25	assaulting with intent to cause certain acts to be done or omitted
section 53	causing explosion likely to endanger life or property
section 54	attempt to cause explosion, or making or keeping explosive with intent to endanger life or property
section 55	making or possession of explosive
section 60	destroying or damaging property
section 61	threats to destroy or damage property
section 71	forgery
section 75(1)	possessing a false instrument with intent
section 98(1)	counterfeiting notes and coins with intent
section 100(1)	custody or control of counterfeit notes and coins with intent
section 105	importation and exportation of counterfeit notes and coins
section 118	rape
section 119	procurement of person by threats
section 120	procurement of person by false pretences
section 129	trafficking to or from Hong Kong in persons
section 130	control over person for purpose of unlawful sexual act or prostitution
section 131	causing prostitution of person
section 134	detention of person for unlawful sexual act or in vice establishment
section 137	living on earnings of prostitution
section 139	keeping a vice establishment
12. Theft Ordinance (Cap 210)	
section 9	theft
section 10	robbery
section 11(1)	burglary
section 16A	fraud (Added 45 of 1999 s. 6)
section 17	obtaining property by deception
section 18	obtaining a pecuniary advantage by deception
section 18D	procuring false entry in certain records
section 19	false accounting
section 23(1) and (4)	blackmail
section 24(1)	handling stolen goods
13. Offences against the Person Ordinance (Cap 212)	
section 17	shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm
14. Firearms and Ammunition Ordinance (Cap 238)	
section 13	possession of arms or ammunition without licence
section 14	dealing in arms or ammunition without a licence
15. Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405)	
section 25(1)	assisting another to retain the benefit of drug trafficking

16. Organized and Serious Crimes Ordinance
(Cap 455)
section 25(1) assisting a person to retain proceeds of indictable offence
17. Weapons of Mass Destruction (Control of
Provision of Services) Ordinance (Cap
526)
section 4 providing services that assist the development,
production, acquisition or stockpiling of weapons
of mass destruction (Added 90 of 1997 s. 15)

* Note: The short description of offences in this Schedule is for ease of reference only.

(Enacted 1994)
