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Foreword

The introduction of criminal liability for end-user copyright piracy in April 2001 triggered a heated debate in the community. There was concern that the new law impaired the dissemination of information in enterprises and teaching in schools. In June, with the approval of the Legislative Council, the Government suspended the new law except as it applied to computer programs, movies, television dramas and musical recordings. The suspension will end on 31 July 2002. We have undertaken to formulate a long-term solution after wide consultation in the community.

2. This consultation document addresses the main issues raised in the community debate, as well as some related issues over which members of the public have also expressed their concern at that time. We invite the public to give views on all of these issues. The strength of public opinion on an issue will be an important factor to be taken into account when we determine the way forward and formulate concrete legislative proposals.

3. An electronic copy of this document is available at the following websites -

- Commerce and Industry Bureau http://www.info.gov.hk/cib
- Intellectual Property Department http://www.info.gov.hk/ipd
- Government of the Hong Kong Special Administrative Region http://www.info.gov.hk

4. Please send your views to the Commerce and Industry Bureau **before 31 December 2001** for the attention of Ms Laura Tsoi, Assistant Secretary for Commerce and Industry, in one of the following ways -

- **by mail, at Level 29, One Pacific Place, 88 Queensway, Hong Kong**
- **by fax, at 2869 4420**
- **by email, at laura_tsoi@cib.gov.hk**

5. Unless you specify a reservation, we shall assume that you have licensed us to reproduce and publish your views in whole or in part in any form and to use, adapt or develop any proposals put forward without the need for permission or subsequent acknowledgement of the party making the proposal.

Commerce and Industry Bureau
October 2001

CHAPTER 1

CRIMINAL PROVISIONS RELATED TO END-USER PIRACY

1.1 On 1 April 2001, the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 ("the Amending Ordinance") came into effect. A key effect of the Amending Ordinance is to amend the Copyright Ordinance so that a person will commit an offence if he possesses knowingly an infringing copy of a copyright work for the purpose of, in the course of, or in connection with, any trade or business.

1.2 The Amending Ordinance was enacted as a response to community concerns about rampant copyright piracy in computer software, films and music. In 1999, we consulted the public on several measures to strengthen the law to combat this problem. One of the measures that gained wide support was to criminalise the possession of a pirated copy of a copyright work other than for personal, domestic use.

1.3 This measure targets acts of copyright piracy by business end-users. It addresses the perceived 'gap' in the then prevailing Copyright Ordinance whereby a person possessing an infringing copy of a copyright work would be prosecuted only if he is found to be "dealing in" (e.g. buying and selling) the infringing copy. With the amendments introduced by the Amending Ordinance, a firm that uses, for example, pirated computer software in its business may be liable to criminal prosecution.

1.4 Apart from pirated computer programs or music / video compact discs, an infringing copy may be, among others, an unauthorised photocopy of a newspaper article, an unauthorised recording of a television news programme, or an electronic copy of an INTERNET webpage made without permission. Furthermore, the term "business" as used in the Copyright Ordinance is not confined to commercial activities. It can also cover educational, charitable or government activities. That is to say, the new end-user criminal liability applies to the possession of an infringing copy in the course of such activities.

1.5 To address public concerns that the new end-user criminal liability is too onerous and, as a result, has hampered dissemination of information and classroom teaching, the Copyright (Suspension of Amendments) Ordinance 2001 has suspended the relevant provisions except as they apply to computer programs, movies, television dramas and musical recordings. The Government has undertaken to consult the public widely with a view to

formulating a long-term solution before the suspension expires in July 2002.

Issues of concern

1.6 Public concerns about the new end-user criminal liability introduced by the Amending Ordinance focus on the following issues -

(a) ***whether criminal sanction should apply to the possession of an infringing copy of a copyright work in 'business' activities of a non-profit-making nature.*** Those in favour consider it fair to treat equally all activities that are not for private or domestic purposes. They believe that educational, charitable or government organisations, despite that their activities are not for profit, should uphold the same high standard of respect for intellectual property rights as commercial organisations. The opposite view is that non-profit-making activities should be treated the same as those for private and domestic purposes, as the infringing act involves no commercial advantage or private financial gain;

(b) ***whether employees in possession of an infringing copy supplied by the employer for use in business should be criminally liable.*** There are concerns that criminal sanction is too harsh for employees who will have little clout to bargain with the employer if they wish to keep their job. On the other hand, some have argued that employees who knowingly collaborate with the employer to infringe the intellectual property rights of other people should not be condoned. Such employees are considered as being no different from a salaried employee selling pirated computer software for the employer. Moreover, to exempt employees from criminal liability would diminish the deterrent effect of the new law;

(c) ***whether the end-user criminal provisions should apply only to copyright works afflicted by rampant piracy.*** Those in support argue that criminal sanction against end-users is a stringent measure that should be used only where there is a serious piracy problem. Those against consider that the law should treat all

types of copyright work equally;

(d) ***whether certain acts of the end-user which infringe copyright but which do not give the end-user any commercial advantage or private financial gain, should be exempt from criminal liability.*** Such unauthorised acts may include, for example, photocopying a newspaper article, recording a television news report, or printing a picture downloaded from a website, for archival purpose without permission. Those in favour of exemption argue that these acts generally do not conflict with a normal exploitation of the work by the copyright owner or unreasonably prejudice his legitimate interests. Many are done on an ad hoc basis and the scale of infringement is small. Those against consider that such acts are restricted by copyright and right holders are entitled to exercise their right regardless of the scale of the infringement. Criminal sanction is an effective deterrent against users who do not bother to obtain permission from right holders; and

(e) ***whether the expression "for the purpose of, in the course of, or in connection with, any trade or business" introduced by the Amending Ordinance has cast the criminal net too wide.*** The suggestion has been made to delete the phrase “in connection with" from the expression so that activities incidental to or marginally related to business will be outside the scope of the end-user criminal provisions. In some other provisions of the Copyright Ordinance, similar expressions have been added by the Amending Ordinance for the sake of consistency. It has been further suggested that the phrase “in connection with” should be deleted similarly from those provisions.

Possible options

1.7 Depending on the outcome of this consultation exercise, there could be a wide range of options on the way forward. At one extreme is the option to maintain all the provisions in the Copyright Ordinance as amended by the Amending Ordinance after the suspension expires next July. At the other end, the option is to repeal all the end-user criminal provisions in the Copyright Ordinance introduced by the Amending Ordinance. In between there could be

different ways to re-shape the criminal provisions in the Copyright Ordinance to address the issues outlined in paragraph 1.6 above.

1.8 One possible option is making the effects of the Copyright (Suspension of Amendments) Ordinance 2001 permanent. This means that criminal sanction will continue to be available against any person who possesses knowingly in business an infringing copy of a computer program, a movie, a television drama or a musical recording. The possession of an infringing copy of other types of copyright work will not be a criminal offence. This option had been debated in the Legislative Council before the suspension legislation was enacted in June and was generally acceptable to the community at that time.

1.9 As mentioned above, other options may be formulated having regard to the public's response to this consultation document and the specific issues outlined in paragraph 1.6.

1.10 We do not have any preferred option at this stage. However, in considering whether and how the criminal provisions in the Copyright Ordinance should be re-shaped, it is important to take account of the following factors –

(a) there is still a significant problem of copyright piracy with respect to computer software, movies, television dramas and musical recordings, and a continued need to provide a strong and effective deterrent against such piracy;

(b) effective protection of copyright will help boost the development of Hong Kong's knowledge economy, particularly in relation to information technology;

(c) in many sectors of the society, there appears a practical need for timely dissemination of information by photocopying, faxing, as well as transmission over the INTERNET which may involve making copies of copyright works; and

(d) it is necessary to uphold Hong Kong's international image and treaty obligations.

Summary

1.11 Your views are sought on the following issues –

(a) whether criminal sanction should apply to the possession of an infringing copy of a copyright work in 'business' activities of a non-profit-making nature;

(b) whether employees in possession of an infringing copy supplied by the employer for use in business should be criminally liable;

(c) whether end-user criminal liability should apply only to copyright works afflicted by rampant piracy;

(d) whether certain acts of the end-user which infringe copyright but which do not give the end-user any commercial advantage or private financial gain, should be exempt from criminal liability; and

(e) whether the phrase "in connection with" in the expression "for the purpose of, in the course of, or in connection with, any trade or business" used in the Copyright Ordinance as amended by the Amending Ordinance should be removed.

CHAPTER 2

PERMITTED ACTS FOR EDUCATIONAL PURPOSES

2.1 The Copyright Ordinance permits certain acts to be done in relation to copyright works notwithstanding the subsistence of copyright. These permitted acts are subject to various conditions specified in the Ordinance. The primary consideration is that the act should not conflict with a normal exploitation of the work by the copyright owner, or unreasonably prejudice his legitimate interests.

2.2 Some of the permitted acts are directly related to education. They fall under the following categories –

- Things done for the purpose of instruction or examination (section 41 of the Ordinance)
    - Anthologies for educational use (section 42)
- Performance, playing or showing work in the course of activities of educational establishments (section 43)
- Recording by educational establishments of broadcasts and cable programmes (section 44)
- Reprographic copying made by educational establishments of passages from published works (section 45)

These permitted acts strike a balance between the practical need for using copyright works for educational purposes, and the protection of copyright.

'Reasonable extent' and 'Passages'

2.3 Section 41(1) of the Ordinance provides that copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied, to a reasonable extent, in the course of instruction or of preparation for instruction, if the copying –

(a) is done by a person giving or receiving instruction; and

(b) is not by means of a reprographic process[1].

2.4 Section 45(1) of the Ordinance provides that reprographic copies of artistic works or of passages from published literary, dramatic or musical works may, to a reasonable extent, be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work, or in the typographical arrangement.

2.5 In both of these sections, the expression 'to a reasonable extent' is used to limit the scope of the permitted act of copying of works. This expression has not been defined in the Ordinance so as to allow flexibility in its interpretation under different circumstances. However, in the absence of a clear definition, many teachers find it difficult to ascertain whether or not a specific act of copying is reasonable. They are thus uncertain whether the act is permitted. Such ambiguity to an extent discourages teachers from using, say, materials extracted from newspapers or downloaded from the INTERNET for maximum teaching effectiveness. This is because in practice the inspiration to use a work and the moment of its use are so close in time that it would be impossible to expect a timely reply to a request for permission from the copyright owner.

2.6 In addition, the use of the expression 'passages from published literary, dramatic or musical works' in section 45(1) has the effect of limiting the copying to a small extract of the work concerned. Without a precise definition of the word 'passage', this provision has similarly created for teachers a problem of determining the extent of permissible copying. The provision has also prevented teachers from photocopying works of short length, e.g. a newspaper editorial or a short poem, for effective classroom use.

2.7 There are two possible approaches to resolve the problem. One is for copyright owners and the educational sector to work out together some detailed, non-statutory guidelines for different circumstances. This approach has been adopted in the United States.

2.8 The other approach is to legislate in more definitive terms the extent of free, permissible copying. Bearing in mind the primary consideration that the copying must not conflict with a normal exploitation of the work by the copyright owner, or unreasonably prejudice his legitimate interests, and based

[1] A reprographic process means a process –
(a) for making facsimile copies (e.g. photocopying); or
(b) involving the use of an appliance for making multiple copies,
and in relation to a work held in electronic form, includes copying by electronic means.

on the experience of some other jurisdictions, the following elements may be covered in the definition –

(a) the maximum number of pages of a published work that may be copied within a period of time. For example, Australia allows two pages within 14 days and Singapore allows five pages;

(b) the maximum percentage of a published work that may be copied within a period of time. For example, the United Kingdom allows one per cent within one quarter; Australia allows one percent within 14 days (but in any event not less than two pages); Singapore allows five percent within 14 days (but in any event not less than five pages);

(c) the number of copies to be made. For example, Germany limits the number to that required for one school class;

(d) whether the copying of the work concerned is deemed necessary for the purpose of instruction; and

(e) the nature and purpose of the work being copied. For example, whether it is intended to be 'consumed' in the course of instruction, such as exercises, workbooks and tests.

By its nature, the statutory approach is likely to be less flexible, less detailed, and more restrictive than the non-statutory approach.

Copying not permitted where licensing schemes are available

2.9 The permitted act of recording or copying under sections 44 and 45 of the Ordinance will not be a permitted act if –

(a) licences under licensing schemes are available authorising the recording or copying in question; and

(b) the person making the copies knew or ought to have been aware of that fact.

2.10 This condition is not applicable to other permitted acts for educational purposes mentioned in paragraph 2.2 above. Since the recording or copying in question does not conflict with a normal exploitation of the work by the copyright owner, or unreasonably prejudice his legitimate interests, there may be a case for removing the carve-out to reduce teachers' uncertainty and

facilitate teaching. In quite a number of jurisdictions where free copying of insubstantial parts of works for educational purposes is permitted, such a condition does not exist.

Uploading of copyright works to school INTRANET

2.11 As computer-based communication becomes more and more popular and inexpensive, the use of INTRANET for information dissemination within a school is growing. For example, teachers may distribute teaching reference materials or examination papers to students by posting them on the school INTRANET, and students may similarly share their research project reports with other students.

2.12 The uploading of a copyright work to the INTRANET may involve three steps –

- the conversion of the work from paper form to electronic form, which normally amounts to copying of the work;
- the transmission of the electronic copy of the work to a computer server; and
- allowing access to the work by teachers and students within the school.

From the legal standpoint, it is not certain whether the third step will amount to making the work available to the public, which is an act restricted by copyright. At present, there is no provision in the Copyright Ordinance for permitting such an act for educational purposes. It is for consideration whether a permitted act in relation to this should be provided in the same spirit as in the case for copying an insubstantial part of a work for educational purposes.

Summary

2.13 Your views are sought on the following issues -

(a) the approach to be adopted for clarification of the meaning of "to a reasonable extent" and "passages' in sections 41 and 45 of the Copyright Ordinance;

(b) if a statutory approach is to be adopted, the elements that should be covered in clarifying the meaning of the two expressions;

(c) whether the act of recording or copying permissible under sections 44 and 45 of the Copyright Ordinance should be permitted no matter licences under licensing schemes are available or not; and

(d) whether a new permitted act should be provided under the Copyright Ordinance to facilitate the uploading of copyright works to a school INTRANET for access within the school.

CHAPTER 3

PERMITTED ACTS FOR VISUALLY IMPAIRED PERSONS

3.1 The Copyright Ordinance permits designated non-profit-making bodies to make copies of television broadcasts or cable programmes for the purpose of providing people with a physical or mental disability with copies which are sub-titled or otherwise modified for their special needs. These non-profit-making bodies will not need to obtain authorisation from the copyright owners concerned unless licensing schemes are available for authorising such acts.

3.2 There are about 75,000 visually impaired persons in Hong Kong. Most of them have difficulty in reading copyright works in the traditional printed format. For their education, employment and daily living, there is a need for such works to be transcribed into Braille, large-print, talking or other specialised formats. The transcription amounts to doing acts restricted by copyright, e.g. copying or adapting the copyright work. It is for consideration whether such transcriptions should be similarly permitted under the Copyright Ordinance provided that they are carried out by non-profit-making bodies for the exclusive use of visually impaired persons, and that no such transcriptions are commercially available in Hong Kong within a reasonable time or at a reasonable price.

3.3 As mentioned in paragraph 3.1 above, where a licensing scheme is available for authorising the relevant act, the non-profit-making body must obtain a licence and cannot rely on the exemption provided in the Copyright Ordinance. There may be a case to review whether the law should be further relaxed by removing this requirement. In a number of overseas jurisdictions where statutory exemptions are provided for people with a disability, for example, the United States, Canada and Japan, no such requirement exists.

Summary

3.4 Your views are sought on –

(a) whether a new permitted act should be provided for the transcribing of works in the printed format into Braille, large-print, talking or other specialised formats by non-profit-making bodies for the exclusive use of visually impaired persons where no such transcriptions are commercially available in Hong Kong within a reasonable time or at a reasonable price; and

(b) whether the acts mentioned in paragraphs 3.1 and 3.2 above should be permitted no matter a licensing scheme is available or not for authorising those acts.

CHAPTER 4

PERMITTED ACTS RELATED TO FREE PUBLIC SHOWING OR PLAYING OF BROADCAST OR CABLE PROGRAMME

4.1 Under the Copyright Ordinance, the showing or playing in public of a broadcast or cable programme generally requires the permission of the right holders concerned. The right holders related to a broadcast or cable programme may include, among others –

- the broadcast or cable programme service operator;
- the producer of the film or sound recording included in the broadcast or programme;
- the artist whose performance has been recorded in the film or sound recording;
- the composer of the music included in the film or sound recording; or
- the writer of the lyrics of a song in the film or sound recording.

4.2 However, the Copyright Ordinance also provides that the showing or playing in public of a broadcast or cable programme (other than an encrypted programme)[2] to an audience who has not paid for admission to the place where the broadcast or programme is shown or played, does not infringe any copyright in -

(a) the broadcast or cable programme; or

(b) any sound recording or film included in it,

or infringe any right in relation to the performance included in the sound recording or film.

4.3 For example, the playing of a radio music programme in a shopping mall or a showroom for audio equipment may not infringe the

[2] For example, a radio or television programme which does not require the payment of a fee for it to be heard or seen.

copyright in the radio broadcast or the sound recording included in it, or the performers' right in the sound recording. This exemption, however, does not extend to other underlying works such as the music and lyrics of a song included in the radio programme. Thus, the copyright holders of the music and lyrics of the song may demand the payment of royalty by the shopping mall and showroom operators, whereas the radio broadcaster and performers cannot do so. This appears to be an inconsistency.

4.4 Some copyright users have expressed the view that the exemption should be extended to cover all underlying copyright works included in the broadcast or cable programme. They argue that all the works in the broadcast or programme should be treated the same. Moreover, when the copyright holders of the underlying works licensed their works to the radio or television network operators, they should have been aware that their works would be accessible to the general public by way of the broadcast or cable programme. They should not therefore expect to be paid any royalty for the showing or playing of their works in public to an audience who has not paid for admission to the place where the works are to be shown or played. On the other hand, copyright holders consider it appropriate to give a higher level of protection to the underlying works to encourage intellectual creation.

4.5 Another issue is whether the existing condition for exemption - that the audience has not paid for admission to the place where the broadcast or cable programme is to be seen or heard – is too restrictive. Based on this condition, for example, the showing of a television broadcast to in-patients in a private hospital or to customers in a restaurant, the provision of a television set in a hotel room for the use of guests, or the playing of a radio programme in a taxi carrying passengers may not qualify for exemption.

4.6 Some copyright users have suggested that the showing or playing in public of a non-encrypted broadcast or cable programme such as those set out in paragraph 4.5 above should be exempted even where an admission fee is charged. They point out that such broadcast or programme is generally accessible to the general public free of charge, and that almost every home in Hong Kong is equipped with television sets and radios to receive such broadcast or programme. They argue that in those cases set out in paragraph 4.5, the showing or playing of the broadcast or programme does not conflict with a normal exploitation of the related works by the right holders, or unreasonably prejudice their legitimate interests. In addition, they hold the view that the admission charge in those cases (i.e. charge for room and treatment in private hospitals, charge for food and service in a restaurant, hotel room charge, and fare for taxi journey) is not substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme. Furthermore, if a royalty is

paid to the right holders, the cost is likely to be passed on to the end-user ultimately who would not need to pay anything had he seen or heard it, say, at home.

4.7 On the other hand, there may be situations where goods or services supplied at the premises in which the broadcast or cable programme is shown or played are charged at prices which are substantially attributable to the facilities provided for seeing or hearing the broadcast or programme. In such cases, right holders may arguably have good justification to demand a royalty.

4.8 One option to address the issue is to confine the meaning of 'paid for admission to the place' (see paragraph 4.2 above) to the situation where goods or services are supplied at that place at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme.

Summary

4.9 Your views are sought on –

(a) whether the statutory exemption in paragraph 4.2 above should be extended to cover all underlying copyright works included in the broadcast or cable programme; and

(b) whether the exemption should be extended to cover all public places where the broadcast or cable programme is shown or played except where goods or services are supplied at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme.

CHAPTER 5

PARALLEL IMPORTATION OF COPYRIGHT WORKS OTHER THAN COMPUTER SOFTWARE

5.1 In May 2001, we consulted the public on a proposal to liberalise parallel importation of computer software. During the consultation, some respondents expressed the view that parallel importation of all other types of copyright work should also be made legal. However, some others held the view that parallel importation of movies and musical works should not be liberalised as this would severely damage the local movie and music industries. We undertook to consult the public further on this matter in the current exercise.

Parallel importation – definition and legal provisions

5.2 Parallel importation of a copyright work usually means the importation into Hong Kong without permission of the copyright owner, of a copy of that work which has been lawfully made outside Hong Kong.

5.3 Under the Copyright Ordinance, a copy of a copyright work which is parallel imported and which, if made in Hong Kong, would have either infringed the copyright in that work, or breached an exclusive licence agreement relating to that work, is regarded as an infringing copy.

5.4 For a copyright work which has been published for 18 months or less, it is a criminal offence to import otherwise than for private and domestic use a copy of that work which is an infringing copy by virtue of its parallel importation as described in paragraph 5.3 above. It is also a criminal offence to deal in such an infringing copy (e.g. selling it). The maximum penalty is $50,000 per infringing copy and four years' imprisonment.

5.5 In general, parallel importation of or subsequent dealing in a copyright work which has been published for more than 18 months will not attract criminal liability[2], but civil remedies (e.g. injunction and damages) are still available to the copyright owner.

[2] No time limit applies to copies of a work made in a country, territory or area where there is no law protecting copyright in that work or where the copyright in the work has expired.

Parallel importation of computer software

5.6 There is overwhelming support from the public and the Legislative Council for making parallel importation of computer software legal. We are preparing the necessary legislative amendments to this end.

Parallel importation of other copyright works

5.7 Common examples of copyright works other than computer software which may be parallel imported include books, magazines, films, and musical recordings. A less obvious example is an article, say, a compact disc player or a toy, made by an industrial process from a design in which copyright subsists. Such an article may be treated as a copy of that design, in which case the parallel importation of the article is restricted in broadly the same way as for other copyright works.

5.8 Removing the restrictions on parallel importation for all types of copyright work would be in line with Hong Kong's free-market philosophy, as this will facilitate the free flow of goods. Liberalising parallel importation would increase competition and the availability of products in the market, resulting in more choices and lower prices for the consumer. Such liberalisation will also be in step with the growing popularity of purchases through the borderless INTERNET.

5.9 However, this move may affect the interests of copyright owners, exclusive licensees and sole distributors. Liberalising parallel importation would limit the ability of copyright owners in segregating markets and in adopting different pricing for different markets. Exclusive licensees and sole distributors may face competition from parallel importers once the restrictions are lifted.

5.10 In particular, the local movie and music industries have raised objection to liberalising parallel importation of films and musical recordings. They have argued that Hong Kong needs a high standard of protection against parallel importation to ensure that investment in the production and distribution of films and musical recordings will continue to flourish. According to these industries, the commercial value of their products is the highest immediately after their first publication and restricting parallel importation at this time is critical. For this reason, and after much debate in the Legislative Council in 1997 when the Copyright Ordinance was enacted, the Ordinance now provides for an 18-month period after the first publication of a copyright work in which parallel importation will be subject to criminal sanction.

5.11 In the four years since 1997, we have seen the emergence of a much more integrated global market, partly due to the development of the INTERNET and e-commerce. There may be a case for reviewing whether the restrictions on parallel importation should be lifted; and even if there is a continuing need for the restrictions to remain for some types of copyright work, whether the 18-month threshold should be shortened.

Parallel importation – international practices

5.12 There is no international standard or consensus on parallel importation. Parallel importation is prohibited in the United States. In the European Union (EU), parallel importation among members of the EU is allowed while that from outside the EU is prohibited. Both Singapore and New Zealand allow parallel importation for all types of copyright work. Australia adopts a selective approach, permitting parallel importation of sound recordings. A bill to liberalise the parallel importation of computer software, books, periodicals and sheet music is being considered in the Australian Parliament.

End-user civil and criminal liabilities

5.13 The amendments to the Copyright Ordinance effective on 1 April 2001 introduced both civil liability and criminal sanction against the possession of an infringing copy of a copyright work in the course of business. Since a parallel imported copy of a work can be an infringing copy, a person who uses a parallel imported copy of a work in business may incur civil and criminal liabilities[3]. For example, a karaoke lounge playing a parallel imported compact disc may be criminally liable. Regardless of whether parallel importation should be liberalised, there appears a case to remove the criminal and civil liabilities of the end-user for using parallel imported copies of a work in business.

Summary

5.14 Your views are sought on the following issues -

(a) whether the civil liability and criminal sanction against parallel importation of and subsequent dealing in all types of copyright work should be removed, and whether there should be any

[3] The Copyright (Suspension of Amendments) Ordinance 2001 enacted in June 2001 has the effect of suspending until 31 July 2002 the new criminal provisions except as they apply to computer programs, movies, television dramas and music recordings. The Ordinance has also suspended the criminal sanction against a person using parallel imported computer programs in the course of business.

exception;

(b) if there should continue to be criminal sanction against parallel importation of and subsequent dealing in some types of copyright work, whether the current 18-month threshold should be reduced; and

(c) whether the civil liability and criminal sanction imposed on end-users of parallel imported copies of copyright works in business should be removed.

CHAPTER 6

UNAUTHORISED RECEPTION OF SUBSCRIPTION TELEVISION PROGRAMMES

6.1 Subscription television services offer a wide range of programmes catering to the interests of different viewers. They increase consumer choice and enrich Hong Kong's cultural life. The major source of income for providers of such services is often the fees paid by viewers. To ensure the economic viability of such services, legal protection against fraudulent access to such services is necessary.

6.2 Service providers usually control access to subscription television programmes by encrypting them so that only subscribers can access a programme by way of authorised decoders. Under the Broadcasting Ordinance, it is a criminal offence for a person to import, export, manufacture, sell, offer for sale, or let for hire an unauthorised decoder in the course of trade or business. The maximum penalty is a fine of $1 million and five years' imprisonment.

6.3 In addition, under the Copyright Ordinance, a service provider has the same rights and remedies against a person who makes, imports, exports, sells or lets for hire a decoder for receiving its subscription television programmes without authorisation, as a copyright owner has in respect of an infringement of copyright.

6.4 Fraudulent reception of subscription television programmes is not uncommon in many developed countries. In Hong Kong, the problem has been rising in recent years. This is partly due to the ready availability, both within Hong Kong and across the boundary, of low-cost illicit devices which enable viewers to access subscription television programmes in Hong Kong free of charge. It is also partly due to the fact that the laws of Hong Kong currently provide no civil remedy or criminal sanction against the fraudulent reception of subscription television programmes per se.

6.5 We need to consider whether and, if so, how the law should be strengthened to tackle this rising problem, which will also adversely affect the attractiveness of Hong Kong as a regional broadcasting hub.

Possible options

Fraudulent reception - criminal liability

6.6 One option is to make it an offence for a person to receive a subscription television programme fraudulently, with intent to avoid payment of any charge applicable to the reception of such programme.

6.7 This option will tackle the problem at source and will have a strong deterrent effect. It is consistent in principle with the criminal sanction against fraudulent abstraction of electricity, or the fraudulent use of a public telephone with intent to avoid payment, under the Theft Ordinance. Criminal sanction against fraudulent reception of subscription television programmes exists in, for example, the United Kingdom, the United States and New Zealand.

6.8 In considering this option, we need to examine -

(a) whether the problem is so severe as to justify criminal sanction;

(b) whether such 'end-user' criminal liability is too harsh, particularly where the reception is for private and domestic purposes;

(c) how the criminal law will be enforced. To be effective, an enforcement agency will often have to enter premises, including domestic premises, to gather evidence after a report of violation is received. This could be quite intrusive. On the other hand, in the three jurisdictions mentioned in paragraph 6.7 above, there is no active enforcement of the criminal law at least in respect of private and domestic premises; and

(d) whether service providers could overcome the problem by employing digital transmission and advanced encryption technology.

Fraudulent reception - civil liability

6.9 Apart from criminal liability, it is for consideration whether a person who receives a subscription television programme fraudulently should be liable to civil action (e.g. injunction, damages and recovery of costs) by service providers. For example, the law in the United States provides for both criminal and civil remedies against fraudulent reception.

Possessing unauthorised decoders for commercial purpose

6.10 Another approach, which is narrower in scope, is to introduce criminal sanction and civil remedy against the possession of unauthorised decoders for commercial purposes. Under this approach, for example, a bar which uses an unauthorised decoder to receive a subscription sports programme for the enjoyment of its customers will commit an offence and be subject to civil action by the service provider. However, a person who uses a similar device at home to access the same programme for private enjoyment will not be liable. The United Kingdom has both criminal sanction and civil remedy against possession of unauthorised decoders for commercial purposes. In Australia, only civil remedy is available.

6.11 This option will be effective against fraudulent reception for commercial purposes. But it cannot address the problem in the private and domestic domain.

Summary

6.12 Your views are sought on the following issues –

(a) whether criminal sanction against fraudulent reception of subscription television programmes should be introduced;

(b) whether civil remedy against fraudulent reception of subscription television programmes should be introduced; and

(c) whether criminal sanction and civil remedy against the possession of an unauthorised decoder for commercial purposes should be introduced.

CHAPTER 7

LICENSING BODIES

7.1 A licensing body is a society (or other types of organisation) which has as one of its main objects, the negotiation or granting of licences to copyright users in relation to works of more than one author. The licensing body may be a copyright holder or an agent for him.

7.2 The existence of licensing bodies makes it more convenient for copyright users to obtain authorisation from different authors. Instead of locating and negotiating with each author individually, a prospective user can negotiate with one single body representing the authors collectively.

7.3 Since copyright is a private property right, right holders can set royalty charges and other terms of the licence freely. A licensing body representing most or all of the authors in relation to a genre of copyright works is in very strong position vis-à-vis prospective users in setting the terms of the licence. To address this issue, the Copyright Ordinance establishes a Copyright Tribunal which, among other responsibilities, adjudicate disputes between licensing bodies and prospective licensees on terms of the licence including rates of royalty.

7.4 Furthermore, to enhance the transparency of licensing bodies, the Copyright Ordinance establishes a voluntary registration scheme for licensing bodies. Registered licensing bodies must make available to the public essential information such as scales of royalty charges for different uses.

Copyright Tribunal

7.5 Some copyright users have expressed the view that referring a dispute to the Copyright Tribunal would incur substantial cost. To this extent, they claim that this method of adjudication is not effective. Some users have also alleged that the Copyright Tribunal is biased towards copyright owners because its members have conflict of interests. These users have suggested that the Tribunal be replaced with an arbitration system under which the parties to a dispute may each appoint an arbitrator of their own choice.

7.6 We have carefully examined this suggestion. The costs involved in a Tribunal proceeding are mainly related to those for legal representation. Legal representation is not mandated for proceedings before the Tribunal. However, allowing legal representation is essential to ensure due process, particularly given the technical complexity of copyright issues. Such costs cannot be avoided even under an arbitration system. The appointment of arbitrators with expertise in copyright issues would also be expensive.

7.7 We disagree that the Copyright Tribunal is biased towards copyright owners. The allegation is groundless. Members of the Tribunal have been appointed from a wide spectrum of the community. A member must declare any possible conflict of interests in a particular case, and will be excused from the proceedings of the Tribunal in relation to that case.

Compulsory registration of licensing bodies

7.8 Some copyright users have expressed the view that all licensing bodies should be mandated under the law to be registered and to publish their scale of royalty charges so as to increase transparency. At present, the registration of licensing bodies is voluntary and only those registered are required to publish their scale of charges.

7.9 Enhancing the transparency of licensing bodies is consistent with Government's policy objective. However, to require all licensing bodies to be registered as proposed would need very careful consideration.

7.10 Firstly, we need to examine whether such an arrangement will conflict with our international obligation that we shall not subject the exercise of copyright by the right holder to any formality (e.g. a registration requirement).

7.11 Secondly, in terms of protecting the interests of copyright users, the benefits of introducing a regulatory regime for licensing bodies are limited. The main benefit is to increase the transparency of royalty charges by requiring licensing bodies to publish their scales of charges for different uses. But such scales can only serve the purpose of general guidance because licensing bodies may vary the terms of a licence according to the particular circumstances of the case. The Government is

not in a position to approve or reject any such variation[4]. There may be a large number of licensing bodies falling within the wide definition of licensing body. The substantial resources needed for managing a regulatory regime may not be commensurate with its potential benefits.

7.12 In terms of protecting the interests of authors represented by a licensing body, there does not appear to be any particular problems in the Hong Kong context that justify the introduction of a compulsory registration system at this stage.

Summary

7.13 Your views are sought on the following issues -

(a) whether the Copyright Tribunal should be replaced with an arbitration system to adjudicate disputes between copyright users and licensing bodies; and

(b) whether licensing bodies should be mandated to be registered and to publish their scales of royalty charges.

[4] The Copyright Tribunal is the channel for settling disputes between copyright users and licensing bodies in relation to royalty charges or other terms of the licence.