

LEGISLATIVE COUNCIL BRIEF

Copyright Ordinance

(Chapter 528)

COPYRIGHT (SUSPENSION OF AMENDMENTS) BILL 2001

INTRODUCTION

At the meeting of the Executive Council on 26 April 2001, the Council ADVISED and the Chief Executive ORDERED that the Copyright (Suspension of Amendments) Bill 2001, at Annex A, should be introduced into the Legislative Council to suspend the implementation of the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (the amending Ordinance) insofar as it applies to certain criminal provisions in the Copyright Ordinance and subject to certain exceptions.

BACKGROUND AND ARGUMENT

The Amendments to the Copyright Ordinance

2. The use of copyright infringing products in business, e.g. pirated computer software is a serious problem in Hong Kong. According to an unofficial estimate, about 50% of all computer software used in business is pirated.

3. In 1999, in response to wide community concern about rampant piracy of computer software, music and films, we consulted the public on additional legislative measures to combat the piracy problem. One of the proposed measures that gained wide public support was to strengthen the criminal provisions against copyright piracy in the course of business. A main objective of the amending Ordinance is to amend the Copyright Ordinance to implement this proposal.

4. Before being amended by the amending Ordinance, the Copyright Ordinance stipulated, *inter alia*, that an offence would be committed if a person possessed an infringing copy of a copyright work for the purpose of trade or business with a view to committing an infringing act. Based on legal advice, we had interpreted the phrase “for the purpose of trade or business” narrowly to mean that an enterprise would commit an offence only if it was engaged in dealing in the infringing copy concerned. For example, a firm that engaged in manufacturing optical disks containing pirated computer software would commit an offence and be prosecuted. In contrast, a firm engaged in garment manufacturing and which used pirated accounting software in its business would not, according to our interpretation of the law, be prosecuted.

5. The amending Ordinance has replaced the phrase “for the purpose of trade or business” with “for the purpose of, in the course of, or in connection with, any trade or business” where it has appeared in the Copyright Ordinance. As a result of this amendment, the garment manufacturing firm in paragraph 4 above will commit an offence and be prosecuted by knowingly possessing the pirated software in the course of business, even though it is not engaged in making the software concerned for sale.

6. The term “business” as used in the Copyright Ordinance¹ is not confined to commercial activities. It can also cover educational, charitable or government activities. An infringing copy of a copyright work is one the making of which infringes the copyright of that work. An infringing copy may therefore be a pirated computer program, an unauthorized photocopy of a newspaper article, an unauthorized recording of a television programme, or an electronic copy or hardcopy of a copyright work downloaded from the Internet without the authorisation of the copyright owner. In principle, all copyright works should be treated equally and should enjoy the same level of protection under the law.

Problems with Implementing the Amending Ordinance

7. For the purpose of disseminating information, enterprises have a practical need to make timely copies (e.g. photocopy, facsimile, scanning, recording) of newspaper or magazine articles, and to a lesser extent, of radio or television broadcasts or cable programmes, or to download works from the Internet. However, unless authorized by the copyright owner, the possession in the course of business of an infringing copy of the work thus made may be liable to criminal prosecution. The threat of criminal

¹ Section 198 of the Copyright Ordinance defines the term ‘business’ to include a trade or profession. A British court has interpreted the term ‘business’ to include as least some government activities.

proceedings and the absence of a convenient mechanism to obtain the required authorization have hampered the dissemination of information in enterprises. Some business associations have suggested that ad hoc photocopying of newspaper articles for internal reference purposes should not be made an offence.

8. Furthermore, the educational sector is concerned that teachers may incur criminal liability inadvertently as they routinely make multiple copies of copyright works contained in newspapers, magazines or books, as well as works downloaded from the Internet, for classroom use. They may also record radio or television broadcasts for teaching purposes. We have explained, through various means including briefings and guidelines, to the educational sector that the Copyright Ordinance already provides exemptions for educational copying under specified circumstances, and that the amending Ordinance has not changed any of these exemptions. We have also explained that in relation to books, all subsidised or government schools are specifically authorized under licensing agreements to make photocopies of any books within the terms of the agreement. However, the educational sector remains worried about the possibility of committing an offence when conducting normal school activities. Teachers are particularly concerned that the statutory exemptions for educational copying are subject to the condition that copying must be done within a “reasonable extent”, which is not clearly defined in the Copyright Ordinance.

9. Recognising the impact of the amending Ordinance on the photocopying of newspaper articles, we have since last year been encouraging and assisting the local newspaper industry to establish a collective licensing mechanism, similar to the practice in countries such as the United Kingdom and Australia, to facilitate compliance with the new law. Unfortunately, the newspaper industry has been unable to agree on formulating such a mechanism so far. As regards books and magazines, a collective licensing mechanism is already in place but there are practical limitations as to its operational effectiveness.

Suspension

10. To address the immediate concerns of the public, the Secretary for Commerce and Industry announced on 12 April 2001 that the Government would introduce legislative amendments, as an interim measure, to suspend the application of the amending Ordinance to the key criminal provisions in the Copyright Ordinance insofar as they apply to -

- (a) works in the printed media, viz, newspapers, magazines, periodicals and books;

- (b) works in sound or television broadcast, or included in subscription cable television programmes; and
- (c) works downloaded from the Internet,

subject to some exceptions.

11. The exceptions referred to in paragraph 10 are computer programs, visual or audio recordings of music or songs, television dramas and movies. The works excluded generally have substantial commercial value and are not normally 'information' disseminated in enterprises or schools. Moreover, piracy of these works in Hong Kong and elsewhere is rampant. The amending Ordinance, which has the effect of providing a higher level of protection, should continue to apply to them.

12. To ensure that the suspension is easily understood by the public, we propose that instead of setting out the categories of the copyright works as listed in paragraph 10, the suspension should apply to all copyright works except computer programs, visual or audio recordings of music or songs, television dramas and movies. In practice, the difference between the two approaches is small as the works listed in paragraph 10 are already quite exhaustive.

13. The suspension will mean that with respect to all copyright works (subject to the exceptions set out in paragraph 11), the key criminal provisions in the Copyright Ordinance will revert to the position before the commencement of the amending Ordinance. The suspension will not affect the civil remedies available to copyright owners in respect of any copyright works.

14. In practical terms, we will suspend the criminal sanctions against, say, the possession **in the course of business (including teaching activities in educational establishments)** of an unauthorized photocopy of a newspaper cutting, an unauthorized recording of a television news programme, or an unauthorized copy of a photograph downloaded from the Internet.

15. However, the possession of such infringing copies knowingly **for dealing in the same** is still an offence after the suspension (see paragraph 4 above). Distributing infringing copies of any copyright work to such an extent that the owner of the copyright is prejudicially affected is also an offence under section 118(1)(f) of the Copyright Ordinance. Furthermore, where the infringing copy is a work falling within those exceptions set out in paragraph 11 above, say, a computer program, a person who knowingly possesses it **in the course of business** will still be liable to criminal prosecution.

16. After the enactment of the Bill, we shall consult non-governmental organizations, the copyright industry, and various sectors of the community with a view to formulating a long-term solution to the problem. We will then introduce another Bill to make further amendments to the law.

17. We had originally intended not to stipulate an end date to the suspension so as to allow ample time for thorough examination of any proposed permanent solutions. Taking into account the views of the Legislative Council, we now propose that the suspension should end on 31 July 2002, but it may be changed by the Secretary for Commerce and Industry by a notice published in the Gazette and with the approval of the Legislative Council.

18. Pending the enactment of the Bill, the amending Ordinance remains in force. Should we receive any complaints lodged by identifiable complainants before then, we will follow up the case according to the law. However, consideration will be given to the legislative intent announced by Government and to the public interest before a final decision is made on the action to be taken.

THE BILL

19. **Clause 2(1)** provides that, with the exception of those types of copyright work stated in Clause 2(2), sections 118 and 120 (i.e. the key criminal provisions) of the Copyright Ordinance shall be read as if the amending Ordinance had not been enacted.

20. **Clause 2(2)** sets out those types of copyright work to which Clause 2(1) does not apply. They are movies, television dramas, sound recordings or films the whole or a substantial part of which consists of a musical work and any related literary work, and computer programs.

21. **Clause 3(1)** provides that the suspension shall cease to have effect on 31 July 2002. **Clauses 3(2) and (3)** empower the Secretary for Commerce and Industry to change the end date of the suspension by a notice published in the Gazette and with the approval of the Legislative Council.

22. The relevant provisions of the Copyright Ordinance and the amending Ordinance affected by the amendment Bill are at Annex B.

PUBLIC CONSULTATION

23. At its special meeting on 12 April, the Legislative Council Panel on Commerce and Industry unanimously supported the proposed suspension and a fast-track legislative process to implement the suspension. Representatives of major chambers of commerce and most of the copyright stakeholder groups who were present at the meeting also had no objection to the proposals. At its meeting on 19 April, the Panel discussed a first draft of the Bill and recommended that a subcommittee should be formed to scrutinize it. At its meeting on 25 April, the relevant subcommittee discussed a revised draft Bill submitted by the Government and supported its introduction in principle.

BASIC LAW IMPLICATIONS

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

HUMAN RIGHTS IMPLICATIONS

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

BINDING EFFECT OF THE LEGISLATION

26. The Bill will not affect the current binding effect of the Copyright Ordinance.

FINANCIAL AND STAFFING IMPLICATIONS

27. There are no financial or staffing implications arising from the Bill.

ECONOMIC IMPLICATIONS

28. The suspension will to a large extent remove the criminal sanction in relation to the printed media as a deterrent for some trade and business sectors, including the educational profession, from copying books or newspaper or magazine articles without authorization or paying a licence fee to the publishers concerned. As a result, the media and book publishing industries will lose potential revenue from this source. The precise loss is difficult to quantify.

LEGISLATIVE TIMETABLE

29. The legislative timetable will be as follows –

Publication in the Gazette	27 April 2001
First Reading and Commencement of Second Reading debate	2 May 2001
Resumption of Second Reading debate, committee stage and Third Reading	To be advised

PUBLICITY

30. We have issued a Legislative Council brief and a press release. A spokesman is available to answer public enquiries.

ENQUIRIES

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

Commerce and Industry Bureau
26 April 2001