

Government puts forward refined proposals on copyright-related issues

Having carefully considered the views received on the package of preliminary copyright-related proposals, the Government considers that refinements to some of the proposals are necessary, a Government spokesman said today (November 10).

The proposed refinements mainly cover the following three areas:

1) Business end-user criminal liability

a) Proposed criminal liability for copying/distributing copyright infringing printed works

One of the preliminary proposals is to introduce a new business end-user criminal offence for significant infringements involving copying with a view to distributing or distributing infringing copies of copyright works published in four types of printed works, i.e. newspapers, magazines, periodicals and books, in the course of and for the purpose of business. It is also proposed to specify numerical perimeters for the “safe harbour” of the offence within which the concerned infringing acts will not attract criminal liability.

The spokesman pointed out that copyright work user groups were very concerned about the proposed offence for fear that it would affect the free flow of information and hinder the development of Hong Kong into a knowledge-based economy. While most user groups have refrained from coming forward with specific perimeters for the “safe harbour”, copyright owners in the publishing industry have suggested various perimeters.

On balance, the government considers the proposed criminal offence should not cover casual or ad hoc copyright infringements for business end-users because this already attracts civil liability.

The Government therefore proposes to limit the proposed business end-user copying/distribution criminal offence for copyright works published in the four types of printed work to regular or frequent infringements only, and to lay down the following numerical perimeters for the “safe harbour”:

* for copyright works in newspapers, magazines and periodicals (excluding academic journals), the proposed criminal offence will not apply if the number of infringing copies made for distribution or distributed does not exceed 1,000 copies within any 14-day period; and

* for copyright works in books (including academic journals), the proposed criminal offence will not apply if the total retail value of the infringing copies made for distribution or distributed within a 180-day period does not exceed \$8,000, assuming that one infringing copy of more than 15% of the number of pages of the book concerned (a qualifying infringing copy) only will count for the purpose of calculating the retail value perimeter. Non-qualifying infringing copies will not count for the purpose of retail value calculation except when the cumulative number of copies made/distributed within the 180-day period exceeds 50% of the number of pages of the book concerned, in which case all the

non-qualifying infringing copies together will count for the purpose of calculating the retail value perimeter.

b) Directors'/partners' criminal liability

In its preliminary proposals, the Government suggested that if a body corporate or a partnership committed an act attracting any business end-user criminal offence, the director(s) of the body corporate or the partner(s) of the partnership would be equally liable in the same case unless there is evidence showing that the director(s)/partner(s) has not authorised the infringing act to be done.

The spokesman pointed out that some user groups had advised that it would be difficult for directors and partners to have full knowledge of and control over their staff's activities in the course of business.

"The Government accepts it may be too onerous to impose a criminal liability on all directors and partners. Accordingly, we propose to limit the scope of the proposed criminal liability to cover only those directors, partners or persons that carry out chief executive functions," the spokesman said.

2. Circumvention of technology measures for copyright protection

a) Criminal provision against commercial dealing

The Government has also suggested in its preliminary proposals to introduce a new criminal offence against the commercial dealing of devices, products or components to circumvent effective technological measures for copyright protection applied to a copy of copyright work, or the provision of commercial service to enable or facilitate the circumvention of such effective technological measures.

"However, we have been alerted to the fact that certain technological measures that prevent copyright infringements also perform an area code restriction function for the purpose of controlling market segmentation.

"After taking into account the views expressed by the computer game industry and user groups, on balance, we propose to narrow the scope of the proposed criminal sanction so that it will not cover those copyright protection technological measures that are applied to a copy of a copyright work embodied in a physical article and also have the effect of controlling market segmentation through area code restriction.

"In other words, the proposed criminal sanction will only apply to those physical copies of computer games protected by effective technological measures which do not have an area code restriction function," the spokesman added.

b) Civil liability for the act of circumvention

The Government has also refined its preliminary proposals to provide civil remedies against the act of circumvention of effective technological measures, including both copy

protection measures and access control measures, applied to copyright works to prevent infringements.

“We propose to narrow the scope of the proposed civil liability so that it should only apply if the person who commits the act of circumvention knows or has reasonable grounds to know that he is pursuing a circumvention objective and with a view to inducing, enabling, facilitating or concealing an infringement of copyright.

c) Exemptions

“It is also proposed that exemptions from any liability in respect of circumvention activities should be broadened. The Government will explore with copyright owners suitable formulation to give effect to the exemptions,” the spokesman said.

3. Parallel Importation of Copyright Works

On parallel importation of copyright works, while user groups in general have demanded further liberalisation of parallel imports, copyright owners in the film, music and publication industries have strongly objected to any shortening or removing the 18-month criminal liability period.

On balance, the spokesman said the Government had proposed to further liberalise parallel importation by:

* removing the civil and criminal liability pertaining to the importation and possession for use of parallel imports of copyright works by all business end-users except those for commercial dealing purposes; and

* reducing the period during which parallel imports would attract criminal liability to nine months after public release.

Nevertheless, given the music and film industries' grave concern that complete liberalisation would enable local businesses such as karaoke, coffee shops and restaurants to parallel import and play or show in public new songs or movies still being promoted or screened in cinemas in Hong Kong, it is proposed that the relaxation for business end-use will not apply to parallel imported musical sound recordings, musical visual recordings, movies and TV dramas used for public performance purposes.

“We are now preparing the necessary legislative amendments to the Copyright Ordinance along the lines of all the preliminary proposals as refined. Our plan is to introduce the amendment bill into the Legislative Council in early 2006.

“We will continue to discuss with stakeholder groups as we further develop the proposals in the course of drafting the amendment bill,” the spokesman said.

To further improve Hong Kong's legislative regime for protecting copyright, the Government launched a public consultation exercise early this year on the review of certain provisions of the Copyright Ordinance. A package of preliminary proposals were formulated and announced in June this year after the consultation exercise.

Since then, the Government has solicited views from various stakeholder groups including both major copyright work user groups and copyright owners on the preliminary proposals. The above refinements have been proposed by the Government after having carefully considered all the views received. Details of the refinements can be downloaded from the websites of the Commerce and Industry Branch (CIB) of the Commerce, Industry and Technology Bureau at www.info.gov.hk/cib and the Intellectual Property Department at www.ipd.gov.hk and any views can be sent to CIB in writing by post at Level 29, One Pacific Place, 88 Queensway, Hong Kong or e-mail at co_review@citb.gov.hk.

Ends