

FAQs on Amendments to the Copyright Ordinance (2007 - 2009)

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Copyright Protection

Q1. What are the additional measures introduced by the Copyright (Amendment) Ordinance 2007 (“Amendment Ordinance”) for enhancing copyright protection, and what are the respective effective dates for the new provisions?

A1. Apart from maintaining the scope of the business end-user criminal liability in relation to possession of infringing copies of computer programs, movies, TV dramas and musical recordings (*see [Q&A2.](#)*), the Amendment Ordinance has introduced a number of new civil and criminal liabilities for copyright infringement as follows: -

(a) A new business end-user criminal offence against the infringing acts of making with a view to distributing or distributing infringing copies of copyright works published in four types of printed works (*see [Q&A3.](#)*)

(b) A new criminal offence that may be applicable to the director(s), partner(s) or persons(s) responsible for the internal management of a body corporate or partnership if the body corporate or partnership is found to have committed an act which attracts one of the aforesaid business end-user criminal liabilities, unless he proves that he did not authorize such act. (*see [Q&A21.](#)*)

(c) A new criminal offence against any person who is engaged in commercial dealing of circumvention tools or provides circumvention services on a commercial basis for the circumvention of technological measures (i.e., access control measures or copy-protection measures).

(see [Q&A29.](#))

(d) Extended civil liability against any person who deals in circumvention tools or provides circumvention services (whether or not in a commercial context) for the circumvention of technological measures. (see [Q&A29.](#))

(e) New civil liability against any person who circumvents a technological measure used for copyright protection. (see [Q&A29.](#))

(f) New rights to copyright owners and their exclusive licensees to seek civil remedies against any person who tampers with rights management information attached to copyright works. (see [Q&A38.](#))

(g) New civil liability against any person who offers films or comic books for commercial rental without the authorization of the copyright owners. (see [Q&A39.](#))

Please refer to [this table](#) for the respective effective dates for the above liabilities.

Business end-user criminal liability

Q2. Would I commit an offence if I use pirated computer software in business after the Copyright Ordinance was amended?

A2. Yes, you would. The Amendment Ordinance has not changed the scope of the offence against possession of an infringing copy of copyright work for use in business which has been in operation since 2001. That is, a person renders himself criminally liable if he knowingly possesses infringing copies of any of the four categories of works (namely, computer software, movies, musical recordings (including visual and sound recordings), and TV dramas) for use in his business. This criminal offence applies equally to all business end-users covering individuals and organizations, whether profit-making or not.

The mere possession of an infringing copy of any other categories of copyright works for use in one's business does not attract criminal liability (BUT see [Q&A3.](#) for another possible criminal liability which may apply to

business end-users). Please however note that possessing, for the purpose of or in the course of any trade or business, a copy of any copyright work which one knows or has reason to believe to be an infringing copy without authorization of the copyright owner may attract *civil liability for secondary infringement of copyright*.

Q3. Would I commit an offence if I make photocopies of articles from newspapers, magazines, periodicals or books for distribution in business for internal reference?

A3. The Amendment Ordinance has introduced a new offence against the making for distribution, or distribution, of infringing copies of copyright works in four types of printed works, namely newspapers, magazines, periodicals and books. This offence, known as the “copying and distribution offence”, will apply if -

(a) the extent of infringing copies so made or distributed exceeds the numeric limits prescribed by the Copyright (Amendment) Ordinance 2009 (see [Q&A6](#));

(b) the infringing acts are conducted on a frequent or regular basis for the purpose of or in the course of any trade or business; and

(c) financial loss is caused to the copyright owner concerned.

This offence will apply equally to all business end-users covering individuals and organizations, whether profit-making or not, except non-profit-making educational establishments (see [Q&A19](#)).

It would therefore be prudent for all business end-users to obtain licences from the relevant [copyright licensing body](#) to cover their copying and distribution activities and ensure strict compliance with the terms of such licence.

Q4. Does the copying and distribution offence mentioned in [Q&A3](#) apply to the distribution of physical copies only?

A4. No, the offence will also apply to distribution of digital copies through

any electronic medium (e.g. scanned copies transmitted by electronic mails).

Q5. Would I commit an offence if I merely scan articles from newspapers or magazines and then upload them onto

- (a) my company's intranet for internal reference within my company, and/or
- (b) the Internet?

A5. Converting a printed work into an electronic version (e.g. scanning) involves copying of the work. Generally speaking, if the conversion is made without the permission of the copyright owner, the resulting scanned copy is an infringing copy.

As far as the copying and distribution offence in [Q&A3](#) is concerned, frequent or regular scanning and uploading of infringing copies of articles in newspapers or magazines on a business's intranet for access by staff members fall within the ambit of the offence. Note however, that operation of this offence in relation to distribution through an Intranet or other private network of an organization (except distribution by e-mail and by fax) is suspended for the time being. Before extending the coverage of this offence to Intranet distribution, the Government will further consult the stakeholders about the numeric limits applicable to such distribution, having regard to the availability of appropriate licensing schemes covering such distribution.

The offence does not apply to distribution through the Internet. That said, it is important to bear in mind that under the existing Copyright Ordinance, any unauthorized scanning and uploading activity without lawful excuse ***constitutes civil infringement***. In addition, such unauthorized activities, particularly those involving uploading onto the Internet, run the risk of attracting criminal liability for "prejudicial distribution". This offence is constituted when a person distributes infringing copies (irrespective of the types of copyright works and the distribution channels) to such an extent as to affect prejudicially the copyright owner(s). The best policy is therefore to refrain from such unauthorized activities.

Q6. What exactly are the "numeric limits" prescribed for the copying and distribution offence?

A6. The Copyright (Amendment) Ordinance 2009 prescribes two separate sets of numeric limits, applicable to different categories of works, within which the copying and distribution offence does not apply. These numeric limits are as follows: -

(a) For newspapers, magazines and periodicals (excluding *academic journals*) –

The total number of "infringing pages" (i.e. those pages each containing in whole or in part any infringing copy) made for distribution or distributed within any 14-day period must ***not exceed 500*** (see [Q&A8](#). for the quantification methods);

(b) For books and *academic journals* –

The total value of infringing copies made for distribution or distributed within any 180-day period must ***not exceed HK\$6,000*** (see [Q&A9](#). for the evaluation methods).

See [Q&A7](#). about the meaning of “academic journals”

Q7. For the purpose of the prescribed numeric limits in [Q&A6.](#), are all journals or periodicals containing articles written by professionals (e.g. accountants, architects, doctors, engineers and lawyers etc.) and/or published by professional bodies invariably considered “academic journals”?

A7. An “academic journal” (known as “a specified journal” under the Copyright Ordinance) is a kind of periodical that contains scholarly articles relating to a discipline, and normally at least one of those articles in an issue of such periodical has been peer-reviewed by one or more than one expert or scholar in the discipline. Based on this concept, the mere fact that a journal or periodical containing articles written by professionals or is published by a professional body does not necessarily render such publication an “academic journal” under the Ordinance. To make a proper determination, one needs to consider the nature, substance and quality of the journals/periodicals in question and the articles therein. Where the periodic publication in question does not qualify as an “academic journal”, it will be treated as a general periodical to which the numeric limit under [Q&A6.\(a\)](#) applies.

Q8. With regard to [Q&A6.\(a\)](#) on the numeric limit prescribed for

newspapers, magazines and periodicals (excluding academic journals) -

- (a) how do I determine the number of “infringing pages” made/distributed in physical copies, and
- (b) how about if some or all of the infringing copies are made in electronic form or distributed by electronic means such as emails?

A8. (a) The total number of “infringing pages” is determined on the following premise: -

- (i) Each "infringing page" is in A4-size (i.e.29.7cm x 21 cm); and
- (ii) The original image size of each copyright work being copied is not reduced or enlarged during the copying process.

In other words, each page in A4-size containing in whole or in part any infringing copy the image size of which is identical to that of the original copyright work will be counted as one “infringing page”.

On the above premise, where the copying process involves enlargement or reduction of the original image size of the relevant copyright work (e.g. a newspaper article) and/or use of photocopying papers larger or smaller than A4-size, the degree of such enlargement/reduction and/or the actual size of the photocopying paper will be taken into account when calculating the total number of “infringing pages”. (See Illustration 1 below)

Illustration 1

Organization X, having altogether 10 staff members, regularly makes and distributes copies of clippings from newspapers and magazines to each of its members for reference without obtaining proper licence from the relevant copyright owners.

Scenarios	No of “infringing pages” made/distributed to each employee within a 14-day period	Size of each “infringing page”	Enlargement / Reduction of the original image of copyright works	Total no. of “infringing pages” made/distributed
i.	50 (pages)	A4-size	Nil	50 (pages) × 10 (sets) = <u>500 pages</u> (Within the numeric limit)

ii.	50 (pages)	A4-size	Reduced by 25% (i.e. 75% of the original image size)	$50 \text{ (pages)} \times 100/75 \text{ (adjust for image size)} \times 10 \text{ (sets)}$ $= \underline{666.66 \text{ pages (to 2 decimal places without rounding off)}}$ (Numeric limit exceeded)
iii.	50 (pages)	A3-size (to be treated as double of A4-size)	Nil	$50 \text{ (pages)} \times 2 \text{ (adjust for paper size)} \times 10 \text{ (sets)}$ $= \underline{1,000 \text{ pages}}$ (Numeric limit exceeded)
iv.	50 (pages)	A5-size (to be treated as half of A4 size)	Enlarged by 75% (i.e. 175% of the original image size)	$50 \text{ (pages)} \times 1/2 \text{ (adjust for paper size)} \times 100/175 \text{ (adjust for image size)} \times 10 \text{ (sets)}$ $= \underline{142.85 \text{ pages (to 2 decimal places without rounding off)}}$ (Within the numeric limit)

A8. (b) If some or all of the infringing pages are made in electronic form or distributed by electronic means, the infringing copies in the electronic files will first be printed on A4-size papers, and each printed page will then be counted as an “infringing page”. If there is any enlargement or reduction in the image size of the original work(s), appropriate adjustment to the image size will be made as in the case of physical copies as illustrated in scenarios (ii) + (iv) under [Q&A8.\(a\)](#).

Q9. With regard to [Q&A6.\(b\)](#) on the numeric limit prescribed for books and academic journals, how do I determine the total value of the relevant infringing copies?

A9. (a) For books

Where the infringing copies contain **more than 25%** of the total number of printed pages of a book, *the value of the book* is taken to be the value of such infringing copies. On the other hand, where the aforesaid percentage

does not exceed 25%, the value of the infringing copies shall be ignored for the purpose of the numeric limit referred to in [Q&A6.\(b\)](#).

The value of a book is determined by reference to the following: -

- its retail price as printed in or on it by the publisher (“the marked retail price”);
- if there is no marked retail price, its retail price (sometimes known as “list price”) as recommended by the publisher before any discount is given (“the recommended retail price” which can usually be found at major online bookshops);
- if there is neither marked retail price nor recommended retail price, the readily ascertainable market value (see [Q&A16.](#)).

Illustration 2

Without obtaining proper licence from the relevant copyright owners, Company X frequently makes and distributes copies from books to its 100 employees for reference.

Scenarios	Total no. of printed pages of the relevant book	No. of printed pages in the book copied/distributed to each employee within a 180-day period	Value of the book (in terms of marked retail price, recommended retail price or readily ascertainable market value in HK\$)	Value of infringing copies (HK\$)
i.	100 (pages)	15 (pages) (i.e. less than 25% of the total pages)	(HK\$) 500	Nil (Within the numeric limit)
ii.	200 (pages)	50 (pages) (i.e. equal to 25% of the total pages)	(HK\$) 200	Nil (Within the numeric limit)
iii.	50 (pages)	30 (pages) (i.e. more than 25% of the total pages)	(HK\$) 100	$\text{HK\$}100 \times 100 \text{ (sets)}$ $= \underline{\text{HK\$}10,000}$ (Numeric limit exceeded)

(b) For academic journals

- (i) Where the infringing copies contain **not more than 25%** of the total number of printed pages of an issue of an academic journal **but include one or more than one complete article(s)** in such issue, the **value of the article(s)** is taken to be the value of the infringing copies. The value of each relevant article is its retail value as recommended by the publisher before any discount is given to traders or consumers.

If the infringing copies contain **not more than 25%** of the total number of printed pages of an issue of an academic journal and does **not include any complete article(s)** in such issue, the value of the infringing copies shall be ignored for the purpose of the numeric limit referred to in [Q&A6.\(b\)](#).

- (ii) In the remaining case, namely where the infringing copies contain **more than 25%** of the total number of printed pages of an issue of an academic journal, the **value of the issue of the academic journal** is taken to be the value of such infringing copies, irrespective of whether such infringing copies contain any complete article(s).

The value of an issue of an academic journal is determined by reference to the following: -

- its retail price as printed in or on it by the publisher (“the marked retail price”);
- if there is no marked retail price, the subscription price of the journal as printed in or on the relevant issue of the journal by the publisher (“the marked subscription price”) to be divided by the number of issues covered in the subscription;
- if there is no marked retail price nor marked subscription price, the subscription price as recommended by the publisher before any discount is given to traders or consumers (“recommended subscription price”) to be divided by the number of issues covered in the subscription.

Illustration 3

Organization Y, without obtaining proper licence from the relevant copyright owners, regularly distributes copies from issues of academic journals to its 20 employees for reference.

Scenarios	Total no. of printed pages of the relevant issue of the academic journal	No. of printed pages in the relevant issue of the academic journal copied/distributed to each employee within a 180-day period	Value of the relevant issue of the academic journal or the article book in such issue	Value of infringing copies (HK\$)
i. (Copies containing <u>no</u> complete article made from an issue of an academic journal)	100 (pages)	10 (i.e. less than 25% of the total pages)	(HK\$) 200 (marked retail price of the issue of the journal)	Nil (Within the numeric limit ³)
ii. (Copies containing one complete article made from an issue of an academic journal)	100 (pages)	10 (i.e. less than 25% of the total pages)	(HK\$) 200 (recommended retail price of the article)	$\text{HK\$}200 \times 20 \text{ (sets)}$ $= \underline{\text{HK\$}4,000}$ (Within the numeric limit ³)
iii. (Copies with or without any complete article made from an issue of an academic journal)	100 (pages)	50 (i.e. more than 25% of the total pages)	(HK\$) 500 (marked retail price of the issue of the journal)	$\text{HK\$}500 \times 20 \text{ (sets)}$ $= \underline{\text{HK\$}10,000}$ (Numeric limit exceeded)

Q10. How do I calculate the value of infringing copies made from a volume of a publication series or multi-volume book set (e.g. a multi-volume set of encyclopedia or a novel) in which each volume thereof does not have any

marked/recommended retail price but the said price for the entire book set is ascertainable?

A10. The following example serves to illustrate the calculation method: -

- A set of infringing copies made from a volume of a 3-volume book set consists of more than 25% of that volume.
- Each volume has 250 printed pages (i.e. the total number of printed pages for the entire set is 750).
- No price is set for the individual volume.
- The marked/recommended retail price of the entire book set is HK\$500. (The marked retail price, if available, will always be the first value to be taken into consideration. If no marked retail price is available, one then needs to take into account the recommended retail price, if any.) The value of each volume is then taken to be $\text{HK\$}500 \times 250/750 = \text{HK\$}166.66$ (to 2 decimal places without rounding off).
- The set of infringing copies is treated to have the same value of the relevant book volume, i.e. HK\$166.66 (to 2 decimal places without rounding off).

Q11. Where the marked retail price of a book (or marked retail/subscription price of an issue of an academic journal) is denominated in more than one currency, which currency should one adopt for determining the value of the infringing copy made from such book or journal under [Q&A9](#)?

A11. The price in Hong Kong dollars will be adopted, if available. Otherwise the Hong Kong dollar value shall be calculated based on the value in other currencies as printed in or on the book/issue of the academic journal, in the following order: -

- (i) US dollars;
- (ii) (where the currency in US dollars is not available) the first foreign currency being printed in or on the book/issue of the journal.

Q12. Where the price of a book or an issue of an academic journal applicable for determining the value of the relevant infringing copies is denominated in a currency other than Hong Kong dollar, what is the applicable exchange rate for

converting such foreign currency into Hong Kong dollar value?

A12. The exchange rate at the time when the infringing copies were made/distributed will be relevant, and reference is to be made to -

(i) the opening indicative counter exchange selling rate published by The Hong Kong Association of Banks in respect of the relevant foreign currency; or

(ii) if no such rate is published, the representative exchange rate published by the International Monetary Fund in respect of the relevant foreign currency.

Q13. Does the copying and distribution offence apply to the scenario where the source from which the infringing copies was made for distribution consists of a mixture of publications (e.g. newspapers, magazines, periodicals plus books), and the extent of making/distribution of such infringing copies has only exceeded one prescribed numeric limit (say, the one for books) at the material time?

A13. Yes. The respective numeric limits for newspapers/magazines/periodicals (other than academic journals) on the one hand and for books/academic journals on the other operate independently of each other. As such, unauthorized copying/distribution activities conducted on a frequent or regular basis to an extent in excess of any prescribed numeric limit under [Q&A6](#). is capable of being caught by the copying and distribution offence.

Q14. Is it correct that keeping the extent of unauthorized copying/distribution activities within the numeric limits would eliminate any business end-user liability for copyright piracy?

A.14. No. While making for distribution or distributing infringing copies to the extent within the numeric limit would mean the copying and distribution offence is inapplicable, the business end-user concerned may still be subject to **civil liability** under the Copyright Ordinance. In addition, the business end-user may run the risk of committing another **criminal offence** for “prejudicial distribution” if the extent of distribution has prejudicially affected the copyright owner(s) (see [Q&A5](#). above).

Q15. Can I make copies of a book that is out of print?

A15. You should seek authorization from the copyright owners if you want to make a copy of the book regardless of whether the book is commercially available in the market. Copying a substantial part of the book without authorization of the copyright owner may render you civilly liable for copyright infringement.

Nevertheless, for the copying and distribution offence in [Q&A3.](#), you may rely on a defence based on the following circumstances –

(a) you had taken adequate and reasonable steps to obtain a licence from the copyright owner for the copying of the book but failed to get a timely response from him; or

(b) you had made reasonable efforts but failed to obtain commercially available copies of the book and the copyright owner had refused to grant a licence to you on reasonable commercial terms; or

(c) you had made reasonable enquiries but failed to ascertain the identity and contact details of the copyright owner.

Q16. Is it safe to assume that a book that has been published many years ago and has neither a marked retail price nor a recommended retail price will unlikely have any inherent value for the purpose of determining the relevant numeric limits under [Q&A9.](#), and therefore the value of any infringing copy made from such book can be taken as zero and hence ignored for the purpose of calculating the relevant numeric limit under [Q&A9.](#)?

A16. Not necessarily. For the purpose of determining the numeric limit for a book without a marked retail price or a recommended retail price, its readily ascertainable market value still needs to be taken into account (see [Q&A9.\(a\)](#)). For instance, even though such book was published some time ago, it may still be available at bookstores with a readily ascertainable market value. [Q&A15.](#) applies in case such book is no longer commercially available in the market.

Q17. If several employees made copies of works and distributed them within a business, would the copies made by individual employees be added together for considering whether the extent of copying and distribution has exceeded the prescribed numeric limits?

A17. When considering whether the employer has committed the copying and distribution offence, all infringing copies made for distribution at his instruction/direction for the use of the business will be added together for the purpose of considering whether, for example, the infringing acts were done on a frequent/regular basis or any of the prescribed numeric limits has been exceeded. It is irrelevant, in the circumstances described, that the copies are made by different employees. In addition, the offence may apply to both the employer and his employee(s) at the same time, subject to any available defence which they may have (see [Q&As15., 27. & 28.](#)).

On the other hand, if the infringing copies are made by the individual employees for their own personal reference, it would not be covered by the copying and distribution offence (which targets the making for distribution or distribution of infringing copies in business).

It is important for business end-users to take steps to monitor and control internal copying and distribution of copies of the four types of printed works (i.e. newspaper, magazine, periodicals and books) and obtain an appropriate licence from the relevant licensing bodies to cover their copying and distribution activities in order to avoid committing an offence.

Q18. Does the copying and distribution offence under [Q&A3.](#) apply to commercial activities only?

A18. The offence aims to combat significant infringements involving copying and distribution activities conducted in the course of business. Under the Copyright Ordinance, “business” is not confined to commercial activities. In fact, the Ordinance as amended has clarified the meaning of “business” to include (a) a trade or business; and (b) business conducted otherwise than for profit. In this regard, teaching activities in educational establishments, government activities, activities of charitable or other non-profit making organizations may, depending on the nature of the activities, also be considered activities conducted in the course of business. Hence, in addition to commercial enterprises, the offence could also apply to certain activities carried on by charitable organizations, non-profit making bodies, government institutions and educational establishments (except those being exempted, see [Q&A19.](#)).

Q19. Would a teacher be liable under the copying and distribution offence in [Q&A3](#). if, without authorization, he/she has copied works in newspapers and books on a large scale for distribution to his/her students on a frequent or regular basis?

A19. The copying and distribution offence does not apply to educational establishments that fall into the following categories:

- (a) Government schools;
- (b) non profit-making educational establishments (exempted from tax under section 88 of the Inland Revenue Ordinance); or
- (c) educational establishments receiving direct recurrent subvention from the Government.

Hence, teachers working in these educational establishments would not be affected by the new offence.

Nevertheless, the activities on a scale described in the question would likely constitute *civil infringement* under the Copyright Ordinance. It is thus advisable for these educational establishments to obtain licences from the relevant [copyright licensing bodies](#) for such copying and distribution activities and ensure strict compliance with the terms of the licence.

Educational establishments which do not belong to the above three categories (e.g. profit-making private tutorial schools) are *not* exempted from the offence. Teachers of those educational establishments could be subject to criminal liability for unauthorized copying and distribution of infringing copies to their students if such activities are conducted on a regular or frequent basis and the extent of such activities exceeds the prescribed numeric limits (see [Q&A6](#)).

Q20. Students are sometimes required to make copies of books, newspapers, magazines and periodicals for study purposes. Are they exempted from the copying and distribution offence?

A20. The copying and distribution offence will only apply to copying and distribution activities carried on by a person in the course of or for the purpose of trade or business (see [Q&A3](#)). A student who makes copies of printed work

for his private study or for the purpose of receiving instructions in an educational establishment is not acting in the course of or for the purpose of trade or business. Therefore, the offence does not apply to him.

Under the Copyright Ordinance, students are allowed to make fair use of reasonable portions of copyright works for the following purposes:

- (a) research or private study; or
- (b) receiving instructions in a specified course of study provided by an educational establishment (see [Q&A7. of FAQs on Copyright Exemptions](#))

However, if the copying exceeds fair and reasonable portions, students may render themselves civilly liable for copyright infringement.

Directors'/partners' criminal liability

Q21. If my company is found to be using pirated computer software in business, would I, as the director of the company, be held liable for a criminal offence?

A21. To promote corporate accountability and responsible governance against the use of infringing copies to generate business output, the Amendment Ordinance has introduced a new offence against the directors and partners responsible for the internal management of their organizations if their organizations possess infringing copies of computer software for use in business (See [Q&A2.](#)). If there is no such director or partner, any persons responsible for the internal management of the body corporate or partnership under the immediate authority of the directors or partners may then be liable.

However, the directors and partners (or other persons responsible for internal management of the organization) will be absolved from liability if they did not authorize the infringing activities concerned (See [Q&A22.](#)).

The above also applies if the company is found to be using an infringing copy of a movie, TV drama or musical recording in business.

Q22. What would a director or partner need to do to show that he did not

authorize the use of pirated computer software in his company/partnership?

A22. Where a body corporate or partnership is found to have possessed an infringing copy of computer program for use in business, the director or partner may adduce evidence to show to the court's satisfaction that

- (i) he has caused his body corporate or partnership to set aside financial resources and directed the use of the resources; or
- (ii) the body corporate or partnership has incurred expenditure,

for the acquisition of a sufficient number of genuine copies of the computer program to which the proceedings relate. If the director or partner has done so, he will be taken as having adduced sufficient evidence to show that he did not authorize the use of the infringing copies. The burden will be on the prosecution to prove beyond reasonable doubt that the director/partner has authorized the concerned infringing act.

In the event that the director or partner has not done the abovementioned acts, it is still open to him/her to adduce other evidence to show that he/she did not authorize his/her company to use pirated computer software. This may include the following –

- (a) he/she has introduced policies or practices against the use of pirated computer software in his/her company; or
- (b) he/she has taken actions to prevent the use of pirated computer software within his/her company.

The court would take into account all the circumstances of the case in considering whether sufficient evidence has been provided. The same will also apply if the company is found to be using an infringing copy of a movie, TV drama or musical recording in business.

Q23. If my company is found to have made for distribution or distributed infringing copies of copyright works that may attract the copying and distribution offence as mentioned in [Q&A3](#). above, would I, as the director of the company, be held liable for a criminal offence?

A23. To promote corporate accountability and responsible governance

against the use of infringing copies to generate business output, the Amendment Ordinance has introduced a new offence against the directors and partners responsible for the internal management of their organizations if their organizations have done any act which could give rise to the business end-user criminal liability for the copying and distribution offence (see [Q&A3.](#)). If there is no such director or partner, any persons responsible for the internal management of the body corporate or partnership under the immediate authority of the directors or partners may then be liable. However, the directors and partners (or other persons responsible for the internal management of the organization) will be absolved from liability if they did not authorize the infringing activities concerned (see [Q&A24.](#)).

Q24. What would a director or partner need to do to show that he/she did not authorize the infringing act of making for distribution or distributing infringing copies of copyright work within his/her company/partnership?

A24. Where a body corporate or partnership is found to have done an act which may attract the business end-user copying and distribution offence as mentioned in [Q&A3.](#) above, the director or partner may adduce evidence to show to the court's satisfaction that –

- (i) he/she has caused his body corporate or partnership to set aside financial resources and directed the use of the resources for the acquisition of appropriate licences, in accordance with the needs of the body corporate or partnership, to make or distribute, or to make and distribute, copies of the copyright work to which the proceedings relate;
 - (ii) he/she has caused his body corporate or partnership to set aside financial resources and directed the use of the resources for the acquisition of a sufficient number of copies of the copyright work to which the proceedings relate;
 - (iii) the body corporate or partnership has incurred expenditure for the acquisition of appropriate licences, in accordance with the needs of the body corporate or partnership, to make or distribute, or to make and distribute, copies of the copyright work to which the proceedings relate;
- or

(iv) the body corporate or partnership has incurred expenditure for the acquisition of a sufficient number of copies of the copyright work to which the proceedings relate.

If the director or partner has done any of the abovementioned acts, he/she will be taken as having adduced sufficient evidence to show that he/she did not authorize the infringing acts. The burden will be on the prosecution to prove beyond reasonable doubt that the director/partner has authorized the concerned infringing act.

In the event that the director or partner has not done any of the abovementioned acts, it is still open to him/her to adduce other evidence to show that he/she did not authorize his/her company to make for distribution/distribute the infringing copies in question. This may include the following –

(a) he/she has introduced policies or practices against the making and distribution of infringing copies of copyright works by the body corporate or partnership; or

(b) he/she has taken actions to prevent the making and distribution of infringing copies of copyright works by the body corporate or partnership.

The court would take into account all the circumstances of the case in considering whether sufficient evidence has been provided.

Defence for employees in respect of business end-user criminal liability

Q25. Would an employee who has been supplied with an infringing copy of a copyright work for use in the course of his employment be liable for a criminal offence?

A25. A person who knowingly possesses an infringing copy of any of the four categories of works (i.e. computer program, movie, TV drama and musical recording) for use in his business would be liable for a criminal offence.

The Amendment Ordinance has introduced a statutory defence for employees who have been supplied with infringing copies in the above

circumstances. However, an employee would not be entitled to rely on the above defence if he is in a position to make or influence a decision regarding the acquisition of the infringing copy in question. Nor could he rely on the defence if he has the authority to make or influence a decision regarding removal or use of the infringing copy at the time when the infringing act was committed.

It should be noted that employees who are employed to deal in infringing copies (e.g. to sell, let for hire, distribute for profit or reward) would not be able to rely on the above defence.

Q26. What factors would be taken into account in determining whether an employee is in a position to decide on the acquisition or removal of the infringing copies under the defence in [Q&A25](#)?

A26. Relevant factors may include: whether the employee has the responsibility/authority to decide on the nature/type of computer programs that should be purchased and used in the business; whether the employee has in fact recommended the use of the infringing copies concerned.

Q27. Would an employee be liable for the copying and distribution offence (see [Q&A3](#).) if he was requested by this employer to make and distribute infringing copies of articles from books, newspapers, periodicals or magazines?

A27. The Amendment Ordinance has introduced a statutory defence for employees who did the infringing acts in the course of their employment and in accordance with the instruction given to them by or on behalf of their employers. This defence however would not apply if at the time when the infringing copies were made or distributed, the employee was in a position to make or influence a decision regarding the making or distribution of the infringing copies.

Q28. What factors would be taken into account in determining whether an employee is in a position to make or influence a decision regarding the making or distribution of the infringing copies under the defence in [Q&A27](#)?

A28. Relevant factors may include: whether the employee has the responsibility to decide on the acquisition of appropriate licences to cover the making and distribution of copies made from newspapers, magazines,

periodicals or books in the organization, the type of printed works that should be purchased and used in the business; whether the employee has in fact recommended the infringing copies concerned to be made or distributed.

Civil remedies for circumvention of technological measures

Criminal liability relating to circumvention activities

Exceptions to civil and criminal provisions

Q29. What is a “technological measure” that has been employed to protect copyright? What is meant by “circumventing the measure”?

A29. A technological measure used for copyright protection is any measure that acts as a barrier to prevent infringement of a copyright work. Such measures may include access control measures or copy control measures.

Examples:

(a) The copyright owner of an on-line music website may encrypt the songs put on the website and require the use of passwords to gain access to the songs. This is meant to prevent non-subscribers from gaining access to the songs and downloading the songs without his authorization. A person who disables the password function to gain access to the songs is said to have circumvented the access control measure.

(b) The copyright owner of a computer game may incorporate a copy control measure in the computer game to prevent users from copying its contents. A person who bypasses, disables or removes the protection measure is said to have circumvented the copy control measure.

Q30. Would I be liable for playing pirated computer games using a modified game machine?

A30. The playing of a pirated computer game on a modified game machine often involves circumvention of the copy control/access control measures in the computer game and the making of an unauthorized copy of the game. You could therefore be subject to civil liability for unlawful circumvention of technological measures and for copyright infringement.

Q31. Would I be liable for playing parallel imported computer games using a modified game machine?

A31. No, you will not incur any liability if you circumvent for the sole purpose of overcoming regional coding or other measure with a similar effect so as to gain access to a parallel-imported copyright work.

Q32. Would I be liable for purchasing a modified game console?

A32. The mere act of purchasing a modified game console does not involve any circumvention activity and would not attract any liability (**but** see [Q&As30.&31.](#) for liability for subsequent acts).

Q33. Would I incur any liability if I circumvent a technological measure in order to do certain acts that do not infringe the copyright of the work protected by the measure?

A33. Yes, you may attract civil liability if you knowingly circumvent a technological measure unless you come within the specific and limited exemptions for the following activities –

(a) achieving interoperability of an independently created computer program;

(b) research into cryptography;

(c) identifying and disabling the function of a technological measure to collect or disseminate information which tracks and records the manner of a person's use of a computer network (spyware) in order to protect privacy;

(d) security testing for a computer or computer system/network;

(e) gaining access to parallel imported copies of copyright works;

(f) preventing access by minors to harmful materials on the Internet (screening software); and

(g) copying for preservation and replacement purposes by the librarian or archivist of a specified library or archive under [section 50, 51 or 53 of the Copyright Ordinance](#).

The Government appreciates that legitimate needs for additional exemption may arise as a result of changes in circumstances. Members of the public are welcome to put forward proposals on any new exemption for Government's consideration as and when necessary. The procedures and information required for such proposal is contained in the [Guidance Note for Proponents of Additional Exemptions on Circumvention of Technological Measures](#) published by the Government.

Q34. Can a shop sell modified game consoles which enable the playing of parallel imported computer games?

A34. It depends. If the sole purpose of the modified game console is for the playing of parallel-imported computer games, the new civil liability and criminal liability will not arise. However, if the modified game console has other functions as well, say, for the playing of pirated computer games, then the sale of such modified game consoles will attract civil and criminal liability.

Q35. If a shop provides circumvention services for its customers or give away circumvention devices without charging directly for the services or devices, would it be liable?

A35. If the circumvention services or circumvention devices were provided directly or indirectly as part of a business which is conducted for profit, then the shop providing the circumvention service would be criminally liable regardless of whether it charges separately for the service or device. Likewise, if it is proved that such a shop distributes circumvention devices for profit or reward, or actually includes the circumvention devices as part of the sale of other products, it will be criminally liable. It is important to note that shops will not be able to evade liability simply by providing circumvention devices/services under the cover of "free" offer.

Q36. Could a trader selling circumvention devices evade the new criminal offence if he sells the devices to others under the guise of "for research

purposes”?

A36. One of the exceptions to the sale of circumvention devices applies to a person who conducts research into cryptography. However, the following conditions would have to be met before the exception becomes applicable –

(a) he must be a party to a team involved in the research activities; and

(b) in the course of carrying out the research activities, he develops or supplies circumvention devices to other parties in the team to enable them to proceed with the research.

Q37. Would the new criminal offence against commercial dealing of circumvention devices and commercial provision of circumvention services apply to the trading of general tools such as crypto library or descrambling tools?

A37. The criminal offence covers devices with the following characteristics –

(a) devices that are promoted, advertised or marketed for circumvention of technological measures;

(b) devices which have limited commercially significant purpose except to circumvent technological measures; or

(c) devices primarily designed, produced or adapted for circumventing technological measures.

Generally speaking, it is not the Government’s intention to apply the anti-circumvention provisions to general tools which are necessary for legitimate software development and scientific research activities.

Rights management information and allowing copyright owners and exclusive licensees to seek civil remedy

Q38. What is meant by “rights management information”?

A38. Rights management information means information which identifies the

author, the copyright owner, the performer, or the terms and conditions of use of the copyright work (or recording of the performance). Such information is generally attached to the copyright work (or recording) or otherwise appears when the copyright work (or recording) is made available to the public through the Internet.

Rental rights for films and comic books and providing civil remedy against violation

Q39. Will I be liable if I am a customer renting films or comic books from rental shops that have not been authorized by the relevant copyright owners?

A39. No.

Q40. Will the new rental rights for films and comic books apply to non-commercial lending activities?

A40. No.

Q41. Will the rental rights for comic books apply to the operation of comic cafés/tea-houses which provide comic books to its customers for reading on their premises?

A41. Comic cafes/tea-houses that provide comic books for on-the-spot reference by their customers subject to a direct or indirect payment will be regarded as carrying on rental activities that are restricted under the Amendment Ordinance. Operators of such comic café/tea-house should seek authorization from the concerned copyright owners for their rental activities.

Q42. What should a film or comic book rental shop operator do to absolve his liability under the new rental rights provisions?

A42. A film or comic book rental shop operator should seek authorization from the concerned copyright owners for his rental activities. The Government is encouraging copyright owners to develop reasonable and user-friendly licensing schemes for the rental business and adopt a one-stop shop approach as far as possible to handle licensing requests.

Q43. What could a rental shop operator do if he considers that the terms and conditions of a rental licensing scheme are not reasonable?

A43. Any dispute over film and comic book rental licensing schemes may be referred to the Copyright Tribunal which is a quasi-judicial body empowered to adjudicate disputes over licensing schemes and to confirm or vary the terms of such licensing schemes as it considers appropriate.

Information concerning the Copyright Tribunal and the relevant forms for initiating proceedings could be obtained from the Clerk to the Copyright Tribunal. Request should be sent in writing to the Clerk:

- by fax at 2574-9102
- by e-mail to “clerk_to_copyright_tribunal@ipd.gov.hk”.

Q44. What should I do with my existing stocks of movies/comic books that I have acquired for my rental business before the commencement of the rental rights provisions?

A44. The rental rights provisions will not affect the existing stocks of movies and comic books that rental shop operators have acquired for their rental business before the commencement of the rental rights provisions. Rental shop operators are encouraged to enter into appropriate rental licensing agreements or acquire rental versions of the works concerned to ensure that their future rental activities are legitimately undertaken.

Q45. Will I be affected by the new rental rights provisions if I only provide commercial rental services as my side business?

A45. Yes. You should obtain authorization from the concerned copyright owners regardless of whether the commercial rental activities are provided as your main or side business. If you fail to do so, copyright owners may seek civil remedies.

Q46. Will I be affected by the new rental rights provisions if I only charge my customers a membership fee, but do not charge directly on the copies of movies or comic books offered for rental?

A46. Yes. You should seek authorization from the concerned copyright owners if you offer copies of movies or comic books for rental in return for direct or indirect commercial advantage. If you fail to do so, copyright owners may seek civil remedies.

Q47. Will I be affected by the new rental rights provisions if I sell second-hand movies or comic books?

A47. Genuine sales of second-hand movies or comic books will not be affected by the new rental rights provisions. However, if a shop sells copies of movies or comic books to its customers on the understanding that they may be returned at a lower fee, such activities could also constitute rental activities under the rental rights provision. The concerned operator should seek authorization from the relevant copyright owner; otherwise, he/she may incur civil liability.