

FAQs on Copyright (Amendment) Ordinance 2007

Copyright Protection

Q1. Has the Copyright (Amendment) Ordinance 2007 (the “Amendment Ordinance”) introduced any new civil or criminal liability for copyright protection? If yes, when will the new liability come into effect?

A1. The Amendment Ordinance has introduced a number of new civil and criminal liabilities for copyright protection. The major ones are 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. *(please refer to [Q3](#))*
- (b) A new criminal offence against director(s) or partner(s) who are responsible for the internal management of a body corporate or partnership if the body corporate or partnership has done an act attracting the business end-user criminal liability, unless he proves that he did not authorize the act. *(please refer to [Q13](#))*
- (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). *(please refer to [Q21](#))*
- (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. *(please refer to [Q21](#))*
- (e) New civil liability against any person who circumvents a technological measure used for copyright protection. *(please refer to [Q21](#))*

- (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. *(please refer to [Q30](#))*
- (g) New civil liability against any person who offers films or comic books for commercial rental without the authorization of the copyright owners. *(please refer to [Q31](#))*

The above provisions that introduce new liabilities under the Amendment Ordinance have not come into effect yet. They will come into effect on a date to be appointed by the Secretary for Commerce and Economic Development by notice in the Gazette.

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. 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 following four categories of works for use in his business, namely, computer programs, movies, TV dramas, musical recordings (including visual and sound recordings). This criminal offence applies equally to an individual and a business organization.

The possession of an infringing copy of any other categories of works for use in one's business will not attract criminal liability but may incur civil liability (refer to [Q3](#) for other possible business end-user criminal liability).

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

A3. The Amendment Ordinance has introduced a new offence against copying for distribution or distribution of infringing copies of copyright works in four types of printed works (i.e., newspapers, magazines, periodicals and books). This new offence will apply if -

- (a) the number of copies made/distributed exceeds the numeric limits (“safe harbour”) prescribed in subsidiary legislation to be made by the Secretary for Commerce and Economic Development (refer to [Q7](#));
- (b) the infringing acts are conducted on a frequent or regular basis;
and
- (c) financial loss is caused to the copyright owner concerned.

This offence will apply equally to an individual and a business organization.

Any person who copies and distributes infringing copies in business within the limits of the “safe harbour” will not commit a ***criminal offence***. However, it should be noted that such copying and distribution activities ***constitute civil infringement*** under the existing Copyright Ordinance.

It would therefore be prudent for companies to obtain licences from the relevant [copyright licensing body](#) to cover their copying and distribution activities.

- Q4. Does the new copying/distribution offence mentioned in [Q3](#) apply to distribution of physical copies only?
- A4. No, the new offence will also apply to distribution of digital copies (e.g. scanned copies transmitted by electronic mails).
- Q5. Would I commit an offence if I merely scan articles from newspapers or magazines and upload them on my company’s intranet for internal reference within my company?
- A5. Converting a printed work into an electronic version involves copying of the work. If the conversion is made without the permission of the copyright owner, the resulting scanned copy is an infringing copy. Frequent or regular scanning and uploading of scanned copies of articles in newspapers or magazines on a business’s intranet for access by its staff could fall within the ambit of the new copying/distribution offence in [Q3](#).

Numeric limits (“safe harbour”) will be prescribed in subsidiary

legislation to be made at a later stage. The safe harbour defines the limits above which unauthorised scanning and uploading activities carried on by a person in the course of business would lead to criminal sanctions. Until the numeric limits are set, the offence will not apply to intranet networks. However, it should be noted that such unauthorized scanning and uploading activities ***constitute civil infringement*** under the existing Copyright Ordinance.

- Q6. Would I commit an offence by scanning printed works and uploading the scanned copies onto the Internet for the public to access?
- A6. Converting a printed work into an electronic version involves copying of the work. If the conversion is made without the permission of the copyright owner, the resulting scanned copy is an infringing copy. Uploading a scanned copy of a work onto the Internet for distribution to members of the public without the permission of the copyright owner could constitute a criminal offence under the existing Copyright Ordinance. This offence applies equally to an individual and a business organization. The Amendment Ordinance does not change the scope of this existing offence.
- Q7. What exactly is the “safe harbour”?
- A7. The “safe harbour” sets out the numeric limits above which unauthorized copying and distribution activities carried on by a person in the course of business would risk committing the new copying/distribution offence in [Q3](#). The numeric limits will be prescribed by reference to the number of infringing copies distributed, the percentage copied from a book, the retail value of the book being copied, etc.
- Q8. Can I make copies of a book that is out of print?
- A8. 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.

Nevertheless, for the new copying/distribution offence in [Q3](#), 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.

Q9. Does the new copying and distribution offence (refer to [Q3](#)) apply to commercial activities only?

A9. The new 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. 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 as activities conducted in the course of business. The amended Ordinance has clarified the meaning of “business” to include (a) a trade or business; and (b) business conducted otherwise than for profit. Hence, in addition to commercial enterprises, the new 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)(refer to [Q11](#)).

Q10. Would a teacher be liable under the new copying/distribution offence in [Q3](#) if, without authorization, he/she copies newspapers and books on a large scale for distribution to his/her students on a frequent or regular basis?

A10. The [new copying/distribution offence](#) would 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.

That said, the activities above constitute *civil infringement* under the existing Copyright Ordinance. It is thus advisable for these schools to obtain licences from the relevant [copyright licensing bodies](#) or such copying and distribution activities.

Educational establishments which do not belong to the above three categories (e.g. profit-making private tutorial schools) are *not* exempted from the new offence. Teachers of those schools 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 if the extent of copying or distribution exceeds the numeric limits to be prescribed under the law (“safe harbour”) (refer to [Q7](#)).

Q11. Students are some times required to make copies of books, newspapers, magazines and periodicals for study purposes. Would they be exempted under the new copying and distribution offence?

A11. The new copying/distribution offence will only apply to copying and distribution activities carried on by a person in the course of business (refer to [Q3](#)). 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 business. Therefore, the new 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 (refer to [Q7 of FAQs on Copyright Exemptions](#))

However, if the copying exceeds fair and reasonable portions, he renders himself civilly liable.

Q12. 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 exceeds the safe harbour?

A12. When considering whether the employer has committed the copying/distribution offence, all infringing copies made for distribution at his instructions/directions for the use of the business, should be added together for the purpose of considering whether, for example, the infringing acts were done on a frequent/regular basis or the “[safe harbour](#)” has been exceeded. It is irrelevant, in the above circumstances, that the copies are made by different employees.

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/distribution offence which targets at the ***distribution*** of infringing copies in business.

It is important for business end-users to take steps to manage 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 a criminal offence.

Directors'/partners' criminal liability

Q13. If my company is found to be using pirated computer software in business, would I, being the director of the company, be held liable for a criminal offence?

A13. 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 attract criminal end-user liability for possession of infringing copies of computer software in business ([Q2](#)). 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 the liability if they did not authorise [the infringing activities concerned](#).

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

Q14. What would a director or partner need to do to show that he did not authorise the use of pirated computer software in his company/partnership?

A14. 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. These 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.

Q15. If my company is found to have made for distribution or distributed infringing copies of copyright works that may attract the new copying/distribution offence as mentioned in [Q3](#) above, would I, being the director of the company, be held liable for a criminal offence?

A15. 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 lead to the business end-user copying/distribution criminal liability ([Q3](#)). 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 the liability if they did not authorise the [infringing activities concerned](#).

Q16. What would a director or partner need to do to show that he/she did not authorise the infringing act of making for distribution or distributing infringing copies of copyright work within his/her company?

A16. Where a body corporate or partnership is found to have done an act which may attract the business end-user copying/distribution offence as mentioned in [Q3](#) above, the director or partner may adduce evidence to show to the court's satisfaction that –

(a) 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;

(b) 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;

(c) 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

(d) 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. These 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

Q17. 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?

A17. 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. sell, let for hire, distribute for profit or reward) would not be able to rely on the above defence.

- Q18. 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 [Q17](#)?
- A18. 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.
- Q19. Would an employee be liable for the new copying/distribution offence (refer to [Q3](#)) if he was requested by this employer to make and distribute infringing copies of articles from books, newspapers, periodicals or magazines?
- A19. 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.
- Q20. 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 [Q19](#)?
- A20. 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 company, 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

Q21. What is a “technological measure” that has been employed to protect copyright? What is meant by “circumventing the measure”?

A21. 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.

Q22. Would I be liable for playing pirated computer games using a modified game machine?

A22. 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.

Q23 Would I be liable for playing parallel imported computer games using a modified game machine?

A23 No, you will not incur [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.

Q.24. Would I be liable for purchasing a modified game console?

A24. No, the mere act of purchasing a modified game console does not involve any circumvention activity and would not attract any liability (Refer to [Q22 and 23](#) for liability for subsequent acts).

Q25. Would I attract 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?

A25. Yes, you may attract civil liability if you knowingly circumvent a technological measure, even though your intention is not to commit an infringing act. The Amendment Ordinance has only introduced very 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](#).

Before the prohibition against circumvention of technological measures comes into operation, the Government will consider, having regard to the views of the public and the laws of other jurisdictions, whether further exceptions should be provided through subsidiary legislation.

- Q26. Can a shop sell modified game consoles which enable the playing of parallel imported computer games?

A26 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.

- Q27. 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?

A27. 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 liabilities simply by providing circumvention devices/services under the cover of “free” offer.

- Q28. 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”?

A28. 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.

Q29. 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?

A29. 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.

It is not our intention to apply the anti-circumvention provisions to those 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

Q30. What is meant by “rights management information”?

A30. 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

Q31. 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?

A31. No.

Q32. Will the new rental rights for films and comic books apply to non-commercial lending activities?

A32. No.

Q33. 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?

A33. 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.

Q34. What should a film or comic book rental shop operator do to absolve his liability under the new rental rights provisions?

A34. 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.

Q35. What could a rental shop operator do if he considers that the terms and conditions of a rental licensing scheme are not reasonable?

A35. 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”.

Q36. 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?

A36. 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.

Q37. Will I be affected by the new rental rights provisions if I only provide commercial rental services as my side business only?

A37. 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.

Q38. 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?

A38. 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.

Q39. Will I be affected by the new rental rights provisions if I sell second-handed movies or comic books?

A39. Genuine sales of second-handed 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 attract civil liability.