

LETTERHEAD OF HONG KONG BAR ASSOCIATION

CB(1) 1250/00-01(09)

By fax only

Your ref: B1/BC/11/00

14th May 2001

Mrs. Florence Lam
Clerk to Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road
Hong Kong

Dear Mrs. Lam,

**Bills Committee on
Copyright (Suspension of Amendments) Bill 2001**

Thank you for your letter dated 11th May 2001. Enclosed please find the Bar's submission on the Copyright (Suspension of Amendments) Bill 2001 sent to the Commerce and Industry Bureau for your information.

Should there be someone representing the Bar at the forthcoming LegCo Panel Meeting, my secretary Ms Amy Lee will inform you before Thursday, 17th May.

Yours sincerely,

Margaret Lam
Administrator

encl.

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BY FAX & BY HAND

25th April 2001.

The Commerce & Industry Bureau,
Level 29 One Pacific Place,
88 Queensway,
Hong Kong.

Attn: Ms. Laura Tsoi

Dear Sirs,

Re: Draft Copyright (Suspension of Amendments)
Bill 2001

Thank you for your letter dated 19th April, 2001 inviting the comments of the Bar Association on the Draft Copyright (Suspension of Amendments) Bill 2001.

Enclosed please find the Bar's comments thereon for your consideration.

Yours faithfully,

Edward Chan S.C.
Vice Chairman
(Acting Chairman)

Encl.

**HONG KONG BAR ASSOCIATION'S COMMENTS ON
Draft Copyright (Suspension of Amendments)
Bill 2001**

1. The draft suspension amendments, as well as the original amendments, have ramifications which are immensely far-reaching and serious.

It must be remembered that the Copyright Ordinance, before the controversial amendments which recently commenced on 1st April, 2001, was enacted after a long period of consultation and consideration by the Law Reform Commission and its Copyright Sub-committee which after having studied the matter from 1987-1993, did not recommend criminalization of possession of infringing copies other than for purposes of trade or business with a view to committing an infringing act. In fact, paragraphs 19.29 and 19.33 of the Law Reform Commission Report of the Law Relating to Copyright (Topic 22) rejected criminalization of possession for a purpose merely incidental to the nature of the business.

However, the recent amendments extended criminal liability with grievous and draconian consequences which do not exist in any other jurisdiction.

2. Now that the controversial amendments have to be reconsidered, it will be necessary to consider a number of fundamental issues including the following:
 - a. whether the extension of criminal liability is justified or appropriate;
 - b. If so,
 - (i) whether there should be provisions to balance or to counter the possible abuse of monopoly and dominant position such as the de-regulation of parallel imports in both civil and criminal contexts;
 - (ii) whether there need to be competition provisions including unfair trade practices provisions; and
 - (iii) whether there should be exceptions (which must be specific and clear) to criminal liability in view of the uncertain ambit of the defences under the civil provisions such as fair dealing, education et cetera.

It would be therefore most unwise and unrealistic to approach the matter in a piecemeal and haphazard manner. A full and proper public consultation should be carried out. The Bar shall be happy to provide detailed views.

3. In view of the above considerations, the provisions extending criminal liability by the recent amendments should be suspended pending full and proper re-consideration. The Bar believes this is the right way forward.
4. If, contrary to our view, a limited suspension is insisted upon, the draft bill still suffers from fundamental problems:
 - a. The approach is wrong. The approach presently adopted is dangerous as it may not cover all intended exempted categories. The better approach would be to suspend the extension of criminal liability save in respect of specific categories of matters which are clearly defined and were the original subject of concern.
 - b. The drafting of the bill is fundamentally flawed. The Bar is most concerned that insufficient attention has been paid to basic copyright concepts. For instance:
 - (i) A “printed version of a computer program” (clause 2(2)(b)) is not a copyright work at all. Furthermore, the express exclusion of “a copyright work in any form other than in printed form” defeats the very purpose of the draft bill itself. This is so because most copyright works are not in printed form. For example, newspaper articles (literary works) are almost invariably written in manuscript or in electronic form. Digital photographs and hand and computer-generated drawings (artistic works) are not in printed form. Indeed, very few copyright works are in printed form.
 - (ii) The phrase “a film commonly known as a movie or television drama” (clause 2(3)(a)) is of uncertain scope and meaning and the words “movie” and “television drama” are not defined. Additionally, the Bar does not understand why artificial distinctions between different types of film are introduced.
5. The Bar therefore takes the view that the provisions extending criminal liability in the Intellectual Property (Miscellaneous Amendments) Ordinance should be suspended pending mature re-consideration.