

Legislative Council Panel on Commerce and Industry

Proposal to Liberalize Parallel Importation of Computer Software

Introduction

This paper seeks Members' support for Government to proceed with the legislative amendments to implement the proposal to liberalize parallel importation of computer software.

Background

2. In the context of the Copyright Ordinance, parallel importation of a copyright work (e.g. computer software) means the importation into Hong Kong of a copy of that work which was lawfully made in the country or territory where it was made. A copy of computer software which is parallel imported and which, if made in Hong Kong, would have either infringed the copyright in that computer software, or breached an exclusive licence agreement relating to the software, is regarded as an infringing copy .

3. Under the Copyright Ordinance, so long as a piece of computer software has only been published for 18 months or less, it is a criminal offence to import otherwise than for private and domestic use copies of that software which are infringing copies by virtue of their parallel importation, or to sell such infringing copies. The maximum penalty is \$50,000 per infringing copy and 4 years' imprisonment.

4. In general, parallel importation of computer software which has been published for more than 18 months will not attract criminal liability¹, but will still be subject to civil sanction by the copyright owner concerned. The Copyright Ordinance sets out, for the avoidance of doubt, a number of defences and special matters that the court should take into account in establishing the liability of anyone accused of parallel importation, e.g. whether the person had made reasonable enquiries sufficient to satisfy himself that the software in question was not an infringing copy.

¹ No time limit applies to copies of computer software made in a country, territory or area where there is no law protecting copyright in that software or where the copyright in the software has expired.

5. The Legislative Council as well as users of computer software in the business community have expressed the view that allowing parallel importation of computer software would increase competition and availability of products in the market, resulting in more choices and lower prices for the consumer. Such liberalization will help ease the financial burden of small and medium enterprises in replacing their pirated computer software with legitimate products, in compliance with the recent amendments to the Copyright Ordinance which criminalize the possession of pirated computer software in the course of business.

6. The Government welcomes this idea which is in line with Hong Kong's free-market philosophy. To remove both civil and criminal liabilities for parallel importation of computer software would also be in step with the growing popularity of purchases through the Internet.

7. As the proposal would affect the interests of the software industry, we undertook to consult the industry and other interested parties on the proposed liberalization.

Public consultation

8. We issued over 130 consultation letters on 25 May 2001 to various interested organizations and companies. We have also posted the letter on the Internet inviting comments from the public at large. At the end of the consultation period on 15 June 2001, we received a total of 51 submissions. There is overwhelming support (42 submissions, i.e. over 82%) for the proposal. Many are of the view that the proposal will promote market competition and bring significant benefits to consumers who will be able to enjoy more choices of software products at lower prices.

9. Only 6 submissions (12%) hold opposite views. A few are concerned about the interests of software distributors who have invested resources in providing value-added services such as training. Some anticipate that less training would be provided by software distributors. A few also worry that the proposal will make investigation/prosecution of software piracy difficult. The film and music industry associations have expressed concern over the possible impact brought about by the convergence of computer software with music and film products.

10. In 9 submissions (18%), specific suggestions are made that the proposed liberalization should not be limited to computer software, but should apply to all copyright works.

11. A summary of the views received is at the Annex.

Proposal

12. Having regard to the overwhelming support received, we propose to amend the Copyright Ordinance to remove the criminal and civil liabilities relating to parallel importation of computer software. It is important that civil liability be removed together with criminal liability. With civil restriction still in place, copyright owners may still apply to the court for an injunction, or sue for damages, thus defeating the purpose of the proposal to facilitate parallel importation.

13. Subject to members' support, we will proceed with the drafting of the necessary bill for introduction into the Legislative Council early in the 2001-2002 legislative session.

14. We note the views of the film and music industries and would examine carefully the treatment of multimedia products (e.g. computer software with films and music) in the course of preparing the bill. We will draw on the experience of other jurisdictions where appropriate.

Liberalization of parallel imports of all copyright works

15. Some respondents have suggested an across-the-board removal of restriction on parallel importation of all copyright works. Members will note that it has always been the Government's view that there should not be any artificial barrier to the free flow of goods (in this case parallel imports). However, we also note the intensity of opposition of certain industry sectors to this issue. Members are invited to give their views on this suggestion. We may further consult the public on this in the course of forthcoming review of the Copyright Ordinance.

Commerce and Industry Bureau
June 2001

**Public Consultation on
Proposal to Liberalize Parallel Importation of Computer Software**

**Summary of Views Received
(as at 15 June 2001)**

I Numerical analysis

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- 51 submission received in total (list of individuals and organizations making submissions is at Appendix);
 - 42 submissions (82%) are in support of the proposal; 9 (18%) of such submissions suggest that the proposal should apply to all copyright works;
 - 6 submissions (12%) are against or have reservations on the proposal;
 - 3 submissions (6%) give other views.

II Summary of views

(a) In support of the proposal

- (i) The current restrictions on parallel importation have nothing to do with IP protection.
- (ii) The current restrictions on parallel importation have imposed an onerous burden on the consumers who may not possess sufficiently accurate market information to confirm the date of the release.
- (iii) The 18-month ban would delay the importation of know-how and restrict information flow. The proposal would enable Hong Kong to get the most up-to-date software technologies through multiple, parallel and competitive channels.
- (iv) The proposal would increase market competition, lower software prices, improve availability and choice of software products, and also eliminate problems that might result from the otherwise legal purchase of software from the Internet.

- (v) The proposal would help reduce the local SMEs' cost of doing business.
- (vi) Parallel importation should not be brought within the ambit of the criminal law as the relevant disputes can be pursued in the context of commercial contracts.
- (vii) The proposal should be extended to all copyright works.

(b) Against/have reservations

- (i) Retailers provide value-added services such as training but the parallel importers may not. The proposal would be damaging to local IT industry as there will be loss of IT training and IT professionals.
- (ii) Use of parallel imported software in business (in addition to private and domestic use) should be allowed but the importation of such software for sale should remain an offence. This would enable organizations to acquire cheaper software but some protection would be retained for companies who have invested heavily to become distributors/agents in HK.
- (iii) The proposal may have the unintended effect of increasing the selling of counterfeit copies of software products.
- (iv) Business opportunities for local vendors may diminish. This would result in less local presence for software developers and would make investigation/prosecution of software piracy difficult.
- (v) Liberalization of parallel imports on multimedia products should not be allowed as this would severely and adversely affect the local film industry.
- (vi) Prominent notice should be made on the packaging of software products indicating details of the parallel importers from which consumers can seek technical support or the fact that no technical support is available.

- (vii) Consideration should be given to liberalizing parallel imports only 12 months after the launch of new software in Hong Kong so that sufficient technical skills can be accumulated by authorized distributors to ensure that consumers will get the technical support.
- (viii) There should be an exemption clause to retain the 18-month restriction for locally produced software products. This would not affect the latest and most advanced software from overseas but would help the survival of software industry in Hong Kong which is still in the development stage.

(c) Other views

- (i) Copyright protection in software field has led to monopoly. Issues of monopoly and methods of ensuring reasonable pricing should be examined.
- (ii) It can be difficult for consumers to distinguish between genuine and infringing copies.
- (iii) Government should consolidate the various consumer protection law so as to protect consumers from misleading and deceptive practices in the marketplace, where infringing articles, such as pirated software may be sold.

List of Individuals and Organizations Making the Submissions

(i) *Individual Members of the public*

- 17 submissions

(ii) *Organizations*

1. Business Software Alliance
2. Chinese University of Hong Kong, The
3. Consumer Council
4. EDIAsia
5. Federation of Hong Kong Industries
6. G&A Management Consultants Ltd
7. Hong Kong Baptist University
8. Hong Kong Bar Association
9. Hong Kong Information Technology Federation
10. Hong Kong Institute of Education, The
11. Hong Kong Kowloon and New Territories Motion Picture Industry Association Ltd
12. Hong Kong Polytechnic University, The
13. Hong Kong University of Science and Technology
14. Information and Software Industry Association
15. Innovation and Technology Association
16. Institution of Electrical Engineers (IEE) Hong Kong, The
17. International Federation of Phonographic Industry (Hong Kong Group) Ltd
18. IT Accountants Association
19. Jardine OneSolution (H.K.) Ltd.
20. Law Society of Hong Kong, The
21. Lingnan University
22. Masons
23. Motion Picture Association
24. NetDimensions
25. Open University of Hong Kong, The
26. Scott Wilson (Hong Kong Ltd)
27. Sing Tao Ltd
28. South Island Estate Ltd.
29. Swire Properties Ltd
30. Tech Pacific (H.K.) Ltd
31. University of Hong Kong, The

32. We Software Ltd
33. Web-site.com
34. Yip, Tse & Tang, Solicitors