

Relationship between the Copyright (Amendment) Bill 2001 and Copyright (Amendment) Bill 2003

This paper compares the Copyright (Amendment) Bill 2001 (“the 2001 Bill”) with the Copyright (Amendment) Bill 2003 (“the 2003 Bill”), in particular provisions concerning parallel importation in the two Bills.

Purposes of the Bills

2. The purpose of the 2001 Bill is to remove civil and criminal liability in relation to parallel-imported copies of computer software.

3. The main purpose of the 2003 Bill is to implement the following recommendations arising from the public consultation on certain provisions of the Copyright Ordinance (“the Ordinance”) conducted in late 2001¹:

- (a) the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 whereby criminal liability for the use of pirated copies of copyright works in business is confined to only four categories of works (namely, computer programs, movies, television dramas and musical recordings) should be made permanent;
- (b) the phrase ‘in connection with’ should be removed from the expression ‘for the purpose of, in the course of, or in connection with, any trade or business’ where it appears in the Ordinance;
- (c) a new defence against criminal liability should be provided for employees possessing infringing copies of works belonging to the four categories mentioned in (a) above and which were supplied by their employers, and that this defence should take retrospective effect from 1 April 2001;
- (d) to combat illicit reproduction of books by copy-shops for commercial purposes more effectively, the relevant criminal provisions in the Ordinance should be reviewed; and

¹ For details of the background of the 2003 Bill, please refer to the Legislative Council Brief on Copyright (Amendment) Bill 2003 issued on 29 January 2003.

- (e) the existing restrictions on parallel importation of copyright works (other than computer software) should be maintained, except that the criminal and civil liability for importation and possession of such goods by end-users should be removed.

4. As one can see from the above, issues related to parallel importation are addressed in both Bills. A detailed comparison between the two Bills in this area is set out below.

Comparison of the parallel importation provisions in the two Bills

Scope of relaxation

5. In general terms –

- the 2001 Bill removes all civil and criminal liability in relation to parallel-imported copies of computer software, by exempting such copies from the definition of “infringing copy” under section 35(3) of the Ordinance; and
- the 2003 Bill removes criminal and civil liability in respect of non-commercial dealings with parallel-imported copies of copyright works, by introducing appropriate exemptions wherever such liability is imposed in the Ordinance.

6. As shown above, the 2001 Bill seeks to remove all civil and criminal liability related to parallel-imported copies of computer software generally², including both the actual importation of such copies and any dealing in them. Thus, if the 2001 Bill is enacted, a person will not incur civil or criminal liability for parallel importing copies of computer software, selling such copies, or using such copies in his business.

7. The 2003 Bill also seeks to remove civil and criminal liability in

² Certain types of computer software will be excluded from the scope of liberalisation. These include, for example, movies or musical recordings packaged as computer software.

relation to parallel-imported copies of copyright works, but is different from the 2001 Bill in the following two main aspects-

- (a) the 2003 Bill removes civil and criminal liability in relation to certain specified acts of dealing that are of a non-commercial nature. Existing restrictions on other dealings with parallel-imported copies (e.g. the commercial acts of selling or importing for sale) will be maintained; and
- (b) the removal of liability mentioned in (a) above applies to **all types of copyright works**.

8. Since the scope of the two Bills in relation to parallel-imported copies is different, the 2003 Bill cannot replace the 2001 Bill per se.

Approaches adopted under the two Bills

9. Apart from the differences in scope, different approaches are adopted in the two Bills to give effect to the relaxation proposed under the respective Bills.

10. In the 2001 Bill, the approach taken is to exclude parallel imported copies of computer software from the definition of 'infringing copy' under section 35(3) of the Ordinance. The effect of this will be that, after enactment of the 2001 Bill, parallel-imported copies of computer software will no longer be infringing copies. As a result, none of the civil or criminal sanctions under the Ordinance against dealing with infringing copies of copyright works will apply to parallel-imported copies of computer software. In other words, there will be no restrictions whatsoever on the parallel importing of or dealing with parallel-imported copies of computer software.

11. Furthermore, since the use of computer software often requires installing the software (i.e. making a copy of the software) in the user's computer, the 2001 Bill provides in clause 4 that possessing a copy so made would not attract criminal liability, notwithstanding any term in the

end-user licence agreement prohibiting the use of the software in Hong Kong (and therefore rendering the copy installed in the user's computer an infringing copy).

12. In the 2003 Bill, we propose that certain specified dealings of a non-commercial nature with an infringing copy of a copyright work should be exempted from civil or criminal liability if the copy is an infringing copy by virtue only of its being parallel-imported. Unlike in the case of the 2001 Bill, the parallel-imported copy in question remains an infringing copy, and so any act outside the specified exempted acts (for example, selling or importing for sale any such copy) will continue to attract civil and criminal liability as before.

13. Since we have adopted two completely different approaches in the 2001 Bill and the 2003 Bill for removing restrictions on parallel importation, there is no overlapping of substantive provisions as between the two Bills. (There is some overlapping as regards defined terms, section numbering and other mainly editorial aspects, and these will be dealt with by committee stage amendments in the usual manner.)

Commerce and Industry Branch
Commerce, Industry and Technology Bureau
February 2003