

香港特別行政區政府
工商及科技局
工商科



香港金鐘道八十八號
太古廣場第一期二十九樓

Our Ref : CIB

CB(1) 1297/02-03(01)
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28 March 2003

Ms Connie Szeto
Clerk to Bills Committee
Legislative Building
8 Jackson Road
Central, Hong Kong
(Fax No : 2869 6794))

Dear Ms Szeto,

**Bills Committee on Copyright (Amendment) Bill 2001
and Copyright (Amendment) Bill 2003**

**Follow-up to meeting on 4 March 2003
and meeting on 7 April 2003**

I refer to your letter of 4 March 2003 to Mr Donald Chen of our Bureau. Our follow-up actions are as follows:

Proposed combination of the 2001 Bill and 2003 Bill

- (a) At Annex A please find a table illustrating the effects of the proposed amendments under the 2001 Bill and 2003 Bill in relation to parallel importation on different types of copyright works;
- (b) While it is feasible to combine the two Bills, we would like to point out that doing so may delay the enactment of the provisions in the 2001 Bill and thereby slowing down the liberalization of parallel importation of computer software.

If Members' concern is on the need to iron out any inconsistencies between the two Bills, combining two Bills is

not the only option. A mock-up of the Copyright Ordinance, incorporating both sets of amendments in the 2001 Bill and the 2003 Bill will also serve the purpose.

However, if having regard to the above, Members maintain the view that the two Bills should be combined, the Administration will not object. In this connection, a copy of draft Committee Stage Amendments (CSAs) has been prepared as requested by Members (Annex B). Under the CSAs, the 2001 Bill is subsumed into the 2003 Bill.

Attendance of the Administration

Below please find the attendance list of the Administration for the meeting scheduled for 7 April.

Miss Mary Chow 周淑貞女士	Deputy Secretary for Commerce, Industry and Technology (Commerce and Industry) 工商及科技局副秘書長(工商)
Mr Donald Chen 陳羿先生	Principal Assistant Secretary for Commerce, Industry and Technology (Commerce and Industry) 工商及科技局首席助理秘書長(工商)
Mr Jeffrey Chan 陳飛先生	Assistant Secretary for Commerce, Industry and Technology (Commerce and Industry) 工商及科技局助理秘書長(工商)
Ms Pancy Fung 馮淑卿女士	Assistant Director for Intellectual Property 知識產權署助理署長
Ms Maria Ng 吳凱詩女士	Senior Solicitor, Intellectual Property Department 知識產權署高級律師
Mr Jonothan Abbott 顏博志先生	Senior Assistant Law Draftsman, Department of Justice 律政司高級助理法律草擬專員
Mr Sunny Chan 陳元新先生	Senior Government Counsel, Department of Justice 律政司高級政府律師
Mr Y K Tam 譚耀強先生	Senior Superintendent, Intellectual Property Investigation Bureau, Customs and Excise

Department
香港海關版權及商標調查科高級監督

Yours sincerely,



(Jeffrey Chan)

for Secretary for Commerce, Industry and Technology

cc

DIP (Attn: Ms Pancy Fung)
(Attn: Mr Maria Ng)
S for J (Attn: Mr Jonothan Abbott)
(Attn: Mr Sunny Chan)
C of C&E (Attn: Mr YK Tam)
AA/SCIT

**The effect of the proposed amendments under the Copyright (Amendment) Bill 2001 and Copyright (Amendment) Bill 2003
in relation to parallel importation on different types of copyright works**

Parallel importation^{Note 1} of Computer Software			
	Current position	Impact of 2001 Bill on the <u>current position</u>	Impact of 2003 Bill on the <u>current position</u>
Status of a parallel imported copy of computer software	If its making in Hong Kong would have constituted an infringement of copyright, or a breach of an exclusive licence agreement, it is an infringing copy by virtue of section 35(3) of the Copyright Ordinance (“Ordinance”).	A parallel imported copy will be excluded from the definition of “infringing copy”. It is not therefore an infringing copy.	No impact
Liability of commercial dealing with parallel imported copies, e.g. sale or import for sale. ^{Note 2}	If the parallel-imported copy is an infringing copy (see above), both civil and criminal liability ^{Note 3} will be incurred.	Existing liabilities will be removed	No impact ^{Note 4}
Liability of using a parallel imported copy in the course of doing business (commonly called end-user liability) ^{Note 5}	In general, no criminal liability ^{Note 6} but civil liability remains.	Existing liabilities will be removed	Existing liabilities will be removed
Liability of using a parallel imported copy for private and domestic purpose	No liability	No impact	No impact
Parallel importation of copyright works other than computer software			
Status of a parallel imported copy of work	If its making in Hong Kong would have constituted an infringement of copyright, or a breach of an exclusive licence agreement, it is an infringing copy by virtue of section 35(3) of the Ordinance.	No impact	No impact
Liability of commercial dealing with parallel imported copies, e.g. sale or import for sale. ^{Note 2}	If the parallel imported copy is an infringing copy (see above), both civil and criminal liability ^{Note 3} will be incurred.	No impact	No impact ^{Note 4}
Liability of using a parallel imported copy in the course of doing business (commonly called end-user liability) ^{Note 5}	<ul style="list-style-type: none"> Where the copyright work involved is a movie, TV drama, musical sound recording or musical visual recording, there is criminal liability. There is civil liability for all categories of copyright works. 	No impact	Existing liabilities (civil and criminal) will be removed
Liability of using a parallel imported copy for private and domestic purpose	No liability	No impact	No impact

Note 1: Parallel importation in the context of a copy of a copyright work refers to the importation into Hong Kong of a copy of a work (that was lawfully made outside Hong Kong) without the explicit authorisation of the copyright owner.

Note 2: Specific acts that will attract legal liabilities are set out in sections 30 and 31 (for civil) and section 118 (for criminal) of the Ordinance.

Note 3: Criminal liability incurs only if the dealing happens in the first 18 months after the publication of the work. For both civil and criminal cases, it is a statutory defence for the defendant to prove that he did not have reason to believe that the copy in question is an infringing copy by virtue of section 35(3). This defence will not be affected by the 2001 Bill and 2003 Bill.

Note 4: The 2003 Bill changes the structure of the existing criminal offence provisions under the Ordinance but the coverage of criminal acts generally remain the same as that in the Ordinance.

Note 5: Generally, end-user liability refers to the act of possessing an infringing copy for the purpose of or in the course of any trade or business. Please refer to section 31(1)(a) and section 118(1)(d) of the Ordinance.

Note 6: The Copyright (Suspension of Amendment) Ordinance has suspended the criminal liability of using a computer program. However, it has not suspended criminal liability for movie, TV drama, musical visual recording and musical sound recording. If the computer software contains such “associated works”, criminal liability for using the software remains.

COPYRIGHT (AMENDMENT) BILL 2003

COMMITTEE STAGE

Amendments to be moved by the Secretary for Commerce,
Industry and Technology

Clause

New

Amendment Proposed

By adding –

“3A. Meaning of “infringing copy”

Section 35(3) of the Copyright Ordinance (Cap. 528) is amended by repealing
“A” and substituting “Except as provided in section 35A, a”.

Clause

New

Amendment Proposed

By adding –

“3B. Section added

The following is added immediately after section 35 –

**“35A. Computer program as “infringing copy”
under section 35**

- (1) For the purposes of section 35(3) –
 - (a) a copy of a work that is a computer program is not an infringing copy if it was lawfully made in the country, territory or area where it was made; and
 - (b) a copy of an associated work is not an infringing copy if it was lawfully made in the country, territory or area where it was made.
- (2) For the purposes of this section, where –
 - (a) an article that has embodied in it a copy of a work that is a computer program is or is proposed to be imported into Hong Kong; and
 - (b) at the time it is so imported or proposed to be imported, there is also embodied in the article a copy of any other work (other than a copy specified in subsection (3), (4), (5), (6) or (7)),

that other work is to be regarded as associated with the computer program; and in this Part the copy of the other work embodied in the article is referred to as a “copy of an associated work”.

(3) A copy of a feature film that is embodied in an article is not a copy of an associated work for the purposes of subsection (2) if –

- (a) the copy is a copy of a feature film in its entirety or substantially in its entirety; or
- (b) where the copy is a copy of part of a feature film –
 - (i) all those parts of the feature film copies of which are embodied in the article together constitute the feature film in its entirety or substantially in its entirety; or
 - (ii) the viewing time of all those parts of the feature film copies of which are embodied in the article is more than 15 minutes in aggregate.

(4) A copy of a television drama that is embodied in an article is not a copy of an associated work for the purposes of subsection (2) if –

- (a) the copy is a copy of a television drama in its entirety or substantially in its entirety; or
- (b) where the copy is a copy of part of a television drama –
 - (i) all those parts of the television drama copies of which are embodied in the article together constitute the television drama in its entirety or substantially in its entirety; or
 - (ii) the viewing time of all those parts of the television drama copies of which are embodied in the article is more than 10 minutes in aggregate,

and in paragraphs (a) and (b)(i), reference to a television drama, in the case of a television drama comprising one or more episodes, is a reference to an episode of the television drama.

(5) A copy of a musical sound recording that is embodied in an article is not a copy of an associated work for the purposes of subsection (2) if the economic value of the article is predominantly attributable to –

- (a) the economic value of the copy, as embodied in the article; or
- (b) where copies of more than 1 musical sound recording are embodied in the article, the combined economic value of all such copies, as embodied in the article.

(6) A copy of a musical visual recording that is embodied in an article is not a copy of an associated work for the purposes of subsection (2) if the economic value of the article is predominantly attributable to –

- (a) the economic value of the copy, as embodied in the article; or
- (b) where copies of more than 1 musical visual recording are embodied in the article, the combined economic value of all such copies, as embodied in the article.

[(7) *Proposed exemption for e-books.*].”.”.

Clause

4

Amendment Proposed

In proposed section 118A, by adding --

- “(6) For the purpose of any proceedings for an offence under this section --
- (a) a person is a lawful user of a computer program for the purposes of sections 60 and 61 if he has a contractual right to use the program in any place in or outside Hong Kong, and section 60(2) shall have effect accordingly; and
 - (b) sections 60 and 61 apply in relation to a copy of an associated work as they apply in relation to a copy of a computer program and, accordingly, any act that may under those sections be done in relation to a copy of a computer program without infringing the copyright in the program may be done in relation to a copy of an associated work without infringing the copyright in the work.”.

Clause

11

Amendment Proposed

In proposed Schedule 6 –

(a) in section 1(1) by adding –

““relevant copy work” (有關作品複製品) means –

- (a) a copy of a work that is a computer program; or
- (b) a copy that is a copy of an associated work for the purposes of section 35A(2) of this Ordinance;”.

(b) by adding –

“1A. Application of section 35A to previously imported copies

(1) Section 35A has effect in relation to a relevant copy work that was imported into Hong Kong before the commencement of the amendment Ordinance of 2003 as it has effect in relation to a relevant copy work that is imported into Hong Kong after that commencement.

(2) Accordingly, as regards any act done after the commencement of the amendment Ordinance of 2003 (including any act alleged to constitute an infringement of copyright or an offence under section 118 or 118A of this Ordinance), a relevant copy work that is an infringing copy for the purposes of section 35(3) of this Ordinance by virtue only of an importation that occurred before that commencement is not to be regarded as an infringing copy for the purposes of section 35(3) of this Ordinance unless it would also be an infringing copy for the purposes of section 35(3) of this Ordinance if the same importation occurred immediately after that commencement.

(3) For the avoidance of doubt, nothing in this section or in the amendment Ordinance of 2003 affects any right of action in relation to an infringement of copyright that occurred before the commencement of the amendment Ordinance of 2003.

1B. Exemption from criminal liability previously incurred in respect of “parallel-imported” copy of computer program or associated work

(1) As from the commencement of the amendment Ordinance of 2003, no person shall be liable to conviction for an offence under section 118(1) of this Ordinance, as that section applied immediately before that commencement, in respect of an infringing copy of a copyright work that is a relevant copy work, where the relevant copy work –

- (a) is an infringing copy by virtue only of section 35(3) of this Ordinance; and
- (b) is an infringing copy for the purposes of section 35(3) of this Ordinance by virtue of an importation or proposed importation that occurred before the commencement of the amendment Ordinance of 2003,

unless the relevant copy work would also be an infringing copy for the purposes of section 35(3) of this Ordinance if the same importation or proposed importation occurred immediately after that commencement, having regard in particular to section 35A of this Ordinance.

(2) For the avoidance of doubt, nothing in this section affects any conviction for an offence that was entered before the commencement of the amendment Ordinance of 2003.

1C. Exemption from criminal liability previously incurred in respect of a back-up copy of, or necessary

**copying or adapting of, a computer program
or associated work**

(1) This section applies to an infringing copy of a copyright work that is a relevant copy work, where the relevant copy work –

- (a) was made before the commencement of the amendment Ordinance of 2003; and
- (b) is an infringing copy by virtue only of the fact that it was made by a person who was not a lawful user of a copy of the computer program or other work for the purposes of sections 60 and 61 of this Ordinance,

and in this section “infringing copy to which this section applies” shall be construed accordingly.

(2) As from the commencement of the amendment Ordinance of 2003, no person shall be liable to conviction for an offence under section 118(1) of this Ordinance, as that section applied immediately before that commencement, in respect of an infringing copy to which this section applies unless, for the purposes of proceedings for an offence under section 118A of this Ordinance, a copy made in the same circumstances immediately after that commencement would be a copy made by a person who is not a lawful user of a copy of the computer program or other work for the purposes of sections 60 and 61 of this Ordinance, having regard in particular to section 118A(6) of this Ordinance.

(3) For the avoidance of doubt, nothing in this section affects any conviction for an offence that was entered before the commencement of the amendment Ordinance of 2003.”;

(c) in section 2, by deleting the section heading and substituting –

**“Exemption from criminal liability previously
incurred in respect of “parallel-imported”**

copies of works (other than computer programs)".

Clause

Schedule 1

Amendment Proposed

In section 8(b), by adding –

“copy of an associated work section 35A(2)”.