

立法會

Legislative Council

LC Paper No. LS128/02-03

Paper for the Bills Committee on Copyright (Amendment) Bill 2001 and Copyright (Amendment) Bill 2003

Background

In the Administration's Paper "New Formulation to define the scope of liberalisation" (Paper No. CB(1)1866/02-03(01), the Administration stated that it did not agree to use the concept of "essential object" test based on section 31(5) of the Copyright Act 1968 of Australia and as interpreted in an Australian case: *Australian Video Retailers Association Ltd. v. Warner Home Video Pty Ltd.* [2001] FCA 1719. At the Bills Committee meeting on 6 June 2003, members requested the legal adviser to the Bills Committee to comment on the issue.

Section 31(5) of the Australian Copyright Act

2. Section 31 provides that a copyright owner has several exclusive rights to deal with his copyright work. Under section 31(5), a copyright owner of a computer program has the exclusive right to enter into a commercial rental arrangement in respect of the computer program. However, he does not have the exclusive right if the computer program is not the essential object of the rental.

Australian Video Retailers Association Ltd. (Retailers) v. Warner Home Video Pty Ltd. (Warner) [2001] FCA 1719

3. Warner is the owner of the copyright in relation to certain computer programs in DVD. Retailers had rented DVD embodying both motion pictures and computer programs to customers without the licence of Warner. Warner alleged Retailers of infringing the copyright of the computer programs in DVD. The question before the court is whether the computer program in DVD constitutes the "essential object of the rental". The court ruled that-

"where the essential object (in the sense of purpose) is to be able to experience both the video and audio aspects of a motion picture, albeit that the full benefit of the DVD technology cannot be

experienced or obtained without use of the computer program embodied in the DVD disc, the essential object of the rental is not the computer program but video and audio content of the motion picture and other material consisting of special features, documentaries, etc."

Comments

4. The Administration stated that they did not agree to use the "essential object test" because -

- (a) the test will set out, in a positive manner, the types of articles (with a computer program incorporated) that fall within the scope of liberalisation; and
- (b) the term "essential object" is not clear.

5. On argument (a), it is noted that the Administration has used the test of "likely purpose of acquisition of an article". It appears to be similar to the "essential object test" in that a purposive approach is used in both tests. With a similar test, the Administration has set out, in a negative manner, the types of articles that fall outside the scope of liberalisation. The Administration may wish to clarify whether with the "likely purpose" test, it is possible to set out, in a positive manner, the types of articles that fall within the scope of liberalisation and whether this would achieve greater clarity as to the rights and obligations of copyright owners. It may also wish to further clarify whether it is possible to set out the types of articles respectively that will fall within and outside the scope of liberalisation.

6. On argument (b), the Australian court seems to have no difficulty in interpreting the phrase "essential object of the rental" in section 31(5) of its Copyright Act to mean "the essential purpose of the rental".

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