



COMMENTS BY THE INTELLECTUAL PROPERTY COMMITTEE ON THE COPYRIGHT (AMENDMENT) BILLS 2001 and 2003

PRELIMINARY CONCERNS

- 1 The Law Society was invited by the Bills Committee to make comments on Committee Stage Amendments (CSAs) to the Copyright (Amendment) Bills 2001 and 2003. By letter of 22 May 2003 we were invited to provide our views by 21 June 2003. Subsequently the Commerce and Industry Branch (CIB) of the CITB proposed further amendments to the Copyright (Amendment) Bill 2001 to exclude so-called "e-books" from the ambit of parallel import liberalisation. These proposals were provided to us by letters of 3 and 5 June 2003 requesting our comments by 11 June 2003.
- 2 We are aware of the tight legislative timetable, but are concerned that we have not been given adequate time to review the proposed amendments which are complex and confusing in nature. We have noted a number of errors but cannot be expected to correct all errors and fear that any legislation passed in its present form will be defective.
- 3 Indeed, we have to say that we are very concerned about the form of the proposed amendments and the effect of these in relation to unlicensed use (including parallel imports) of computer programs (especially through the Internet and other on-line services), which are the backbone for the converging media industries.
- 4 The policy behind the drafting of the 2001 Bill is to dilute copyright in respect of computer programs (although it is unclear what present evil this addresses), but at the same time to recognise the legitimate commercial concerns of the movie, music, television and, most recently, publishing industries. The unfortunate result is that the structure of the proposed legislation is to take away rights and then restore them as exceptions. Consequently, the drafting process is often very convoluted and difficult to follow. We observe this as lawyers. The general public will undoubtedly be even more confused.
- 5 **We propose an alternative solution in paragraphs 14 and 15 below.**
- 6 The public's understanding of the proposed legislation will depend upon the way it is presented. A clear example of this was the outcry following the passing of the 2001 amendments, notwithstanding prior consultation, and the subsequent bowing to pressure with the passing of the Copyright (Suspension of Amendments) Ordinance.

- 7** Now, the stated aim of the Bills is to make permanent the suspension arrangements and to liberalise the law with respect to parallel imports of articles embodying computer programs and end-user liability. Our concern is that the legislation will again be misunderstood as liberalising copyright restrictions law at a time when the government should be promoting more effective remedies.
- 8** The effect of the Bills if passed will be largely to dilute the existing rights of copyright owners, whereas what is urgently required is more effective provisions to protect creativity and technological developments. In particular, the legislation does not address industry concerns such as internet piracy of software, anti-circumvention measures, business end-user software piracy, cable and satellite piracy, and the production, distribution and sale of pirated or counterfeit products, including the imposition of landlord liability. From our experience as practitioners, copyright owners are generally unhappy with the lack of progress in addressing these matters.
- 9** New technological developments will undoubtedly arise. Internet and other computer based digital applications are likely to expand, for example in the area of mobile telecommunications and broadcasting. The present proposals respond to those industries today with the loudest voice and assume that other copyright owners (such as newspapers, photo galleries and engineers) do not or will not need similar protection in respect of unlicensed use or their computer based products in the future.
- 10** The government argues that by liberalising parallel import restrictions on computer programs consumers will be able to replace pirated copies with legitimate cheaper parallel imported copies. We view this with some cynicism since the use of parallel imported computer programs will still be controlled under end-user licence agreements with territorial restrictions. The argument is therefore likely to be more imagined than real.
- 11** We note that the views of the games industry represented by the Interactive Digital Software Alliance (IDSA) have not been taken into account in the proposed amendments simply on the basis that "the scope of liberalisation should be as wide as possible" and that "it is not appropriate to reduce the scope of liberalisation further" (paragraph 11 of the CIB June 2003 briefing paper to the Bills Committee). This is not further explained and we fail to see the force of this argument.
- 12** The proposed liberalisation will have a psychological impact reducing the ability of enforcement bodies to tackle the ever increasing problem of end user piracy. Consequently, the piracy problem may be aggravated rather than improved under the proposed amendments unless a serious effort is made by the government to rigorously enforce and prosecute cases of business end- user piracy. We would urge the government to look closely at other remedies to control the piracy problem.
- 13** We are concerned about the complexity of the law now proposed and observe that the attempt to liberalise the law has not led to any simplification of its provisions. We also note that the interrelation between the two Bills is sometimes difficult to follow. For example, proposed Section 118A in the 2001 Bill is not the same as proposed Section 118A in the 2003 Bill. We do therefore recommend a thorough review of the proposed legislation in its entirety taking into account the provisions of both Bills.

AN ALTERNATIVE (SIMPLER) PROPOSAL FOR THE 2001 BILL

- 14 We offer a much simpler approach to the policy proposal of the 2001 Bill. Assuming the policy is that only parallel imported computer programs "as such" are to be removed from the ambit of copyright legislation, a provision to this effect could very simply be drafted.**

- 15 The provision would properly define what a parallel import is by reference to a positive definition of "lawfully made" (as opposed the negative one proposed). It would state that there should be no restrictions under the Copyright Ordinance with respect to any dealing or use in Hong Kong of any parallel import of a computer program "as such" (similar to the Patents Ordinance provision on computer programs). This would leave open the door to protecting both existing and future technologies substantially protected as copyright works in their own right whether or not also comprising computer programs as backbones. The provision would therefore state that such technologies must "substantially comprise" or be "reasonably treated" as embodying such works.**

**The Law Society of Hong Kong
Intellectual Property Committee**

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