



Patricia S. Schroeder
President and
Chief Executive Officer

June 20, 2003

BY ELECTRONIC MAIL (cksin@sinchungkai.org.hk) AND FACSIMILE (011 852 2869 6794)

The Honorable SIN Chung-kai
Chairman of the Bills Committee
Clerk to Bills Committee
Attn: Ms Christina SHIU
Legislative Council Secretariat
3rd floor Citibank Tower
3 Garden Road
Central, Hong Kong

RE: Copyright (Amendment) Bill 2001 and Copyright (Amendment) Bill 2003

Your Excellency, the Honourable Sin Chung-kai:

I am writing in response to an invitation to submit comments on the Copyright (Amendment) Bill 2001 and Copyright (Amendment) Bill 2003 which the Bills Committee is still considering. On behalf of the over 300 publishers that make up the Association of American Publishers (AAP), I appreciate the opportunity to provide you with our thoughts. We attach for your reference two submissions, dated November 22, 2002 and December 22, 2002, respectively, made to Ms. Laura Tsoi, Assistant Secretary for Commerce, Industry and Technology, which address most of our points, including most remaining concerns. We refer you to those letters, but also wish to point out the following to your Committee:

- First of all, we applaud your government for the provisions of the Copyright (Amendment) Bill 2003 that are intended to combat the serious problem of

illicit reproduction of books and other published materials by copyshops. These provisions will mark an enormous step forward in the fight against book piracy in Hong Kong. We remain concerned about exceptions to Section 118C that would relieve one from criminal liability for pirating *an entire book* as a part of a larger reprographic copy, so long as that book was less than 20% of the entire reprographic copy. We feel certain the drafters did not intend this, and refer to our comments submitted to Ms. Tsoi, in which we provided an alternative that will preserve an adequate exception to criminal liability without running afoul basic principles of copyright law.

- Publishers of the AAP are deeply disappointed that serious concerns raised in previous submissions made by us to your government (especially those made on November 22, 2002 and December 22, 2002) went largely unaddressed. In particular, we remain perplexed as to why the Hong Kong government insists upon discriminating against publishers when it comes to criminalizing the use, in the course of a trade or business, of infringing copies of copyrighted materials. There is no principled basis to discriminate against the vast majority of materials produced by AAP member companies. Enactment of Section 118A of the Copyright (Amendment) Bill 2003 in its current form would permanently eliminate the possibility of criminal prosecution for any commercial enterprise that builds its business upon the exploitation of pirate copies of books, journals, original databases, reference works, or similar copyrighted materials. We point out once again that Section 118A's carve-outs will be inconsistent with Hong Kong's international legal obligations, specifically the requirement of TRIPS Article 61 to make criminal remedies available against copyright piracy on a commercial scale.
- We remain concerned about proposed changes in both Bills regarding parallel importation of "computer software." Simply put, if the effect of the Bills is to eliminate the publisher's ability to control importation of copies of CD-ROMs, e-books and similar products into Hong Kong, this would certainly have serious detrimental impacts on investment and employment in the publishing and distribution sectors in Hong Kong and in the practical ability of Hong Kong authorities to prevent the piratical importation of unauthorized copies of such products into Hong Kong.
- Finally, we are disturbed and disagree with the view expressed in paragraph 24 of the legislative council brief (Ref CIB/07/09/5/2) on the Copyright (Amendment) Bill 2003 that "exhibiting in public a parallel imported book for the promotion of culture, or distributing a limited number of parallel

imported copies for classroom use, would not attract any civil or criminal liability.” From this, the drafters’ intent appears to be to remove liability for infringing activity that is not associated with an end-use (i.e., impinging on exhibition or distribution rights).

In addition to these comments and the attachments hereto, we ask you to take note of comments of June 20, 2003, submitted under separate cover, by the Hong Kong and International Publishers' Alliance. Please do not hesitate to contact me if I can provide further information or answer any questions.

Respectfully submitted,



President and
Chief Executive Officer

Attachments as stated



Patricia S. Schroeder
President and
Chief Executive Officer

November 22, 2002

BY ELECTRONIC MAIL (laura_tsoi@citb.gov.hk) AND FACSIMILE (866 2869 4420)

Ms. Laura Tsoi
Assistant Secretary for Commerce, Industry and Technology
Level 29, One Pacific Place
88 Queensway
Hong Kong

RE: Comments on the Copyright (Amendment) Bill 2001 and draft Copyright (Amendment) Bill 2002

Dear Ms. Tsoi:

I am President of the Association of American Publishers (AAP), which represents some 310 publishers that account for over 80% of American published materials sold worldwide. The AAP is the principal trade association of the book publishing industry, publishing hardcover and paperback books in every field – fiction, general non-fiction, poetry, children's literature, textbooks, reference works, religious books, and scientific, medical, technical, professional and scholarly books and journals. Our members also publish audio and video tapes, computer software, looseleaf services, electronic products and services including online databases, CD-ROMs and a range of educational materials including classroom periodicals, maps, globes, filmstrips, and testing materials.

I am writing in response to your e-mail of November 9, 2002, requesting our views on the proposed liberalization of parallel import protection of computer software in the Copyright (Amendment) Bill 2001 (the Bill). We appreciate your reaching out to the publishing community, albeit at this late stage of the legislative process. We have also just learned of your request, dated November 19, to a local reprographic rights organization, seeking comments on the extract of the draft Copyright (Amendment) Bill 2002 which, as you have explained, “seeks to replace section 118 of the Copyright Ordinance to, among others, tighten existing provisions and add a new provision to

combat illicit reproduction of books by copyshops more effectively.” While the deadline of November 23, 2002 is too soon for us to provide you with final comments on the draft 2002 legislation, we make some preliminary remarks below.

I. Response to November 9 Request for Comments on Proposed Liberalization of Parallel Import Protection

a. Discussion

The issue of parallel import protection is of great importance to all publishers, and in particular to those AAP members who maintain offices or agency relationships in Hong Kong to serve the HKSAR and broader regional markets throughout Asia. We appreciate that the Bill is once again being scrutinized by a LegCo Bills Committee, because of the recognition on the part of your government that the Bill as drafted “will allow parallel importation of publications embodied in computer software.” In common parlance, it appears that publications in electronic form such as CD-ROMs and e-books would be encompassed within the category of products that would lose protection against parallel importation. We believe, after reading all of the policy statements on the reasoning behind this Bill, that the relaxation of parallel import protection in such products may be an unintended consequence and certainly appears inconsistent with the stated goal of the legislation.

We note that the Legislative Council Panel on Commerce and Industry’s “Review of Certain Provisions of the Copyright Ordinance” earlier this year concluded that “the status quo be maintained” with respect to parallel import protection of all works other than computer software. We agree with this goal. Although products such as CD-ROMs and e-books may contain computer programs, the marketplace (in Hong Kong and elsewhere) does not treat them as “computer software” and neither should the law in Hong Kong if it means to reflect the realities of the marketplace. Neither CD-ROMs of reference works, literary material, and the like, nor e-books, are sold or consumed in the same way as business software applications or even entertainment software programs such as videogames. Indeed, the marketing and consumption patterns of these products are in many ways more like those for movies and sound recordings, which are explicitly excluded from the scope of the legislation.

Eliminating the publisher’s ability to control importation of copies of CD-ROMs, e-books and similar products into Hong Kong could have serious detrimental impacts on investment and employment in the publishing and distribution sectors in Hong Kong and in the practical ability of Hong Kong authorities to prevent the piratical importation of unauthorized copies of such products into Hong Kong. On the other side of the ledger, to the extent that future Hong Kong consumers enjoy price reductions in these products due

to their unauthorized parallel importation from less wealthy neighboring territories where they may currently be sold more cheaply, that effect will be short-lived, as publishers are likely to eliminate differential pricing in order to preserve their access to the Hong Kong market. At the very least, the enactment of legislation to eliminate this aspect of copyright control regarding this important category of products must be preceded by thoughtful consideration of the net economic and cultural impacts of such a significant legal change. This can hardly be accomplished in a hurried two-week consultation period near the end of the legislative process.

AAP suggests amending the Bill in order to eliminate or minimize its impact upon CD-ROMs, e-books and similar products, so that the necessary consideration could be given to whether to divest publishers of the ability to control importation of such products into Hong Kong. Specifically, AAP recommends amending the Bill so that a “literary work other than a computer program” is not normally treated as an “associated work,” even when imported as part of an article that also contains a computer program. The first way to accomplish this is to set out that, like musical sound recordings or musical visual recordings, a copy of a “literary work other than a computer program” is not an “associated work” as long as “the economic value of the article is predominantly attributable to the economic value of the copy, or to the combined economic value of all such copies, as embodied in the article.” Alternatively, it can be set out that a copy of a “literary work other than a computer program” embodied in an article is not an “associated work” as long as the copy is the essential object of the article for ordinary commercial purposes.

Either alternative would acknowledge and respond to the reality that more and more copyrighted works are distributed in digital forms, and in a product that may incidentally include a computer program. For example, a reference work (protectable as a literary work and/or compilation) such as a dictionary or encyclopedia is distributed in CD-ROM form along with a computer program that facilitates searching the text. Similarly, an e-book containing the literary work of famed Hong Kong writer Liu Yi-chang (or any other author) contains not only the text of the book but also and incidentally a computer program (e.g., a program to allow one to virtually turn the pages). In neither case is the consumer of the product primarily seeking a search engine or a page turning program, but rather the literary work (or compilation) to which the computer program provides useful access. Yet both products would appear to be treated, for purposes of this legislation, the same way as a product that consists principally of a computer program (for example, an accounting program) which incidentally includes prose or audio-visual material that explains how it is to be used. These disparate products serve different markets, reflect different distribution and marketing structures, and should not be treated the same for purposes of deciding whether to eliminate parallel import protection.

AAP's first proposal utilizes the existing structure of Section 35A(3)(b) and recognizes that, in the case of many CD-ROM products and e-books, the economic value of the article in question depends predominantly upon the literary material presented and not the computer program used to access it; no one would buy an e-book simply to obtain a page-turning program. Our alternative proposal borrows the commonly accepted formulation found in Article 11 of the TRIPS Agreement, in which the requirement to provide an exclusive rental right for computer programs "does not apply to rentals where the program itself is not the essential object of the rental." While necessarily somewhat imprecise, this "essential object" formulation has a sound track record in national legislation and can be applied in a practical and simple manner.

We also wish to take this opportunity to express the deep concern of publishers that the Hong Kong government policy regarding right holders' ability to control the unauthorized parallel importation of their works may be in flux. In particular, we would be very disturbed to learn of any plans of the Hong Kong government to relax protection against parallel imports of published materials. Such a drastic change would have a devastating effect on foreign and domestic publishers, distributors, and ultimately, consumers, both in Hong Kong and abroad. We would caution that the careful and deliberate consideration and study that should precede the relaxation of parallel import protection for electronic publications would be even more essential as to the potential negative effects of relaxing parallel import protection of any literary works in any other formats. Such consideration and study should give particular emphasis to the harm to the local authorized distribution business, the availability of the materials for which protection is to be relaxed, price evaluations, and the effect on piracy levels in Hong Kong as a result of any relaxation, and should provide ample opportunity for input from publishers and their representatives.

We note that, at least for the publishing industry, differential pricing of published materials is an important consideration that also has serious social and cultural implications with regard to availability of published materials in the developing world. Relaxation of parallel import protection in Hong Kong will make it extremely difficult for publishers to make available published materials at lower prices, including in neighboring markets, thus driving up costs for everyone, including Hong Kong's consumers. We simply point this out as one example of the kind of careful consideration and study which agencies, committees and legislators must undertake before making decisions with regard to the relaxation of parallel import protection of published materials and other subject matter.

b. AAP's Proposed Amendment to the Bill Regarding Parallel Imports

We recommend an amendment to Section 35A(3)(b) as set out in the Copyright (Amendment) Bill 2001:

(3) A copy of a work 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 or part of a feature film, and its duration when viewed (as embodied in the article) is more than 20 minutes; or
*(b) the copy is a copy of a musical sound recording or a musical visual recording, **or a literary work other than a computer program**, and the economic value of the article is predominantly attributable to the economic value of the copy, or to the combined economic value of all such copies, as embodied in the article.*

An alternative recommended amendment, creating a new Section 35A(3)(c), is as follows:

(3) A copy of a work 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 or part of a feature film, and its duration when viewed (as embodied in the article) is more than 20 minutes; ~~or~~
(b) the copy is a copy of a musical sound recording or a musical visual recording, and the economic value of the article is predominantly attributable to the economic value of the copy, or to the combined economic value of all such copies, as embodied in the article; ~~or~~
(c) the copy is a copy of a literary work other than a computer program, and the copy is the essential object of the article for ordinary commercial purposes.

II. Preliminary Response to November 19 Request for Comments on Provisions to Combat Illicit Reproduction of Books by Copyshops

The AAP commends the Hong Kong government for deciding to address the problem of illicit reproduction of books and other published materials by copyshops. The thrust of the proposed amendment is to add a valuable new tool for enforcement against the rampant unauthorized copying of books, journals, and other publications in these establishments. While the timing of your request (November 19 request for comments by November 23) makes it impossible for us to fully address the issues with respect to the draft provisions we have seen, we note that it is most important to address the following two issues, one of which, based on your e-mail, appears to have been squarely addressed:

- It is important to eliminate possible claims by copyshops that they are not making infringing copies for sale but merely providing a service to customers. Proposed

Section 118C(1) appears to do this by including within the definition of covered entities those that “offer ... reprographic copying services to the public.”

- Because many copyshops do not stockpile copies but quickly dispense them to customers, and since it is almost impossible to detect illegal copying ordered by a customer, it is vital to enforcement efforts that copies made or possessed “without the licence of the copyright owner” under Sections 118(1)(a) and 118C(2) respectively include so-called “test” orders or purchases initiated by agents of copyright owners. It is not clear from the draft whether such “test” orders or purchases are included in those made “without the licence of the copyright owner.”

Other issues which AAP may wish to address at a later time include certain of the defenses set out in draft Section 118C, including but not limited to questions over whether copying of a work is to be excused if it forms only a defined percentage of the material copied.

III. Conclusion

AAP appreciates this opportunity to express the views of publishers on the proposal to eliminate parallel import protection for many of their electronic products, even though these are not generally thought to constitute computer software. We also appreciate the opportunity to make brief remarks with respect to the draft amendments and additions to Section 118 of the Copyright Ordinance, and we reserve for a later time the opportunity to submit a more complete discussion of the issues therein. Please do not hesitate to contact me if I can provide further information or answer any questions.

Respectfully submitted,



President and
Chief Executive Officer



Patricia S. Schroeder
President and
Chief Executive Officer

December 22, 2002

BY ELECTRONIC MAIL (laura_tsoi@citb.gov.hk) AND FACSIMILE (011 852 2869 4420)

Ms. Laura Tsoi
Assistant Secretary for Commerce, Industry and Technology
Level 29, One Pacific Place
88 Queensway
Hong Kong

RE: Additional Comments on Certain Provisions of the Draft Copyright (Amendment) Bill 2002

Dear Ms. Tsoi:

This follows up on my letter to you dated November 22, 2002, which provided comments, on behalf of the Association of American Publishers (AAP), on the Copyright (Amendment) Bill 2001. That letter also included some preliminary comments on the draft Copyright (Amendment) Bill 2002. This letter is intended to provide additional and more detailed comments on this draft legislation. As you now from my earlier letter, AAP is the principal trade association of the book publishing industry.

1. At the outset, may I express the strong opposition of book publishers to the text of Section 118A of the draft legislation. The effect of this provision would be to make permanent the suspension of prior legislation establishing criminal penalties for use, in the course of a trade or business, of infringing copies of a wide range of copyrighted materials, including the vast majority of materials produced by AAP member companies. In other words, enactment of Section 118A in its current draft form would permanently eliminate the possibility of criminal prosecution for any commercial enterprise that builds its business upon the exploitation of pirate copies of books, journals, original databases, reference works, or similar copyrighted materials.

It is, frankly, quite difficult to understand the principled basis upon which the HKSAR government could withdraw such a wide category of illicit business from the reach of its

criminal law. Such an action is inconsistent with Hong Kong's international legal obligations, specifically the requirement of TRIPS Article 61 to make criminal remedies available against copyright piracy on a commercial scale. There is no excuse for inviting unscrupulous businesses to make a profit in Hong Kong through deliberate, intentional theft of intellectual property, often developed at considerable expense and financial risk by authors and publishers; yet that is precisely the message that enactment of Section 118A in its current form would send. We urge that this measure be redrafted to apply to all types of copyrighted works, or at a minimum that the scope of infringing materials whose use in a business setting will not give rise to criminal liability be drastically narrowed, so that literary works other than newspapers and magazines (such as books, journals, original databases and compilations, and reference works) will be protected. Attached to this letter please find a suggested text that would achieve this objective.

2. On the other hand, we applaud the provisions of the draft Copyright (Amendment) Bill 2002 that are intended to combat the serious problem of illicit reproduction of books and other published materials by copyshops. As you explained in an e-mail to a local reprographic rights organization dated November 19, the proposed amendment "seeks to replace section 118 of the Copyright Ordinance to, among others, tighten existing provisions and add a new provision to combat illicit reproduction of books by copyshops more effectively." The thrust of the proposed amendment is to add a valuable new tool for enforcement against the rampant unauthorized copying of books, journals, and other publications in these establishments. In this regard we offer the following observations and suggestions:

- **Eliminate "Service" Argument Put Forward by Copyshops:** AAP agrees that it is important to eliminate possible claims by copyshops that they are not making infringing copies for sale but merely providing a service to customers. You have stated that the proposed amendment to the existing section 118(1)(a), making infringing copies "for reward," in addition to such copies "for sale or hire," will eliminate the "service" argument, since no sale or hire need be shown, so that as long as the copyshop earns a "reward" from the transaction, it can be prosecuted. We also note that proposed Section 118C(1) expressly would apply to copyshops, notwithstanding any argument that they merely provide a service, since it includes within the definition of covered entities those that "offer ... reprographic copying services to the public." In these two ways, the proposed Bill tightens the coverage of copyshops, and does not permit copyshops to use spurious arguments that relieve them of liability. AAP supports both changes wholeheartedly.
- **Category of Works Covered Under Section 118C Should be Broadened:** The proposed draft Bill artificially defines the work to be protected in the copyshop provision as "a copyright work as published in a book, magazine or periodical."

There is no reason for such a cutoff of other works capable of being reproduced by reprography, and indeed, several provisions in the Copyright Ordinance lend strong support to broader inclusion. For example, under Section 45 of the Ordinance (“Reprographic copying made by educational establishments of passages from published works”), reprographic copies of “artistic works or . . . passages from published literary, dramatic or musical works” are all covered. We believe such a listing of the works covered, as opposed to the product configurations in which these works may be embodied (i.e., a “book, magazine or periodical”), is the much sounder formulation. AAP believes that Section 118C should apply to copies of any literary, artistic, or dramatic work capable of reprographic copying.

- **Provision on Amount of a Work That May be Copied Without Liability Should Be Revised:** Proposed draft Section 118C(4) would provide a complete defense when the work reproduced by the copyshop without authorization (“as published in a book, magazine or periodical”) is contained in another “principal work” of which the copied work forms 20% or less. We know of no precedent for such a percentage in the Hong Kong Ordinance, although other laws have included percentage allowances for permissible copying (albeit at smaller percentages, generally no more than 10%).¹ However, those other laws apply to the permissible copying of a percentage of a work, not, as in the case of this draft, to the inclusion of a work that is copied in its entirety and included in a “principal work” in which the copied work in question appears. The result of the formulation in this draft could be disastrous for publishers. For example, it appears that a copyshop would be able to claim this defense if it copied without authorization an entire 100 page book appearing in a compendium totaling 550 pages. We do not believe this is what the drafters intended. A defense may be appropriate where a copyshop makes copies of a small percentage of the work in question. In this case, Section 118C(4)(b) could read as follows:

the infringing copy included in the principal copyright work contains no more than 10% of the work infringed.

If necessary, some adjustment to this guideline could be considered in the case of very short works, such as newspaper articles.

AAP appreciates this opportunity to express the views of publishers on the proposed draft amendments and additions to Section 118 of the Copyright Ordinance. Please do not hesitate to contact me if I can provide further information or answer any questions.

¹ See, for example, Sections 10(2) and 10(2A) of the Australian Copyright Act (10 per cent of certain works deemed to be “reasonable portion” for purposes of various limitations and exceptions to exclusive reproduction right).

Respectfully submitted,

A handwritten signature in cursive script that reads "Pat Schroeder". The signature is written in black ink and is positioned between the closing phrase and the printed name.

President and
Chief Executive Officer

Enclosure as stated