

20 June 2003

Clerk to Bills Committee
(Attention Ms Christina Shui)
Legislative Council Secretariat
3rd Floor Citibank Tower
3 Garden Road
Central
Hong Kong

Submission via email to
cshiu@legco.gov.hk

Dear Sirs

BILLS COMMITTEE ON COPYRIGHT (AMENDMENT) BILL 2001 AND COPYRIGHT (AMENDMENT) BILL 2003

1. Thank you for your letter of 22 May 2003 inviting the Australian Chamber of Commerce in Hong Kong ("**AustCham**") to comment on the Copyright (Amendment) Bill 2003 ("**2003 Bill**").
2. As you will appreciate, AustCham has diverse membership, including major multinational corporations, financial institutions and law firms, but the majority of our membership comprises SME's. Our members include businesses that are copyright owners as well as members that are copyright users. We have endeavoured in this submission to fairly represent the diverse views of our members.
3. We have therefore limited our comments to those matters that we believe are of critical interest to our members, rather than providing a general commentary on the Bill.
4. I confirm that AustCham will not be seeking to make oral submissions to the Bills Committee at its meeting on 4 July 2003, and a completed reply slip was submitted by fax on 20 June, to that effect. [Please note AustCham's comments are confidential and are not to be made public, provided to the media or otherwise disclosed without its express prior written permission].



5. General Observations

5.1 I believe that I can state with confidence that none of our members would deny the right of copyright owners to protect their legitimate interests. We note that a recent survey by the Business Software Alliance (BSA)¹ showed that, in 2002, Hong Kong lost approximately US\$82.3 million in software revenue

5.2 due to a 56 per cent piracy rate (which is a 3% increase in software piracy from 2001). AustCham agrees that there is an urgent need to take action to:

- (a) protect the interests of copyright owners in Hong Kong; and
- (b) minimise the prevalence of pirate copies, and other forms of copyright infringement, in Hong Kong.

It is for this reason that AustCham supports the 2003 Bill, subject to our comments below, as we believe it is a valuable first step towards redressing the current imbalance and anomalies in the copyright regime in Hong Kong. We also believe that imposing criminal liability for certain acts of copyright infringement is a necessary step which should help to reduce the incidence of copyright infringement generally. We do have concerns, however, about certain aspects of the 2003 Bill, specifically in relation to the selective imposition of criminal penalties in relation to certain kinds of works but not others, and the removal of civil and criminal liability for parallel imports of copyright works.

5.3 PROPOSED AMENDMENTS TO SECTION 118

- (a) Under the 2003 Bill, section 118 of the Copyright Ordinance will be deleted entirely and replaced by a new section 118. One of the concerns with the previous Section 118 was the ambiguity of the expression “for the purpose of, in the course of, or in connection with, any trade or business”, which was generally considered to be too broad. We believe that Sections 118(1)(d) and (e) of the 2003 Bill will remove this ambiguity by clarifying the specific types of infringing acts that will attract criminal liability (such as selling, letting for hire, distribution for profit or financial reward, transporting or storing infringing copies of copyright works for profit or financial reward etc.). Relative to the original wording of these subsections we believe that the new wording will provide

¹ (Source: Software piracy costs HK, mainland billions, SCMP, 4 June, 2003 <<http://technology.scmp.com/techbiz/ZZZ6OL479GD.html>>



for increased certainty for both copyright owners and copyright users in knowing the types of activities that will constitute an offence.

- (b) As noted above, the act of transporting or storing infringing copies of copyright works for profit or financial reward will be included in the list of offending acts under the 2003 Bill. This will expand the scope of specific activities that are to be treated as criminal offences. Enforcement of this provision will be assisted by a new section 118 (4) which provides for a presumption that a person is transporting or storing an infringing copy for profit or financial reward where the circumstances give rise to a reasonable suspicion that he or she is doing so for profit or financial reward. A new Section 118(5) provides for a similar presumption where a person possesses an infringing copy of a copyright work with a view to transporting or storing the infringing copy. Given the level of copyright infringement in Hong Kong at this time, we accept that an argument can be made that this expansion of liability and shifting of the presumption of innocence may be justified. However, there are good reasons to be concerned about a presumption of this kind, especially when the imposition of criminal penalties is concerned. **While the purpose of this presumption is understandable, on balance we believe that the burden of proof should remain on the prosecution to prove that the defendant has the requisite intent.**
- (c) We note also that, while sections 118(4) and (5) are intended to assist in the enforcement and prosecution of offending acts, their effectiveness will depend on the interpretation of the phrase "circumstances that give rise to a reasonable suspicion" by the courts.

5.4 NEW SECTION 118A

- (a) The 2003 Bill inserts a new section 118A into the Copyright Ordinance. Under this Section a person will commit an offence if he possesses for the purpose of, or in the course of, any trade or business, with a view to using it in that business, an infringing copy of a copyright work belonging to the following categories of works: feature film, musical sound recording, musical visual recording or television drama. We have some concerns with the concept of separating copyright into different categories of works, and it is unclear to AustCham why these specific types of copyright works should attract more protection (in the form of criminal sanctions) than other types of copyright works. For example, it is unclear why a television drama is more worthy of protection



under the Copyright Ordinance than a children’s television program or a documentary. In relation to “feature films”, is it the Government’s objective to give this genre of film greater protection than other genres such as, for example, short films or documentary films? This type of genre based differentiation is inconsistent with the underlying principles of the Copyright Ordinance. On the other hand, we accept that it may not be appropriate for criminal sanctions to apply to all forms of copyright works (e.g. photocopies).

- (b) It should also be noted that, as currently drafted, Section 118A potentially exposes individuals concerned with the management of a business who are using a single infringing copy of a relevant copyright work to criminal sanctions. This is potentially a significant risk in relation to the use of infringing copies of computer software by businesses. If this provision is to be retained in its current form, AustCham proposes that a six month moratorium be instituted to give businesses the opportunity to audit their software usage and take such steps as are necessary to avoid criminal liability.
- (c) Section 118A(3) provides a defence for employees where an infringing copy is provided to him by or on behalf of his employer for use in the course of his employment. This section will not be available to employees whose position is concerned with the management of the business (refer Section 118A(4)) unless that management employee can prove that he did not know or had no reason to believe that the copy in question was an infringing copy (refer Section 118B(1)). While we understand that there is some concern among copyright owners that these two defences in parallel could act as a loophole which would enable copyright users to avoid liability for infringing works, we believe that the current defence is fair and reasonable given that most non-management employees will not be in a position to know whether or not a copy is an infringing copy and that managers should not be liable if they can prove that they did not know and had no reason to believe that a work was infringing.

We have difficulty in understanding the objectives of Sections 118B(2) and 118B(3), which impose higher obligations on copyright users for imported pirated copies than for other pirated copies. While we understand that the intent is to impose a high standard of proof for parallel imported work, we do not understand why this distinction is made and we are not sure how this will work in practice. Further we do not believe, as some copyright owners have suggested, that the answer is to impose this higher standard of proof for all works (which would include infringing works



covered by Section 118A(3)), as this approach would shift the onus of proving that a copyright work is legitimate to businesses. This would impose an unreasonable burden on businesses and significantly increase the cost of doing business in Hong Kong.

- (d) In addition to these amendments, the 2003 Bill will also introduce a new offence under section 118C directed at copying services whereby a person engaged in a commercial copying service (which under the current drafting could potentially include school and university libraries which offer photocopy services) will commit an offence if he possesses two or more substantially identical infringing copies of a copyright work as published in a book, magazine or periodical. While a number of defences are available under this section (e.g. where a person can prove that he did not know or had no reason to believe that the copies in question are infringing copies, that the relevant literary work is available free of charge to the public, or that the copy constitutes not more than 20% of a principal work in his possession) we believe that the ambit of this section is too broad and places an unreasonable burden on copying services. It is not reasonable to expect copying services to review the work they are given by their customers to determine how many copies they have in their possession or whether the copies are infringing or not. **If this section is to be retained, we suggest that the burden of proof should be on the prosecution to prove that the copying service knew or should have known that the work was illegitimate** (e.g. if a copying service owner is asked to make 100 copies of a complete book with no excuse given then this could be considered reasonable grounds to show that the copying service did not have reasonable grounds to believe that the work is legitimate).

5.5 REMOVAL OF CIVIL AND CRIMINAL LIABILITY FOR PARALLEL IMPORTED COPIES OF COPYRIGHT WORKS

- (a) The 2003 Bill proposes to remove civil and criminal liability for possession of parallel imported copies of copyright works for use in a person's business, provided that:
- (i) the imported copyright works were lawfully made in the originating jurisdiction; and
 - (ii) the person possessing the infringing copy does so other than for purpose of selling or letting for hire, distributing for profit or financial reward or otherwise prejudicially affecting



the copyright owner. We note that these restrictions will not apply to parallel imported computer software if the proposed Copyright (Amendment) Bill 2001 is enacted.²

The 2003 Bill will also amend the Copyright Ordinance to specifically provide that the expression "lawfully made" does not include the making of a copy of a work in a country or place where there is no law protecting copyright in the work or where the copyright in the work has expired.

- (b) We are concerned about the practical effect of liberalising parallel import restrictions. While we understand that one of the objectives of the 2003 Bill is to allow parallel importing under certain circumstances to allow business users to replace pirated copies with legitimate cheaper parallel imported copies, we do not believe that this will work in practice. Rather, it will become increasingly difficult to differentiate legitimate parallel imports from pirated copies or illegitimate used parallel import copies (for example where the copyright work is legitimately imported but is then used for one of the purposes set out in 6.3(a)(ii)). As a result the proposed liberalisation could create confusion and may actually reduce the ability of enforcement bodies to tackle the ever increasing problem of end user piracy.

5.6 Finally, we note that while the 2003 Bill is a useful first step in helping to protect copyright owners and reduce copyright infringement in Hong Kong, it will be of limited use unless a serious effort is made by the Government of the Hong Kong SAR to promote and protect the rights of copyright owners through education programs and to rigorously enforce and prosecute cases of business end-user piracy. Accordingly, we would urge the Government to look closely at all available remedies to control the piracy problem.

² As noted in the Legislative Council Brief Copyright (Amendment) Bill 2001 (Ref: CIB 07/09/6 (pp 2-3)) if the proposed Copyright (Amendment) Bill 2001 is enacted in its current form it is proposed to remove both civil and criminal liabilities related to parallel importation of, and subsequent dealings in, computer software.



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If you would like any further information about this submission or would like to discuss this matter further please contact me on the numbers below.

Yours faithfully

Alan Johnson
Chairman
The Australian Chamber of Commerce