

HONG KONG BAR ASSOCIATION'S

Comments on Copyright (Amendment) Bill 2003

Copyright (Suspension of Amendments) Ordinance 2001

1. The Bar is in favour of making permanent the suspension arrangements under the Copyright (Suspension of Amendments) Ordinance 2001.

Proposed sections 30(2)(b), (3)(b), (4)(b) and (5)(b): Abolishing civil liability in respect of end-user's self or home use of parallel imported goods

2. The Bar is in favour of abolishing the end-user's civil liability in relation to parallel imports if the goods concerned are imported for use in his business or for his home use.
3. These provisions are a step in the right direction, though we are of the view that their scope of exemption from civil liability can be made even broader.

Proposed section 118(1)(d): Offences in relation to infringing copies generally

4. For clarity, we suggest to amend this provision as follows:-

“(d) he –

- (i) sells or lets for hire;
- (ii) offers or exposes for sale or hire;
- (iii) transports for profits or financial reward;
- (iv) stores for profit or financial reward; or
- ~~(iv)~~(v) distributing for profit or financial reward; or
- ~~(v)~~ (vi) for the purpose of selling or letting for hire any infringing copy of

a copyright work, exhibits in public,
an infringing copy of a copyright work;”

Proposed section 118(2): Abolishing criminal liability in respect of end-user’s import of parallel imported goods for use in his business or for home use

5. The Bar is in favour of abolishing the end-user’s criminal liability if the parallel-imported goods were imported for use in his business or for his home use.

Proposed section 118A: Offences in relation to infringing copies of particular categories of works

6. With respect to the proposed s.118A(1), the Bar repeats its view that it has always opposed the criminalisation of possession of an infringing copy and that the basis for attracting criminal liability should be “use” instead.

- Legal practitioners are often required to keep copies of alleged infringing copies in their possession for the purpose of or in the course of their practice, e.g., for the purpose of advising their clients or otherwise acting for them in judicial proceedings.
- Notwithstanding the provision in section 54(1) of the Copyright Ordinance, Cap.528 relating to the exemption of liability for anything done for the purpose of judicial proceedings, it is advisable to make appropriate provisions to make sure that the proposed s.118A will not affect the practice of lawyers and people from other professions as their clients may bring in “infringing copies” (as defined in the Copyright Ordinance, Cap.528) for seeking advice or consultation.

7. For consistence with the rest of the Copyright Ordinance, Cap.528, the Bar

suggests that the term “feature film” used in the proposed s.118A(1)(a) be replaced by the word “movie” which has been used in the proposed s.35A under the Copyright (Amendment) Bill 2001.

8. The Bar suggests that the proposed s.118A(1)(b) be amended as follows:-

“(b) he so possesses the infringing copy with a view to the copyright work being used ~~in doing any act~~ for the purpose of or in the course of the trade or business.”

9. With respect to the proposed s.118A(2), the Bar is in favour of this exemption from criminal liability in respect of parallel-imported goods for use in the end-user’s trade or business as it is consistent with the deregulation of parallel imports.

10. With respect to the proposed s.118A(5), the Bar suggests the following modification:-

“(5) This section does not apply to a copy of ~~a copyright work that is~~ a computer program if –

- (a) the copy is in a printed form; or
- (b) the computer program incorporates the whole or any part of another work, not being a computer program itself, and is technically required for the viewing or listening to of the other work by a member of the public to whom a copy of that work is made available.”

Proposed section 118C: Offence in relation to possession of infringing copies by a copying service

11. With respect to the proposed s.118C(2), the Bar does not understand the reason for using the term “substantially identical reprographic copies” as a copy reproduced by reprographic means should be identical to the original work.

12. In the circumstances, the Bar suggests the following modifications to be made to the proposed s.118C(2):-

“(2) A person commits an offence if, for the purpose of or in the course of a business that includes the ~~providing~~ provision of a copying service, he possesses 2 or more ~~substantially identical reprographic~~ infringing copies of the same a copyright work as published in a book, magazine or periodical, ~~being copies that are infringing copies of the copyright work.~~”

13. The Bar suggests that the proposed s.118C(5) be amended to become the new s.118C(3) with the following modifications:-

“(5) (3) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that ~~copies~~ of the book, magazine or periodical in question ~~(not being infringing copies)~~ are is available free of charge to members of the public who wish to acquire their own copy.”

14. The Bar adds that it does not understand the logic behind the defence under the

proposed s.118C(5) because copyright still subsists in books, magazines or periodicals even if they are made available free of charge to members.

15. With respect to the proposed s.118C(3), the Bar suggests that it be amended to become the new s.118C(4).

16. With respect to the proposed s.118C(4), the Bar suggests that it be amended to become the new s.118C(5) with the following modifications:-

~~“(4) (5)~~ In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that –

(a) ~~he possessed the infringing copies formed part of by virtue only of the fact that he possessed reprographic copies of another work (“principal work”), which he possessed in which reprographic copies the copyright work to which the charge relates forms part of the principal work; and~~

(b) ~~the infringing copies works as published in a book, magazine or periodical constitute not more than 20% of the contents of each of the reprographic copies of the principal work.”~~

Dated this 12th day of 2003.