



3rd July, 2003

The Hon SIN Chung-kai
Chairman
Bills Committee
3/F Citibank Tower
3 Garden Road
Central, Hong Kong

Dear The Hon SIN Chung-kai,

Re : Copyright (Amendment) Bill 2003

IFPI (Hong Kong Group) would like to refer to the above Bill. It may be desirable if we simply focus our discussion and our views on the policy behind such Amendment Bill 2003 first before we go into the wordings of the Bill.

A. **Background**

The main issues of the Amendment Bill 2003 may be summarised as follows:

- i. the liberalisation of parallel import of Computer Program while the existing restriction on parallel import of other copyright works will be maintained;
- ii. the **removal** of criminal and **civil liability** of business users of the parallel-imported copy of any of the copyright works unless the importing or possession of such parallel-imported copy is for the selling, letting for hire, or distributing for profit or financial reward or to such an extent as would **prejudicially** affect the copyright owner; and
- iii. any use of the pirated copy of the Four Categories of Works, namely, computer programs, movies, television dramas and musical recordings in the business will attract criminal liability.

New section 35 (A) as in Copyright (Amendment) Bill 2001 provides as to what kind of works have been excluded for the purpose of criminal offences in relation to parallel imports, mainly the computer program.

B. **Rental Right for Musical Sound Recordings and Musical Visual Recordings**

New definitions on musical sound recordings (as compared to the pure audio sound recording) and musical visual recordings (as compared to the definition on films and television dramas) have now been introduced under new section 35(A).

Section 25 of the Copyright Ordinance (Cap. 528) clearly restricts, among other things, any rental copy of a sound recording. No doubt this will apply to musical sound recording (being within the definition of a sound recording).

In the circumstances, any protection of rental right for the musical sound recording should be extended to the musical visual recordings in order to closed the loophole; otherwise it will clearly defeat the intention of the legislation.

C. **Removal of Civil Liability of Corporate Endusers of Musical Recordings**

We would like to suggest that both criminal and civil liabilities be remain unchanged and available in the case of the use of the parallel imported copy of musical recordings by corporate endusers.

D. **The meaning of “Affect Prejudicially”**

Under the present proposal, the main restrictions for the purpose of the business or trade are the parallel importation of copies of copyright work for the sale or hire of those copies or distribution of parallel imported copies other than for profit or financial reward or to such an extent as to *affect prejudicially* the copyright owner in the business context.

The key words is this context which govern what may or may not be allowed are "to such an extent as to affect prejudicially the copyright owner". It is not clear as to what amounts to be prejudicial to the copyright owners.

In determining whether the use is prejudicial or not, we may need to consider many factors but more importantly the following factors before reaching a conclusion:

1. the **purpose and character of the use**, including whether such use is of a commercial nature;
2. the **nature** of the copyrighted work;
3. the **amount and substantiality** of the portion used in relation to the copyrighted work as a whole; and
4. the **effect of the use upon the potential market** for or value of the copyrighted work.

We would like to suggest that certain guideline or meaning be included in the Amendment bill.

In this connection, we would like to refer you to section 118(7) of the Copyright Ordinance 1997 which provides for what amounts to "what amounts to the defence of no reason to believe that the copy in question is the infringing copy".

Perhaps, we will get into the drafting points when we have a chance to clarify the above issues.

Yours truly,
For and on behalf of International Federation of the
Phonographic Industry (Hong Kong Group) Ltd

Ricky Fung
Chief Executive Officer

c.c. IFPI HKG Committee