THE AMERICAN
CHAMBER OF COMMERCE
IN HONG KONG

美國商會

Comments of the American Chamber of Commerce, IP Committee on Copyright (Amendment) Bill 2003

Thank you for inviting the American Chamber of Commerce to comment on Copyright (Amendment) Bill 2003 (the "2003 Bill"). Our Chamber is an organization of over 2200 members who have been doing business in Hong Kong for many years. Our members value the opportunity to do business in Hong Kong and take seriously our responsibility to enhance its business environment and its international stature. It is in this spirit that we offer our views on the 2003 Bill.[1]

The Chamber's overarching concern regarding the 2003 Bill is that the draft legislation is designed to narrow the scope of protection for copyright works in Hong Kong at a time when copyright piracy is increasing. We believe that reducing the level of protection for copyright works is unjustified and would send the wrong signal to the public regarding the importance of respecting intellectual property rights. This is particularly true given the important strides Hong Kong has made in the past in IPR protection. It is now more important than ever for Hong Kong to show leadership in this area, in order to maintain its competitiveness vis-à-vis other developed economies in the Asia region, and to reap the economic benefits that flow from lower levels of piracy.

Accordingly, we urge the government and LegCo members to modify the 2003 Bill to address the specific concerns outlined below.

"For the purpose of or in the course of any trade or business"

Section 118(1)(d) - One of the objectives of the 2003 Bill is to clarify the meaning of the phrase "for the purpose of or in the course of any trade or business" in the Ordinance. We note that in the new Section 118(1)(d) – and elsewhere in the 2003 Bill – the reference to "trade or business" is omitted, and the concept of "for profit or financial reward" is introduced. We are of the view that this change has reduced the scope of protection for copyright owners, as there may be circumstances in which an infringer commits infringing acts other than for a specifically identifiable "profit or financial reward."

Section 118(1)(e) - This new section is intended to partly replace existing Section 118(1)(d), which deals with possession of infringing copies for the purpose of trade or business with a

[1] We are aware that Copyright (Amendment) Bill 2001 (the "2001 Bill") has also been tabled and is being reviewed by the Bills Committee. The 2001 Bill proposes amendments to the Copyright Ordinance (the "Ordinance") that will allow parallel importation of computer programs in Hong Kong, while at the same time attempts to balance such liberalisation against the interests of the movie, music, television and publishing (on e-books) industries. As changes to Section 35 of the Ordinance under the 2001 Bill are yet to be finalized, we have not included comments on the 2003 Bill that relate to parallel imports in the interim.

view to committing *any act infringing the copyright*. Such infringing acts will presumably cover all the acts restricted by the copyright as listed in Section 22 of the Ordinance. The new Section 118(1)(e) only lists out certain specific infringing acts that are done for profit or financial reward. We are concerned that the new Section 118(1)(e) would greatly reduce the scope of protection under the existing Section 118(1)(d) without justification.

End User Liability

Section 118A(1) – We understand that the new Section 118A(1) is intended to make permanent business end user liability for possession or use of infringing copies of a computer program, feature film, musical sound recording, musical visual recording, or television drama ("Protected Works") as reflected in the Copyright (Suspension of Amendments) Ordinance 2001 (the "Suspension Ordinance"). However, when the new Section 118A(1) is read together with the newly proposed Section 196A (which seeks to define the phrase "for the purpose of or in the course of trade or business"), the meaning of the new Section 118A(1) is ambiguous and overly restrictive. In particular, it seems to suggest that even when a company/business possesses an infringing copy of the Protected Works for demonstrably commercial use, so long as the infringing copy is not used for the purpose of or in the course of the *specific* trade or business in which the company/business is engaged, the company/business will not be criminally liable under this Section. That is contrary to the intent of the law, which is meant to criminalize piracy on a commercial scale. In addition, we are concerned that this provision would make prosecution more complicated and allow defendants to unjustly escape liability.

Section 118A(3) - The statutory defence under new Section 118A(3) problematic. As currently proposed, employees who are designated with the specific responsibility to procure the use of the Protected Works may also rely on this defence, so long as such employees are not "concerned in the management of the employer's business". This defence may be easily abused by the management and employees who would otherwise be subject to criminal liability. Further, those employees in a company/business who do not know and had no reason to believe that the copy in question was an infringing copy of the copyright work are already protected from liability under the defence set forth in Section 118B(1).

Section 118A(5) The provision would exclude from coverage of the criminal law any computer program that is available online and that contains a copy of another copyright work, provided the computer program is necessary for the viewing of or listening to the other work. This provision is evidently meant to apply in limited circumstances involving ordinary Internet usage, but as drafted it would dramatically reduce the scope of protection for a wide range of copyright works. Computer programs frequently contain copies of other copyright works, and in these situations the program is always required to view or listen to the other work. There is no basis for eliminating coverage for such works (either the computer program or the associated copyright work) merely because they are made available online. The provision is contrary to the intent of the drafters and inconsistent with the objective of 118A and therefore should be eliminated or significantly modified.

Printed Materials and Copying Service

General: Members of the publishing community have expressed concern about provisions in the 2003 Bill that would make permanent the suspension of the April 2001 amendments to the Copyright Ordinance criminalizing end user piracy of copyright works – only as those

amendments apply to printed works. This suspension sends the wrong message to the education and small business communities –communities the government should be striving to educate on the importance of intellectual property rights. For these reasons, the government and LegCo should reinstate criminal liability for end user piracy of printed materials that takes place for the purpose of or in the course of any trade or business, including academic institutions.

Section 118(C)(4) – In addition, the statutory defences under sub-section 4 of the new Section 118(C) are problematic. It will be easy for copy shops to avoid liability by breaking up an order to copy the entire book into apparently independent orders, each constituting not more than 20% of the book's overall contents.

Section 118(C)(5) – This statutory defence implies that so long as a publication is distributed free of charge, it could be freely copied without attracting criminal liability. It is fairly common for companies and businesses to distribute their publications to members of the public free of charge (or even over the Internet), but requiring the recipients to provide something other than money in return, for example contact details for further marketing opportunities. Therefore, this defence unnecessarily dilutes the right holder's interests and should not be introduced.

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