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Secretary for Commerce, Industry and Technology
(Attn: Mr Donald CHEN, Principal Assistant Secretary
(Commerce and Industry))
Commerce, Industry and Technology Bureau
8/F West Wing,
Central Government Offices
Ice House Street Central
Hong Kong

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BY FAX

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Dear Mr. Chen,

Copyright (Amendment) Bill 2003

I am scrutinizing the legal and drafting aspects of the Bill and would like to seek your clarifications on the following:

Clause 2 - new section 30(2)(b)

2. Under new section 30(2)(b), how can a person's purpose of importing a parallel-imported copy be ascertained? Is a person required to declare his purpose when he imports a parallel-imported work into Hong Kong?

Clause 4 - new section 118(1) and (2)

3. If a teacher imports into Hong Kong over 100 parallel-imported textbooks for his students, will the teacher be held liable under new section 30(2)(b)(ii) and section 118(1)(f) for distributing infringing copies to such an extent as to affect prejudicially the owner of the copyright?

4. If after acquiring one of the books, student A then sells it to a second-hand bookshop which sells it in turn to student B without any knowledge that it is a parallel-imported copy, will student A and the bookshop be held liable under section 118(1)(d)(i)? It is noted that under the existing section 118(1)(d) and (e), a person will only be criminally liable if he sells, exhibits, distributes an infringing copy of a copyright work for the purpose of or in the course of any trade or business. Is it the administration's intent to hold a person criminally liable (such as student A) even though one is not in the course of trade or business?

Clause 4 - new section 118(1)(d)(iii) and (e)(ii)

5. Under the new section 118(1)(d)(iii), a new offence for transporting or storing an infringing copy of a copyright work for profit or financial reward is created. A person who transports or stores an infringing copy of a copyright work in circumstances that give rise to a reasonable suspicion that he is transporting or storing the infringing copy for profit or financial reward is presumed in the absence of evidence to the contrary to be transporting or storing the infringing copy for profit or financial reward.

6. Under new section 118B(1), it is a defence for the person charged to prove that he did not know and had no reason to believe that the copy in question was an infringing copy of the copyright work.

7. It appears that there is no need for the prosecution to prove any mens rea. It is for the defendant to prove that he did not have the knowledge of the infringing copy and that he has to rebut the presumption of transporting or storing the infringing copy for profit or financial reward. It is noted that in the U.K. Copyright, Designs and Patents Act 1988, the prosecution bears the burden of proof. Section 107(1)(c) of the 1988 Act provides that-

"A person commits an offence who, without the licence of the copyright owner possesses in the course of business with a view to committing any act infringing the copyright an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work."

8. The Law Reform Commission (LRC) in its Report on "Reform of the Law Relating to Copyright" in November 1993 "thinks it right that the prosecution, and not the accused, should bear the usual burden of proof We recommend that the offence provisions (sections 107-110) of the 1988 Act should be adopted in Hong Kong (p.197)." Why is there a departure from the recommendation of LRC? Apart from Hong Kong, which country has shifted the burden of proof onto the defendant? Further, it is noted that the burden of proof under this section is different from the new section 118D(2). Why is there a different approach?

9. Under the new section 118(1)(e)(ii), a person commits an offence if he possesses an infringing copy of a copyright work with a view to storing for profit or financial reward. If a person is found to have a collection of infringing copies of a copyright work and on questioning, he says that he may sell the collection for a good price, would he be charged under section 118(1)(d)(iii) for storing for profit or financial reward or under section 118(1)(e)(ii) for possessing infringing copies of a copyright work with a view to storing for profit or financial reward?

10. As for the term "for financial reward", is there any authority for the term to be translated as "經濟報酬" in Chinese?

Clause 4 - new section 118(3)

11. Subsection (1)(b), (c), (d)(iii) and (e)(ii) does not apply to an article in transit. How about an article that is being transhipped?

Clause 4 - new section 118C(2)

12. A person commits an offence if for the purpose of a business that includes the providing of a copying service, he possesses 2 or more substantially identical reprographic copies of a copyright work as published in a book, magazine or periodical being copies that are infringing copies of the copyright work. What if he possesses only 1 infringing copy and he has the intention to make profit out of that infringing copy some day in future? Would he be held liable under the new section 118(1)(e)(ii), i.e. for possessing an infringing copy of a copyright work with a view to storing for profit or financial reward or any other section?

Clause 4 - new section 118C(4)

13. Please clarify the effect of 4(a) and (b) with illustrations.

Clause 8 -new section 196A

14. Should the word "any" be added before the word "trade" in the heading as well as in the provision so that it can reflect the reference "for the purpose of or in the course of any trade or business" as now being used in the Copyright Ordinance?

15. As of to-day, I have not received the marked-up copy of the amended version of the 2003 Bill incorporating the amendments made by the 2001 Bill and I therefore could not make any comments thereon. When will it be available? Your early reply before the date of next meeting, i.e. before 8 September 2003 is appreciated.

Yours sincerely,

(Anita HO)
Assistant Legal Adviser

c.c. DoJ (Attn: Mr Jonothan ABBOTT, SALD and Mr Sunny CHAN, SGC)
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