

# **HONG KONG BAR ASSOCIATION**

## **COPYRIGHT ORDINANCE**

### **(Chapter 528)**

#### **COPYRIGHT (AMENDMENT) BILL 2001**

1. Our view remains that maintaining laws which impose criminal sanctions for possession for purposes merely incidental to business is draconian, unwarranted and without parallel in any other part of the world. Such criminal sanction should be repealed immediately.
2. If, contrary to our views, such criminal sanctions are to be maintained, the matter must be approached on a broader spectrum. As a matter of priority, there should be provisions to balance or to counter the possible abuse of monopoly or dominant position. In particular, there should be complete liberalization of parallel imports. Our views have been set out in the Hong Kong Bar Associations Comments on Draft Copyright (Suspension of Amendments) Bill 2001.
3. This Bill seeks to remove civil and criminal liabilities related to the parallel importation of and subsequent dealings in computer software. The proposed liberalization accords with modern principles of free trade and consumer choice.
4. We are pleased to see that the proposed amendments adopt the spirit of our recommendations rendered in April, 2001 – see the Hong Kong Bar Association's Comments on Draft Copyright (Suspension of Amendments) Bill 2001.
5. However, these proposed amendments are only limited to computer software. They do not go far enough. There should be complete liberalization of parallel imports.

Dated: 28<sup>th</sup> August 2002

# Hong Kong Bar Association

## Draft Copyright (Suspension of Amendments) Bill 2001

1. The draft suspension amendments, as well as the original amendments, have ramifications which are immensely far-reaching and serious.

It must be remembered that the Copyright Ordinance, before the controversial amendments which recently commenced on 1<sup>st</sup> April, 2001, was enacted after a long period of consultation and consideration by the Law Reform Commission and its Copyright Subcommittee which after having studied the matter from 1987-1993, did not recommend criminalization of possession of infringing copies other than for purposes of trade or business with a view to committing an infringing act. In fact, paragraphs 19.29 and 19.33 of the Law Reform Commission Report of the Law Relating to Copyright (Topic 22) rejected criminalization of possession for a purpose merely incidental to the nature of the business.

However, the recent amendments extended criminal liability with grievous and draconian consequences which do not exist in any other jurisdiction.

2. Now that the controversial amendments have to be reconsidered, it will be necessary to consider a number of fundamental issues including the following:
  - a. whether the extension of criminal liability is justified or appropriate;
  - b. If so,
    - i. whether there should be provisions to balance or to counter the possible abuse of monopoly and dominant position such as the de-regulation of parallel imports in both civil and criminal contexts;
    - ii. whether there need to be competition provisions including unfair trade practices provisions; and
    - iii. whether there should be exceptions (which must be specific and clear) to criminal liability in view of the uncertain ambit of the defences under the civil provisions such as fair dealing, education et cetera.

It would be therefore most unwise and unrealistic to approach the matter in a piecemeal and haphazard manner. A full and proper public consultation should be carried out. The Bar shall be happy to provide detailed views.

3. In view of the above considerations, the provisions extending criminal liability by the recent amendments should be suspended pending full and proper re-consideration. The Bar believes this is the right way forward.
4. If, contrary to our view, a limited suspension is insisted upon, the draft bill still suffers from fundamental problems:

- a. The approach is wrong. The approach presently adopted is dangerous as it may not cover all intended exempted categories. The better approach would be to suspend the extension of criminal liability save in respect of specific categories of matters which are clearly defined and were the original subject of concern.
- b. The drafting of the bill is fundamentally flawed. The Bar is most concerned that insufficient attention has been paid to basic copyright concepts. For instance:
  - i. A "printed version of a computer program" (clause 2(2)(b)) is not a copyright work at all. Furthermore, the express exclusion of "a copyright work in any form other than in printed form" defeats the very purpose of the draft bill itself. This is so because most copyright works are not in printed form. For example, newspaper articles (literary works) are almost invariably written in manuscript or in electronic form. Digital photographs and hand and computer-generated drawings (artistic works) are not in printed form. Indeed, very few copyright works are in printed form.
  - ii. The phrase "a film commonly known as a movie or television drama" (clause 2(3)(a)) is of uncertain scope and meaning and the words "movie" and "television drama" are not defined. Additionally, the Bar does not understand why artificial distinctions between different types of film are introduced.

5. The Bar therefore takes the view that the provisions extending criminal liability in the Intellectual Property (Miscellaneous Amendments) Ordinance should be suspended pending mature re-consideration.

Dated 25 April 2001

Hong Kong Bar Association