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6th September 2002

Clerk to Bills Committee
(Attn : Ms. Christina Shiu)
Legislative Council Secretariat
3rd floor Citibank Tower,
3 Garden Road,
Central, Hong Kong

URGENT
By Fax & By E-mail
(2869 6794)
(cshiu@legco.gov.hk)

Dear Sirs,


Re : Bills Committee on Copyright (Amendment) Bill 2001

We thank you for your letter of 16th July 2002 inviting views from our organisation on the above and enclose our response for your attention [Document No. 1]. The response paper was produced by our Copyright Committee with Mr. Tan Loke-Khoon as the Convenor and other members consisting of Mr. Gilbert Collins and Mr. Tim Hancock. Mr. C. K. Kwong participated in his capacity as President of the APAA Hong Kong Group.

Although no general meeting was called for tabling, discussing, debating and resolving on a position to be taken by the Group so that the enclosed response cannot be treated as our official position, it is based on the views of our Copyright Committee which consist of practitioners with long standing experience in this field.

In addition to the comments set out in Document No. 1, it may be useful, and accordingly we have, enclosed a further copy of our letter to the Secretary for Commerce and Industry dated 16th June 2001 [Document No. 2] for the sake of completeness.

Yours faithfully,


C. K. Kwong
President
Asian Patent Attorneys Association
Hong Kong Group

Encl.

cc Members of the Copyright Committee
cc Councillors

Document No. 1

Hong Kong Group Asian Patent Attorneys Association Comments on the Copyright (Amendment) Bill 2001

General Comments

We are of the view that all civil and criminal liabilities under the Copyright Ordinance against parallel importation of and dealing in copyright works should be removed. We believe that there should be an “all or none” approach so that all types of copyright work will be treated equally. As such, we do not support the amendments in the sense that parallel importation of films and musical sound recording or musical visual recording will continue to attract both civil and criminal liabilities.

Specific Comments

Section 35A(3) – In relation to a feature film, we see the threshold of the duration of the film as more than 20 minutes as arbitrary. For television programs that are allocated with 30-minutes time slots for broadcast, the actual airtime without intervening commercials may only be slightly more than 20 minutes. Similar consideration is valid for documentary and short movies. We believe that the same test for musical sound recording or musical visual recording should be applied in relation to feature film, i.e. whether the economic value of the article is predominantly attributable to the economic value of the copy of the associated work embodied in the article.

Section 118A(1) – It should be noted that Section 118(1) deals with different kinds of infringing acts that will attract criminal liability. The wording of Section 118A should be clarified to ensure that the copies or adaptation (see further discussion relating to adaptation below) made under Sections 60 and 61 will only be considered as non-infringing copies in relation to imports into Hong Kong and possession in the business environment and not otherwise. For instance, where a person makes for sale or hire a back up copy (that might be lawfully made under Section 60) without the authority of the copyright owner, that copy should still be considered as an infringing copy for the purposes of Section 118(1)(a).

Section 118A(1)(a) – The wording of this sub-section is ambiguous. It is not clear how a person can have “a contractual right” to use a parallel imported program when “that contractual right is subject to terms that have the effect of restricting or prohibiting the use of the program in Hong Kong”. Under that contract, such person simply has no “contractual right” to use the program that is parallel imported into Hong Kong in the first place.

We also suggest that clear wording should be used to clarify that the contractual restriction or prohibition that section 118(A) covers is purely relating to territorial restriction or prohibition, and not other restriction or prohibition relating to the use of the program in general.

We note that Section 60 (3) allows the copyright owner and user of a computer program to disallow the making of back-up copy for the purposes of lawful use by agreement. The Government may consider taking this opportunity to clarify whether the parties may also by agreement disallow the copying or adaptation of a program under Section 61.

Section 118A(1)(b) – Section 61 allows a lawful user of a copy of the computer program to copy *or adapt* the program without infringing the copyright in the program if the copying or adapting is necessary for his lawful use.

By virtue of the amendments under Section 118A, a lawful user may also adapt a copy of an associated work under Section 118A(1)(b).

However, since the term “adaptation” in relation to computer program and other types of works has been defined in Section 29(3), Section 118A(1)(b) should be clarified to ensure that the right to make adaptation, even if necessary for the lawful use of a lawful user, is not extended in a way that will affect the copyright owner’s exploitation of the associated work (e.g. translation of the associated work).

L- 18/6/2001



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16th June 2001

Secretary for Commerce and Industry
Commerce and Industry Bureau
Government of the Hong Kong
Special Administrative Region
Level 29, One Pacific Place,
88 Queensway, Hong Kong

By Fax & By Hand
(2869 4420)

Attn : Ms. Laura Tsoi

Dear Sir,

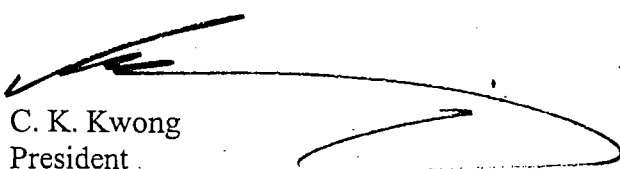
Re : Proposal to Liberalize Parallel Importation of Computer Software under
the Copyright Ordinance

We thank you for your letter of 25th May 2001 requesting views of our organization on the above by the 15th June and enclose our response for your attention. Our Copyright Committee consisting of Ms. Anne Choi, Mr. Gilbert Collins and Mr. Tim Hancock has arranged for a quick survey to gauge the reactions of our members for this purpose.

Although no general meeting was called for tabling, discussing, debating and resolving on a position to be taken by the Group so that the enclosed response cannot be treated as our official position, the response is nevertheless based on the input of those who responded.

We hope our input is of assistance to the Administration in the development of its policy.

Yours faithfully,


C. K. Kwong
President
Asian Patent Attorneys Association
Hong Kong Group



Encl.

cc Members of the Copyright Committee
Council Members

**Response to the invitation of views by
Commerce and Industry Bureau on the Proposal to Liberalize Parallel
Importation of Computer Software under the Copyright Ordinance**

1. A quick survey was conducted by the Asian Patent Attorneys Association Hong Kong Group ("the Hong Kong Group") amongst its members during the 5 days period from the 9th June 2001 to 13th June 2001 by way of circulation of a Questionnaire as per the document annexed hereto marked "A" to gauge the general trend of thoughts among our members.
2. All those who responded are in favour of the proposal to remove the criminal and civil liabilities relating to parallel importation of computer software.
3. A majority of those responded in fact took the further view that extension of the proposal to other copyright materials should be considered by the Government.
4. The following observations were made by some of our members :-
 - (a) Parallel imports are genuine goods;
 - (b) Criminal punishment in the context of parallel import exceeds the grievance of the copyright owner;
 - (c) Various factors in the development of commerce and industry worldwide have eroded the justifications which might be available for prohibiting parallel import previously :-
 - (i) the global village concept;
 - (ii) the dynamic arrangements employed by multi-national companies to shift their manufacturing base to low costs countries;
 - (iii) over spilling effect of advertising efforts internationally due to advance in communication technology;
 - (iv) availability of products via the internet through on-line purchases; and
 - (v) worldwide warranties/services available to the goods irrespective of the place of purchase.
 - (d) Consistency of copyright and trade mark laws on this issue should be considered.