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13 September 2002

Clerk to Bills Committee
(Attn: Ms Connie Szeto)
Bills Committee on Copyright (Amendment) Bill 2001
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Ms Szeto,

Bills Committee on Copyright (Amendment) Bill 2001

I refer to your letters of 7 and 11 September 2002 enclosing copies of three submissions to the Bills Committee, and inviting the Government to respond to those submissions.

2. We welcome the general support for the Bill expressed in those submissions. As regards the specific issues raised in the submissions, some have already been addressed in our letter of 6 September, and we will not repeat them in this letter. Our responses to other views raised are set out below.

Approach adopted for excluding feature films

3. We are mindful that the scope of the Bill should be wide enough to cover computer software for educational and recreational purposes which often contains audio-visual works in addition to computer programs. On the other hand, we want to avoid unintentionally lifting the restrictions on parallel importation of movies and musical recordings.

4. To exclude feature films from the liberalisation, we have adopted the test that if an article contains a copy of a computer program and a copy of a feature film with duration of more than 20 minutes, the article cannot be parallel imported. We have modelled this on the approach adopted by Australia in its Copyright Amendment (Parallel Importation) Bill 2002. As for musical recordings, the approach adopted is that if an article contains a copy of a computer program and a copy (or copies) of musical sound recording(s) or musical visual recording(s), and the economic value of the article is predominantly attributable to the economic value of the musical recording(s) contained in the article, the article cannot be parallel imported.

5. We accept that there may be a case to adopt a consistent approach in excluding feature films and musical recordings from the liberalisation, by using the economic-value test. We are consulting the movie industry on this revised approach, but the industry's initial feedback is not positive.

Licence for incorporating movie and music clips in computer software

6. The local movie industry has suggested that any movie or music clips incorporated in computer software should be excluded from the liberalisation. In other words, any computer software incorporating movie or music clips cannot be parallel imported, unless the licence for the use of the movie or music clip in the computer software covers the territory of Hong Kong.

7. We have reservation about this suggestion. The suggestion will create considerable uncertainty for parallel importation of computer software incorporating movie or music clips, as it will be difficult for a parallel importer to ascertain whether a movie or music clip incorporated in the software is properly licenced or not. This will affect a great number of educational and entertainment software, and will significantly defeat the objective of the liberalisation exercise.

8. From a practical standpoint, we believe that the suggestion will not bring any significant economic benefit to the industries concerned, apart from the additional safeguard against parallel importation of movies or musical recordings disguised as computer software.

Section 118A(1)

Clarification to prevent sale or hire of a back-up copy

9. The view has been expressed that the wording of section 118A(1) should be clarified to ensure that the copies or adaptation 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, so that if a person makes for sale or hire a back-up copy without authority of the copyright owner, that copy will still be considered as an infringing copy for the purpose of section 118(1)(a).

10. Section 118A(1) provides that for the purpose of any proceedings for an offence under section 118(1), sections 60 and 61 of the Copyright Ordinance (where a lawful user of a computer program may make a back-up copy, or copy or adapt the computer program if it is necessary for his lawful use) have effect notwithstanding the existence of geographical restrictions in the end-user licence of the computer program. If the back-up copy is made for sale or hire, it is not necessary for the user's lawful use and will, therefore, be outside the scope of section 60.

Contractual right to use a computer program

11. The view has been expressed that the words "a contractual right" in the proposed section 118A(1) are ambiguous as 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".

12. An end-user licence of a computer program originally intended for sale outside Hong Kong may contain a term that the licence will be void if the program is used in Hong Kong. Under this licence, the end user has a contractual right to use the program outside Hong Kong, but cannot use it in Hong Kong.

Clarification of section 118A(1)(b) to restrict the scope of "adaptation"

13. It has been suggested that section 118A(1)(b) should be clarified to ensure that the right to make adaptation of an associated work 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).

14. For the same reason as explained in paragraph 10 above, we consider that the existing wording of section 61 has provided adequate safeguard to limit the purpose of the adaptation.

Whether parties may by agreement disallow the copying or adaptation of a computer program under section 61 of the Copyright Ordinance

15. It is suggested for consideration to provide in section 61 that the copying or adaptation allowed should be subject to any agreement provided to the contrary.

16. This is a matter outside the scope of the Bill. Section 61 provides that a lawful user of a computer program may copy or adapt the program if the copying or adaptation is necessary for his lawful use. Unlike the making of a back-up copy, such copying or adaptation is essential in using computer programs, e.g. a computer program may not be perceived, assessed or run without being copied into computer memory; copying or adaptation may be required where there is a bug (which is a coding error) in a computer program. There is therefore a practical need to allow for such copying or adaptation free from any agreement terms which provide to the contrary.

17. The Chinese translation of this letter will be sent to you separately.

Yours sincerely,

(Laura Tsoi)

for Secretary for Commerce, Industry and Technology

c.c. IPD (Attn: Miss Pancy Fung and Miss Maria Ng)
D of J (Attn: Mr Jonothan Abbott and Mr Sunny Chan)
C&ED (Attn: Mr Y K Tam)