Paper for Bills Committee
on Copyright (Amendment) Bill 2001

List of drafting issues raised in submissions to the Bills Committee

Clause No.	Organizations	Views	Administration's responses
1	Legal Service Division (LSD)	On change of Secretary's title Will Secretary for Commerce and Industry" be amended to "Secretary for Commerce, Industry and Technology"?	CSA will be proposed.
3	LSD	On new section 35A(1) - "Computer Program" ● Why is "computer program" not defined? ● Can computer games be parallel imported?	● Law Reform Commission Report in 1993 did not recommend defining "computer program". ● Yes. Provided they satisfy requirements under section 35A in Clause 3 of the Bill.
	Hong Kong Information Technology Federation	Definition for "software"? "Firmware" is not taken into consideration.	"Firmware" should fall within the scope of "computer program" and therefore the Bill.

		<u>On new s.35A(1)(a) - "lawfully made"</u>	
	The Law Society of Hong Kong (Law Soc.)	● "Lawfully made" is ambiguous. It could not allow parallel import of copies of computer program made in violation of contract terms such as those in manufacturing licence restricting copies made and subsequently to be sold in Hong Kong.	● "Lawfully made" is already in use in the Copyright Ordinance. If at the time of making copies of that computer program, the licensee does not intend to import them to Hong Kong, those copies will be lawfully made even though they are subsequently parallel imported to Hong Kong by a third party.
		● "Lawfully made" is not the same as lawfully "put on the market". Suggest to state that "a copy of a computer program or associated work made outside Hong Kong is not an infringing copy by virtue only of any term in any contract with the owner of copyright in the work in Hong Kong restricting or prohibiting the import or sale of such copies in Hong Kong."	
		● The places referred to in the definition of "lawfully made" under section 35(9) of the Ordinance should be extended to exclude places recognizing exclusions or defences which Hong Kong does not recognize under the Ordinance.	● Not practicable to compare certain aspects of the copyright law in another jurisdiction with those in Hong Kong before determining whether a certain copy of copyright work was "lawfully made" in that jurisdiction.
		● The Bill has not addressed the situation where a copy is “lawfully made” by an overseas copyright owner who is different from the copyright owner in Hong Kong. Section 35(9) should be amended by adding “lawfully made by or on behalf of the owner of copyright in the work in Hong Kong”.	● No such distinction should be made. "Lawfully made" covers the situation where copies of a work are made or authorized to be made by the copyright holder in the place where they are made, no matter in Hong Kong or overseas.

	Law Soc.	<u>On new s.35A(2)(a) - "embodied"</u> A non-infringing copy of an associated work should be "lawfully embodied" in the article.	Adding "lawfully" before "embodied" is unnecessary. For a copy of an associated work to be considered as lawfully made, it must be lawfully embodied in the article.
	Law Soc.	<u>On new s.35A(2) - "associated work"</u> ● Why films and musical recordings are treated differently from other copyright works? ● A feature film does not seem to include a comedy or documentary.	● Consistent with policy decisions. ● A comedy or documentary may fall within the scope of a movie or a television drama.
	Movie Producers & Distributors Association	<u>On new section 35A(3)(a) - "20-minute duration"</u> Easy to edit a 1-hour television drama into two discs, each of 20 minutes. For films, not unusual to have different stories in one film. The "20 minutes duration" is unnecessarily too long. Should be amended to "10 minutes in aggregate" with "no more than 1 minute of film content from each film."	To prevent licensees from breaking down a movie into several parts, copyright owners can insert appropriate terms in the licence agreement to protect their interests.
	Law Soc./ H.K. Group Asian Patent Attorneys Association (APAA)	The 20-minute duration is arbitrary. The actual airtime for a 30-minute TV program may be slightly more than 20 minutes. So are documentary and short movies.	The effect is to prevent a copy of a full-length movie or television drama disguised as computer software from being lawfully parallel imported into Hong Kong. Approach adopted by Australia for a similar purpose.
	LSD	If a film is divided into several parts and put into different disks which are then packaged in a box, can that box be parallel imported?	Yes. But unlikely to appear in practice as it makes little marketing sense to break down a movie into several parts and put into several disks as the viewer will need to change disks several times to view a film.

	LSD	<u>On new s.35A(4) – “musical visual recording”</u> Two definitions for "musical visual recording"?	CSA will be proposed.
4	Law Soc.	<u>On new s.118A</u> ● Section 118A should apply to "lawfully made" not just to the meaning of "lawful user" in section 60(2) of the Ordinance.	● This section applies to cases where there is geographical restriction in the end-user licence agreement. It is to remove criminal liability of a user resulting from the making of back-up copies or other copying or adaptation of computer programs and/or associated works that are necessary for his lawful use. It is not necessary to relate section 118A to the term "lawfully made" in section 35A of the Bill or section 35(4) of the Ordinance.
		● Section 118A(1) should be clarified to refer only to parallel importation and use of genuine copies of computer program but not to pirated copies.	● Clear from the wording that the provision is only targeted at genuine copies of computer software.
		● Section 118A(1)(b) should be clarified to avoid abuse in relation to copying or adaptation of the associated works such as making a Chinese translation of an English encyclopaedia contained in a computer program.	● Clarification is unnecessary. Section 61 of the Ordinance is limited in scope - the copying or adaptation under this section must be necessary for the lawful use of the program.
		● Section 35A amendment should be incorporated in section 118 of the Ordinance or else criminal liability in relation to parallel imported copies of computer program will still exist under section 118.	● Incorporation not necessary. Under section 35A, copies of computer programs and their associated works will not be considered as "infringing copies" if they are lawfully made in the place where they are made. Criminal provisions in section 118 will not apply to such copies.

		● Defence in section 36(1) applies to both parallel imported goods and pirated goods. It should be amended to apply only to parallel imported goods.	● A matter outside the scope of the Bill. Will deal with this aspect in another Bill.
	Business Software Alliance	Section 118A is over-inclusive and could be interpreted to void all use limitations in software licences as they apply in Hong Kong. The meaning of " where a person has a contractual right to use a computer program" is unclear. Section 118A should be removed from the Bill.	Is considering appropriate wording to amend the section.
	APAA	● 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 for sale or hire a back-up copy without the authority of the copyright owner. ● The wording in section 118A(1) (a) is 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". Such person has no "contractual right" to use that program in Hong Kong. ● 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).	● 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. ● 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. ● The existing wording of section 61 has provided adequate safeguard to limit the purpose of the adaptation.

5	LSD	<u>On definition of “copy of an associated work”</u> Different wording for the definition " copy of an associated work".	CSA will be proposed.
	LSD	<u>On section 199A(4)</u> How many convictions have been recorded since the enactment of the Ordinance and how many were for parallel importing copyright work?	From July 1997 to May 2002, 7,795 cases were convicted but none relates to parallel importation. Recently, one case on parallel import is under investigation.
	Chinese General Chamber of Commerce	Any civil liability arising from parallel importation before the new law comes into effect should be removed.	Do not propose to remove civil rights as retrospective removal of private rights is a very serious matter and should not be made without strong justifications.

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