

Legislative Council Bills Committee

Copyright (Amendment) Bill 2001

**Comparison between relevant provisions of
the Hong Kong Copyright (Amendment) Bill 2001
and the Australian Copyright Amendment
(Parallel Importation) Bill 2002**

Purpose

The purpose of this paper is to provide a brief comparison between relevant provisions in the Hong Kong Copyright (Amendment) Bill 2001 (“HK Amendment Bill”) and the Australian Copyright Amendment (Parallel Importation) Bill 2002 (“Australian Bill”) in relation to liberalization of parallel importation of computer software products.

The Australian Bill

2. The Australian Bill proposes amendments to the Copyright Act 1968 (“Australian Copyright Act”) in order to remove restrictions against parallel importation and subsequent commercial distribution of computer software products (including interactive computer games). It also deals with liberalization of parallel importation of other types of copyright works (including books, periodicals and sheet music). The Australian Bill is presently being considered by the House of Representatives.

3. In preparing the HK Amendment Bill, we have made reference to provisions in the Copyright Amendment (Parallel Importation) Bill 2001 which is substantially the same as the Australian Bill.¹

4. The Australian Bill and the Australian Copyright Act can be viewed at <http://scaleplus.law.gov.au>.

¹ The Copyright Amendment (Parallel Importation) Bill 2001 lapsed as a result of the calling of the Federal election in October 2001.

Comparison between relevant provisions

Exclusion of parallel imported goods from the definition of “infringing copy”

5. An “infringing copy” is defined in the Copyright Ordinance (Cap 528) (“HK Copyright Ordinance”) to include parallel imported copyright works (section 35(3) of the HK Copyright Ordinance). The HK Amendment Bill seeks to exclude parallel imported computer software products from the definition of “infringing copy” if they were lawfully made in the place where they were made (section 35A(1) under clause 3 of the HK Amendment Bill).

6. An “infringing copy” is defined in the Australian Act to include parallel imported copyright works (section 10(1) of the Australian Act).² The Australian Bill seeks to exclude parallel imported computer software products from the definition of “infringing copy” by excluding non-infringing copies of computer programs and accessories whose importation does not constitute an infringement of copyright (section 10(1) of the Australian Act as amended by Item 4 of Schedule 1 of the Australian Bill).

“Lawfully made” (in the HK Amendment Bill) or “non-infringing copy” (in the Australian Bill)

7. Under the HK Amendment Bill, computer programs and associated works are not infringing copies if they were “lawfully made” in the place where they were made. “Lawfully made” is a concept currently used under the HK Copyright Ordinance. Section 35(9) of the HK Copyright Ordinance provides that “lawfully made” does not include the making of a copy in a country, territory or area where there is no law protecting copyright in the work or where the copyright in the work has expired.

8. Under the Australian Bill, a “non-infringing copy” of a computer program or accessory refers to: (a) a work made in a country that is a party to the Berne Convention or a member of the World Trade Organization with laws that is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”); and (b) its making does not constitute an infringement of any copyright in a work under the law of that country (section 10AB proposed to be inserted by

² Restrictions on parallel importation of sound recordings were removed in 1998. Therefore, the existing definition of “infringing copy” excludes parallel imported sound recordings.

Item 8 of Schedule 1 of the Australian Bill).

9. Given that any copyright works created or published by anyone anywhere in the world would qualify for copyright protection in Hong Kong, the definition of “lawfully made” is not confined to works made in a Berne Convention country or a TRIPS member.

“Associated work” (in the HK Amendment Bill) or “accessory work” (in the Australian Bill)

10. Technological convergence is creating computer software products that contains both computer programs and other copyright works such as audio-visual materials. Common examples are computer software products for educational and recreational purposes. Our policy intent is that the scope of the proposed liberalization should be wide enough to cover such other copyright works that may be embodied in computer software products. On the other hands, movies and music recordings are increasingly packaged and sold as digital multimedia products that can be shown or played in a computer. It is necessary to circumscribe the scope of the proposed liberalization carefully, in order to avoid unintentionally lifting the restrictions on parallel importation of movies and music recordings. It is our intent that the proposed liberalization will not be applicable to copyright works whose principal use is to be viewed or played as a movie, a television drama, or a musical audio or visual recording.

11. To achieve the above objectives, the HK Amendment Bill introduces the term “associated work”. A copy of an “associated work” is a copy of a work embodied in an article which has also embodied in it a copy of a computer program that is imported into Hong Kong (section 35A(2) under clause 3 of the HK Amendment Bill). In addition, the HK Amendment Bill provides that a copy of an associated work does not include the following works:

- (a) a copy of a feature film (which is defined to mean a movie or a television drama) or any part thereof and the duration when viewed (as embodied in the article) is more than 20 minutes; and
- (b) a copy of a musical sound recording or musical visual recording if the economic value of the article is predominantly attributable to the economic value of the musical recordings in question (section 35A(3) and (4) under

clause 3 of the HK Amendment Bill).

12. We understand that the scope of the proposed liberalization in Australia is also intended to include computer software products for educational or recreational purposes.³ Films produced for cinema release or television broadcast exceeding 20 minutes are excluded from the proposed liberalization.

13. The Australian Bill uses the term “accessory”. If a person imports into Australia an article that has embodied in it a copy of a computer program, then a copy of any other work (other than a feature film⁴) that is embodied in the article on its importation is taken to be an accessory to the article (section 10AD(1) proposed to be inserted by Item 8 of Schedule 1 of the Australian Bill).

14. “Feature film” is defined to mean a cinematograph film that:

- (a) is produced wholly or principally for exhibition to the public in cinemas or by way of television broadcasting; and
- (b) is more than 20 minutes in duration (section 10AD(2) proposed to be inserted by clause 8 of the Australian Bill).

15. Musical recordings are not dealt with in the Australian Bill as parallel importation of sound recordings was liberalized in 1998.

Distinction between “associated work”(in the HK Amendment Bill) and “accessory work” (in the HK Copyright Ordinance)

16. We use the term “associated work” in the HK Amendment Bill in order to distinguish it from “accessory work” which is a term currently used in the HK Copyright Ordinance. “Accessory work” is defined in section 35(8) of the HK Copyright Ordinance to mean copyright works found in labels, packaging or containers, written instructions or warranty, instructional sound recordings or films. Copyrights which subsist in these accessory works of non-copyright goods would not be infringed by parallel importation of such goods into Hong Kong if the economic value of the goods is not predominantly attributable to the economic value of such accessory works.⁵

³ This is gathered from the Explanatory Memorandum to the Australian Bill.

⁴ The definition of “feature film” is set out in paragraph 14 below.

⁵ Paragraph 19 of the minutes of Bills Committee on Copyright Bill dated 16 May 1997.

17. As the copyright works embodied in an article containing a computer program should not be limited to “accessory works” as defined in section 35(8) of the HK Copyright Ordinance, we introduced the new term “associated work” to cover different types of works embodied in a computer software with the exception of those copyright works whose principal use is to be viewed or played as a movie, a television drama, or a musical audio or visual recording.

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