

Legislative Council Bills Committee

Copyright (Amendment) Bill 2001

Consultation with Publishing Industry, Music Industry and Consumer Council

Purpose

This paper briefs Members of the result of our latest consultation with the publishing industry, music industry and the Consumer Council on the Bill.

Background

2. At the meeting on 7 November 2002, the Bills Committee asked the Administration to consult -

- (a) the publishing industry on the Bill, which would allow parallel importation of e-books;
- (b) the music industry to work out ways to prevent circumvention of restrictions on parallel importation under the Bill; and
- (c) the Consumer Council's further views on liberalizing parallel importation of publications in electronic forms under the Bill.

Consultation with the Publishing Industry

3. We issued a letter to 21 organizations representing local and international publishers, inviting them to give their views on the Bill. We received two written submissions - one from the International Publishers Association, and one from the Association of American Publishers. We also had a meeting with representatives of the Hong Kong Publishing Federation and Hong Kong Reprographic Rights Licensing Society.

4. The publishing industry opposes the inclusion of e-books within the scope of the Bill. They argue that the proposed liberalization will result in an increase in piracy and will prevent the adoption of differential pricing for different markets. They also argue that under Mainland regulations, non-domestic publishers must license a Mainland

enterprise to publish their books for the Mainland market in return for a royalty. Because of the size of the Mainland market and the relatively low purchasing power of Mainland readers, such royalty is necessarily small. If parallel importation of e-books is allowed, third party traders may import into Hong Kong e-books published for the Mainland market, thereby adversely affecting business in the Hong Kong market.

5. We have reservation about the claim that liberalizing parallel importation would result in an increase in piracy. Parallel imported goods are not pirated goods. There is no concrete evidence to suggest that piracy will increase as a result of allowing parallel importation. In its latest submission to us (at the Annex), the Consumer Council has referred to an expert's finding that the liberalization of parallel importation of musical recordings in Australia has not led to any increase in piracy.

6. Regarding the question of differential pricing, a key objective of the proposed liberalization is to enable consumers to benefit from lower prices of the same product sold in markets outside Hong Kong. Regarding the concern about parallel imports from the Mainland, the adoption of differential pricing for the Mainland and Hong Kong markets is a matter of commercial choice for the publisher with a view to maximizing their return on investment. Likewise, we must balance the interests between consumers and copyright owners. The impact of parallel importation of e-books from the Mainland on local publishers is mitigated to some extent by the fact that simplified Chinese is used in the Mainland whereas in Hong Kong, traditional Chinese is still predominantly used. From a practical point of view, although e-books are likely to become more popular in the future, their market share vis-à-vis traditional printed books in the Hong Kong market is now relatively small. We believe that the immediate impact of the proposed liberalization on local publishers should not be very significant.

7. Having carefully considered the publishing industry's view, on balance, we recommend that the scope of the Bill should remain unchanged.

Consultation with the Music Industry

8. We met with a representative of the International Federation of Phonographic Industry to discuss the music industry's recent written submission (which was copied to the Bills Committee). The industry repeats its previous position that the Bill should focus on computer

programs per se and should not relax parallel import restrictions on other types of copyright works, such as musical recordings, that constitute the content of computer software.

9. We do not agree with the music industry's view. Technology convergence is creating computer software that contains both computer programs and other copyright works such as audio-visual materials. Common examples are computer software for educational and recreational purposes. In last year's public consultation on the proposed liberalization of parallel importation of computer software, we received wide support from the public for the liberalization of parallel importation of all types of computer software including educational and recreational software. We believe the current formulation in the Bill to exclude musical recordings by the economic-value approach strikes a right balance between protecting music industry's interests and addressing the practical need to allow a limited amount of audio-visual content in computer software.

Consultation with the Consumer Council

10. The Consumer Council's further submission in response to our invitation for comments on the scope of the Bill is at the Annex.

Commerce and Industry Branch
Commerce, Industry and Technology Bureau
December 2002

Consumer Council

Comments to Commerce, Industry and Technology Bureau on Liberalization of Computer Software Regarding 'Associated Work'

Introduction

1. In general, the Council supports the Government's initiatives that have been made in relation to allowing for the parallel importation of copyrighted goods in view of the benefits that arise from providing consumers with wider choices and cheaper prices. Benefits can also arise for the wider economy, by reducing the costs of doing business, and without increasing any detriment to the owners of copyrighted work.
2. For example, with regard to Australia, where parallel imports of sound recordings were liberalized in 1998, Professor Allan Fels, the Chairman of the Australian Competition and Consumer Commission, at a meeting in Rome on 23 May 2001 at the Conference on Competition, Trade & Development, speaking on Intellectual Property, Competition & Trade Policy Implications of Parallel Import Restrictions, made the following observations:

"Retailers report that advertising and promotional spending is continuing and the indent services provided by producers has improved. Very little has been heard about damage to artists' incomes from parallel imports. While the industry predicted rampant piracy, the available reports are that the incidence of piracy is low, and arises mainly from Australian sources. In fact a report published by International Federation of Phonographic Industry in September 2000, Recording Industry in Numbers 2000, reports that in Australia the incidence of piracy in 1999 decreased from the levels reported in 1998."

3. The Council therefore urges the Government to continue with its program of liberalization to ensure that Hong Kong's reputation of being the freest economy in the world (as noted in the recent Heritage Foundation Report) is maintained.

Consumer safeguards following liberalization of parallel imports

4. While the Council agrees, in general, with the Government's proposal to remove the criminal and civil liabilities relating to parallel importation of computer software, it stresses the need for adequate safeguards to protect consumers from misleading and deceptive practices in the marketplace. For example, where infringing articles may be passed off as parallel imports. This point was made in the Council's submission to the Department in August 2002, in response to the Department's Consultation Paper – Proposal to Liberalize Parallel Importation of Computer Software Under the Copyright Ordinance'

Definition of 'associated work'

5. Under Section 35A(3) where the duration of a feature film or part of a feature film embodied in software is more than 20 minutes, or the predominant economic value of the software article is attributable to a sound recording or a

musical visual recording, the work does not come within the definition of 'associated work', and is therefore not considered to be within the scope of liberalization.

6. The benefits to consumers and the economy through the current round of liberalization will depend on the extent to which importers of parallel software will be able to take advantage of liberalization. An obligation will rest on the importer to ensure that associated work in an imported article does not infringe the *Copyright Ordinance*. By the same token it will be in the interests of owners of copyrighted work to limit the extent to which the associated work exemption can be used. The Council is concerned that importers should not be subject to undue pressure from copyright owners' attempts to limit the extent to which liberalization will take effect. For example, by using threats of civil suit that are constructed on a narrow definition of associated work, so as to dissuade importers of software, and in turn diminish the benefits that liberalization will bring to the economy and consumers.
7. In this regard, any concerns about the extent of the boundaries of 'associated work' should be clarified at the outset, so as to avoid any exploitation of the legal process to achieve unintended results.

Civil and criminal liabilities in regard to individual consumers

8. The Government's proposal is to remove the civil and criminal liabilities relating to parallel importation of and subsequent dealings in computer software with certain exceptions (paragraph 10 of the Brief refers). The proposed section 35A has the effect of exempting civil and criminal liabilities for importation and sale of parallel imported copies of computer programs and associated works (paragraph 16 of the Brief refers).
9. In the Brief, except as relates to the end-user licence agreement, there is no mention about civil and criminal liabilities for individual purchasers/consumers (e.g. employees or sole proprietors of small businesses) under the Bill. The Council notes that exemption of liability for individual consumers is provided. The Government no doubt appreciates that without such exemption, the liberalization of parallel importation will not have maximum effect in the market.
10. Section 31(1)(a) provides, amongst other things, that copyright is infringed by a person who possesses for the purpose of, in the course of, or in connection with, any trade or business, copy of a work which is, and which he knows or has reason to believe to be, an infringing copy. "Infringing copy" is defined under section 35(3). We believe that it is under section 31(1)(a) that civil liabilities, relating to parallel imported computer software and associated work, of individual consumers may arise.
11. We believe that criminal liabilities, relating to parallel imported computer software and associated work, of individual consumers may arise under section 118(1)(d) as amended by the *Copyright (Suspension of Amendments) Ordinance 2001*. The said section provides that a person commits an offence if he possesses for the purpose of, in the course of, or in connection with, any trade or business with a view to committing any act infringing the copyright, an infringing copy.
12. The proposed section 35A provides that for the purpose of section 35(3), a copy of a work that is a computer program or a copy of an associated work is

not an infringing copy. By adding the proposed section 35A, it seems that both the civil (except for those relating to end users licence agreement if any) and criminal liabilities of individual consumers in respect of parallel imported computer software and associated work are exempted.

13. However, owing to the complexity of the current provisions under the *Copyright Ordinance*, *Intellectual Property (Miscellaneous Amendments) Ordinance 2000* and *Copyright (Suspension of Amendments) Ordinance 2001*, the extent of liability is not clear. We would be obliged if the Government could ensure that the exemption of civil and criminal liabilities for individual consumers is provided for in the Bill, in case our understanding is inaccurate.

Consumer Council
November 2002