

5th January, 2004

Ms Mary Chow
Deputy Secretary (CI)2
Commerce, Industry & Technology Bureau
Level 29, One Pacific Place
88 Queensway
Hong Kong

Dear Ms Chow,

Re : Copyright Amendment Ordinance (2003)

We refer to the updated version of the bill in respect of the Copyright Amendment Ordinance (2003) (the “Bill”).

In essence, the parallel importation restrictions allow copyright owners to separate the world market into different geographical areas to secure the greatest return on the investment of the copyright works.

Obviously the terms of the licence will be very much different for developed countries to those developing or underdeveloped ones. Investors in copyright industry such as records, films, books, computer game etc. would make their investment in a country where it will better protect their interest and investment.

From the view point of economic policy, the critical issue is to set out a legal framework which would provide incentives to the various parties who create and distribute creative works as Hong Kong is now striving hard to build a knowledge based economy.

On behalf of the records industry, which invest and create a lot of local copyright works in musical sound recordings, we wish to set out our positions regarding the liabilities of the corporate end-users in the Bill as follows:

Position of the Bill

1. The above bill would remove both civil and criminal liabilities in relation to the importation and possession of parallel imported copy of all copyright works *except the importation or possession is for the purpose of selling or letting for hire; or distributing for profit or financial reward, or to such an extent as would affect prejudicially the owner of the copyright.*
2. In a practical term, the corporate end-user might use parallel imported copy for its own use in business or trade as long as the physical copy of the parallel imported

copy remains in its own possession (i.e. not for sale, let for hire or distribution for profit or financial rewards etc).

The Use Of The Parallel Imported Copy By The Corporate End-Users

3. However, there is a wide spectrum of use of the parallel imported copy in the business context, it might be the playing of the musical sound recordings in an office, or the playing of musical visual sound recordings in a Karaoke lounge. The latter simply means for commercial purpose of a business, the corporate end-user makes available or supplies the parallel imported copies of the musical visual sounding recordings to its customers to play at the Karaoke Lounge. The cyber café or coffee shop might make available or supply the parallel imported copy of films to its customers' own viewing during business operating hours.
4. As different from just the model of business travellers who carry their computer programmes in laptop computers into Hong Kong, or the law firm which uses a parallel imported book in preparation of a case, the range of commercial use of the parallel imported copy may now involves the use of the copy incidental to the business of a corporate end-user on one hand, to the use of it by a **community of users including the public** that have been allowed access to such a copy on the other hand, namely, a corporate end-user makes available or supplies such copy to any member of the public albeit the corporate end-user retains the same copy.

OUR OPPOSITION

5. Obviously, we **do strongly oppose** to any use of the parallel imported copy by the corporate end-user in the situation in which any member of the public might have access to the copy for one's own enjoyment.
6. Our view is that any use of the parallel imported copy of any copyright work by a corporate end-user (other than for its own private use) such as making available or supplying such copy to and/or at the request by any member of the public for such public member's own enjoyment would definitely **unreasonably prejudice** the **legitimate interests** of the copyright owner or the exclusive licensee. This kind of activity must amount to copyright infringement.

Legal Certainty

7. As regards the use of the words "affect prejudicially" in the civil and criminal provisions relating to the restriction on the use of the parallel imported copy, we hereby reiterate our earlier view that the wordings are not precise.

In this connection we wish to refer you to the recent Court of Final Appeal case **NO. 5 OF 2003 (CRIMINAL)** in which the learned Mr Justice Lord Scott of Foscote NPJ with the unanimous approval of all other Justices of the Court of Final Appeal, stated in paragraph 36 of the Judgment that

The principle of legal certainty requires that a law must be sufficiently precise to enable a citizen to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail (see Human Rights Practice Encyclopedia, para. 1.061).

This lends support to our observation on this issue.

We respectfully submit that any amendment of the law at this juncture must be carefully considered as this would have a devastating or stimulating effect on the development of the creative industry in Hong Kong. What has been set out for liberalisation of computer programme or software should not be extended to other copyright works lightly as we are dealing with different creative industries that operate and survive on different business models and which create the copyright works or contents for the global market. Any action will cost the local industry dearly while there is minimum impact, if any, on the international corporations

Thank you for your kind attention.

Your truly,
For and on behalf of International Federation of the
Phonographic Industry (Hong Kong Group) Ltd

Ricky Fung
Chief Executive Officer

c.c. Committee - IFPI (Hong Kong Group) Ltd