

14th 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)

As you may note, the amendments made to the Copyright Ordinance has been on a section by section manner, any amendment made to one section may have different interpretation over the other sections. Upon review of the amended Ordinance and the proposed Bill, we are concerned of the purpose and effect of the whole parallel importation provisions in the context of copyright law.

We write to seek your clarification of the proposed bill for following issues:

SWAPPING OF PARALLEL IMPORTED COPY OF WORKS

1. Our concern is that the Bill as it now stands would allow the corporate end-users to swap the parallel imported physical copies of any copy works among themselves without attracting any liability as the swapping itself is not within the scope or definition of sale, let for hire or distribution.
2. As the technology for online market for sale or distribution has now been emerging very fast, copyright owner may now be able to sell his work online by charging a fee and any distribution or sale of work online will inevitably involve a technology for copying and transmission process.
3. The recent digital technological development has made it increasingly easy to copy and disseminate work inexpensively. The many Peer to Peer (P2P) services now in existence demonstrate the ease of massive scale of unauthorised downloading, uploading and dissemination of digitised sound recordings as MP3 files via the Internet globally.
4. P2P swapping/sharing of files of copyright works OVER THE INTERNET is not limited to music files but extends to other copyright works such as movies as bandwidth increases under fast developments in technology. No doubt, the digital technology does shift the balance against the copyright owners in favour of infringers.

SWAPPING OF AN ELECTRONIC FILE OBTAINED OVERSEAS THRU INTERNET

5. Our concern is that such grey area allowing swapping (as oppose to sharing) might extent to P2P swapping of files over the Internet between the corporate end-users. This clearly defeats the purpose of the true intention of this legislation as any copy obtained abroad without the consent of the copyright owner or the exclusive licensee should be for all intents and purpose be treated as parallel imported copy. The making of the copy occurs at overseas and then transmits to Hong Kong Corporate end-user.
6. The Copyright Ordinance provides that the owner of a copyright work has the exclusive right to make available copies of the work to the public by wireless or wire means such as Internet. If the criminal and civil liabilities of the corporate end-users were to be removed, the corporate end-users might obtain an **electronic copy** of musical sound/visual recordings files or other copyright works from on-line distributors abroad via the Internet.
7. The Hong Kong copyright owner could not have any remedies against the corporate end-users as the **electronic copy** is a genuine copy and could not be understood as a pirated copy.
8. It appears that section 26 of the Copyright Ordinance only makes the uploader of the music files liable but not the downloader. Section 22 only applies to the making/copying but it appears that the duplication/copying of the copyright works is done by the uploader but the downloader only could be said to be in the possession of such music files in its server. However, possession of the foreign made legitimate copy is not a pirated copy under the proposed bill.

OUR CONCERN

9. In short, in order to get around the sanctions as proposed in the Bill, the importer simply operates an off-shore on-line distribution of electronic files of copyright works to corporate end-users. The Bill as it now stands will favour investors of copyright works abroad and not in Hong Kong.
10. To make thing more complicated, it is difficult to distinguish an **electronic copy** downloaded from an authorised site or unauthorised site abroad, with the ease of copying by digital technology, the Bill as it now stands will facilitate and encourage new ways of infringement of copyright as it is highly improbable if not impossible for the copyright owner to prove such an **electronic copy** is an infringing copy (given the situation that there might be hundreds of vendors abroad) and even if it does, the defendant might argue the **electronic copy** is a result of swapping from other corporate end-users and he did not know and has no reason to believe that such an **electronic copy** is an infringing copy.

OUR PROPOSAL

11. In short, if the parallel importation provisions are for the restriction of the **PHYSICAL** copy of the work originated abroad to be imported into Hong Kong subject to the consent of the copyright owner or THE EXCLUSIVE LICENSEE for certain commercial activities and to combat against the piracy problem, it is imperative to put an avoidance of doubt provision to clarify the matter, namely, *the provisions shall not apply to any electronic copy of any copyright works obtained by on-line distribution from abroad.*

12. The legislation must now deal with the issues of digital technology on copyright in our information technology era. It is especially so if Hong Kong is striving hard to invest on information technology. The copyright owners and exclusive licensees need to be accorded with update and equivalent rights (as in physical copies) in the use of electronic files for the purpose and in the course of trade and business and that any swapping of electronic files shall be deemed to be an infringing activity. The sooner we have the right legislation in place, Hong Kong copyright owners will have more venue to commercially exploit their rights without fear of massive copying of their works by electronic means.

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