



INTERNATIONAL
FEDERATION OF
THE PHONOGRAPHIC
INDUSTRY
[HONG KONG GROUP]
LIMITED

24th January, 2004

Mr. Jeffrey Chan
Assistant Secretary for Commerce, Industry and Technology
(Commerce and Industry)
Commerce, Industry & Technology Bureau
Level 29, One Pacific Place
88 Queensway
Hong Kong

Dear Mr. Jeffrey Chan,

Reference is made to your letter of 7th January, 2004 seeking views from the recording industry in Hong Kong in respect of the latest proposals in the drafting of the Bills. In furtherance of our earlier submission on our positions on the Bill, we wish to let you have our views in respect of the specific points as raised in your letter dated 7th January 2004.

A. Section 118 (1) (e) iv

1. The proposed section 118 (1) (e) iv, provides that

A person commits an offence if, without the licence of the copyright owner for the purpose of or in the course of any trade or business, he distributes “for profit or reward” an infringing copy of a copyright work.

2. There has been a lot of focus on the ambiguity of the wordings “for profit or financial reward” in the previous version of section 118 (1) (e) iv. The same issue remains and is still very much alive even by deleting the word “financial” as proposed in this new version.

3. We recommend that the words “for profit or reward” be deleted from the present proposed version of the section 118 (1) (e) iv which should then read as follows :

A person commits an offence if, without the licence of the copyright owner for the purpose of or in the course of any trade or business, he distributes an infringing copy of a copyright work.

4. This is in line with the section 118 (1) (e) iv of the original HK 1997 Copyright Ordinance which simply provides that

A person commits an offence if he, without the licence of the copyright owner for the purpose of trade or business, distributes an infringing copy of a copyright work.



B. Effect Of Dealing In Second Hand Infringing Copies

1. The concern over the sale of second-hand infringing copy of a book by a student to a friend might be caught under section 118 (3) (b) might be justified albeit one may argue that the first hand book which has been imported for the primary purpose being used by the student is for his study during the school year in the first place. It was only after it has been so used then he decided to dispose it. Now it becomes a used book or a second hand book. Therefore it is difficult to suggest that, as far as this student is concerned, the purpose of import is used for sale.
2. Any amendment to be made with a view to removing any criminal liability to this kind of situation by exempting non-business dealings would, in a practical term, allow any sale or distribution of a parallel imported of first hand copy of a work as a "second hand" copy in a "disguised non business context" even such sale and distribution is for profit or reward. This would create grey area. The importer simply uses the first hand imported copy once or twice or unwraps the package which will then be sold as a second hand copy on a non-business context in order to avoid any criminal liability.
3. Furthermore, with our strong view on the unacceptability of allowing any corporate end-user to let the public members of a community to have access to or to use the parallel imported copy for the purpose of or in the course of any trade or business of that particular corporate end-user as set out in our letter dated 5th January 2004, we strongly suggest that the whole section 118 (3) be revisited and rewritten in order to avoid all the undesirable results.

C. The Meaning Of The Word "Import"

1. There is no definition of the word "Import" but only "Article in Transit" in the Copyright Ordinance (cap 528).

Section 198 defines "article in transit" means an article which-
 (a) *is brought into Hong Kong solely for the purpose of taking it out of Hong Kong; and*
 (b) *remains at all times in or on the vessel or aircraft in or on which it is brought into Hong Kong.*

Section 198 clearly refers to the physical copies of any works.

2. However, the word "Import" is defined in section 2 of the Import and Export Ordinance as "to bring, or cause to be brought into Hong Kong any article". In *Mattel v. Tonka* (1992) FSR 28, which dealt with the shipment of physical goods, it was held that the word "Import" was to be given its ordinary meaning and



imported might attract import duty and different countries have different tariffs as might be applied to the particular goods.

4. In the circumstances, it has all along been the position that the amendment to the parallel importation provisions refers to and is restricted to the importation of the physical goods and not those available on line, which is a separate and different right on its own.

D Communication Right Under WIPO and WPPT

1. On-line distribution of any copies of a work in a compressed electronic file format is a newly recognized right which is in response to the new means of communication over the so call Global Information Infrastructure through services such as Internet. In this connection, we wish to refer you to Article 8 of the WIPO Copyright Treaty 1996 ("WIPO") and Article 14 of WIPO Performances And Phonograms Treaty 1996 ("WPPT")
2. This newly recognized *right of communication* to the public simply provides producers of phonogram and other copyright works with exclusive rights to authorize the use of their phonogram or copyright works in an electronic market place via communication networks to home computers or other receiving device and the members of the public are able to access such phonograms or copyright work from a place and at a time individually chosen by them, in the context of on-line, on-demand interactive services.
3. This communication right is recognized for all kind of copyright works under section 26 of the Hong Kong Copyright Ordinance (1997) which includes but not limited to the subscription services of any on-line on-demand interactive services.
4. In short, there is a difference between the meaning of import i.e. bringing physical copy of a work from aboard and of communication right, i.e. downloading electronic file of a work from the source originated or uploaded outside Hong Kong. These are two distinct and separate rights.
5. The sale of a physical copy of a second hand book by a student to his friend as demonstrated in paragraphs B 1 and B2 above is different from the sale of a second hand copy of an e-book obtained on line. The former is the imported physical copy of a work and the latter is a digitized copy in an electronic file format of the same work obtained by wire or wireless transmission. Very often than not, the licence of such digitized electronic copy would allow the end-user, i.e. the student, to make one or more back up copies of the work in his computer. The swapping/sharing of an electronic file is much easier to make and very difficult to catch.
6. We understand that the issue of communication right and digital agenda would not



be covered under this proposed 2003 copyright amendment which deals with the parallel importation of a physical copy of a work. We will make further submission on digital agenda on a separate and appropriate occasion which will deal mainly on the communication right of making available of copies to the public by the author or copyright owner.

Your letter under reply has also been referred to our London Office for further comment. We will make further submission to you as soon as we receive the same.

Once again, we appreciate the opportunity to comment on the Bill

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

A handwritten signature in black ink, appearing to read 'Ricky Fung', written over a large, light-colored circular scribble.

Ricky Fung
CEO

c.c. IFPI (Hong Kong Group) Committee