



HONG KONG BAR ASSOCIATION

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28th December 2001

Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Attn: Ms. Connie Szeto
Clerk to Panel

Dear Sirs,

**LegCo Panel on Commerce and Industry
Review of Certain Provisions of Copyright Ordinance**

Thank you for your letter dated 23rd November 2001 inviting the comments of the Bar Association on the Review of Certain Provisions of Copyright Ordinance.

Enclosed please find the Bar's comments thereon for your consideration.

Yours faithfully,

Alan Leong, S.C.
Chairman

Encl.

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香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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Ms. Janine Cheung

HONG KONG BAR ASSOCIATION

Comments on the Consultation Document on the Review of Certain Provisions of the Copyright Ordinance

Chapter 1: Criminal Provisions relating to End-user Piracy

- The Bar is of the view that mere possession of an infringing copy by end users should not be criminalized. The Bar refers to paragraph 1 of its previous comments dated 25th April 2001, a copy of which is attached hereto for ease of reference.
- If criminal sanction is to be retained, it should be restricted to business activities of a profit-making nature, and its ambit should be restricted as far as possible to avoid any draconian consequences.
- Paragraph 1.11(a): No
- Paragraph 1.11(b): No
- Paragraph 1.11(c): Yes
- Paragraph 1.11(d): Yes
- Paragraph 1.11(e): Yes

Chapter 2: Permitted Acts for Educational Purposes

Paragraphs 2.13(a) and (b)

- From a legal point of view, the Bar prefers certainty to ambiguity, provided the users and the parties involved are prepared to accept giving up flexibility for certainty in respect of the permissible amount of work which the users may copy under any proposed statutory approach to be adopted.
- The educational users and the copyright owners would be in a better position to express an opinion on what amount of work they should be allowed to copy under this exemption, and the elements that should be covered if the statutory approach is to be adopted.

Paragraph 2.13(c)

- The act of recording or copying permissible under sections 44 and 45 of the Copyright Ordinance should be permitted no matter whether there are any licences available under any licensing schemes or not.
- Acts permitted by the Copyright Ordinance do not need to be licensed. Licensing schemes merely license the users to do what they are not otherwise allowed to do.

Paragraph 2.13(d)

The Bar supports the proposed permitted act under this paragraph.

Chapter 3: Permitted Acts for Visually Impaired Persons

Paragraphs 3.4(a) and (b)

The Bar supports the proposed permitted acts under both paragraphs.

Chapter 4: Permitted Acts Related to Free Public Showing or Playing of Broadcast or Cable Programme

Paragraph 4.9(a)

- The statutory exemption should be extended to all underlying copyright works.
- It is not fair if all copyright owners are not treated equally.

Paragraph 4.9(b)

- The Bar finds the proposed extension of the statutory exemption acceptable.
- The Bar prefers this paragraph to read as “the exemption should be extended to cover all public places where the broadcast or cable programme is shown or played except where goods or services are supplied at prices which are substantially ~~attributable to~~ higher than the normal prices to reflect the provision of the facilities afforded for seeing or hearing the broadcast or programme.”

Chapter 5: Parallel Importation of Copyright Works other than Computer Software

Paragraph 5.14(a)

- The Bar is in favour of removing civil liability and criminal sanction against parallel importation of and subsequent dealing in all types of copyright work.
- The Bar refers to our view previously submitted to the Bar on this issue. The Bar is in favour of the policy of free trade having regard to the provisions of WTO.
- It is against the public interest to place restrictions on parallel imports and to allow traders to carve up the markets in different jurisdictions and charge the consumers in Hong Kong artificially higher prices.
- The lowering in retail prices is conducive to encourage a wider circulation of books and dissemination of information and knowledge, and the availability of less expensive computer programs and other apparatus is conducive to lowering business costs in Hong Kong.

Paragraph 5.14(b)

The Bar is against the continuation of criminal sanction against parallel importation and subsequent dealing in the parallel imported copies of copyright works under this paragraph. See the comments under paragraph 5.14(a) above.

Paragraph 5.14(c)

The Bar is in favour of the removal of civil liability and criminal sanction imposed on end-users of parallel imported copies of copyright works in business. See the comments under paragraph 5.14(a) above.

Chapter 6: Unauthorised Reception of Subscription Television Programmes

Paragraph 6.12(a)

- The Bar is not sure that this has anything to do with copyright infringement.
- But insofar as the suggestion of making “fraudulent reception of subscription television programmes” a criminal offence is concerned, it should be made the subject of other Ordinances such as the Telecommunication Ordinance or the Broadcasting Ordinance and not the Copyright Ordinance.
- Insofar as private premises are concerned, any invasion of privacy, if it has to be done, has to be done with sufficient safeguards.
- Further consultation should be carried out after a more crystallized bill on the criminalisation of “fraudulent reception of subscription television programmes” is prepared.
- Any power to award compensation in respect of “fraudulent reception of subscription television programmes” should be provided for in criminal proceedings under other ordinances and not the Copyright Ordinance.

Paragraph 6.12(b)

The Bar does not support this proposal as the fraudulent reception of subscription television programme does not appear to be a copyright infringement issue.

Paragraph 6.12(c)

- The Bar only supports the introduction of criminal sanction but not civil remedy against possession of an unauthorized decoder for commercial purposes.
- Any power to award compensation in respect of possession of an unauthorized decoder for commercial purposes should be provided for in criminal proceedings under other ordinances and not the Copyright Ordinance.

Chapter 7: Licensing Bodies

Paragraph 7.13(a)

- As copyright licensing involves public interest including those of the consumers, it is preferable for a statutory tribunal instead of a bi-partite mechanism to resolve licensing differences.
- As arbitration is a consensual process, there has to be a mandatory system such as the Copyright Tribunal to take care of cases where the parties do not agree to submit their disputes to arbitration.
- Parties can choose to mediate or arbitrate at any stage if they want to.
- The procedures of the Copyright Tribunal should be simplified so as to enable the parties to go straight to the substantive hearing which should be made less formal. This is in line with past experience and the recent proposal for reform of civil litigation in Hong Kong.

Paragraph 7.13(b)

The Bar supports the proposal under this paragraph in the interest of transparency and accountability.

28th December 2001



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BY FAX & BY HAND

25th April 2001.

The Commerce & Industry Bureau,
Level 29 One Pacific Place,
88 Queensway,
Hong Kong.

Attn : Ms. Laura Tsoi

Dear Sirs,

Re : Draft Copyright (Suspension of Amendments)
Bill 2001.

Thank you for your letter dated 19th April, 2001 inviting the comments of the Bar Association on the Draft Copyright (Suspension of Amendments) Bill 2001.

Enclosed please find the Bar's comments thereon for your consideration.

Yours faithfully,

Edward Chan S.C.
Vice Chairman
(Acting Chairman)

Encl.

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香港金鐘道三十八號高等法院對面二樓

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**HONG KONG BAR ASSOCIATION'S COMMENTS ON
Draft Copyright (Suspension of Amendments)
Bill 2001**

1. The draft suspension amendments, as well as the original amendments, have ramifications which are immensely far-reaching and serious.

It must be remembered that the Copyright Ordinance, before the controversial amendments which recently commenced on 1st April, 2001, was enacted after a long period of consultation and consideration by the Law Reform Commission and its Copyright Sub-committee which after having studied the matter from 1987-1993, did not recommend criminalization of possession of infringing copies other than for purposes of trade or business with a view to committing an infringing act. In fact, paragraphs 19.29 and 19.33 of the Law Reform Commission Report of the Law Relating to Copyright (Topic 22) rejected criminalization of possession for a purpose merely incidental to the nature of the business.

However, the recent amendments extended criminal liability with grievous and draconian consequences which do not exist in any other jurisdiction.

2. Now that the controversial amendments have to be reconsidered, it will be necessary to consider a number of fundamental issues including the following:
 - a. whether the extension of criminal liability is justified or appropriate;
 - b. If so,
 - (i) whether there should be provisions to balance or to counter the possible abuse of monopoly and dominant position such as the de-regulation of parallel imports in both civil and criminal contexts;
 - (ii) whether there need to be competition provisions including unfair trade practices provisions; and
 - (iii) whether there should be exceptions (which must be specific and clear) to criminal liability in view of the uncertain ambit of the defences under the civil provisions such as fair dealing, education et cetera.

It would be therefore most unwise and unrealistic to approach the matter in a piecemeal and haphazard manner. A full and proper public consultation should be carried out. The Bar shall be happy to provide detailed views.

3. In view of the above considerations, the provisions extending criminal liability by the recent amendments should be suspended pending full and proper re-consideration. The Bar believes this is the right way forward.
4. If, contrary to our view, a limited suspension is insisted upon, the draft bill still suffers from fundamental problems:
 - a. The approach is wrong. The approach presently adopted is dangerous as it may not cover all intended exempted categories. The better approach would be to suspend the extension of criminal liability save in respect of specific categories of matters which are clearly defined and were the original subject of concern.
 - b. The drafting of the bill is fundamentally flawed. The Bar is most concerned that insufficient attention has been paid to basic copyright concepts. For instance:
 - (i) A “printed version of a computer program” (clause 2(2)(b)) is not a copyright work at all. Furthermore, the express exclusion of “a copyright work in any form other than in printed form” defeats the very purpose of the draft bill itself. This is so because most copyright works are not in printed form. For example, newspaper articles (literary works) are almost invariably written in manuscript or in electronic form. Digital photographs and hand and computer-generated drawings (artistic works) are not in printed form. Indeed, very few copyright works are in printed form.
 - (ii) The phrase “a film commonly known as a movie or television drama” (clause 2(3)(a)) is of uncertain scope and meaning and the words “movie” and “television drama” are not defined. Additionally, the Bar does not understand why artificial

distinctions between different types of film are introduced.

5. The Bar therefore takes the view that the provisions extending criminal liability in the Intellectual Property (Miscellaneous Amendments) Ordinance should be suspended pending mature re-consideration.

25th April 2001