

**Submission dated 5 June 2007 on the Copyright (Amendment) Bill 2006
from the Hong Kong Law Society**

Views / Concerns	Administration's Response
<p>The Law Society of Hong Kong objects to the definition of “lawfully made” as proposed by the Administration. It remains of the view that “lawfully made” in the parallel import context should mean “made in the overseas territory with the authorization of the copyright owner in Hong Kong”, rather than being based by reference to the rights of an overseas copyright owner having no rights in Hong Kong. It makes reference to a Singapore case (<i>Public Prosecutor v Teo Ai Nee & Anor</i>) in supporting its argument.</p>	<p>The expression “lawfully made” whenever it appears in the existing Copyright Ordinance, the Bill or the proposed CSAs, is followed by the words “in the country, territory or area where it was made”. The reference has to be read as a whole. This reference is used to refer to a parallel-imported copy which is an infringing copy only by virtue of section 35(3) of the Copyright Ordinance. As section 35(3) also covers “pirated copy” made abroad, we use the reference “which was lawfully made in the country, territory or area where it was made” to state clearly that the concerned context relates to parallel importation. For cases where the copyright is in different hands in different territories as raised by the Law Society, so long as the copy was made with the authorization of the overseas copyright owner in the territory where the copy was made, it should be regarded as “lawfully made” in the parallel importation context. In other words, those copies should be parallel-imported copies rather than pirated copies.</p> <p>We consider that the decision in the Singapore case quoted by the Law Society of Hong Kong may not be applicable to Hong Kong as our legislative framework is different from that in Singapore. Firstly, there is an express provision in the Singapore Copyright Act to the effect that reference to “the licence of the owner of any copyright” in certain provisions of the Act relating to importation of articles shall mean the licence of the copyright owner in the importing country (i.e. Singapore). There is no express provision to that effect in our Copyright Ordinance. Secondly, the judge considered that if “the licence of the owner of any copyright” were to refer to the licence of the person who owns the copyright in the place where the article was made, the Singapore copyright law would not be able to prevent imports from countries which did not provide adequate copyright protection. This observation is not of concern to us as “lawfully made” is expressly stated in the existing section 198(3) of our Copyright Ordinance to exclude copies made in a country, territory or area where there is no law protecting copyright in the work or</p>

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	<p>where the copyright in the work has expired. More importantly, Singapore made amendments to its Copyright Act in 1994 subsequent to the above decision. The effect of the amendments was that where reference is made to the “consent of the owner of copyright” in relation to the making of an imported article, the copyright owner concerned is the one who has the right to make the article in the country where the article is made. The above amendments have thus reversed the legal position decided by the Singaporean court.</p> <p>Singapore has fully liberalized parallel imports of copyright works except for copies made in places where there is no copyright protection or where such protection is inadequate. Imported copies made with the consent of the person who has the right to make the copies in the country where the copies were made (though without the consent of the copyright owner in Singapore) are regarded as parallel-imported copies and no restriction is imposed on the importation and sale of such copies in Singapore.</p> <p>It is worth adding that Australia has also liberalized parallel importation of certain types of copyright works in recent years. Copyright works that are no longer subject to prohibitions against parallel importation include computer programs. The term “non-infringing copy” is used in the Australian Copyright Act. In relation to computer programs, a non-infringing copy is a copy that is made in a country that is a party to the Berne Convention or a member of the World Trade Organisation (WTO) and its making did not constitute an infringement of any copyright in a work under a law of that country. Therefore, insofar as parallel imports are concerned, the legality of an imported article in Australia is determined by reference to the law of the place where the copy was actually made. In other words, copies made in a country with the consent of the copyright owner in that country are regarded as parallel-imported copies rather than pirated copies.</p>

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<p>The Law Society considers that the proposed definition represents a fundamental change in the law and submits that the effect of the proposed definition has not been explained to stakeholders. It further adds that the definition removes the rights of the authors to restrict importation of infringing copies and thus fails to “protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation” as enshrined in Article 140 of the Basic Law.</p>	<p>We do not agree that the proposed CSAs represent a fundamental change in the law. It has all along been our legislative intention that “lawfully made”, in relation to a copy of a work made in a country, territory or area, refers to a copy which was made with the consent of a person who is entitled to the copyright in the work in the country, territory or area but does not include a copy that was made in a country, territory or area where there is no law protecting copyright in the work or where the copyright in the work has expired. Indeed, we have reflected this intention in previous exercises to amend the Copyright Ordinance (e.g. paper no. CB(1)191/03-04(01) as at 23.2.2004). The proposed CSAs aim to put our intention beyond doubt. We would like to reiterate that we have sounded out copyright owners in various industries to ascertain if it is common for copyright ownership of a certain work to be in different hands in different territories. According to our understanding, this practice of split ownership in different geographical locations is rare. The industries mainly rely on licensing arrangements rather than assignments of ownership to handle their copyright works. We have briefed the copyright owners of our proposed definition and have not received any objection from them.</p> <p>The Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement) of the World Trade Organisation does not contain any required standard for the treatment of parallel imports. Our copyright law already accords copyright protection to authors consistent with the TRIPS Agreement. As explained above, Australia and Singapore have adopted a similar approach in defining what constitutes parallel importation in the context of the liberalization of parallel imports. We do not agree that the proposed definition of "lawfully made" in relation to a copy of a work made in a country, territory or area is inconsistent with Article 140 of the Basic Law.</p>