

**The Administration's response to the submission dated 15 June 2007
from the Law Society of Hong Kong on the Copyright (Amendment) Bill 2006**

Purpose

This note sets out the Administration's response to the representations made by the Law Society of Hong Kong dated 15 June 2007 ("the representations").

Points 1 and 2 in the representations

2. It has been our long established policy that copies of a copyright work made with the licence of the copyright owner in the place of manufacture should be regarded as genuine rather than pirated copies. This is the case irrespective of whether the overseas copyright owner in the place of making is the same as the copyright owner in Hong Kong in respect of the copyright work. Trade in genuine products outside channels of distribution approved by the copyright owners in Hong Kong should be governed under the regime of parallel imports. This should be distinguished from trade in pirated goods.

3. Defining "lawfully made" in the way as the Administration has proposed would not take away the protection of the rights and interests of the copyright author who creates his/her copyright work under Article 140 of the Basic Law. The copyright author is by law the first owner of the copyright work, and copyright ownership is transmissible by assignment as personal and movable property. It can be split by contractual arrangements.

Point 3 in the representations

4. Although both trade marks and copyright are intellectual property, the policy considerations on parallel imports are different. For trade marks, the exhaustion principle generally applies and parallel imports are largely deregulated. For copyright, the exhaustion principle does not generally apply and parallel imports are still largely regulated. To liberalize certain parallel imports of copyright works is permissible under international intellectual property law, and is consistent with BL 140 and the Administration's copyright policy.

Point 4 in the representations

5. For copyright works with split copyright ownership in different geographical locations, it is also arguable that the copyright owners who split the ownership contractually of the same copyright work should be in a better position than any traders or distributors to prove if a copy of the work is or is not lawfully made, if both categories of personnel are to prove the same issue. The proper balance is whether there is a need for the special facilitation provision at all.

Point 5 in the representations

6. We understand that the affidavit provision proposed by the Law Society seeks to create a presumption which places an evidential burden on the defendant. The affidavit provision may be used by the copyright owner in Hong Kong or, where there is split copyright ownership in different areas, the person entitled to copyright in the place of manufacture.

7. As explained in our response to the Law Society's submission dated 12 June 2007, we doubt if an affidavit provision imposing an evidential burden on the defendant would serve any useful purpose in negating a defence that the subject matter of the proceedings is in fact a parallel-imported copy, rather than a pirated copy. If the defendant argues his case by claiming that the copy in question was lawfully made in the place of manufacture, he would need to adduce evidence. If he has already adduced evidence to raise an issue that the copy was lawfully made, any evidential burden imposed by the affidavit provision would already have been discharged.

8. We would like to reiterate that the affidavit provision proposed by the Law Society is not called for from the practical point of view. We have not encountered the sort of problems raised by the Law Society in our past enforcement experiences in relation to pirated copies. In previous cases involving pirated copies, the courts had no difficulty in accepting the expert evidence tendered by examiners who showed that the characteristics of the copies in question differed from those of genuine copies and were therefore pirated copies. As a matter of fact, split copyright ownership in different geographical locations rarely occurs. With global copyright ownership, copyright owners have control over their licensees and

understand well the features of the parallel-imported products. The examiners acting on behalf of copyright owners could tell if a certain product is pirated or not.

9. The introduction of new affidavit provisions should be supported by the need to address enforcement or operational problem having regard to actual enforcement experience. We reiterate our undertaking that we will closely monitor the enforcement situation and review, in consultation with the stakeholder groups, if any facilitation measure should be introduced as and when we face any practical problem in the future.

Point 6 in the representations

10. Finally, we appreciate the Law Society's understanding of the Administration's will to clarify anything whenever and wherever it is necessary to do so.

Commerce and Industry Branch
Commerce, Industry and Technology Bureau
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