CB(1)1941/02-03(02)

HONG KONG BAR ASSOCIATION

Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
DX-180053 Queensway 1 E-mail: info@hkba.org Website: www.hkba.org
Telephone: 2869 0210 Fax: 2869 0189

By fax: 2869-4420

Your ref: CIB

12th June 2003

Commerce, Industry and Technology Bureau
Level 29, One Pacific Place
88 Queensway
Hong Kong

Attn: Mr. Jeffrey Chan
for Secretary for Commerce, Industry and Technology

Dear Sir,

I refer to your letters on 2/6, 3/6 and 5/6 seeking the Bar's views on the Copyright (Amendment) Bill 2001 on the New Formulation to define the Scope of Liberalisation; and your letter on 22/5 on the Copyright (Amendment) Bill 2003.

I am sending you the tentative views of the Bar Council. Please note that this will be subject to the final adoption by the Bar Council at its next meeting. I shall revert to you after the meeting.

Yours faithfully,

Edward Chan, SC
Chairman

HONG KONG BAR ASSOCIATION'S

Comments on Copyright (Amendment) Bill 2001

New Formulation to Define the Scope of Liberalisation

General views on parallel import

1. The Bar reiterates its stance that parallel import of lawful copies of all kinds of copyright works should be deregulated.

2. The Bar urges the government to consider the deregulation of parallel import of lawful copies of all kinds of copyright works as a whole, and not in a piece-meal manner. As a matter of policy, it is not right that discrimination should be made between different kinds of works.

3. The law of copyright should be consistent with the approach adopted under our trade mark law. The Trade Marks Ordinance, Cap.559 has removed the restriction against parallel import generally without making any distinction between different types of goods.

4. The deregulation of parallel import is consistent with the promotion of public interest.
   - It is conducive to the promotion of dissemination of knowledge and information, competition and choice to the consumers.
   - It is consistent with the international trend of free trade.

Section 35A: Exclusion of parallel-imported computer programs and other works embodied in the same article which also embodies the computer programs from the definition of "infringing copy"

A. Section 35A(1)

5. The Bar is of the view that the proposed s.35A(1) should be made s.35A(2) instead.

6. The Bar suggests that the proposed s.35A(1) be amended as follows:-

"~~(1)~~ (2) This section applies to ~~a copy of a work that~~ –

(a) ~~is~~ a copy of a computer program; or

(b) except as provided in subsection (3) ~~or (4)~~, ~~is~~ a copy of a work other than a computer program~~, that~~ which copy is embodied in an article ~~in~~ which ~~is~~ also embodies~~d~~ a copy of a computer program,

and that, but for this section, would be an infringing copy for the purposes of section 35(3)."

B. Section 35A(2)

7. The Bar is of the view that the proposed s.35A(2) should be amended as s.35A(1) and be put as the first provision under the new s.35A.

C. Section 35A(3)

8. The Bar is of the view that the rationale and mechanism of the proposed s.35A(3) are unsatisfactory for the following reasons:-

- In the case of parallel import, the goods involved would be lawfully made overseas and it is unlikely that one would import an article containing only

parts of a movie or television drama (as opposed to the entire movie or television drama) in reality.

- It is also unrealistic to expect the users to import parts only of movies of the length of 15 minutes or television dramas of the length of 10 minutes.
- A part may not constitute a substantial part of the copyright work and hence may not be an infringement.

9. Further, it is difficult to understand why the proposed s.35A(3) refers to the concept of "substantially in its entirety".

- The proposed s.35A(3)(a) contains the reference "the copy is a copy of a movie or a television drama in its entirety or substantially in its entirety".
- The proposed s.35A(3)(b) also contains the reference "all those parts of the movie or television drama copies of which are embodied in the article together constitute the movie or television drama in its entirety or substantially in its entirety".
- The Bar is of the view that such references are superfluous. By virtue of ss.22(3)(a) and 23 of the Copyright Ordinance, Cap.528, a copy needs not be an exact copy of the copyright work, and it includes the reproduction of a substantial part of the copyright work.

10. Works like movies and television dramas are also covered under the proposed s.35A(4). We suggest that the proposed s.35A(3) should be deleted.

11. The Bar suggests that the concluding sentence of the proposed s.35A(3), namely, "reference to a television drama, in the case of a television drama comprising one or more episodes, is reference to an episode of the television drama" should be

incorporated into the definition of “television drama”.

D. Section 35A(4)

12. With respect to the proposed s.35A(4)(a), we are of the view that the reference to “forms part of” the specified excepted works is not necessary.

- The Bar does not think that one would import the various works specified therein in part in reality.
- A part may not constitute a substantial part of the copyright work and hence may not be an infringement.

13. With respect to the proposed s.35A(4)(b), we are of the view that the suggested test is not satisfactory.

The Bar is of the view that the concluding part of the proposed s.35A(4) is not appropriate.

- The objective of the concluding part of the proposed s.35A(4) is to assess the purchaser’s purpose of acquiring the article concerned.
- The suggested test is whether the purchaser buys the article for the purpose of acquiring the computer programs *simpliciter* or for the purpose of acquiring the other substantive work embodied in the article.
- However, the concluding part of the proposed s.35A(4) asks the court to ignore the functions of the computer programs of enabling the purchasers to view or listen to or search any specific part of the substantive work embodied in the article.
- The suggested test does not work if it seeks to disregard the purchaser’s

purpose of acquiring the computer program *simpliciter*.

14. Subject to the Bar views as stated in paragraph 13 above, and as a result of its recommendation of deleting the proposed s.35A(3) in the above, the Bar suggests that the proposed s.35A(4) should now become the new s.35A(3). Further, the Bar is of the view that "e-books" should not form part of the excepted works. If "e-books" are to be included as an excepted work, the Bar suggests that the proposed s.35A(4) should nevertheless be amended as follows:-

"~~(4)~~ (3) A copy of a work other than a computer program (the "other work"), ~~that~~ which copy is embodied in an article ~~in~~ which ~~is~~ also embodies~~d~~ a copy of a computer program, is not a copy of a work to which this section applies if -

(a) ~~the copy of the work is or forms part of~~ the other work is –

(i) an e-book;

(ii) ~~a copy of~~ a movie ~~(other than a copy to which subsection (3) applies)~~;

(iii) ~~a copy of~~ a television drama ~~(other than a copy to which subsection (3) applies)~~;

(iv) ~~a copy of~~ a musical sound recording; or

(v) ~~a copy of~~ a musical visual recording; and

(b) the article ~~is an article that~~, if acquired by a person for his own use, is likely to be acquired for the purpose of acquiring a copy of the other work ~~the copies of works to which paragraph (a) applies~~ more so than for the purpose of acquiring a copy of the computer program ~~the copies of other works that are embodied in the article,~~.

~~and in considering for the purposes of paragraph (b) the extent to which an article is likely to be acquired for the purpose of acquiring copies of works other than works to which paragraph (a) applies, no regard shall be had to those functions of any copy of a computer program that provide a means of viewing or listening to a copy of a work to which paragraph (a) applies (and, where the copy of the work is in encrypted form, of any decrypting that is necessary to enable such viewing or listening), or for searching for any specific part of such copy of a work.~~"

E. Section 35A(5)

15. The Bar suggests that this be amended to become s.35A(4) if "e-books" are to be included as one of the excepted works.

Dated this 12th day of June 2003.