LS/B/10/01-02

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Secretary for Commerce, Industry and Technology
(Attention: Mr. Philip CHAN,
Principal Assistant Secretary (5))
Commerce, Industry and Technology Bureau
Level 29 One Pacific Place
88 Queensway
Hong Kong

31 July 2002

BY FAX & BY POST
Fax No. : 2869 4420
Total no. of page(s) : (2)

Dear Mr. Chan,

Copyright (Amendment) Bill 2001

I am scrutinizing the legal and drafting aspects of the Bill with a view to advising Members and would like to seek your clarification on the following:

General Observation

2. What other jurisdiction has enacted legislation on parallel importation? Is the proposed Bill modelled on the legislation of any jurisdiction?

3. The terms "feature film", "musical sound recording" and "musical visual recording" are defined in the Bill. However, it is noted that the same definitions also appear in the proposed section 118 of the draft Copyright (Amendment) Bill 2002 except with a slight variation for the term "musical visual recording". Which definitions are to be retained?

4. While "copy of an associated work" is defined, why is a definition for the term "computer program" not considered necessary? A definition of the term "computer program" is provided in the U.S. and the Australian laws.

Clause 1

5. Please confirm that there will be a Committee Stage amendment to amend the reference of the "Secretary for Commerce and Industry" to the "Secretary for Commerce,

Industry and Technology".

Clause 3

6. If a feature film of about 90 minutes is to be divided into 5 parts which are then embodied separately in 5 disks each containing copies of computer programs and if they are packed into one box, can the box be parallel imported? Further, can disks of non-feature films such as documentary films, games be parallel imported?

Clause 5

7. The definition of "copy of an associated work" first appears in section 35A and is then repeatedly referred to in the proposed sections 118A(2), 199A(1) and 199B(1) with slight variations in wording. Is the difference in wording necessary?

8. In respect of the proposed 199A(4), how many convictions have been recorded under section 118(1) since the enactment of the Ordinance? Of these convictions, how many were for parallel importing copyrighted work?

9. I would appreciate it if you would let me have your reply in both English and Chinese version 5 days before the date of next meeting.

Yours sincerely,

Anita HO
Assistant Legal Adviser

c.c. Department of Justice (Attn: Mr. Jonothan ABBOTT, SALD and
Mr Michael LAM, SGC)
LA
CAS(1)4

Our ref. : CIB 07/09/6 Tel. no. : 2918 7482
Your ref. : LS/B/10/01-02 Fax no. : 2869 4420

2 September 2002

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Copyright (Amendment) Bill 2001

Thank you for your letter of 31 July. Our responses to your questions are set out below.

General Observation

2. You asked what other jurisdiction had enacted legislation on parallel importation and whether the subject Bill is modeled on the legislation of any jurisdiction.

3. We have found legislation in Australia, United Kingdom and the United States, among others, containing restrictions against parallel importation of copyright works. We have adopted in our bill to some extent the approach of the Copyright Amendment (Parallel Importation) Bill 2002 of Australia. The Australian bill is being considered by the Australian Parliament.

4. You noted that the same definitions for the terms “feature film”, “musical sound recording” and “musical visual recording” appear in both the Bill and the proposed section 118 of the draft Copyright (Amendment) Bill 2002, except with a slight variation for the definition of the term “musical visual recording”. You asked which definition is to be retained. We intend to adopt the latest version of the definition for the term “musical visual recording”, which is a conscious refinement. We will move a Committee Stage Amendment (CSA) to effect the change.

5. You asked why a definition for the term “computer program” is not necessary.

This term is currently used in the Copyright Ordinance ("the Ordinance") without a definition, based on the recommendation of the Law Reform Commission Report in 1993. No problem has arisen so far. We consider that the absence of a definition for the term will not affect the purpose or the scope of the Bill.

Clause 1

6. You asked us to confirm that there would be a CSA to amend the reference of the "Secretary for Commerce and Industry" to the "Secretary for Commerce, Industry and Technology". We so confirm.

Clause 3

7. You asked whether a feature film of about 90 minutes can be parallel imported if it is divided into 5 parts, embodied separately in 5 disks each containing copies of computer programs and packed into one box.

8. If we take each disc as "an article" referred to in section 35A (2)(a) of Clause 3 of the Bill, and if the duration of the feature film embodied in each disk (when viewed) is not more than 20 minutes in duration, then the disk can be parallel imported. Since there is no provision in the Bill to prevent the packaging of such disks into one box, the whole package can be parallel imported.

9. Presumably this leads to the question whether the intent to exclude feature films from the liberalisation will be defeated by such an arrangement. It appears to us that the situation in paragraph 8 is unlikely to appear in practice as it makes little marketing sense to break down a movie artificially into five parts to be put into five separate disks, as the viewer will then need to change disks five times to view a 90-minute movie. In addition, we should bear in mind that parallel imported works are made with the licence of the copyright owner although they are destined for sale in an overseas market. To avoid their licensees from artificially breaking up a full-length movie into separate disks, copyright owners can provide appropriate contractual terms in the licence agreement to protect their interests.

10. You asked whether disks of non-feature films such as documentary films or games can be parallel imported.

11. By definition, a non-feature-film will not be subject to the exclusion under section 35A(3)(a) in Clause 3 of the bill. A documentary film may or may not fall within the definition of "feature film" in the Bill (i.e. a film commonly known as a movie or a television drama). As for computer games, they could generally be parallel imported provided they satisfy the requirements under section 35A in Clause 3 of the bill.

Clause 5

12. You noted that the definition of "copy of an associated work" appears in sections 35A and is then repeatedly referred to in sections 118A(2), 199A(1) and 199B(1) with slight variations in wording. You asked whether the difference in wording is necessary.

13. We agree that the definitions in these sections should be aligned, and we will move a CSA accordingly.

14. In respect of the proposed section 199A(4), you asked how many convictions have been recorded under section 118(1) since the enactment of the Ordinance and of these convictions, how many were for parallel importing copyrighted work.

15. The Ordinance was enacted in June 1997. Prosecution figures under section 118(1) of the Ordinance are as follows:

Year	**No. of cases convicted**
1997 (July-Dec)	742
1998	1,032
1999	991
2000	3,019
2001	1,570
2002 (Jan-May)	441
Total :	**7,795**

None of these convictions relates to parallel importation. Customs and Excise Department had not received any complaint about parallel importation except one received recently. That one case is under investigation.

16. The Chinese translation of this letter will be sent to you separately.

Yours sincerely,

(Laura Tsoi)
for Secretary for Commerce, Industry and Technology

c.c. IPD (Att: Miss Pancy Fung and Ms Maria Ng)
LD (Attn: Mr. Jonothan Abbott and Mr. Sunny Chan)
C&ED (Attn: Mr. William OT Chow and Mr. Y K Tam)

DPP (Attn: Mr R G Turnbull)