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URGENT

Dear Sirs

COPYRIGHT (AMENDMENT) BILL 2001

I am an intellectual property lawyer of some 25 years standing. I write to you in a dual capacity. As a member of The Law Society of Hong Kong's Committee on Intellectual Property (and principal author of the Law Society's submissions on the Copyright (Amendment) Bill 2001 and Copyright (Amendment) Bill 2003) and also on behalf of certain industry groups that attended a round table discussion at our office yesterday on the Copyright (Amendment) Bills, including the Business Software Alliance, International Federation of the Phonographic Industry (Hong Kong Group) Limited, Motion Picture Association, Interactive Digital Software Association, Hong Kong Cable Television Limited and others.

The purpose of this letter is to urge the Administration in the strongest possible terms to withdraw the Copyright (Amendment) Bill 2001 prior to the resumption of the second reading debate on 2 July 2003.

It is with very great regret that we note that further Committee Stage Amendments were proposed and considered following the Bills Committee meeting on 16 June 2003 according to the draft CSAs in Appendix III of LC Paper No. CB(1) 1995/02-03 dated 19 June 2003. We have discovered this only from the LegCo website and there has been no consultation either with the Law Society or the relevant industries, who take a different view of the proposed legislation from that adopted (without clear reason) by the Hong Kong Bar Association. Indeed, we fail to see what standing the Bar Association has to urge deregulation of parallel imports. In contrast, the industries we and other members of the Law Society directly represent clearly take a very different view, but have not been properly consulted.

It is abundantly clear from the industry meeting yesterday that there was considerable surprise that the latest iteration of the Copyright (Amendment) Bill 2001 should be proceeding in its present form without proper consultation and in apparent undue haste.

The latest proposed CSAs with respect to the proposed Section 35A and Section 118A under the Copyright (Amendment) Bill 2001 continue to be unnecessarily complex and most likely not achieving the required objectives (namely to liberalize parallel imports with respect to computer programs). A proper approach to defining parallel imports in respect of which the rights are exhausted is to distinguish between manufactured articles lawfully "put on the market" anywhere in the world rather than "lawfully made". Moreover, we find the current wording of Section 35A very difficult to understand and apply in practice. The lengths to which the draftsman has gone to try and distinguish between what is essentially a computer program and what is essentially a movie, musical sound recording, e-book etc is quite remarkable.

As regards Section 118A(b), the application of the concept "lawful user" in relation to a copyright work other than a computer program to which Section 35A(1) applies (in other words pirated computer programs and both parallel imported and pirated copies of works other than computer programs) is absolutely extraordinary if its meaning is to be understood. It effectively opens the door to wholesale, end user and internet piracy.

It is clearly impossible for us to continue the painful exercise of attempting to assist the Administration's efforts to draft legislation that both liberalizes restrictions on parallel imports of computer programs and permits such restrictions to continue for the time being with respect to other associated works in a manner which will not open the door to serious loopholes, not only in relation to parallel imports of computer programs but also parallel imports and use of pirated copies of other works.

We appreciate that the Administration is bent upon abolishing criminal and civil liabilities for, at the very least, computer programs as such. We note that the Administration wishes to extend this liberalization further and that its longer term agenda is to do just this. However, in view of the very serious reservations that we have about the drafting of the present legislation and the equally serious concerns that have been raised by the relevant industries and practitioners in relation to the proposals, we must again strongly urge the Administration to adopt a simpler approach to Section 35A (as an interim measure).

Accordingly, we propose the following wording for Section 35A:

"(1) A copy of the work to which this sub-section applies is not an infringing copy for the purposes of Section 35(3) if it was lawfully put on the market in Hong Kong or elsewhere.

(2) Sub-section (1) applies to a copy of a computer program as such but not to any other work which is embodied or incorporated in an article together with a computer program and the article as a whole is reasonably regarded as something other than a computer program as such."

On the above basis, the proposed Section 118A would be deleted as well as the various definitions except that we would add:

""Lawfully put on the market" means put on the market in Hong Kong or elsewhere either by the owner, or a person authorized by the owner, of copyright in the work in question which the owner is entitled to protect under this Ordinance."

This would properly reflect the territorial nature of copyright and the fact that copyright may well be owned by different people in different territories. It would not however be necessary to consider whether or not copyright law existed in the place of making in so far as the owner of the Hong Kong copyright had authorized the article to be put on the market.

We believe that the transitional provisions would be quite easy to draft on this basis.

To summarize:

1. The Copyright (Amendment) Bill 2001 should unquestionably be withdrawn in its present form.

2. As an interim measure, the above proposal, which would in our submission be quite straightforward for the court to interpret, may be adopted.

3. There be a further review of copyright law both in relation to parallel imports and end user liability.

4. More importantly, industries and lawyers should be properly consulted to consider provisions for a future digital copyright or other appropriate law to protect digital works and articles embodying such works.

We are copying this letter to the Clerk of Bills Committee and to the Intellectual Property Department. Moreover, in view of the serious legal implications, we also address this specifically to Hon Margaret Ng and Hon Audrey Eu. The matter raised may also be given wider circulation to interested bodies, including the press.

Please give this your urgent and considered attention.

Yours sincerely

Henry J H Wheare

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Industry Groups