

11th July 2005

Clerk to the Bills Committee
Bills Committee on the proposed Copyright (Amendment) Bill 2005
Legislative Council Building
8 Jackson Road
Central
Hong Kong

VIA FACSIMILE: 2869 4420

Dear Sir,

Re: The Proposed Copyright (Amendment) Bill 2005

Further to our submissions to Commerce, Industry and Technology Bureau of HKSAR Government (“CITB”) on the Copyright Amendment Bill (2003) on 25th November 2003, 13th January 2004 and 8th April 2004 respectively, a new round of public consultation was initiated by CITB on “the Review of the Certain Provisions of the Copyright Ordinance” on 9th December 2004 and we did submit our views to CITB in respect thereof on 15th February, 18th March and 11th April 2004 respectively.

The CITB has now released its initial views on the issues as raised therein and made a proposed amendment to the Copyright Ordinance on 17th June 2005 and we are very grateful to the Bills Committee on the proposed Copyright (Amendment) Bill 2005 for inviting us to provide the views of our members on this subject matter. In fact, most of the issues we are dealing with today have been previously raised in the Copyright (Amendment) Bill 2003.

I Overview

1. The 8 major issues as raised in the December 2004 consultation paper and the proposed amendments made to the Copyright Ordinance by CITB in June this year after considering the views, concerns and comments from the public carry wide economic implications which could lead to the substantial improvement to the Hong Kong’s copyright protection regime.
2. As the Bills Committee is fully aware, Hong Kong has the most advanced telecommunication system in the world and the digital information technology has created a new way of exploitation of the contents of our industry. The Internet has now becoming an increasing prevalent medium for use in business, personal communication and governments. However, our contents industry has remained on the analogue business model and has not been able to take the advantage of what the digital information technology may bring to the contents industry into the digital age despite the effort made by Hong Kong Government to drive Hong



- Kong to become a regional centre of creativity on which a knowledge-based economy is built.
3. Our members are of the view that the contents/ creative industries do play a substantial part of the development of the digital information technology but we are much concerned the inadequacy of the copyright protection regime for any on-line transaction. We have emphasized again and again the importance of bringing the copyright protection regime to meet with the technological social and economic development of Hong Kong in order for the contents/creative industries to take advantage and benefit of the huge investment by Hong Kong telecommunication companies on the infrastructure of digital information technology.
 4. As we pointed out to the CITB earlier, the result is that Hong Kong contents/ creative industries would not venture to provide any legal “downloading sites” for Hong Kong public on one hand and the public can have access to a number of illegal downloading sites of our contents on the other hand. No doubt, we share the views of other contents industries that on-line piracy is now becoming prevalent and has now been part of the life of Hong Kong.
 5. There is an urgent need for the legislative reform on the copyright protection regime in the digital environment in Hong Kong. Any such reform which enables the contents/ creative industries to do business on-line must be considered at the international level in order to provide a level-playing field for doing business on line on the global level.
 6. On 20th December 1996, two important copyright treaties were formulated and signed in Geneva, the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. The basic purpose of these treaties was to strengthen the rights of the copyright industries in the digital environment. Both treaties are collectively known as the Internet Treaties and are essentially a catch up which provides further protection to the copyright owner to deal with the revolution in digital information technology by updating Berne Convention, TRIPS and Rome Convention. These serve as an international norm and platform for harmonization of copyright protection related to e-commerce in digital age at the global level.
 7. The reality is that if we have the adequate copyright protection regime under which the copyright owners can control the exploitation of their works in the digital environment, we have an access to a potentially infinite range of copyright materials over a potentially infinite range of media.
 8. Needless to say, most of the developed countries such as U.S., U.K., Australia, and European countries, which understand the potential benefit and advantage of the digital technology as a new way of exploitation of the copyright works, have

legislated in their copyright law in line with the guidelines and norm of both the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

9. However, the situation is different in Hong Kong. We have not been able to enter into the digital age of doing business for our contents and our contents industries are still staying very much at the primordial stage of analogue world in doing business. The present legal frameworks have not been able to meet with our technological innovation economic and social development and the present Copyright Ordinance, as it now stands, simply hampers Hong Kong commitment and ability to develop creative industries upon which a knowledge-based economy is built.
10. In the circumstances, we sincerely urge the Bills Committee to consider any proposed amendment to Copyright Ordinance on a global level and at the macro scope and in the context of the international law, international trading policy and the trading and economic policy of Hong Kong and the strength and weakness of our contents/ creative industries.
11. The Bills Committee must have a vision of what they want for Hong Kong economy and shall shape the future of our economic model for our next generation. Whether the next generation will carry the torch of making Hong Kong as an exporter and a creative centre of Intellectual Property goods and services or simply will make Hong Kong as a consumer centre for these goods and services will very much depend on what we resolve and commit today.
12. In the premises and in the context of what we stated in the above background, we would venture to make the following observations and comments on the proposed amendment to the Copyright Ordinance by CITB after the public consultation on December 2004 consultation paper.

II The Government Proposed Amendment to the Copyright Amendment

13. End-user Criminal Liability

We have no further comments on the proposal that the business end-user criminal liability be limited to the existing 4 categories of works, that is, computer programs, movies, television dramas, and musical recordings and a new business end-user criminal liability (other than those non-profit making educational establishments and educational establishments subvented by Government which are exempted) is introduced to cover any act of distribution to such an extent amounted to prejudicially affect the interest of the copyright owners in respect of four types of printed publications, namely, books, newspapers, magazines and periodicals printed works.

However, a new criminal offence against the director(s) or partner(s) (as the case may be) who has done an act amounting the business end-user criminal liability unless that the director(s) or partner(s) have not authorized the alleged infringing act need special attention. The directors or partners may find themselves criminally liable simply because an unauthorized copy of a work is installed by an unhappy ex-employee without any knowledge of his employer and he reports the alleged infringement to the relevant authority prior to his departure of his employment with that employer bearing in mind that the criminal offence carries heavy penalty and fine. Perhaps, we should consider that summons be issued against the company or directors or partners for any offence related to the use of the infringing copyrighted material in the business and indictable offence to those who deal with the infringing copies on a commercial scale such as sale, and on-line transmission.

14 Copyright Exemption

We are pleased to learn that Hong Kong will not adopt the open-ended non-exhaustive U.S. fair use approach and that all the existing permitted act provisions in the Copyright Ordinance will be retained. However, the boarder provisions for fair dealing of copyright works that adopt the US fair use formula will be limited to two specific purposes, namely education and public administration, need to be addressed carefully.

As we pointed out earlier in our submission, any extension of fair dealing to digital environment without the adequate copyright protection regime for digitalized copy will only make school a source of on-line piracy. We will deal with the specific issues when the final draft bill is presented for further comments.

15. Circumvention of Technological Measures for Copyright Protection

An effective protection against circumvention of technological measures is an important step to encourage and facilitate the development of e-commerce on copyrighted materials as long as both criminal and civil remedies be available against those dealing with any devices, products or components and the provision of services on a commercial scale which circumvent technological measures as may be applied to a copy of a copyright work. No doubt, the technological measures shall include the access control, protection process and copying control mechanisms.

In order to facilitate the future development of digital information technology, we have no objection to the introduction of an exemption to any person who, for the purpose of research into cryptography, does anything which circumvents effective technological measures unless in so doing, or in issuing information derived from that research, he affects prejudicially the rights of the copyright owner.

In order to avoid any misunderstanding conceptual wise, we wish to point out that technological measures shall refer to those which serve as a common technological platform for a variety of copyright works.

For illustrative purpose the licensing arrangement between Macrovision Corporation and Victor Company of Japan Limited (“JVC”) in respect of the use of certain anti-copying technology which may be used to protect **video copyrighted material** against unauthorized analogue copying in connection with Digital Video Disc or Digital Video Cassette Recorder program playback will be caught within the definition of the effective technological measures.

Any copyright owner may use that technology to protect against any unauthorized reproduction of their works in the form of video format in an analogue form he converted into a digital file for on-line distribution. In short, the issue is whether all the content providers who sell copy of their copyright-protected video contents in the form of videocassette tape (i.e. in the analogue form) has applied the anti-copying technology to their analogue video contents when the viewer who intends to use JVC devices to transform the analogue form of the video content into digital form.

16. Rights Information Management

The concept of the rights management information system is different from that of effective technological measures as the former is specific to each and individual copyright works. The information must be associated with the work in question and includes the information which identifies the work, the author and the copyright owner of the work, the performer, about the terms and conditions of use of the work or any numbers or codes that represent such information (see Section 274 (3) of the Copyright Ordinance).

The new provision, which will grant both copyright owners and their exclusive licensees the same right and civil remedies against infringer as made available to those who provide the rights management system, is an important step to bring the copyright protection regime closer to home of the digital environment.

17. Parallel Importation of Copyright Works

Under the World Trade Organization, Article 6 of the TRIPs agreement allows each member to prevent or restrict parallel importation of all or any special category of copyright-protected goods as a matter of their economic policy in the international trade. Obviously, those countries which have a substantial contents/creative industry (and therefore they are practically an exporter of copyright contents) will prevent the parallel importation of copies of the copyright work into their countries. On the contrary, those who are the importer and user of the contents will allow parallel importation of the copyright-protected goods.

In U.S. which has substantial investment on copyright contents such as movie, computer software and sound recordings, it was observed that the purpose of the Copyright Act and the copyright law primarily promotes the broad availability of works of authorship, (Harper & Row, Publishers Inc. v. Nation Enterprises, 471 U.S. 539 (1985)), and through monetary reward to authors (see Sony Corp. v. Universal City Studios Inc., 464 U.S. 417 (1984), at 429). If authors lose control over the distribution of their creations and thus end up competing with lower-priced copies intended for different markets, they may also lose their incentive to create, depriving U.S. consumers of works of authorship.

Hong Kong, after years of consultation in the 90's, concluded that the Copyright Ordinance, which was enacted on 27th June 1997, was to protect the copyright owner's right, and its domestic distribution right after foreign sales. The policy behind such conclusion is very much in line with those as observed in U.S. above.

As we again mentioned in our earlier submission to CITB, most of the Hong Kong movie producers will have to license their movies in the world market by different geographical areas in order to secure the greatest return on the investment on the production of movie as they do not have resources to market their movies around the world on their own.

Hong Kong movie producers operate different windows of commercial exploitation by capitalizing the major market first and obviously, the pricing on the copy of their work is much lower for those sold in the developing countries such as China as compared to those sold in the developed countries or territories such as U.S. and Hong Kong.

Any relaxation to allow parallel importation of copies from the low-priced countries into Hong Kong will effectively change the landscape and ecosystem of our movie industry. They will move their investment to other countries which provide better incentives to the investor for contents/ creative industries.

In fact, CITB did reconsider the issue in early 2000 and came to the same conclusion and notified the Bills Committee in writing on 6th September 2002 that Hong Kong will maintain the status quo in respect of the parallel importation of copyright works other than computer program.

We respectfully submit that any exception for the existing criminal and civil liability for the importation and possession for use of parallel imports of copyright works by educational establishments and libraries for their education and library uses must be considered carefully and they may only allowed to do so if they are absolutely sure that such works are not available in Hong Kong market rather than based on the pricing policy.

18. Rental Rights for Films and Comic Books

The movie industry has requested the granting of the rental right to the film. As we pointed out in our earlier submission on this subject matter dated 8th April 2004, we need the rental right to combat the rampant illegal copying in the market, as we have no control over the rental market. The people simply make copies of our film works by the widely available digital recorders and DVD burners which make perfect copies from the rental works. The fact that the Blockbuster rental shops had moved out of Hong Kong completely in 2004 speaks for itself. The business landscape has changed since 1997 as only analogue VHS recorders were widely available at that time and they produced lesser quality copy. The uncontrolled commercial rental of film works actually encourages illegal copying of the rented film works thereby depriving copyright owners of a return on their investment and discouraging creation of new works.

By granting copyright owners of films a "rental right," Hong Kong creates an exception to the "first sale doctrine" as laid down in Section 24 (3) (a) of the Copyright Ordinance which limits the copyright owner's exclusive right of distribution.

This means that the ownership of the rental copies of a film work still vests in the copyright owner or the exclusive licensee, any dealing with the rental copies with the rental shop will be subject to the licensing arrangement and in this way, the copyright owners will have a better control over the commercial rental arrangement.

This concept has been applied to the sound recordings and computer software (see Section 25). This is motivated by the concern that commercial rental could encourage unauthorized copying and displace sales, thereby diminishing the incentive for creation of new sound recordings and computer software. This principle has been enshrined in Article 11 and Article 14 (4) of TRIPs agreement for computer software and sound recordings respectively.

Article 7 of WIPO Copyright Treaty also provides the rental right for computer program, and Article 9 of WIPO Performances and Phonograms Treaty also provides the rental right for the sound recordings.

If we were granted Rental Right in respect of the film works, we will use the rental business model as adopted by Blockbuster and the major movie studios such as Columbia Tri-star, Disney, Universal, Warner Bros., Twentieth Century Fox, Sony, MGM, and DreamWorks in U.S. The principal terms in consideration will cover a licence to rent the copies of film works on a revenue sharing basis in Hong Kong. There will be in place a central collecting licensing board for better administration and control in the supply of a wide range of rental copies of film works to meet the market demand. We will be working closely with CITB for



finalizing the arrangement with a view to providing the public a wide range of movie titles at a reasonable and affordable price.

Last but not least, we respectfully submit that any Rental Right granted to the film works must have control over and include any other act or practice in the nature of rental, lease, or lending. This will cover the arrangement by the so called “second hand shops” whereby a copy of a film is sold to a purchaser but on terms that it can be brought back with part of the money refunded or another work exchanged later on.

In short, we have confidence that we will have the business model for rental business of film works in place.

III Summary

We urge the policy branch and Legco not to disturb or alter the trading practice commercial law and key success factors which foster the development of movie industry in Hong Kong. Any change of rules or laws which affect the normal business activities or commercial dealings which have been found to be effective in the past will have devastating effect on our movie industry.

On the other hand, any amendment of copyright law which is in line with the Hong Kong’s commitment to become a regional centre of creativity and to become a world class knowledge-based economy will encourage the investment on the creativity here in Hong Kong and Hong Kong will be an exporter of intellectual right goods and services.

We will be pleased to clarify any issues or concerns as raised in this letter.

We will deal with the specific issues as may be raised in the draft bill related to any amendment to the Copyright Ordinance as soon as it becomes available.

If we may be of any further assistance, please do not hesitate to contact the undersigned at direct line 2787 8766.

For and on behalf of
Hong Kong Video Development Foundation Ltd.

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c.c. CITB

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