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CB(1)1385/05-06(08)

Clerk to the Bills Committee on
Copyright (Amendment) Bill 2006
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Sir,

Re Copyright (Amendment) Bill 2006

We refer to your letter dated 12th April 2006 inviting us to present our views and concerns on the Copyright (Amendment) Bill 2006 ("Bill') for which we are most grateful.

We have previously made three submissions to the Legco Panel on the Commerce and Industry on the key issues related to the subject matters of the Bill[1]. We hereby reiterate the contents of these submissions as part and parcel of our present submission to the Bills Committee on this Bill.

We would, however, like to point out the key issues as raised in the Bill. For the sake of clarity, it may be desirable if we advance our views on the policy behind the proposed amendments to the Bill first before we actually deal with the wordings of the Bill.

A. Parallel Import

1. The first and the most important key issue, which is a bloodline to the survival of our industry, is the proposed reduction of **the period of criminal sanction** from 18 months to 9 months. We have expressed our strongest objection in clear and unambiguous terms to the CITB on 15th August 2005 which referred to our meeting with CITB on 29th July during which it was reviewed that the Administration had reconsidered its position to reduce the period of criminal sanction[2]. We hereby reiterate our views as expressed in that 15th August submission.

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1 11th July 2005 under your reference [CB(1)2047/04-05(10)] as posed on your website on the Overviews of the key issues raised in the consultative paper on the Review of Certain Provisions of the Ordinance;
15th August 2005 referring to the meeting with CITB on 29th July on the proposed reduction of criminal sanction on the parallel importation under your reference [CB(1)244/05-06(05)]; and
19th January 2006 on the liabilities of partners and directors under your reference [CB(1)762/05-06(01)].

2 The letter is posted in Legco Website under reference [CB(1)244/05-06(05)]-see note 1 above.

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2. Hong Kong has adopted the national exhaustion of rights for all copyright works except computer program. It is imperative that Hong Kong provides adequate copyright protection for our content creators/investors in culturally rich activities or business which provides copyrighted contents and services to satisfy our cultural and social needs and entertainment as well as serving as an exporter of the same. Our film industry is highly visible in the international arena.

3. The intellectual creation of our Hong Kong talents, who contribute to the development and growth of our contents industry such as books, journals, newspapers, cartoon magazine, clothing/ clothes, jewel and watch designs, films, TV programs, audio broadcasts, music industry etc., is the capital of and pillar of our development of the knowledge-based economy, which Hong Kong is now striving to build. These talents have a much wider vision for Hong Kong economic and social development.

4. We hereby urge the Bills Committee to consider our original 1997 proposal that **the period of criminal sanction against the parallel importers** that the period of criminal sanction (and person who deals with or use the imported copy in business context) be extended from 18 months **to 24 months** as we would like to exploit a new business model based on the advance in the digital information technology which will enable us to compete with the illegal parallel import on price and services. This would provide a market solution against imported counterfeit copies and on-line piracy.

5. We fail to understand why CITB would bring this issue up again at the eleventh hour despite the fact that the Government had always been of the view that there had always been no justification to make any change on this issue as noted in the "Proposals on Various Copyright-related Issues" [under reference CB(1)1792/04-05(05)] (Paragraph 38 refers) which was discussed before the Legco Panel on Commerce and Industries on 19th July and 21st June respectively. Furthermore, the December 2004, public consultation[3] simply followed the recommendation made by CITB of Hong Kong Government on this same issue in its submission to the Legco Bills Committee on Copyright (Amendment) Bill 2001 on 6th September 2002[4].

6. We were somewhat perplexed as to why CITB had changed its stance on 29th July 2005, about 10 days after the 19th July Legco panel meeting during which it was assured that no amendment would be made on the criminal sanction window for parallel importation of copies of a copyright work (except computer program).

3 See the public consultation paper on "The Review of Certain Provisions of The Copyright Ordinance" as published by CITB on 9th December 2004.

4 Letter dated 6th September 2002 from Ms. Laura Tsoi for Secretary for Commerce Industry and Technology addressed to the Bills Committee on Copyright (Amendment) Bill 2001

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7. However, the 15th November 2005 Refined Proposals on Various Copyright Related-Issues as submitted for discussion before the Legco Panel on Commerce and Industry shed some light as to why there was a sudden and abrupt change to cut the blood line of our film industry and shredded our contents industry into pieces.

8. As the Bills Committee may note, all the views of the users of copyrighted materials from the relevant stakeholders, trade organizations such as HKGCC etc, (except that the voice of the Liberal Party was missing) had been fully ventilated in 19th July submission which led to the conclusion that no recommendation be made to any change on the criminal sanction period for parallel importation of copies of copyright works (except the computer program).

9. It is therefore not difficult to visualize that the 15th November submission was strongly influenced by the view of the Liberal Party (please refer to the table as annexed to the submission). In other words, CITB had switched its position between 19th July and 29th July 2005 by ignoring the 4 years of public consultation on this issue.

10. We therefore together with other contents industry wrote to the Liberal Party on 5th January 2006 setting out our positions clearly to which we have not received any courtesy of their reply. A copy of our letter to the Liberal Party is attached hereto as for your easy reference.

11. In short, we believe that the 18 or 24 months criminal sanction period as compared to the criminal protection for full copyright protection period in other jurisdictions such as UK has served and acted as the compromise between the copyright creators/investors and the end users as it has all been understood that the Film industry needs the criminal sanction period to prevent any free-riding of parallel importers during the investment/harvesting phase of the product life cycle. It allows copyright owners to exercise the full distribution rights guaranteed them by our Copyright Ordinance[5].

12. In addition, it is difficult to distinguish between parallel imported copies and counterfeited copies of a film. Criminal sanction of parallel import can facilitate keeping pirated and counterfeit copies out of Hong Kong market during the first and critical phase of the exploitation cycle of the work because they dispense with the need to prove that such copies have been illegally produced[6].

5Sections 101 (2) and 194 (1) clearly allow the copyright owner to segment.

6 Please refer to HKSAR V Chan Kwai Tong (HCMA993/2005) in which the defendant was acquitted for those VCD embodying a film which was published more than 18 months. There was no way to suggest that the VCDs were infringing copies unless a copyright owner from the country from which the VCDs in question were imported into Hong Kong testifies in court that the VCDs are pirated copies.

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13. Therefore, we urge the Bills Committee to reconsider the position of CITB by maintaining the criminal sanction period for at least 18 months if not longer.

B. The Circumvention of the Technological Protection Measures

14. We wish to point that WIPO Internet Treaties fully recognized that, in the digital world, copyright and related rights cannot be effectively protected without the support of **technological protection measures** (such as password protection, scrambling, encryption etc.) and **rights management information** (the metadata related to the copyright work).

15. In the premises, WIPO Internet Treaties provide the legal **protection of technological protection measures**[7] **and of rights management information**[8] against anyone who circumvents the technological protection measures and/or interfere the rights management information in addition to (or **adjuncts to**) the **copyright protection** of their copyrighted contents. This serves as a second layer of copyright protection.

16. In short, any technology to be employed for protection of the copyrighted materials on-line will always be vulnerable to hacking. What one software writer can build, the hacker can always break. The adequate legal protection of both the technological protection measures and rights management information is the key building block and the key centre of the digital copyright law[9].

17. There are two main types of technological protection measures, namely (i) **access control** which allows the copyright owner to control access to the copyrighted material or other subject matter and (ii) copyright protection measures or **copy control** which are designed to control activities such as reproduction of copyright material e.g. by limiting the number of copies that a consumer may make out of the original copy of an item.

18. In Australia, it is perceived that "copy control" is more closely allied with copyright and the infringement of copyright than access control. Access control seeks to prevent all access to copyright materials not only that access which is unlawful.[10]

19. Copy Access itself is not an act of copyright infringement but it is necessary for the protection of the copyright works in the digital environment. Copy control

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7 Protection against the circumvention of Technological Protection Measures - Article 11 of the WCT and Article 18 of the WPPT.

8 Protection for Rights Management Information- Article 12 of the WCT and Article 19 of the WPPT

9 For the full review of this topic, please refer to the IFPI submission to the Legco Panel On Commerce and Industry in respect of the Digital Rights Management System on 9th August 2005 under your website reference [CB(1)2190/04-05(03)]

10 Australia House of Representatives Standing Committee on Legal and Constitutional affairs, Advisory report on the copyright Amendment (Digital Agenda) Bill 1999, November, p60.

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limits how a work may be copied and is usually associated with a work or other subject matter such as confidential personal information.

20. The term " Technological Protection Measure" describes any technology, device or component which is designed, in the normal course of its operation, to protect a copyright work[11] which is broad enough to cover any future development of copy protection. The word "protection" means the prevention or restriction of acts that are not authorized by the copyright owner of that work and the acts fall within the scope of the restricted acts[12].

21. Two points needed to be clearly understood:

    a. Firstly it **is unnecessary to prove that the protection of the works is the main or primary object of the measure**: all that is necessary is that the measure should have been designed to achieve this in the normal course of its operation.
    b. Secondly the **main purpose of the copy protection system must be to protect a copyright work so as to prevent infringement of copyright[13].**

22. Laddie J, stated in Sony v Ball[14] that the purpose of Section 296, (under the heading of "Device Designed To Circumvent Copy-Protection") of the U.K. Copyright Designs and Patents Act 1988 was to prohibit trade in device which overcome copyright protection without regard to whether that assisted copyright infringement. We suggest that the learned Judge's view clearly states and lends support to our view that this should be the purpose of the enactment of the anti-circumvention provisions.

23. U.S. adopts the similar approach, Section 1201 (3) (B) of DMCA describes a technological protection measure as "effectively controls access to a work" if the measure***, in the ordinary course of its operation***, requires the application of information, or a process or a treatment, with the authority of the copyright owner, ***to gain access to the work***.

24. The technological protection measures under DMCA only cover Access Control but not copy control as US considers that copy control will be more related to copyright infringement[15], which will be subject to the constitutional right of "fair use" general defence[16].

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11 Article 6 (3) of the European Directive 2001/29 on "The Harmonization Of Certain Aspects Of Copyright And Related Rights In The Information Society".
12 Section 296 ZA (3)a of the U.K. Copyright Designs and Patents Act 1988.
13 Sony v Ball (2004) EWHC 1738, Ch D, para 39
14 2004 EWHC 1738, Ch D, para 21.
15 Any circumvention of copy control on the exercise of the exclusive rights in the copyright work by the copyright owner will amount to copyright infringement as the infringer has exercised such act, without authorization of the copyright owner
16 Section 8 of the Article 1 of the US Constitution.

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25. Therefore any proposal that a person who circumvents technological protection measures will only attract liability if he knows that the circumvention will lead to copyright infringement is misconceived and **is unnecessary. This against the norm of the international obligations on the protection of the technological protection measures**. Any act of copyright infringement on its own will be a subject matter of a separate legal action for copyright infringement.

26. The suggested definition which ties with the copyright infringement will make the definition of the Technological Protection Measures unnecessarily narrowed. In this connection, we wish to refer you to the Australia Full Federal Court case[17] which rules that the **access control** of the Sony PlayStation game console did not actually constitute a technological protection measure within the definition of the Copyright Act 1968 as it did not prevent copyright infringement per se but prevented access only after infringement had already occurred.

27. As regards the exemptions, we pointed out in our meeting with CITB on 19th January 2006, we fail to understand the rationale behind as to why the text of the amended Section 273 basically in term of the equivalent Section 296 of the U.K 1988 Copyright Act (as amended in 2003), but CITB has chosen to propose that the purported exemptions would be based on US Digital Millennium Copyright Act 2000 which has different constitutional and legal frameworks than those of Hong Kong.

28. The **exemption under DMCA is limited to access control but not copy control**. However CITB suggests in the proposed draft that the exemptions cover both the Access Control and Copy Control.

29. DMCA exemptions require "good faith" aspect for any application of the exemptions of decryption research and the relevant and necessary consent from the right owners is one of the 4 elements for "good faith" consideration[18].

30. However, there is notably an absence of "good faith" requirement in the proposed draft bill. This is not in line with U.S. DMCA approach[19] nor the approach taken by U. K. as laid down in Section 296 ZA (2) of UK Copyright Designs and Patents Act 1988 (which derives from recital 48 to the European Parliament Directive 2001/29 on the Harmonization Of Certain Aspects Of Copyright And

[17] Steven v Sony (2005) HCA 58 related to the key question of what exactly constitutes a Technological Protection Measures under Section 10 of the Australia Copyright Act 1968 which defines Technological Protection Measures as being a
"Device or product or a component incorporated into a process, that is designed, in the ordinary course of its operation, ***to prevent or inhibit the infringement of copyright*** in a work or other subject-matter by either o both of the following means"

[18] Section 1201 (g) of the DMCA refers

[19] 4 elements are required for the establishment of "good faith" requirement under Section 1201 (g) 2 of DMCA

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Related Rights In The Information Society). **It is clear that the act of decrypting a technological protection measure for genuine cryptographical research is unlikely prejudice the copyright owner but the publication of that research is likely to be so**.

31. In short, the scope of the exemptions needed to be looked at carefully and should be narrowly defined as to the extent that it is unlikely to cause prejudicially effect the interest of the right owners, otherwise, the exemption may have a catastrophic financial consequence to the copyright owner/investor.

32. If we were to follow CITB's approach, any new technology of technological protection measure will be subject to decryption research and wide publication before it ever has a chance to test it in a market. It takes a long time to establish and gain confidence on a technological protection measure for use on the digital environment by the copyright owners.

C. The Geographical Regional Coding Systems

33. We wish to put on record that there should be two protection regimes for any regional coding system for segmentation of market into different geographical regions. Technological protection measures used in those copyright works which adopt the national exhaustion of rights (i.e. parallel importation of copies of these works are restricted) should be within the definition of technological protection measures.

34. Whereas those copyright works which have liberalized the parallel import and adopt the international exhaustion of rights should be outside the scope of protection. These include computer program and computer game. The computer software industry chooses to open its market to the world in Hong Kong for parallel imports of computer program and computer game, it should accept the consequence of taking this step in the year of 2000.

35. In our industry, the DVD regional coding allows a copyright owner of a film to exercise and protect its exclusive rights of distribution and of reproduction and such rights are divisible geographically under our Copyright Ordinance. It is a very important technological protection measure for commercial exploitation of the films in the form of digital format.

36. As rightly observed by the US Copyright Office, the film industry's willingness to make audiovisual works available in digital form of DVDs is based in part on the confidence it has on the content scrambling system ("CSS system") which protects it against massive infringement. In the circumstances, the US Copyright

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Office in its prior rule-making proceedings under DMCA has consistently rejected all proposed exemptions which would permit circumvention of CSS on DVD[20].

37. The effect of the rejection of exemption of CSS on DVD has a visible and dramatic economic impact on the motion picture industry. The sales of DVD grew 40.3% in 2003, 27.3% in 2004 and 4.5% in 2005. These figures have endorsed the decision of the major motion picture studios to release material as they have confidence in the security and adequate legal protection of CSS. These major motion picture studios have continued to release new DVD titles in ever increasing numbers including classic titles, television series and growing array of direct to DVD releases. These promote investment and provide the much needed and wider choice of content materials to the public.

38. As regards the regional coding system, we fully understand that it is lawful for an end-user to acquire a copy of a film work in a foreign country and to import into Hong Kong for his own and private use and such use would have been frustrated without the proper coding DVD player available to them. As we pointed out in our meeting with CITB on 19th January 2006, we have no objection for a person to acquire the appropriate DVD player from the market as long as such a DVD player is not for a limited commercially significant purpose of use or no such purpose of use, other than the circumvention or facilitate in the circumvention of a technological protection measure.

39. As regards the Computer and Computer Game or any work which has opened its market for parallel import, we suggest that there should be no restriction on the importation for domestic sale of any device whose sole purpose is to control market segmentation for legitimate copies of compute game and is not otherwise a violation of law.

40. By and large, we agree that the struggle between the contents industry and their digital future is demanding and complex, therefore we agree that we should follow both the U.K[21] and U.S.A [22]approach that a rulemaking mechanism should be in place to deal with the issues arising from the use or the scope of exemptions of the technological protection measures.

41. We also recommend that the act of circumvention be criminalized bearing in mind that the technological protection measures are the centre of the universe of the digital copyright law and of the e-commerce.

D. The Rights Management Information

[20] Rule making on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed Reg. 62011, 27th Oct 2003
[21] Section 1201(g) Section 296 ZE (3) (b) of the U.K. Copyright Designs and Patents Act 1988.
[22] Section 1201 (C) of the DMCA.

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42. We are, in principle, supportive of the amendment to Section 274 and would recommend that it adheres to the requirement of Section 296 ZG of the U.K Copyright Designs and Patents Act 1988 and of Article 7 of the E.U. 2001 directive on the Harmonization Of Certain Aspects Of Copyright And Related Rights In The Information Society.

E. The Liabilities of Partners and Directors

43. We have made our submission to the Legco Panel on Commerce and Industry on 19th January 2006 in respect of the liabilities of partners and directors which has been posted on the Legco website under your reference [CB(1)762/05-06(01)]. We hereby reiterate our views as expressed therein.

44. In summary, we are of the view that there is no such an urgency to introduce this kind of new liabilities on partners and directors as Section 125[23] of the Hong Kong Copyright Ordinance has already covered such criminal liabilities for corporate officers who deal with infringing copies for the purpose of trade or in the course of trade, perhaps with some modification to cover partnership aspects.

45. We suggest that the business community, which comprises mainly SMEs, must insist and maintain that, in the case of status offence, it is **the legal burden on the prosecution** to **prove both the actus reas and mens reus,** namely that a copyright offence has been committed and that the officer or director has all the mental elements to take part in the offence before that officer or director may be convicted.

46. In this connection, we wish to refer to the recent Court of Appeal Case[24] on Section 118 and Section 125 of the Copyright Ordinance in which it was stated that "in our judgment[25], even if a person (a director or any other individual referred to in s 125) is charged under s 125, the statutory defences under s 118 are available to his company and likewise to him. There is no prejudice in that regard."

47. In this case, the prosecution proved both the actus reas and mens reus as required by Section 125 based on the documentation seized by Customs and Excise. In short, it is not so difficult to prove the case which is contrary to what the CITB may have led us to believe.

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[23] Which provides that "Where a body corporate commits an offence under this Ordinance in respect of any act which is shown to have been committed with the consent or connivance of, or to be attributable to any act on the part of, any director, manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity he, as well as the body corporate"

[24] HKSAR V Li Cheung Cacc 375/2004 /Judgment Delivered On 11th January 2005.

[25] Paragraph 18 of the judgment refers

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48. In short, Section 125 of the Copyright Ordinance requires the prosecution to prove the case beyond reasonable doubt against a corporate officer but Section 118 statutory defenses are also avail to that corporate officer under any circumstances.

49. This means **that the directors/partners should be presumed innocence.** The present draft would not obviate the concern of the management of a business entity as there is always a possibility that a staff may upgrade the system in order to facilitate his work even though the management may only provide him with the earlier version of a computer program.

50. We fully understand the concern raised by members of the Legco who represent business entities on this important issue and we know that the key concern they have must relate to the computer program at the work place. We wish to point out that, unlike the other categories of works, it may be difficult for SMEs to differentiate the legitimacy of a computer program which is obtained from overseas or is a parallel imported copy.

51. On the Contrary, it is crystal clear to SMEs that for other 3 specified categories of works namely movie, television drama, musical sound recordings and musical visual recordings, any parallel imports of these 3 specified categories of works used in the course of any trade or business will be, for all intents and purposes, considered as infringing copies as we adopt the national exhaustion of rights model for these works.

52. We note that CITB submitted a brief on the liabilities of directors and partners to the Legco Panel on Commerce and Industry in April 2006 under the reference CB(1)1350/05-06(01) in purported justification for the introduction of such liabilities of directors and partners. We wish to point out that the examples referred to in Paragraphs 7 and 8 of the said brief mostly related to incident in which human life or health may be endangered.

53. In the Bill, the corporate end-user possession offence does not in any way endanger the life or health of any person in a work place nor the scale of the infringement warrants such draconian approach. The status offence in the management context usually of the regulatory in nature and the criminality is marginally minimum which is usually dealt with by way of summons. We are not convinced that there is any justification whatsoever which should make Hong Kong businessman subject to such treatment under our Copyright Ordinance which deals with the intellectual property of a right owner not the life or health of any person.

54. If such status offence were to be introduced, the first offender should be dealt with by way of summons punishable by fine bearing in mind that the seizure and the subsequent forfeiture of the equipment necessary for carrying out the business of

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that business entity will invariably cause great financial hardship to the owners of the business and will be an effective deterrent to other infringers.

F. Business end-user possession offence for 4 specified categories of works

55. We wish to refer you to Paragraph 4 of the Legco Brief on Copyright (Suspension of Amendments) Bill 2001 under reference CIB 09/46/12 dated 26th April 2001 in which your legal advice was that the phrase " for the purpose of trade or business" had been narrowly interpreted to mean that an enterprise would commit an offence only if it was engaged in dealing in the infringing copy concerned.

56. In our meeting with CITB on 19th January 2006, they have confirmed and concurred with our view that the words "in the course of any trade or business" do not cover the business end-user who possesses a copy of an infringing work in question "incidental to the business" of that business end-user[26].

57. If it is the intention of the Administration to maintain the "Status Quo" of the present criminal sanction for business end-users for 4 categories of works only[27] and none for other works and, as the criminal provisions of possession offences for all other works have been suspended under the Copyright (Suspension of Amendments) Ordinance 2001[28], we opine that it may not be necessary to apply for any extension of time if we can resolve that the possession offences be limited to 4 categories only or otherwise first before the deadline of 30th June 2006.

58. In other words, the criminal provisions for possession offences for business end users, the subject matter of the Copyright (Suspension of Amendments) Ordinance 2001, be made permanent and be dealt with once and for all, the Suspension Ordinance 2001 is no longer required (Paragraph 13 of the said Legco Brief dated 26th April 2001 refers).

G. The Criminal Exemption for Education Establishment

59. We strongly object that the school be exempted from any criminal liabilities as it is capable of distributing copyrighted materials to such an extent as to affect prejudicially the interest of the copyright owner in a very large scale beyond our comprehension. This reflects the failure of our schools and our teachers to properly deal with and respect the intellectual property rights in our education system. After all, there is no dispute that **piracy amounts to a theft of copyright work**.

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[26] Same interpretation as in the U.K. case, Pensher Security Door CO. Ltd v Suderland City Council (2000) R.P.C. 249,

[27] " In the course of any business or trade" provisions now cover the business end-user possession offence for computer program, movie, television drama, musical sound recordings and musical visual recordings since 2000 under and by virtue of Section 2 of the Copyright (Suspension of Amendments) Ordinance 2001 (Cap 568).

[28] The practical effect of the suspension in respect of these other works were reverted to the position before the amendment of the Copyright Ordinance in 2000

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60. We strongly suggest that the school must provide adequate technological protection measures and rights management information when dealing with copyrighted materials on-line. We use the word "adequate" in the education context which is in line with the requirements as laid down in U.S. Technology Education and Copyright Harmonization Act ("TEACH Act") of 2002.

61. We wish to emphasis that it is not our intention to control the teaching materials. The school has the full control over the copyrighted materials posted on-line for their students. The adequate digital management systems for the protection of the copyrighted materials on-line are the proper and responsible way by the school for its teaching activities. The content providers will have more confidence to make their contents available to the school as it has the full control on the use thereof.

62. Without the criminal sanction for wrong doings and without digital right management systems, Hong Kong schools will be the safe haven for on-line piracy. Our children will have different value judgment of our society.

63. The concerns as raised by our education interested groups reflect that our teachers do not have any clue about or understand our copyright protection regime and the meaning of it. Our society should not and cannot tolerate or condone any indulgence based on ignorance. Instead of getting the education process in the right path, our teachers choose to find safe haven to cover their ignorance or total disrespect for intellectual property rights.

64. Perhaps, the Intellectual Property Department should be entrusted with the task of providing a mandatory intellectual property course in the training of our in-service teachers.

65. For the purpose of illustrating the absurdity of exemption of criminal sanction in our school system, one may argue that as piracy is equivalent to theft. Any other theft offence of petty nature should be also exempted from schools. This reflects the value judgment of our society.

H. Particulars of the Author in Section 121 Affidavit

66. Section 178 of the Copyright Ordinance provides that a work may be qualified for copyright protection **if the author was** at the material time (a) **an individual** domiciled or resident or having a right of abode in Hong Kong or elsewhere; **or** (b) **a body incorporated** under the law of any country, territory or area

67. It is plainly obvious that an author may be an individual or a corporate body. We agree that Section 121 is not clear as whether the Section 121 affidavit evidence may be appropriate for use by an author which is a corporate body.

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68. This is crucial for our film industry as producer and the principal director of a film are taken to be the author[29] of that film and the producer is defined under Section 199 as the person by whom the arrangements necessary for the making of the film are undertaken. This means that a producer may be an individual and a corporate body.

69. Therefore, we support that amendment for Section 121 to cover corporate body situation in order to put the matter beyond doubt.

70. Last but not least, we wish to conclude by borrowing the words of CITB as stated at page 4 of The Paper Briefs to member of the Legco Panel on Commerce and Industry on 15th February 2005 under the reference of (CB(1) 861/04-05(05)):

71. "With rapid advance of new technology, we need the concerted efforts of all parties concerned to tackle infringing activities on the Internet, we will continue to encourage copyright owners to consider establishing new business models that will meet consumers increasing demand for access to copyright works on the internet."

72. It is clear to them that whether a new business model which attracts further investment from contents creators/investors be viable here in Hong Kong depends very much on the integrity of our digital copyright law. If our schools become the safe haven for on-line piracy, any thought of investing cultural rich activities in Hong Kong will be discouraged.

As the Bills Committee may note, we do not propose to cover all aspects of the Bill at this stage as we would rather choose to focus on the key issues first and we will deal with the others when it comes to actual dealing with the wordings of the Bill.

If we may be of any further assistance, please do not hesitate to contact us.

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

Chu Fung Mui, Clera
Vice Chairman

Encl.

[29] Section 11(2) (a) of the copyright Ordinance

5th January, 2006

The Hon Mrs Selina Chow Liang Shuk-yee GBS, JP
Liberal Party
4/F Henley Building
5 Queen's Road Central
Hong Kong

Dear The Hon Mrs Selina Chow Liang Shuk-yee GBS, JP,

Re : Proposed Reduction of the Criminal Sanction Period for Parallel Importation

We, the undersigned, are authorised to make this submission, individually (on behalf of our respective organisations) and collectively (on behalf of and for all the organisations) as listed out in the signature page below in respect of the Refined Proposals on Various Copyright-Related Issues [under reference CB(1)260/05-06(03)] which was tabled before the Legco Panel on Commerce and Industry on 15 November 2005.

While we may have other views in respect of the various proposals as raised therein, we have come to a consensus view on the so called **proposed Reduction of the Criminal Sanction for Parallel Importation** as referred to in paragraphs 20-25 thereof.

Our view is simple and straight forward, namely, we **vigorously object** to any proposal for **shortening the period of criminal sanction** in **the strongest possible term**.

There is indeed no justification whatosever to bring this issue up every time a review on certain provisions of the Copyright Ordinance is made despite that in the previous occasions, the Government was of the view that it did not recommend to make such a change in the Proposals on various Copyright-related Issues [under reference CB(1)1792/04-05(05)] (paragraph 38 refers) as discussed before the Legco Panel on Commerce and Industries on 19th July and 21st June respectively, and in particular, the December, 2004, public consultation[1] which simply followed the recommendation made by CITB of Hong Kong Government in its submission to the Legco Bills Committee on Copyright (Amendment) Bill 2001 on 6th September 2002[2].

Our views may be summarised as follows:

A. The WTO and the Economic Policy of Intellectual Property Goods

[1] See the public consultation paper on "The Review of Certain Provisions of The Copyright Ordinance" as published by CITB on 9th December, 2004.
[2] Letter dated September 6, 2002 from Ms. Laura Tsoi for Secretary for Commerce Industry and Technology addressed to the Bills Committee on Copyright (Amendment) Bill 2001

1. There is no dispute that Hong Kong government policy is to build a knowledge-based economy in Hong Kong and that intellectual property rights protection regime is the most important key factor in driving Hong Kong economy to build a knowledge-based economy. This is in line with the policy of all other developed industrial countries which value the creativity of their citizens and the wealth which brought by such creatively to their economy. It is not a simple issue on the manufacturing of the low tech and low value industrial goods (commonly known as "me-too products") as people might have perceived wrongly.

2. It is against this context that every member of WTO is obliged to enter into Trade Related Intellectual Property Rights Agreement ("TRIPS Agreement") as the goods which are protected by intellectual property rights are under different regimes or treatments under WTO from other non-IP protected "me too products" etc.

3. The TRIPS Agreement provides substantive norms on the protection of, among others, copyright and related rights. Parallel importation would have been against the objective of international free trade under GATT/WTO Agreement[3] and yet there were many strong voices against any free trade idea be applicable to the intellectual property goods. The developed countries consider that, **importation right concerns an important aspect of economic right for exploitation of intellectual property goods equal to that of *production and distribution*** The goods are the product of the creativity and innovation which requires substantial investment both in people and infrastructure.

4. Therefore Article 6 of the TRIPS Agreement is formulated in order to provide that it is up to each member state of WTO as to whether it will adopt an international exhaustion of rights or national exhaustion of rights model in respect of the Intellectual Property goods in order to meet with its obligations on social and economic welfare[4].

5. In short, World Trade Organization allows each member to erect a trade barrier to intellectual property goods. It is against this background that each member has chosen whatever the exhaustion regime subject to its own consideration of trade and economic policies.

[3] The general principle of the GATT/WTO Agreement is concerned with removing rather than erecting trade barriers but not so for intellectual property goods.

[4] Paragraph 5 (d) of the Doha Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001, confirms that "the effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4."

6. Obviously, those countries which treasure the value of creativity of their people and become **an exporter** of Intellectual Property Goods would take advantage of Article 6 by adopting national treatment as it will market aggressively its innovative/creative products and services to other countries which rely on foreign innovation and creative products.

7. The consumer oriented country, which is **an importer** of Intellectual Property Goods, will favour international exhaustion of rights model as it perceives that liberalisation of imports will allow the cheapest goods lawfully made and sold in other country imported into its country and there **is no incentive to invest, create and export of intellectual property goods in this country**.

8. Some countries may opt for a mixed model by restricting certain import of copy works in order to protect its particular copyright industry while allowing other copyright works freely imported into its country.

9. Therefore it is pointless and highly irresponsible simply to do a world wide web search in order to locate some small countries which represent a minority view of the policies of the developed countries in the world which adopt the international exhaustion of right without due consideration of and comparison with their economic and political considerations and in particular, as whether their economic and social policies are in line with Hong Kong economic development. In short, our leader must have a clear vision regarding the role played by the creativity of Hong Kong talent in the context of knowledge-based economy.

10. The people who take " Free Trade" literally without taking into the global economic and political development and in particular the special issues on creative industry would be too simplistic and be in total ignorance of the issues raised in TRIPS and would be viewed as the persons who are hostile to creativity. They simply fail to appreciate and comprehend the difference between a high valued added products and "me too" products which are characterised with "cut throat pricing strategy" with no incentive to invest or innovate. They are and will continue be an obstacle to block Hong Kong economic development to knowledge-based economy. Perhaps it is about time to remove the obstacle otherwise we will deny our next generation an opportunity to create an IP industry.

11. The issue is very simple unless and until the US and other leading developed countries which have substantial creative industry in their countries, open up their markets to allow free movement of Intellectual Property Goods in and out of their countries, Hong Kong must shape its economic development according to its own economic policy and will only open the market for those intellectual property goods which Hong Kong has no reasonable chance of or is and will be incapable of creating such industry here in future.

B. Hong Kong Copyright Ordinance

12. Hong Kong Copyright Ordinance was enacted on 27th June 1997 and has clearly reflected the vision of the Hong Kong Government on its policy and commitments to the creative industry prior to the handover of the Hong Kong to the People's Republic of China. After all, Hong Kong is a founding member of World Trade Organisation.

13. Hong Kong Copyright Ordinance is modelled on the Copyright, Designs and Patents Act 1988 of the United Kingdom. Section 118 (1) (b) of the Hong Kong Copyright Ordinance, which related to the criminalisation of parallel imported copies, is in identical term of section 107 (1) (b) of the United Kingdom 1988 Act.

14. Therefore for all intents and purposes, under both Hong Kong[5] and the United Kingdom copyright laws, it is not relevant to consider whether a parallel imported copy was legitimately made outside Hong Kong as long as its making was an infringement of the copyright owner or in breach of the exclusive licence relating to that copyright work of the Hong Kong under its copyright law[6].

15. However, there is one fundamental difference which makes Hong Kong a less attractive place to invest in creative industry is that Hong Kong has created a criminal sanction period for only 18 months from the date of the first publication of the copyright work anywhere in the world[7] but there is no such criminal sanction period as such in the United Kingdom and parallel importers are criminally liable for importation of parallel copy of a copyright work as long as the copyright subsists in the work in question.

16. The relaxation of the parallel import has obviously undermined the exclusive rights of reproduction and of the distribution being granted to the Copyright Owner under and by virtue of sections 22 (1) (a) and (b) of the Copyright Ordinance respectively as sections 35 (3)(b) and 35 (4) (c) clearly provide that ***its making*** in Hong Kong would have constituted ***an infringement*** of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work. Needless to say, **the making of copy amounts to an infringement if the reproduction right is thereby infringed.**

17. Furthermore, a parallel importer which imports and trades copies of a copyright work not of the origin of the copyright owner in that member state will, for all intents and purposes, be considered as an unauthorized distributor taking "free ride" on the copyright owner's marketing and promotional activities in that member state.

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[5] Section 35 (3) of the Copyright Ordinance and section 27 (3) of the United Kingdom 1988 Act refer

[6] Paragraph 12-009 of Intellectual Property 2nd Edition by W.R. Cornish 1989

[7] Section 35 (4) (b) of the Copyright Ordinance refers. The theatrical release of a film is not within the definition of publication (see section 196 (4) (c)).

18. If authors lose control over the distribution of their creations and end up competing with lower-priced copies intended for different markets, they may also lose their incentive to create, depriving consumers of works of authorship.

C. The Public Access to a Copy of the Parallel Imported Copy of a Work

19. The present regime is clear and simple. It only makes the infringer criminally liable if his infringement act is committed at commercial level or to such an extent which would prejudice the normal exploitation of the work of the copyright owner here in Hong Kong. There has always been an alternative legitimate route available for any individual citizen to obtain copy from overseas market for his own private and domestic use[8]. This has always been a fair balance between the right of the Hong Kong copyright owner and the real and bona fide user of the copyrighted materials obtained abroad since December 12, 1972, the date on which the United Kingdom 1956 Copyright Act extended to Hong Kong[9].

D. The Consensus

20. Our consensus is that it is inconceivable and indeed, is misconceived, for the Government to propose the reduction of the period of criminal sanction against parallel importer and commercial users of parallel imported copies by way of criminal sanction at this stage in the context of our social and economic development. No doubt, the Hong Kong creative industry does play a special cultural role in Hong Kong which in itself is a strong reason for not judging the issue by the narrow view of competitive effectiveness[10].

21. We maintain that the period of criminal sanction be extended to 24 months in order to enable Hong Kong to develop an electronic publishing centre for both Hong Kong and for those countries who allow parallel importation of goods from other countries.

22. Any relaxation will have a disastrous effect on the ecosystem of Hong Kong content creative/ provider industries and thousands of jobs are at stake. The effect is that Hong Kong would only have the fantasy of becoming a knowledge-based economy as our industrial leaders have no vision for our industry here in Hong Kong anymore. Perhaps, whoever assists in blocking Hong Kong to become a knowledge-based economy owes our next generation an explanation for depriving their chance for creativity and for creating wealth based on their creativity.

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[8] Section 30 of the Copyright Ordinance

[9] The UK Copyright Act 1956 was extended to Hong Kong by virtue of the UK Copyright (Hong Kong) Order (1972 S.I. 1724) in 1972, which came into force on 12th December 1972

[10] See paragraph 12-031 of Intellectual Property by W.R. Cornish, 2nd edition, 1989.

This is a typical market trader mentality and they are happy to make a few percentage commission without due respect to the creative values of intellectual property rights which can and will contribute significantly to our Domestic Growth Product if we have a right leader who is capable of removing the obstacle or "fossil" in our pathway leading to the successful development of the knowledge-based economy here in Hong Kong. This is a conflict between a simple mind trader and a highly intellectual creative man/industrialist.

23. We urge the leader of each and every political party and of each industry and trade organisation to view the matter globally and to shape Hong Kong to become a regional creative centre (therefore an exporter of Intellectual Property Goods and services) and to build a knowledge-based economy by establishing a well respectable intellectual property rights protection regime here in Hong Kong.

---

c.c. Commerce, Industry and Technology Bureau

Signed, individually on behalf of individual organisations :

For and on behalf of
EOL Asia.com Limited
(一按來亞洲有限公司)

Mr Alan Choy
Chief Operating Officer

For and on behalf of
Hong Kong Comics and Animation
Federation Limited (香港動漫畫聯會有限公司)

Mr Tony Wong
Chairman

For and on behalf of
Hong Kong Publishing Federation
Limited (香港出版總會有限公司)

Mr Sing Wong
Vice Chairman

For and on behalf of
Hong Kong Video Development Foundation Ltd
(香港影視發展基金有限公司)

Ms Clera Chu
Vice Chairman

For and on behalf of
International Federation of the
Phonographic Industry (Hong Kong Group)
Limited (國際唱片業協會(香港會)有限
公司)

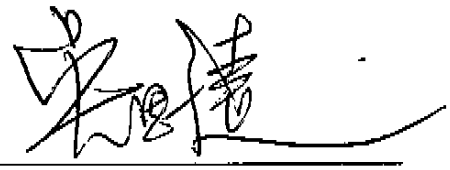
Mr Ricky Fung
Chief Executive Officer

For and on behalf of
Movie Producers and Distributors
Association of Hong Kong Limited
(香港電影製作發行協會)

Mr Tony Shu
Executive Secretary

Signed, individually on behalf of individual organisations :

For and on behalf of
Federation of Hong Kong Filmmakers
(香港電影工作者總會)



Ng See Yuen
Chairman