

**Bills Committee on
Copyright (Amendment) Bill 2006**

Criminal Enforcement against Illegal Parallel Importation

Purpose

1. At the Bills Committee meeting on 8 May 2006, Members requested the Administration to provide more detailed information on the enforcement action taken on criminal cases concerning parallel imported copies of copyright works, including the number of prosecutions and cases successfully prosecuted. This paper provides the requested information.

Copyright Ordinance and Parallel Imports

2. A parallel imported copy is regarded as an infringing copy by virtue of section 35(3) of the Copyright Ordinance (“Ordinance”), which stipulates that a copy of a copyright work is an infringing copy if –

- (a) it has been or is proposed to be imported into Hong Kong ; and
- (b) 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.

3. Under the Ordinance, importation (other than for private and domestic use) and commercial dealing in a parallel imported copy of a copyright work (except computer software)¹ that has been or is proposed to be imported into Hong Kong within 18 months of the first publication of the work attracts criminal liability. Furthermore, possession of a parallel imported movie, television drama, musical sound or visual recording for the purpose of or in the course of any trade or business is currently a criminal offence if the work has been published for not more than 18 months. If a copyright work has been published for more than 18 months, the above acts only attract civil liability.

4. For prosecution action against parallel importation of copyright

¹ Prohibitions relating to parallel importation of computer software were liberalized in 2003.

works to be initiated, it is necessary to obtain, among others, **direct evidence** to prove that –

- (a) the copy in question was imported into Hong Kong; and
- (b) the copy in question was made abroad by a licensed manufacturer who was licensed to make the copy in the place where it was made, but who does not have the right to make the copy in Hong Kong.

5. To substantiate paragraph 4(a), it is necessary to obtain the assistance of the overseas manufacturer who actually made the copy in question to prove that the copy was made by him since most of those cases were detected at retail shops but not at the import and export level such as at the control points. According to some local licensees, it would be very difficult to obtain such direct evidence from the overseas manufacturer. This is because the overseas manufacturer and local licensee have **no** contractual relationship with each other. Furthermore, it may not be in the commercial interest of the overseas manufacturer to prohibit copies which it manufactures from distribution in another territory. Hence there is no incentive for the overseas manufacturer to assist the local licensee. Whilst there is usually information at the packaging or the copy of copyright work itself indicating the place of manufacture or the place of sale of the copy, such information is considered as hearsay evidence and is not admissible as a proof as to whether the copy was imported into Hong Kong in criminal proceedings.

6. To substantiate paragraph 4(b) above, it is necessary to obtain the assistance of copyright owners to confirm that the person identified in paragraph 4(a) above was licensed to make copies of the work overseas but not in Hong Kong. Where there are more than one copyright owners for the work, each of the copyright owners is required to give a witness statement to confirm that he did not grant the right of making the copy in Hong Kong to the manufacturer in question. Some local licensees have reflected that it is too burdensome to obtain the necessary evidence from the copyright owners in each and every such case, considering in particular that most of the cases of parallel imports involve overseas copyright owners. Even if copyright owners are willing to give the required statements, it is doubtful whether they are prepared to take the trouble to fly to Hong Kong to testify in court if their statements are challenged by the defendant.

Enforcement situation

7. Since 2002, the Customs and Excise Department (C&ED) has received 54 complaints alleging the sale of parallel imported copies of copyright works. Of these complaints, eight were not substantiated after investigation; three cases went to trial with one convicted and two acquitted, and two cases are still under investigation or pending prosecution. The remaining cases were not pursuable primarily due to the difficulties in securing co-operation from overseas licensees and copyright owners. Details of the enforcement statistics are given at **Annex**.

Concluding remarks

8. Criminal prosecution requires a high standard of proof to ensure that the defendant is given a fair trial. For criminal cases relating to parallel importation, **direct evidence** from copyright owners and overseas manufacturers are required to prove that the copy in question is an infringing copy by virtue of section 35(3) of the Ordinance.

9. We acknowledge that (i) there are difficulties in securing the necessary assistance from overseas manufacturers; and (ii) some copyright owners, especially the overseas ones, may find it too burdensome to render assistance for satisfying the evidential requirements for proving paragraph 4(b) above.

10. The Administration is reviewing whether and if so what improvement measures are needed to facilitate criminal enforcement against parallel importation.

Commerce and Industry Branch
Commerce, Industry and Technology Bureau
October 2006

Complaints on parallel imported copies of copyright works since 2002
(as of September 2006)

Year	Number of complaints received	Cases not pursuable		Cases proceeded to prosecution		Cases under investigation/ pending prosecution
		Due to insufficient evidence from copyright owner/ overseas manufacturer	Complaints not substantiated for other reasons ^(note 2)	Convicted	Acquitted	
2002	1	1				
2003	8	6			2 ^(note 3)	
2004	3	2	1			
2005	36 ^(note 1)	31	3	1		1
2006	6	1	4 ^(note 4)			1

^(note 1) Of the 36 complaints, 24 complaints concern the same movie title.

^(note 2) Reasons include no parallel imported copies found in follow-up actions, and failure to provide concrete information by the complainants.

^(note 3) The defendant was acquitted due to lack of knowledge that the copies were infringing.

^(note 4) Of the 4 complaints, 3 of them were found to involve copyright piracy rather than parallel imported copies. The 3 cases are under investigation for copyright piracy.