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Via electronic mail
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Ms. Mary Chow
Deputy Secretary
Commerce & Industry Branch
Commerce, Industry & Technology Bureau
The Government of the Hong Kong SAR
Level 29, One Pacific Place
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**Re: Comments of the American Chamber of Commerce
on 7 January 2004 Letter from Commerce, Industry &
Technology Bureau Concerning Proposed Amendments to
Copyright (Amendment) Bill 2003**

Dear Ms. Chow:

Thank you for the invitation, set forth in Assistant Secretary Jeffrey Chan's 7 January 2004 letter, to comment on proposed amendments to Copyright (Amendment) Bill 2003 (the "2003 Bill").

Introductory Remarks

The American Chamber of Commerce in Hong Kong (the "Chamber") is a volunteer and independent business organization, which was established in 1969 and now has a history of over 30 years. The Chamber is currently the most dynamic and influential international economic organization in the Asia-Pacific region, representing more than 2,000 members from over 30 nations, including the United States, Europe and across Asia. Among them, there are large multinational corporations as well as small and medium-sized enterprises. The objectives and duties of the Chamber include representing our diverse membership on issues of common interest and serving as an advocate with governments.

You will recall that we previously submitted comments on the 2003 Bill as part of the consultation process last summer. At that time, we expressed our overarching concern that the draft legislation is designed to narrow the scope of protection for copyright works in Hong Kong at a time when copyright piracy is increasing. We reiterate that reducing the level of protection for copyright works is unjustified and would send the wrong signal to the public regarding the importance of respecting intellectual property rights. This is particularly true given the important strides Hong Kong has made in the past in IPR protection. It is now more important than ever for Hong Kong to show leadership in this area, in order to maintain its competitiveness vis-à-vis other developed economies in the Asia region, and to reap the economic benefits that flow from lower levels of piracy.

Accordingly, we urge the government and Legislative Council members to modify the 2003 Bill to address the specific concerns outlined below and in our prior submission.

Specific Comments on Newly Proposed Text

Proposed Section 118:

- The Administration proposes inserting in several places the phrase “for the purpose of or in the course of any trade or business” (including but not limited to Sections 118(1)(e) and (f)). We note that doing so would require the deletion in the corresponding provisions of language specifying that the covered activities be carried out “for profit or reward.” The reason is that including both phrases in relation to the same infringing activity is redundant. Indeed, the phrase “for profit or reward” was added to the 2003 Bill precisely because, in an earlier version of Section 118, specified activities were criminalized when carried out “for the purpose of, in the course of, or in connection with, any trade or business”; the removal of that phraseology when the Copyright Ordinance was restructured under the 2003 Bill required, in the view of the Administration, the introduction of the new phrase “for profit or reward.” As noted, including both phrases would be redundant and, importantly, the duplication would not be a mere cosmetic flaw. This redundancy would complicate the definition of a number of offenses and create confusion regarding the specific elements of those offenses, which in turn would likely result in practical difficulties in prosecutions. This is compounded by the fact that the 2003 Bill would also define “business” to include “business conducted otherwise than for profit.” Therefore, while we see no difficulty with including the proposed phrase “for the purpose of or in the course of any trade or business” where indicated, these changes would need to be accompanied by corresponding amendments to address the resultant drafting problems identified above.
- With regard to the proposal to revise the expression “for profit or financial reward” to read “for profit or reward,” we remain concerned that there may be circumstances in which an infringer commits infringing acts other than for a specifically identifiable “profit or reward” (whether or not the reward is of a financial nature – for example, when family members or friends assist the principal infringer, or when the infringer carries out acts to achieve some material advantage that may not be easily characterized as a “profit or reward”). Additionally, we question the need for this phrase at all, in light of our comments in the preceding paragraph. Subject to these considerations, we believe the proposed change to be an improvement to the existing text in the 2003 Bill.

Proposed Section 118A

- With regard to Section 118A(1), we previously expressed the concern that the meaning of this subdivision – when read together with draft Section 196A (which seeks to define the phrase “for the purpose of or in the course of trade or business”) – would be ambiguous and overly restrictive. In particular, it seemed to suggest that even when a company/business possessed an infringing copy of protected works for demonstrably commercial use, so long as the infringing copy were not used for the purpose of or in the course of the *specific* trade or business in which the company/business was engaged, the company/business would not be criminally liable. We welcome the proposed revision, which would clarify that criminal liability would attach if protected works were used for the purpose of or in the course of *any* trade or business. However, we note that no mention is made of draft Section 196A. We ask that you confirm that your intention is to delete Section 196A, which is unnecessary and would only create confusion in the interpretation and application of the law.
- We note that efforts have been made to address our prior comment that Section 118A(5) of the 2003 Bill was substantially broader than intended by the drafters and would arguably exclude from coverage of the criminal law any computer program that is available online and that contains a copy of another copyright work, provided the computer program is necessary for the viewing of or listening to the other work. However, we are concerned that the language (even as amended) is ambiguous, overly broad and inconsistent with the objective of 118A, and in any event unnecessary. For these reasons, we ask that it be eliminated or significantly modified.

Proposed Section 118C

- With regard to Section 118C, we believe the 2003 Bill would prove helpful in combating illegal activities undertaken by photocopy shops, and we note that efforts have been made to address potential loopholes in the affirmative defences to charges against copy shop managers. However, the draft legislation still contains provisions that would make permanent the suspension of the April 2001 amendments to the Copyright Ordinance criminalizing end user piracy of copyright works – only as those amendments apply to printed works. This suspension sends the wrong message to the education and small business communities – communities the government should be striving to educate on the importance of intellectual property rights. For these reasons, the government and LegCo should reinstate criminal liability for end user piracy of printed materials that takes place for the purpose of or in the course of any trade or business, including academic institutions.

Other Comments

- Finally, we note that the proposed revisions outlined in Assistant Secretary Chan’s 7 January letter are, as noted in the letter, largely technical in nature. The Chamber is concerned that no effort has been made to address the larger and more substantive issues and objections voiced by the community relating to the 2003 Bill, particularly the overriding concern that it is inappropriate to reduce the scope of copyright protection in Hong Kong in light of serious, ongoing piracy problems – most especially the problem of business end user piracy of copyright works. We urge the

Administration and LegCo to address this issue in the legislative process by refining the text in a manner that would facilitate criminal prosecutions of business end user piracy in appropriate cases, thereby strengthening the IPR environment in Hong Kong and creating an atmosphere in which creativity and innovation can flourish.

Thank you again for the opportunity to offer the Chamber's views on this important matter.

Very truly yours,



Frank Martin
President
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Hong Kong

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