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Dear Sir / Madam,

Consultation on Copyright (Amendment) Bill 2003

I write to seek your comments on certain proposed amendments to the amendments under Clause 4 of the Copyright (Amendment) Bill 2003. For background, the Bill seeks to, among other things, make permanent the arrangements under the Copyright (Suspension of Amendments) Ordinance 2001 (“Suspension Ordinance”) whereby criminal liability for the use of infringing copies of copyright work in business is confined to copies of computer programs, movies, musical recordings and television dramas (“four categories of works”). It was introduced to the Legislative Council (LegCo) in February 2003 and is being scrutinised by the LegCo Bills Committee.

2. Provisions on which your comments are sought are proposed new sections 118, 118A and 118C. The amended version of these provisions is at Annex A, while the corresponding existing provisions of the Bill are at Annex B for reference. The amendments are mainly technical and prepared in response to comments received from the Bills Committee and the parties concerned.

3. Please note that no amendment is proposed at this stage regarding the types of works covered by proposed section 118A (criminal liability for end-user). On this matter, we are still discussing with parties concerned on the appropriate way forward.

4. Please also note that there may be further technical amendments to sections 118, 118A and 118C as well as other provisions of the Bill, depending on future discussion on the Bill at the Bills Committee.

5. We are working out the amendments in relation to proposed

section 36, and 118B in the Bill and section 187 in the Copyright Ordinance to make it clear that the provisions relate only to parallel imports. We will seek your views on the amendments separately.

6. To facilitate your understanding of the amendments, I set out below explanation to the amendments made.

Proposed section 118 of the Bill

Section 118(1)

7. Proposed section 118(1)(a) under Clause 4 of the Bill is separated into sections 118(1)(a) and 118(1)(b) to make the provisions more comprehensible.

8. Concerns have been raised that proposed sections 118(1)(d) and (e) under the Bill may cover acts done in a non-commercial context. For example, proposed section 118(1)(d)(i) may catch a casual sale under which a student sells a second-hand infringing copy of a book to his friend. To avoid casting criminal acts too wide, we propose to add the expression “for the purpose of or in the course of any trade or business” to proposed sections 118(1)(d) and (e) under the Bill so as to confine criminal offences thereunder to activities carried out in a business context. These provisions are renumbered as section 118(1)(e)(i) to (iv), and section 118(2)(a) to (c). Proposed section 118(1)(d)(iii) is taken out from section 118(1)(d) to become section 118(1)(f) for the sake of clarity.

9. We have also revised the expression “for profit or financial reward” as it appears in the Bill to read “for profit or reward”. This is to address the concern that the term “financial reward” may not cover non-monetary reward of significant value, such as diamonds. The Bills Committee however consider that reward of a merely nominal value, such as a cup of tea, should not be covered. We agreed with this, hence the newly proposed section 118(7). A similar provision can also be found in section 118C(6).

Proposed section 118(2) to (5)

10. Proposed sections 118(2) to (5) are renumbered to become amended sections 118(3) to (6) with their content slightly amended to reflect the amendments proposed above.

Proposed section 118A of the Bill

Proposed section 118A(1)

11. We have modified proposed sections 118A(1)(a) and (b) of the Bill, which now become amended section 118A(1). Under the proposed section 118A(1), a person will be criminally liable if he possesses an infringing copy of the four categories of works with a view to it being used in doing any act for the purpose of or in the course of any trade or business.

12. The Bar Association is concerned that proposed section 118A(1) may catch legal practitioners and other professionals for possessing infringing copies provided by their clients for the purpose of or in the course of their practice. We will discuss with the Bar Association on the appropriate amendment and will seek your views when an amendment is worked out.

Proposed section 118A(5)(b)

13. Information/works downloaded from the Internet and saved a person's harddisk for future reference in business may also include the computer program that is technically required to view or listen to the information/works. The copy of the computer program so saved (e.g. an HTML file) may become a pirated copy by virtue of the act of copying. This in effect means that the downloading will attract criminal liability even if the information/works downloaded does not fall into the four categories of works that attract criminal liability under proposed section 118A. Proposed section 118A(5)(b) is required to avoid this situation.

14. Some copyright owners are concerned that current wording of proposed section 118A(5)(b) may unintentionally cover infringing copies of substantial application programs downloaded from the Internet. To put it beyond doubt that the exemption applies only to the infringing copy of computer program mentioned in paragraph 13 above, we have made amendments to the section, which can be found as amended section 118A(6). Under the new draft, the exemption only applies as long as the person possessing the computer program does so with a view to the computer program being used for viewing or listening to the other work, which was made available through the Internet together with the computer program. If the person possesses the computer program with a view to it being used other than for the purpose of viewing or listening to work downloaded together with the computer program, the exemption will not apply.

Proposed Section 118C

15. Substantial amendments have been made to this section which aims to tighten up criminal sanctions against the illicit reproduction of books, magazines and periodicals.

16. Under the original proposed section 118C(2), a person possessing two or more substantially identical infringing copies of a copyright work as published in a book, magazine or periodical will be criminally liable. Various defences are provided under proposed sections (3) to (5) to confine the scope of the offence.

17. However, the following concerns have been raised -

(a) Since proposed section 118C(2) criminalises the possession of two or more infringing copies of copyright works as published in books, magazines or periodicals, a wrong message may be conveyed that the making of one copy is legal. But this is not our intention. Under proposed section 118(1)(a), the making of one infringing copy for profit or reward can still attract criminal liability; and

(b) While the defences under proposed sections 118C(4) and (5) apply to the possession offence under proposed section 118C(2), they are not applicable to the proposed section 118(1)(a). Hence, a copyshop may still be prosecuted under proposed section 118(1)(a) even if the infringing copies in question fall within the scope of the defences referred to in the proposed section 118C(4) and (5).

18. To address such confusions, we have amended proposed section 118C along the following lines:

(a) a person commits an offence if, for the purpose of or in the course of a copying service business, he possesses a reprographic copy of a copyright work as published in a book, magazine or periodical, being a copy that is an infringing copy of the copyright work. Here, "copying service business" means a business, conducted for profit, that includes the offering of reprographic copying services to the public and, where the reprographic copying services are offered to the public at more than one place, means each such part of the business carried on at a separate place;

(b) it is a defence for the person charged to prove that the

infringing copy of a copyright work in question was made otherwise than for the purpose of, and otherwise than in the course of, the copying service business;

- (c) it is a defence for the person charged to prove that the infringing copy of a copyright work in question was made otherwise than for profit or reward; and
- (d) it is a defence for the person charged to prove that he did not know and had no reason to believe that the copy of a copyright work in question was an infringing copy of the copyright work.

19. Under the offence mentioned in paragraph 18(a) above, the mere possession of a reprographic copy of a copyright work as published in a book, magazine or periodical attracts criminal liability.

20. However, we take the view that a person should not be caught for possessing an infringing copy which was made otherwise than for the purpose of, and otherwise in the course of, the copying service business, for example, a source copy left by a customer for copying service. Therefore, we propose to add the defence in paragraph 18(b) above.

21. Also, the offence under paragraph 18(a) may catch end users. To illustrate, if a bookstore provides copying service, a staff member (who is responsible for keeping the account of the bookstore) in the back office may be caught if he possesses an infringing copy of an accounting book for the purpose of or in the course of the copying service business, being a copy made in the bookstore. To avoid unintentionally expanding the net of end-user criminal liability, the defence in paragraph 18(c) above is provided.

22. Defence under paragraph 18(d) above is a general no knowledge defence. The defence is also available to other criminal provisions, such as the amended sections 118 and 118A enclosed.

Timing

23. We should be grateful if you could let us have your written comments by 15 January 2004. Should you have any problems, please feel free to contact me at 2918 7482.

Yours sincerely,

(Jeffrey Chan)
for Secretary for Commerce, Industry and Technology