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Secretary for Commerce, Industry & Technology
(Attention: Ms Priscilla TO, PAS(C&I)3)
Commerce, Industry & Technology Bureau
Level 29 One Pacific Place
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Hong Kong

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Dear Ms TO,

Copyright (Amendment) Bill 2006

I am scrutinising the legal and drafting aspects of the Bill with a view to advising Members and would like to seek your clarification on the following -

Clause 4

On the creation of rental right of comic books and films, apart from rental shops, would private libraries such as those run by clubs charging membership fees and are currently renting comic books and films to their members be affected by this new right?

Clauses 7 and 8

The new section 35(3) provides that a parallel-imported copy of a work is an infringing copy "except as provided in sections 35A and 35B". Under section 35A, a parallel-imported copy of a computer program is not an infringing copy unless it is in effect a movie, a television drama, a musical sound recording, a musical visual recording or an e-book. Under the proposed section 35B, a parallel-imported copy of a musical sound recording, a musical visual recording, a movie or a television drama (and there is no mentioning of an e-book) is not an infringing copy except for commercial dealing purposes or for public showing. Please clarify the relationship of section 35(3), section 35A and the proposed section 35B. Could the drafting of these three provisions be improved so that the legal position of a parallel-imported copy of a computer program, a musical sound recording or an e-book is made clearer?

Clause 11 - the new section 40A

On the definition of a "specified body", paragraph (d) states that it means "an organization which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of welfare for persons with a print disability." Would a charitable religious body be regarded as a specified body so

that it could extract hymns or songs from large books and copy them in large prints for those elderly with poor eye sights or for those who find it difficult to hold heavy books?

Clause 11 - the new section 40C(4)(a)

The new section 40C(4)(a) provides that –

“The specified body must within a reasonable time before making or supplying the accessible copies, notify the relevant copyright owner of its intention to make or supply the accessible copies.”

If a specified body notifies the copyright owner of its intention to make accessible copies beforehand, can the copyright owner object and refuse the specified body to make such copies? What are the consequences if the specified body does not notify the copyright owner beforehand? Could you please clarify the policy intent of this proposed provision?

Clause 12

A fair dealing provision is introduced to some permitted acts, i.e. for purposes of research and private study (section 38), for purposes of giving or receiving instruction (new section 41A) and for purposes of public administration (new section 54A). The existing section 37(3) provides that-

“In determining whether an act specified in this Division may be done in relation to a copyright work notwithstanding the subsistence of copyright, the primary consideration is that the act does not conflict with a normal exploitation of the work by the copyright owner and does not unreasonably prejudice the legitimate interests of the copyright owner.”

Could you please clarify the relationship of section 37(3) with the newly added fair dealing provision? Which section is to prevail?

Clause 13

Under the new section 43(1), would a performance at an educational establishment before persons such as guests of honour be regarded as a “public performance”?

Clause 16

The existing section 54(1) provides that “(C)opyright is not infringed by anything done for the purposes of the proceedings of the Legislative Council or judicial proceedings.” The proposed section 54A then states that “(F)air dealing with a work by the Government, the Executive Council, the Legislative Council, the Judiciary or any District Council for the purposes of efficient administration of urgent business does not infringe the copyright in the work, or in the case of a published edition, in the typographical arrangement.” Would the new section 54A have the effect of prejudicing section 54(1) in relation to the Legislative Council or the Judiciary?

Clause 22 - new section 118(1)(f)

The existing section 118(1)(d) provides that:

“A person commits an offence if he, without the licence of the copyright owner, possesses for the purpose of or in the course of any trade or business with a view to committing any act infringing the copyright, an infringing copy of a copyright work.”

The new section 118(1)(f)(i) now reads as:

“A person commits an offence if he, without the licence of the copyright owner of a copyright work, possesses an infringing copy of the work with a view to its being sold or let for hire by any person for the purpose of or in the course of any trade or business.”

In this new section, the words “by any person” are added. Would it be interpreted to mean by any other person and thus the person who possesses an infringing copy and who intends to sell that copy be excluded? Will the prosecution be required to identify that other person and prove that other person is going to sell that infringing copy? It is noted that the words “by any person” are also added to the new section 118(1)(f)(ii), 118(1B) and (2A).

Further, as the phrase “for the purpose of or in the course of any trade or business” is placed right after the words “any person”, would it be interpreted to just refer to “any person” and not the person who possesses the infringing copy? Does it mean that an individual not in business possessing an infringing copy will be held criminally liable if someone else in business is going to sell that copy? Is there a change in policy intent? Under the current law, a person who possesses an infringing copy for his private and domestic use does not commit any offence.

Clause 22 - new section 118(1)(g)

The new section 118(1)(g) provides that:

“A person commits an offence if he, without the licence of the copyright owner of a copyright work distributes an infringing copy of the work (otherwise than for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works) to such an extent as to affect prejudicially the copyright owner.”

“Distribute” means “deal out in portions or shares among a number of recipients; give a share of to each of a number of people; spread generally” (*The New Shorter Oxford Dictionary*). Should one distribute not just “an infringing copy” but “copies” to a number of people? Please clarify the meaning of “distributes an infringing copy of the work to such an extent as to affect prejudicially the copyright owner” and the scenario contemplated in this provision.

Clause 22 - new section 118(2F)

The new section 118(2F) states that:

“Without prejudice to section 125, where a body corporate or a partnership has done an act referred to in subsection (2A), the following person shall, unless he proves that he did not authorize the act to be done, be presumed also to have done the act –

.....

- (b) in the case of the partnership –
 - (i) any partner in the partnership who, at the time when the act was done, was responsible for the internal management of the partnership;” or
 - (ii) if there was no such partner, any person, who, at the time when the act was done, was responsible under the immediate authority of the partners in the partnership for the internal management of the partnership.”

The existing section 125(3) provides that:

“Where an offence under this Ordinance committed by a partner in the partnership is proved to have been committed with the consent or connivance of, or to be attributable to any act on the part of, any other partner of the partnership or any person concerned in the management of the partnership, that other partner or the person concerned in the management of the partnership commits the like offence.”

In a firm, it is quite common to have a number of partners and managers, e.g. a general managing partner, an administrative partner, an executive manager responsible for buying office equipment including computer program, a human resources manager and an information technology manager. If an infringing copy of a computer program is found in a secretary’s computer of such a firm, who will be charged under the new section 118(2F) and under the existing section 125?

In this section 118(2F), where a company or a partnership is found to be in possession of an infringing copy of a computer program, a movie, a television drama, a musical sound recording, or a musical visual recording, the director or partner responsible for its internal management shall be presumed also to have done the act “unless he proves that he did not authorize the act to be done”. This differs from new section 118(1A) and (1B) where the words “unless there is evidence to the contrary” are used to specify that the defendant bears only an evidential burden. Could you please explain the inconsistency adopted in describing the evidential burden in the new section 118(2F)? Similar wordings are also found in new section 119B(6).

Clause 24 - new section 119B(1) and (2)

Under the new section 119B(1) and (2), in gist, a person in the course of business commits an offence if he makes an infringing copy of a copyright work in a printed form that is contained in a book, a magazine, a periodical or a newspaper on a regular and frequent basis for distribution and it results in a financial loss to the copyright owner. Does it mean that the company will only commit an offence if it copies the same newspaper regularly and frequently? Will an offence be committed if the company makes copies of different articles from different newspaper on different days? Is the prosecution required to prove that such act results in the actual or substantial financial loss to the copyright owner?

Clause 24 - new section 119B(4)

Subsection 1 does not apply to an educational establishment. Does it mean that an educational establishment can make copies without any numeric limit?

Clause 24 - new section 119B(9)(b)

It is a defence for the defendant to prove that he has tried but failed to buy copies of the work and the copyright owner refused to grant a licence on reasonable commercial terms. At what price or under what term will a rare book out of print be regarded as “reasonable commercial terms”? How can the court determine what are “reasonable commercial terms”?

Clause 55 - new section 273A(2)(c)

The person who issues to the public copies of a work has the same rights and remedies to take action against an infringer as a copyright owner. Should he be authorized by the copyright owner to take action or else would there be multiple proceedings?

The above are only some of the preliminary issues. I shall be grateful if you could let me have your response in both Chinese and English on these issues at your earliest convenience, and hopefully no later than 5 days before the Bills Committee starts examination on each clause of the Bill.

Yours sincerely,

(Anita HO)
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