

**Submissions on the Copyright (Amendment) Bill 2006 received
after the Administration's introduction of the outstanding Committee Stage Amendments on 4 May
(as of 9 May 2007)**

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| 2 | Hong Kong and International Publishers' Alliance (HKIPA) (9 May 2007) | <p><u>Safe harbour</u></p> <p>HKIPA made the following points –</p> <p>(a) it continues to object that the “safe harbour provision” will only be made after the enactment of the Copyright (Amendment) Bill 2006;</p> <p>(b) it comments that the empowering provision at section 119B(3) provides an unbounded scope under which it could exclude from the operation of the provision copies made or distributed in any manner whatsoever, without regard to the concept of “reasonable use”. It suggests removing section 119B(3)(b) and 119B(16) altogether, or alternatively, to limit the scope of “manner of distribution” to circumstances under which criminal sanction would be withheld from the making and/or distributing of unauthorized copies by uploading them onto private network;</p> <p>(c) any exclusion of a particular “manner of distribution” based on the unavailability of a relevant licensing scheme is a redundancy that will breed confusion and invite abuse. It is concerned that a defendant may not seek a licence, if he knows that he will not be</p> | <p>On (a), since the Bill contains a host of other proposals that help strengthen copyright protection and make copyright exemption more flexible to users, we would like to reiterate that early enactment and commencement of the Bill is in the overall interests of the copyright owners and users. As more time would be required to discuss with the copyright owners and business users the perimeters of the “safe harbour” provisions and to consider other fine details of the “safe harbour” formulation, the “safe harbour” should be prescribed by way of regulations which will be prepared after the passage of the Bill. We must stress that the regulations are in the form of subsidiary legislation subject to the scrutiny and vetting of the Legislative Council.</p> <p>On (b), our intention is to make use of section 119B(16) to empower the Secretary for Commerce, Industry and Technology (SCIT) to exclude, by way of regulations, the application of section 119B(1) to the distribution of works via certain platforms (e.g. uploading on the Intranet) if the application of the offence</p> |

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| | | <p>prosecuted unless the prosecution can prove that a licence was available at the time of infringement to authorize distribution of the copies in that particular manner.</p> <p>(d) it comments that, to the extent that such a loophole would allow infringement on a commercial scale to evade prosecution, Hong Kong will stand in violation of its obligations under the WTO TRIPS Agreement.</p> | <p>provisions would affect users' reasonable use of copyright works. In revising section 119B(16), we see merits to set out in more concrete terms the factors that would be taken into account when determining whether users' reasonable use of copyright works would be affected. The latest version of section 119B(16) expressly requires that reference be made to the availability of licensing scheme that covers the making or distribution of copies of copyright works in the manner concerned. We trust that the latest version provides clarity. We could not understand how the revised wording would provide an unbounded scope when compared with the original section 119B(14) in the Bill published in the Gazette or the previous version suggested to the Bills Committee. Again, the regulations made under section 119B(16) are in the form of subsidiary legislation subject to the scrutiny and vetting of the Legislative Council.</p> <p>On (c), section 119B(16) does not require the prosecution to prove that a licence that authorize the distribution of copies in a particular manner is available. Nor does it allow the defendant to infringe without seeking a licence from the copyright owner.</p> <p>On (d), there is no standard international practice</p> |

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| | | | <p>as far as business end-user criminal liability is concerned. WTO TRIPS Agreement (Article 61) only requires members to provide for criminal procedures and penalties to be applied in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Distribution of infringing copies of copyright works in the context of commercial dealing of such copies already attracts criminal sanctions under the existing Copyright Ordinance. In addition, distribution of infringing copies of copyright works in circumstances other than in the commercial dealing context but to the extent that prejudicially affects the interests of copyright owners is also a criminal offence. Hence, the proposed business end-user copying/distribution offence is already above the standard required under Article 61 of TRIPS. Even if we exclude certain manner of distribution for the reason that no licensing scheme covering the concerned manner of distribution is available, the question of non-compliance with TRIPS does not arise.</p> |

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| | | <p><u>Exemption from the new offence for actions relating to heritage preservation and conservation</u></p> <p>HKIPA does not have objection in principle to recognizing a well-defined exclusion of “works of historical, cultural or heritage value”. It however raises a few questions on the exemption –</p> <p>(a) whether the purposes of use in section 119B(5A)(b) would include networked or online distribution. If not, the language of subsection 5A should be tightened up to exclude such interpretation;</p> <p>(b) if there would be any numerical limitation on the number of copies a library, museum or archive could make and/or distribute. It is concerned that the exemption may allow each visitor to museums be given an infringing copy of a work in the museum’s “special collections”;</p> <p>(c) it comments that the meaning of “special collection” may be too broad to include best-selling items. It suggests that the exemption should only apply to works which are of “cultural, historical or heritage importance or value”, instead of applying it to any work within a “special collection” that meets such criteria.</p> | <p>On (a), it is not our intention to allow libraries, archives, or museums to engage in networked or online distribution of the materials in the special collection. The exemption is carefully crafted to ensure that the scope of exemption is very narrow. Section 119B(5E) only applies to the making of <u>a single copy</u> of item forming the special collection for the purpose of preserving or replacing the item against loss, deterioration or damage. No exemption is provided under this section for the copies made in the course of networked or online distribution.</p> <p>On (b), Libraries, archives, or museums are not allowed to make copies and distribute the copies to others, except if a single copy is made for preservation or replacement purpose under section 119B(5E).</p> <p>On (c), it is not our intention to cover best-selling items in the special collection. In fact, the libraries, archives or museums owned by the Government would not include infringing copies of best-selling items in the special collection. “Special collection” is defined as a</p> |

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| | | <p><u>Reference to section 118</u></p> <p>HKIPA notes the proposed deletion of the phrase “without prejudice to section 118(1)” from section 119B(1). It considers that the deletion of the phrase will undermine the independent operation of the existing section 118(1)(f) [or the new section 118(1)(g)] from the new section 119B.</p> <p><u>Drafting issues</u></p> <p>HKIPA suggests amending section 119B(1)(a) to read as “without the licence of the copyright owner of <i>one or more than one copyright work</i> described in subsection(2), makes an infringing copy of the work or works for distribution...”. It suggest making similar amendments to section</p> | <p>collection consisting primarily of materials donated or given by the public that are of cultural, historical or heritage importance. The reason is that the special collection may contain individual items not donated or given by the public (for instance, the research materials left by a scholar working for the library in a specified research assignment) but such items are also of cultural, historical or heritage importance and are therefore included in the special collection.</p> <p>Whether a certain infringing act will be charged under the new section 119B(1) or the new section 118(1)(g) depends on the circumstances of the case. These two provisions operate independently. After review, we do not consider the phrase “without prejudice to section 118(1)” is necessary.</p> <p>It is clear from the current drafting of section 119B(1) that the offending act need not be done in relation to the same copyright work. Hence, the suggested amendments are unnecessary.</p> |

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| | | 119B(1)(b). The purpose of the suggested amendments is to clarify that the infringing act need not be done in relation to the same copyright work. | |