

香港特別行政區政府  
工商及科技局  
工商科

香港金鐘道八十八號  
太古廣場第一期二十九樓



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**COMMERCE AND INDUSTRY BRANCH**  
**COMMERCE, INDUSTRY AND**  
**TECHNOLOGY BUREAU**  
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Our ref. : CIB 07/09/18

18 June 2007

Miss Polly Yeung  
Clerk to the Bills Committee on  
Copyright (Amendment) Bill 2006  
Legislative Council Building  
8 Jackson Road, Central  
Hong Kong

Dear Polly,

I refer to the Law Society of Hong Kong's e-mail dated 15 June 2007.

The Law Society disagrees with the Administration's view that the proposed affidavit provision as set out in the Law Society's submission dated 15 June 2007 would impose an evidential burden on the defendant.


The Administration's response is based on the assumption that the affidavit provision proposed by the Law Society would operate along the existing section 121 of the Copyright Ordinance. That is, section 121(3) would apply to the affidavits made under section 121(2D) proposed by the Law Society. Section 121(3) states that the court before whom an affidavit which complies with the conditions in subsection (4) is produced shall presume, in the absence of evidence to the contrary that (a) the statements made in the affidavit are true; and (b) that it was made and authenticated in accordance with subsection (4). The Court of Final Appeal has previously confirmed [*Tse Mui Chun v HKSAR (FACC No. 4 of 2003)*] that section 121(3) imposes a presumption which shifts the evidential burden on the defendant. Hence, we take the view that, in line with the above decision, the affidavit provision proposed by the Law Society would similarly impose an evidential burden on the defendant.

If the Law Society does not intend to apply section 121(3) to the affidavits made under its proposed section 121(2D), there would be ambiguity as

to the effect of the proposed provision. We also have doubt if it is proper to add the provision under section 121.

Article 3 of the TRIPS Agreement requires that each member of TRIPS should accord to the nationals of other members treatment no less favourable than it accords to its own nationals with regard to intellectual property. However, we do not agree that the absence of a "facilitation provision" as proposed by the Law Society contravenes the above international requirement. Where, for example, the plaintiff/prosecution pursues an action based on pirated copies and the defendant adduces adequate evidence to raise an issue that the copies are parallel imports which were lawfully made overseas, the burden placed on the plaintiff/prosecution would be the same irrespective of whether the person who is entitled to the copyright in the work is a national of Hong Kong or other members of the TRIPS Agreement.

Yours sincerely,

A handwritten signature in black ink, consisting of a large, stylized initial 'P' followed by a horizontal line and a long, sweeping tail that curves downwards and to the right.

(Ms Priscilla To)

for Secretary for Commerce, Industry and Technology