

Translation

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Dear the Hon Wong,

Copyright (Amendment) Bill 2006

Thank you for your letter dated 24 May 2006. Our responses to the views on the Copyright (Amendment) Bill 2006 (“the Bill”) as set out in the letter are as follows -

Rental of comic books

Please clarify the meaning of “comic book”. What is the difference between “comic books” and “books, magazines or periodicals” as referred to in the Bill?

1. We have not introduced a legal definition of the term “comic book” in the Bill. The term would be construed according to its literal meaning to refer to a book of strip cartoons telling a story. It should be noted that the meaning of “book” (“冊”) may include published materials such as books, magazines and periodicals. “Books, magazines and periodicals” in the proposed 119B are different forms of published materials which can be “comic books” and other types of reading materials such as novels, financial magazines and academic journals. The scope of coverage of section 25 is different from that of section 119B.

Meaning of “infringing copy”

Clause 7(2) amends section 35(4)(b) of the Copyright Ordinance in which the first day of publication of a work “in Hong Kong or elsewhere” is mentioned. If the first day of publication of the work in Hong Kong and that in another place are different, which one should be adopted?

2. “Beginning on the first day of publication of the work in Hong Kong or elsewhere” means beginning on the day of first publication of the copyright work anywhere in the world. Hence, if the first day of publication of a copyright work in Hong Kong and that in another place are different, the 9-month period should begin on the date which is earlier. We would like to point out that while the Bill seeks to amend the existing section 35(4)(b) of the Copyright Ordinance by repealing “18 months” and substituting “9 months”, it does not seek to change the way of calculating this period.

Imported copy not an “infringing copy” for the purposes of section 35(3)

Please clarify the definition of “import” in the proposed section 35B. If a member of the public brings a copy of a work or a copy each of various works into Hong Kong, would he be regarded as “importing” the copy or copies into Hong Kong?

3. According to section 198 of the existing Copyright Ordinance, the term “import” means to bring, or cause to be brought, into Hong Kong any article. As such, bringing an infringing copy of a work or an infringing copy each of various works into Hong Kong would constitute “importing” such copy or copies into Hong Kong. Under the existing Copyright Ordinance, any person importing into Hong Kong an infringing copy of a copyright work for his private and domestic use does not incur any civil or criminal liability. The Bill does not seek to make any amendments to this.

Please clarify whether a copy of a work “that is, or is intended to be, played or shown in public” in the proposed section 35B(2) covers a copy of a work “which has been played or shown in public” or “which is played or shown in public again”. If a member of the public brings a copy of a specified work “that is, or intended to be, played or shown in public” or a copy each of various specified works “that are, or intended to be, played or shown in public” into Hong Kong, would he be regarded as “importing” the copy or copies into Hong Kong?

4. The proposed section 35B(2) applies to a work which has been played or shown in public or which is played or shown in public again. As pointed out at point 3 above, the term “import” means to bring, or cause to be brought, into Hong Kong any article. Hence, bringing a copy of a work or a copy each of various works into Hong Kong constitutes “importing” such copy or copies into Hong Kong regardless of whether the concerned copy/copies is/are intended to be used for public playing or showing.

Please clarify whether a copy of a work “that is, or is intended to be, played or shown in public” in the proposed section 35B(3) covers a copy of a work “which has been played or shown in public” or “which is played or shown in public again” by the concerned establishments.

5. The proposed section 35B(3) applies to a work which has been played or shown in public or which is played or shown in public again by the concerned establishments.

Making an accessible copy for a person with a print disability

Please clarify whether “his” as in “for his personal use” under the proposed section 40B(1) refers to a “person with a print disability”. If yes, would a maker who is not a “person with a print disability” contravene this section? Also, is it necessary to expressly provide in section 40B(1) that the “person with a print disability” may entrust any other person to make an accessible copy for him?

6. The proposed section 40B(1) aims to provide for a permitted act of making a single accessible copy for a person with a print disability. The accessible copy may be made by a person with a print disability himself or a person without a print disability entrusted by him. In fact,

the proposed section 40B(3) and (4) already stipulates that the maker of the accessible copy is not restricted to a person with a print disability. In particular, the proposed section 40B(4) sets out the restriction on the sum that may be charged for an accessible copy made for a person with a print disability. The word “his” in section 40B(1) refers to a “person with a print disability”. We will further study and consider whether it is necessary to improve the drafting of the proposed section 40B(1) to clarify the meaning.

Please clarify the criteria for determining “reasonable enquiries” under the proposed sections 40B(3) and 40C(3). In addition, does “satisfied” under these sections refer to the subjective satisfaction of the maker, and what are the relevant criteria?

7. The criteria for determining “reasonable enquiries” depend on the specific circumstances of individual cases. In general, a person with a print disability, a person assisting him, or a specified body may make enquiries with the publishers, copyright owners or organizations representing copyright owners.

A person with a print disability or his representative can make an accessible copy only if he is satisfied, after making reasonable enquiries, that copies of the relevant copyright work in a form that is accessible to the person with a print disability cannot be obtained at a reasonable commercial price. As a person with a print disability should consider the outcome of his enquiries or relevant information before deciding whether an accessible copy could be made, the term “satisfied” in the proposed provision covers both objective and subjective test.

Please clarify the criteria for determining “reasonable enquiries” under the proposed section 40C(5).

8. Likewise, the criteria for determining “reasonable enquiries” under the proposed section 40C(5) also depends on the specific circumstances of individual cases. In general, a specified body may find the name of copyright owner, publisher, distributor and other relevant information in the content, covers or packing of the copyright work. Besides, the body may also make enquiries with the organization representing the industry regarding the address of the copyright owner, etc.

Please clarify if the proposed section 40E(5)(a) should stipulate the procedures and monitoring mechanism in respect of proper keeping and destruction of records by specified bodies?

9. The proposed section 40E(5)(b) provides that a specified body must allow the relevant copyright owner or a person acting for him to inspect the record retained under section 40E(5)(a) under certain specified conditions. The specified body should keep the relevant information properly for inspection. We do not consider it necessary to make any express provision on “proper keeping”. In addition, since the information kept in the record under the proposed subsections 40E(2) and (4) does not involve personal data or confidential information, we do not consider it necessary to provide for any express provision on the destruction of records.

Fair dealing

Educational establishments may charge students certain fees in dealing with copyright works. In view of this, please clarify whether such a case is of a “commercial nature” under the proposed section 41A(2)(a) and state the relevant criteria for determining “commercial nature”.

10. According to the related US cases, commercial use of copyrighted materials was less favoured than non-profit use in determining whether there was fair use of the materials. However, the court recognized that the mere fact that a copyright user was a commercial enterprise would not preclude the applicability of the fair use defence.

Whether the dealing with a work is of a “commercial nature” depends on the circumstances of individual cases and there is no single formula applicable to all cases. For example, if a profit-making educational establishment charges students a considerable amount of fee when dealing with copyright works as its major profitable income, the dealing may be regarded as of a “commercial nature”. On the contrary, if a non-profit-making educational establishment charges students a fee on a cost-recovery basis when dealing with copyright works, the dealing may not be regarded as of a “commercial nature”. The crux of commercial and non-profit distinction is whether the user stood to profit from exploitation of the copyrighted material without paying the customary price.

As the concept of “amount and substantiality” is rather abstract, please consider whether a set of criteria which is more comprehensible to the public should be clearly stipulated in the proposed sections 41A(2)(c), 54A(2)(c), 242A(2)(c) and 246A(2)(c) so as to avoid causing confusion.

11. The purpose of the “fair dealing” provisions is to make our copyright exemption regime more flexible. In determining whether any dealing with a work is fair dealing, the court would take into account the factors stipulated in the proposed sections 41(2), 54A(2), 242A(2) or 246A(2) having regard to the circumstances of individual cases, and any other related factors. In fact, the factor of “amount and substantiality” is stipulated in the existing section 38 of the Copyright Ordinance (fair dealing provision for the purposes of research and private study). During the public consultation exercise conducted in early 2005, we consulted the public on whether the portion of the work that could be copied under section 38 should be quantified, and received both supporting and opposing views. Having deliberated the consultation results, we consider it inappropriate to quantify the portion that could be copied in the provision. As to the new fair dealing provisions, we also consider it inappropriate to set any statutory quantitative standards for “amount and substantiality”.

In dealing with copyright works, pupils may resell some works that they do not need to use to their schoolmates. Please clarify whether such a case may be regarded as “dealt with” in the proposed section 41A(5) and state the relevant criteria.

12. “Dealt with” means sold, let for hire, or offered or exposed for sale or hire. If a pupil copies a work for the purpose of receiving instruction in a specified course of study, the copy will not be regarded as an infringing copy by virtue of the proposed section 41A. However, if a pupil sells the copy when he no longer needs to use it, this act will be regarded as “dealt with” and the pupil may attract civil liability.

Please clarify the criteria for determining “efficient administration of urgent business” in the proposed section 54A(1).

13. The purpose of the proposed section 54A(1) is to provide fair dealing exemption for handling urgent business in an expedient way. Whether a case falls within “efficient administration of urgent business” depends

on the circumstances of the case. The term “urgent business” will be construed according to its literal meaning to mean “matters requiring immediate action or attention”.

Playing of sound broadcasts inside vehicles

Please consider whether the exemption provided by the proposed sections 81A and 258A should be extended to cover ships.

14. The scope of exemption provided by the proposed sections 81A and 258A is determined having carefully balanced the interests of copyright owners and users of copyright works. We do not propose extending the scope of the exemption further.

Criminal liability in respect of infringing articles, etc.

The proposed section 118(1)(g) provides that a person commits an offence if he, without the licence of the copyright owner, “distributes” an infringing copy of the work to such an extent as to affect prejudicially the copyright owner. As there may often be exchanges or presentation as gifts of some infringing copies among individuals, please clarify whether such acts amount to distribution under the section, and please state the relevant criteria.

15. Whether distribution of infringing copies by an individual constitutes the extent as to affect prejudicially the copyright owner depends on the circumstances of individual cases and there is no single formula applicable to all cases. If a person presents infringing copies in his possession to his friends as gifts, the acts already constitute “distribution”. However, whether the distribution is to the extent as to affect prejudicially the copyright owner would depend on the quantity distributed and the purpose of use of the infringing copies so distributed. If the quantity distributed is very small and is for domestic use only, it probably would not amount to the extent as to affect prejudicially the copyright owner.

Section 3 of the Interpretation and General Clauses Ordinance provides that “solicitor” means a person admitted before the Court of First Instance to practise as a solicitor; whereas “counsel” means a person admitted before the Court of First Instance to practise as counsel. Since government counsels, in-house lawyers, trainee solicitors or barristers undergoing pupillage may give legal advice to the persons concerned in respect of copies of copyright works, please consider whether the scope of the proposed section 118(2E)(a) should be extended to cover the above mentioned professionals .

16. Our intention is that the proposed section 118(2E)(a) should apply to lawyers or counsels who possess the professional qualifications to give legal advice, in respect of local or overseas laws, pertaining to infringing copies of copyright works. We will consider whether amendments have to be made to the provision to cover persons who are recognized by the authorities concerned in other places to practise as lawyers.

If a solicitor copies a certain number of pages of a law book in the judicial proceedings of a case for submission to the court, will the copying be regarded as something done “for the purpose of judicial proceedings” under section 54(1) so that it will not be regarded as an infringement of copyright? If the copies, after reference and consideration, are not submitted to the court eventually, will the copying be regarded as something done “for the purpose of judicial proceedings” under section 54(1)? If not, please clarify the criteria for determining “for the purposes of judicial proceedings”.

17. The copying of a certain number of pages of a law book by a solicitor for submission to the court in the course of judicial proceedings may be regarded as “for the purpose of judicial proceedings” under section 54(1). Even if the copies, after reference and consideration, are not submitted to the court, it may be regarded as falling within the scope of section 54(1) as long as the production of such copies is genuinely for the purposes of judicial proceedings. Nevertheless, we advise that it is more appropriate for the solicitor to destroy the copies after deciding not to use them. On the other hand, when a solicitor gives general legal advice to a client and the advice is not related to any particular judicial proceedings, it would not be regarded as falling within the scope of section 54(1).

The proposed sections 118(2F) and 119B(6) provide that a director or partner who is responsible for the “internal management” should be presumed to have been in possession of or used infringing copies unless he proves that he did not authorize the act to be done. Please clarify the criteria for determining “internal management”.

18. Whether or not a particular director or partner is responsible for the “internal management” of his organization depends on the facts of the case and the evidence collected by the Customs and Excise Department.

As far as the proposed sections 118(2G), 118(2H), 119B(7) and 119B(8) are concerned, SMEs in general may not have sufficient resources and knowledge to formulate the required policies or practices against the possession or use of infringing copies by their employees. In view of this, please consider if any guidelines or samples of the policies or practices concerned could be formulated for the reference of SMEs.

19. Upon the passage of the proposed directors’/partners’ criminal liability, we will conduct publicity and education activities targeted mainly for SMEs.

Offence relating to infringing copies of copyright works in printed form

Please clarify whether “books, magazines, periodicals or newspapers” under the proposed section 119B(2) refer to publications registered under the Registration of Local Newspapers Ordinance or the Books Registration Ordinance. If yes, should this be expressly provided in the provision? If not, what are the relevant criteria?

20. Newspapers registered under the Registration of Local Newspapers Ordinance (Cap. 268) are newspapers printed or produced in Hong Kong; whereas books registered under the Books Registration Ordinance (Cap. 142) are books printed, produced or published in Hong Kong. “Books, magazines, periodicals or newspapers” referred to in the proposed section 119B(2) do not mean publications registered under the above two ordinances. Instead, they are terms referring generally to different kinds of books, magazines, periodicals or newspapers. We consider that it is not necessary to give the terms a legal definition and they will be construed according to their literal meaning.

The proposed section 119B(3) provides that subsection (1) does not apply in the circumstances specified in the regulations made under subsection (14). Section 119B(14) provides that for the purposes of subsection (3), the Secretary for Commerce, Industry and Technology may by regulations specify the circumstances in which subsection (1) does not apply. Please clarify the criteria for determining the circumstances in which subsection (1) does not apply.

21. The Secretary for Commerce, Industry and Technology may make regulations under the proposed section 119B(14) to specify the “safe harbour” for section 119B (the business end-user copying/distribution criminal liability). The “safe harbour” refers to the limit within which the concerned infringing acts would not be caught under the proposed offence. Our proposed “safe harbour” is set out in Annex C of the Legislative Council Brief on the Bill.

Power of the Tribunal to give consent

Please clarify the criteria for determining “reasonable enquiries” under the proposed section 213A(1).

22. Under the proposed section 213A(1), whether an applicant has made reasonable enquiries depends on the circumstances of the case concerned. In general, considerations to be taken into account may include: whether the applicant has made enquiries with the institutions, trade unions or organizations of the performers; or whether the applicant has made enquiries with the producer or distributor of the fixation containing the performance. Also, the applicant is required to serve notices to the specified persons as the Tribunal may direct under section 213A(3).

Please clarify what orders are referred to in the phrase “such order as it thinks fit” under the proposed Section 213A(4).

23. With the power conferred by the proposed Section 213A(4), the Copyright Tribunal may handle cases flexibly and make such order as it thinks fit, having regard to the circumstances of individual cases. The Tribunal may grant licences on behalf of the persons entitled to the rental rights and order applicants to pay royalties. For example, in the *Exparte Sianel Pedwar Cymru* case in the U.K., as the whereabouts of

some performers (or their successors) could not be ascertained, the Tribunal, upon consideration, exercised its power to grant licences on behalf of the persons entitled to the relevant rights, and stated that the persons entitled to the relevant rights could file applications to the Tribunal for an order that reasonable royalties be paid by the users.

Performers' Moral Rights

With respect to Part IIIA of the Ordinance introduced by Clause 53, apart from a performer whose performance is fixed in a “sound recording”, will any performers whose performances are recorded in any other forms be conferred with moral rights?

24. Clause 53 is formulated in accordance with Article 5 of the World Intellectual Property Organisation Performances and Phonograms Treaty (“WPPT”) 1996 which only covers “live aural performances” and “performances fixed in phonograms”. The proposed sections 272B and 272E confer new rights on performers of a live aural performance and performers whose performances are fixed in sound recordings. These sections, however, do not apply to those performers whose performances are recorded in recordings other than in a sound recording.

Please clarify if a performer who made no sound in his performance would have the right “to be identified” under the proposed section 272B and the right “not to be subjected to derogatory treatment” under the proposed section 272E(1).

25. The proposed sections 272B(1) and 272E(1) are formulated in accordance with the requirements under Article 5 of the WPPT. By virtue of the provisions, only performers of live aural performances and performers whose performances are fixed in sound recordings are conferred with the two types of moral rights. A performer who does not make any sound in his performance is not covered by these sections.

Please clarify whether the wording of the proposed section 272F(1) means that any person who has committed a particular act involving an article and becomes aware afterwards that the article is an infringing one is regarded also as infringing the rights concerned. In order to avoid ambiguity, please consider whether the wording should be amended to read as “a person who ‘knowingly’ commits an act ...”.

26. The act referred to in the proposed section 272F (i.e. to possess in the course of business, sell, let for hire, distribute, etc., infringing articles) would constitute an infringing act only if the defendant has the requisite knowledge. The wording of section 272F is the same as that of various sections in the existing Copyright Ordinance (e.g. sections 30, 31(1), 32(1), 33(1) and 95(1)). These provisions have been in force since 1997 and so far we are not aware of any controversy over or difficulty in the application of such provisions. For the sake of consistency, we consider it inappropriate to amend section 272F.

The proposed section 272I(2) provides that any of the rights referred to in subsection (1) “may” be waived by instrument in writing signed by the person giving up the right. As the rights “may” be waived by instrument in writing under this section, does the section, with such a word used, mean that there are other ways of waiving the rights apart from by way of an instrument in writing? If yes, what are the other possible ways? If not, is it necessary to use the word “shall” instead?

27. The proposed section 272I(2) only specifies one of the ways of waiving moral rights. In fact, apart from instrument in writing, section 272I(6) stipulates that the relevant provisions shall not operate to exclude any informal waivers under the general law of contract or estoppel. For example, a performer may waive his moral rights by way of oral agreement. Another example is the case of a performer who has clearly represented to another party (e.g. the distributor of the fixation) by his conduct or words that he would not exercise his right to be identified as a performer with intent that the other party would act in reliance thereon. If the other party acts in reliance on such representation and does not include the performer’s name in the fixation, then under the law of estoppel, it would be unfair and unreasonable to require the distributor of the fixation to recall copies of the fixation and reprint new covers. As such, the performer cannot turn back on his

representation and make any claims against the distributor arising from this matter.

The proposed section 272L provides that the rights conferred by section 272B (right to be identified as performer) and section 272E (right to object to derogatory treatment) are not assignable. If such rights are not assignable, can they be exercised by an authorised person on behalf of the right owner? If yes, is the authorisation required to be made in the form of an instrument in writing?

28. A moral right is a personal right and it is therefore not assignable. However, as such a right may still subsist after the death of a performer, it can be transmitted to his successor after his death. The owner of a moral right may authorise another person to exercise the right on his behalf and the authorised person shall be accountable to the right owner. It is not necessary for the authorization to be made in the form of an instrument in writing. However, to set out the scope and terms of the authorization clearly in writing is a preferred way from the legal perspective.

The proposed section 272M provides that moral rights may be transmitted to another person on the death of a person entitled to such rights. Please clarify whether section 18 of the Ordinance in relation to the duration of copyright in sound recordings is applicable to moral rights. If not, is there any duration for the moral rights?

29. According to the proposed section 272H of the Bill, the duration of the moral rights of a performer in relation to his sound recording is the same as that for the performer's rights conferred by Part III of the Copyright Ordinance. The performer's rights conferred by section 214 of Part III expire at end of the period of 50 years from the end of the year in which the performance takes place. In other words, moral rights subsist for 50 years after the end of the year in which the performance takes place.

The proposed section 272M(1)(c) provides that if or to the extent that the right does not pass under paragraph (a) or (b), the right is exercisable by his personal representatives. Please clarify whether the right would pass to the Government if there are no personal representatives or beneficiaries. If yes, is it necessary to make express provision for this? If not, how would the right pass?

30. The moral rights of a performer will form part of his estate on his death. If the performer's estate is an intestate estate, the rights will pass under the Intestates' Estates Ordinance (Chapter 73). As that Ordinance covers all kinds of estate of the deceased and has detailed provisions on the succession arrangements, we do not consider it necessary to reproduce the provisions in the Copyright Ordinance.

The proposed section 272N(2) provides that the court may, if it thinks it is an "adequate" remedy in the circumstances, grant an injunction. Please clarify whether the word "adequate" referred to in this section implies that the court may grant an injunction only if it thinks it is an adequate remedy and no other remedy is required. If yes, please clarify if the claimant is not allowed to seek compensation or other remedy at the same time. If not, should the word be changed to "appropriate"?

31. The proposed section 272N(2) is not intended to restrict the remedy for infringement of performers' moral rights. The right owners may apply for injunction, damages and other suitable remedies at the same time.

Section 272N(2) only specifies one of the remedies available in respect of the right to object to derogatory treatment. If the court thinks that a conditional injunction (and not an absolute injunction) is an adequate remedy for the performer, it may grant such an injunction requiring the defendant to make a disclaimer in the performance or sound recording to dissociate the performer from the treatment of the performance. The defendant should stop the derogatory treatment altogether if he does not include the disclaimer as per the court order.

Circumvention of effective technological measures

Please clarify if the wording of the proposed section 273A(1) means that this section applies only if a person did an act and became aware thereafter that the act circumvented the measures. To avoid ambiguity, please consider whether the wording should be amended as: a person knowingly does any act which circumvents the technological measures?

32. The act under the proposed section 273A(1) (i.e., the act of circumvention) constitutes an infringement if the defendant did it with the requisite knowledge. As mentioned in point 26 above, some expressions in the Bill such as “knowing” and “having reason to believe” are used in certain provisions of the existing Copyright Ordinance. For the sake of consistency, we consider it inappropriate to amend the proposed section 273A(1).

The proposed section 273A(2) provides that “the following persons have the same rights and remedies against the person referred to in subsection (1) as a copyright owner has in respect of an infringement of copyright”. Please clarify whether “the person referred to in subsection (1)” refers to “a person” (任何人) or “該人” (in the Chinese text only) in subsection (1), “he”(他) in paragraph (a) or “人” (in the Chinese text only) in paragraph (b)?

33. “A person” (任何人) and “該人” (in the Chinese text only) in subsection (1) and “he”(他) in paragraph (a) refer to the same person (i.e. the person who did the act of circumvention). As for the “人” (in the Chinese text only) in “使人能夠” in paragraph (b), it may include the person who did the act of circumvention and / or another person. In fact, in the Chinese text of the proposed sections 273A to 273C, the term “使人能夠” is used to reflect the meaning of the transitive verbs “enable”, “enabling” or “has enabled” in the English text.

“The following persons” referred to in the proposed sections 273A(2) and 273B(3) means (a) the copyright owner of the work, (b) an exclusive licensee of the copyright owner of the work, and (c) any person who issues or makes available to the public copies of the work or person who broadcasts the work. Since the specified persons in subsection (c) may not be the copyright owners or exclusive licensees who have the rights concerned, please clarify the rationale for the same rights and remedies that the persons referred to in subsection (c) and a copyright owner can have in respect of an infringement of copyright.

34. The persons referred to in sections 273A(2)(c) and 273B(3)(c) include persons who are authorised by the copyright owners to issue to the public, make available to the public through the Internet, broadcast or include in a cable programme, copies of the copyright works. Such persons have the right to apply effective technological measures in relation to the work in order to prevent the work from being used by an unauthorised third party. For example, the publisher of a song (who may not be the copyright owner) has the right to upload the song on a website that adopts access control process so that only authorised users who possess the encryption key are able to download the song for listening. Any person who does an act of circumvention or deals in circumvention devices may result in loss to the persons referred to in subsection (c). Hence, such persons should also have the right to institute legal proceedings against the infringers, and the remedies (including injunction, damages and account of profits) are the same as those for the copyright owners.

The persons covered under the proposed sections 273A(2)(c) and 273B(3)(c) are generally the same as those covered under section 273(2) in the existing Copyright Ordinance. The proposed subsections only extend the coverage of the persons who have the right to institute proceedings to those who broadcast or include in a cable programme the copyright work. This is also generally consistent with sections 296AZ(3) and 296ZD(2) of the Copyright, Designs & Patents Act 1988 in the UK.

Please clarify whether the proposed section 273B(1) applies to any person who did the concerned acts and was “aware” of the concerned situation thereafter? To avoid ambiguity, please consider whether the provision should be amended as: if any person... “knowingly” and...?

35. Please refer to the reply in point 32 above.

Please clarify whether the proposed section 273C targets at acts committed for the purposes of circumvention business but not circumstances involving the circumvention of technological measures in the daily life of members of the public. If yes, given that “for sale or hire” as referred to in subsections 1(a) to (c) may exist in the daily life of members of the public, would the Administration consider amending the provision so that the acts prescribed in subsections (a) to (g) would only relate to a circumvention business. Besides, please consider adding the element of “knowledge” in the provision by amending subsection (1) to read as “..... a person commits an offence if he ‘knowingly’...”

36. The proposed section 273C mainly aims to combat commercial dealing in circumvention devices, and the provision of circumvention services for profit. Subsections 1(a) to (c) targets at the acts of making, importing and exporting, for sale or hire, of circumvention devices. These acts in general relate to commercial dealings rather than private and domestic uses.

We do not agree that section 273C (criminal offence) should be amended to include the “knowing” or “having reason to believe” conditions as in sections 273A and 273B (civil infringement). In criminal proceedings, the prosecution must prove beyond reasonable doubt each and every element of the offence in the provision concerned. We anticipate that in actual circumstances, it is difficult for the prosecution to prove beyond reasonable doubt that the defendant knew that the concerned circumvention device enabled or facilitated circumvention of the technological measures in question and the use of the device would induce or facilitate any person to commit an infringement. We consider it easier for the defendant to adduce evidence to prove on balance of probabilities that he did not know or had no reason to believe that the circumvention device that he dealt with enabled circumvention of the relevant measure or facilitated the

circumvention of the measure. In view of this, we propose introducing a defence provision for the defendant (the proposed section 273C(4)).

Commissioned works

If a member of the public commissions a photographic studio to take photographs or a film without making an agreement on the ownership of the copyright, please clarify whether the copyright belongs to the photographic studio and whether the studio has the right to use the photographs or the film for promotional purpose. If yes, given the lack of knowledge on the part of the general public about making such an agreement for this kind of transaction, please consider making legislative amendments to provide that, under specified circumstances, there is a presumptive agreement between a bona fide commissioner for valuable consideration and the relevant author that the copyright concerned belongs to the commissioner.

37. During the comprehensive consultation and study conducted by the Law Reform Commission of Hong Kong (LRC) on our copyright law from 1987 to 1993, the ownership of copyright in commissioned works was a controversial issue. As discussed at paragraph 3.8 of its report, the LRC pointed out that there were views that the commissioners should own the copyright of all commissioned works because they had commissioned and paid for the works to be done. The LRC considered that while there were merits in this view, there were also many opposing views. The opponents considered that the person commissioning a work could always protect his rights by an express agreement. Hence, the copyright of the work should rest with the author of the work. Any legislative amendment conferring the copyright of a commissioned work on the commissioner would remove the emphasis on the author's rights which is an important principle upheld by the Berne Convention. In the end, the LRC's recommendations have been generally reflected in section 15 of the existing Copyright Ordinance.

The above issue of commissioning a photographic studio to take photographs and a film may, depending on the specific circumstances of the case, involve personal data and be protected by the Personal Data (Privacy) Ordinance (Chapter 486).

Thank you once again for your views. We will be pleased to receive any further comments on the Bill that you may have.

Yours sincerely,

(Ms Priscilla TO)
for Secretary for Commerce, Industry and Technology

cc. The Bills Committee on the Copyright (Amendment) Bill 2006