

**The Administration's Response to the written representations
of the Law Society of Hong Kong dated 13 July on the Copyright (Amendment) Bill 2009**

The Administration would like to thank the Law Society of Hong Kong ("the Law Society") for the time and efforts it spent on preparing the written representations dated 13 July. At the meeting on 15 July, both parties had constructive exchanges on various issues raised in the representations. The following table contains a summary of the Law Society's comments and the Administration's response. Unless otherwise stated, the section numbers referred to in the following table correspond with those of the Copyright Ordinance (Cap 528).

I. General Comments on the Bill	
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(i) Observed that in determining whether there was copyright infringement, one should look at not only the quantity but also the quality of what has been copied, and the quality, rather than the quantity, is of primary importance. Opined that the approach of the Bill had put too much focus on quantitative calculation.	<p>(i) We agree with the Law Society's view that both the quality and the quantity of the reproduction have to be taken into account when considering whether an unauthorized reproduction of a copyright work constitutes an infringing copy of the work within the meaning of section 35. In this regard, section 119B(1) (which prescribes the copying and distribution offence) does not depart from the said fundamental principle underlying infringement since "infringing copy" remains to be a key element of the offence. In other words, similar to other offences involving distribution or possession of infringing copies etc, the copying and distribution offence will not apply unless <i>infringing copies</i> have been made for distribution or distributed in the circumstances prescribed.</p> <p>When section 119B was enacted in 2007, the Legislative Council, having heard the views of stakeholders, consciously decided to adopt the following approach, i.e. for the Administration to draw up a set of detailed numeric limits within which the offence does not apply, so as to provide certainty to the business sector and to ease their concerns about inadvertent breaches. Against this backdrop, while we agree with the Law Society that we should</p>

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	endeavour to keep the legislation simple, we need to set out the numeric limits in sufficient detail.
(ii) The Bill (put in a positive mode) should reflect that criminal sanctions only apply to use which is above certain level of activity.	(ii) The policy intent is that the offence should not apply if the extent of making or distribution of infringing copies does not exceed certain numeric thresholds. The current drafting approach adopted in the Bill seeks to reflect this policy intent by setting out specifically that certain levels of unauthorised use of copyright works do not attract criminal sanction under section 119B.
(iii) Noted that the numeric limits were related to infringing acts committed by a "person". Expressed concerns that this might provide a loophole where more than one person carrying out the infringing activities might take advantage of the numeric limits.	(iii) Similar to a number of offences on copyright infringement under the Copyright Ordinance (e.g. section 118), the copying and distribution offence and the proposed numeric limits apply to "a person", which has to be read in the light of section 3 of the Interpretation and General Clauses Ordinance (Cap 1) ¹ . The Law Society expressed a concern about whether there would be a loophole if the infringing activities were committed by more than one person (e.g. where two or more "persons" together made (for distribution) or distributed certain infringing copies which exceeded the safe harbour, but taking each of these persons individually, no one has exceeded the prescribed numeric limit).

¹ Under section 3 of Cap.1, the word "person" includes any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word "person" occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation.

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	<p>In our view, it is less likely for different "persons" or entities in a normal business setting to act in concert for the sole purpose of circumventing the section 119B offence given the time (and opportunity cost) involved. We submit that a simpler way for avoiding criminal liability under the copying and distribution offence exists, namely, obtaining a licence. Moreover, even if a particular infringement does not fall within section 119B, the business entity in question may still be liable under other sections in the Copyright Ordinance (e.g. those under section 118 which deals with distribution of infringing copies etc.), depending on the circumstances.</p>
<p>(iv) Opined that the Bill could be made more understandable. Suggested to set out the numeric limits on infringement in general terms rather than by detailed provisions.</p>	<p>(iv) We agree with the Law Society that the Bill should not be unduly complex. At the same time, there is a need to set out the numeric limits in sufficient detail.</p> <p>In drawing up the numeric limits, we have endeavoured to make them easy to understand, and reasonably clear and certain for enforcement purposes. Our endeavours include (a) using "A4-size page" as the basis for the numeric limit for newspapers, magazines and periodicals, and (b) replacing the previously proposed two-tier system with the current one-tier system for the calculation of retail value of books and specified journals.</p>

II. Specific comments on certain provisions in Schedule 1AA to the Bill	
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<p><u>Interpretation</u></p> <p>(i) “Qualifying copy”: questioned the reason for the words “...and corresponds to not more than 25% of the issue” in paragraph (b)(ii) of the definition of “qualifying copy”.</p>	<p>(i) Paragraphs (b)(i) and (b)(ii) of the definition of “qualifying copy” are intended to cover two types of “qualifying copy” that may be made from an issue of a specified journal, namely -</p> <p>(a) a set of pages that contains infringing materials corresponding to more than 25% of the printed pages of an issue of the specified journal; and</p> <p>(b) a set of pages that corresponds to <u>not</u> more than 25% of the printed pages of an issue of the specified journal but contains an infringing copy made from the whole of an article in that issue.</p> <p>There is a need to clearly define this two types of “qualifying copy” and make them mutually exclusive, because there are different provisions in sections 7 and 8 of the proposed Schedule 1AA governing the calculation method pertaining to each of them.</p> <p>Our rationale for affording added protection to articles in specified journals is set out in point II (iii) herein below.</p>

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<p>(ii) "Recommended retail price": questioned the rationale for the concept and its compatibility with competition law, as well as the meaning of the words "readily ascertainable" for market value in section 5(3)(c); proposed referring to the actual retail price or market value instead.</p>	<p>(ii) "Recommended retail price", also known as list price or published price, is a benchmark by reference to which a publisher supplies a book to a retailer, a distributor or an end customer (in the case of direct sale). Very often, publishers will offer discounts based on the recommended retail price to individual retailers or distributors. Since they are then free to determine the retail price of the book depending on their desired profit margins, there is no question of limiting competition (in terms of setting the actual retail price of a book).</p> <p>The Bill proposes to use the "recommended retail price" (if any) for calculating the value of the qualifying copies of a book without a marked retail price. We do not prefer using the actual retail price of a book for calculation because it is difficult to ascertain or verify. For example, the defendant might claim that a book was purchased with a huge discount. We prefer using the "recommended retail price" of a book which is a more objective benchmark for calculation in the interest of certainty.</p> <p>If a book has neither a marked retail price nor a recommended retail price, its market value (insofar as it is readily ascertainable) would be used in calculation towards the numeric limit. This serves to take into account the scenario where the book in question is still available for sale on the market.</p>

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(iii) "Specified Journal": questioned the need for the words "normally at least one of which in an issue has been peer-reviewed by one or more expert or scholar in the discipline".	(iii) One of the key features of a "specified journal" (mainly academic journals) that distinguishes it from other journals or periodicals for individual trade/profession is that its articles are often peer-reviewed by experts in the relevant discipline. Some articles in specified journals are made available by publishers for sale individually, for example, case studies in the Harvard Business Review. Having regard to the unique nature of the articles in specified journals, we see a good case for extending the protection to these "articles" in specified journals for the purpose of section 119B offence.
<u>Section 3 Books and specified journals</u>	
(iv) Observed that there seemed to be two separate thresholds, namely a total retail value of \$6,000 OR where the number of pages involved were not more than 25% of the printed pages of the relevant book or specified journal.	(iv) The Bill prescribes a single numeric limit for books and specified journals, namely a total value of \$6,000 within any period of 180 days. In this regard, the threshold of 25% is employed in the definition of "qualifying copy", the value of which will count towards the aforesaid numeric limit.
<u>Section 4 Calculation of total number of infringing pages</u>	
(v) Opined that it might not be necessary to set out the method of calculating the total number of infringing pages in an elaborate form.	(v) The numeric limits proposed under schedule 1AA set out the boundary beyond which the copying and distribution offence will apply. For the reasons stated in point I (i) above, we need to ensure that such limits (and the method of calculation) are spelt out in reasonably clear and certain terms, and that possible ambiguity should be avoided as far as possible. To this end, there is a

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	practical need to set out the method of calculating the total number of infringing pages in sufficient detail, such that it may cater for different scenarios (e.g. where infringing copies are contained in a page smaller/larger than A4 size, or where the image of the infringing copy of a copyright work has been reduced/enlarged as compared with the original size of the work etc).
<u>Section 5 Determination of value of qualifying copies made from books</u> (vi) Questioned the use of "recommended retail price"; opined that the calculation method was complex.	(vi) Please refer to point II (ii) above about the use of "recommended retail price". Please also refer to our explanations in point I (i) above about the importance of setting out the numeric limits (and the method of calculation) in sufficient detail.
<u>Section 6 Determination of value of qualifying copies made from specified journals</u> (vii) Opined that the calculation method was complex and difficult to understand; questioned about the value of an article of less than 25% of an issue of a journal and section 8 of Schedule 1AA.	(vii) Please refer to points II (i) and (iii) above about the definitions concerning "qualifying copy" and about the articles of specified journals. Please also refer to our explanations in point I (i) above about the importance of setting out the method of calculation in sufficient detail.

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<p><u>Concluding comments</u></p> <p>(viii) Noted that the offence did not apply to distribution through the Internet, and distribution through an Intranet was temporarily excluded. Referred the Administration to the review on protecting copyright in the digital environment.</p>	<p>(viii) The proposal to exclude Intranet distribution is just an interim measure to allow more time for the relevant copyright owners to roll out, publicise and promote suitable licensing arrangements, and for the Administration and the copyright owners to formulate the appropriate numeric limit(s) applicable to Intranet distribution.</p> <p>The review on strengthening copyright protection in the digital environment is a separate exercise. The Administration will continue to work closely with the stakeholders, including the Law Society, to take it forward.</p>