

LEGISLATIVE COUNCIL BRIEF

Copyright Ordinance
(Chapter 528)

COPYRIGHT (AMENDMENT) BILL 2009

INTRODUCTION

At the meeting of the Executive Council on 21 April 2009, the Council ADVISED and the Chief Executive ORDERED that the Copyright (Amendment) Bill 2009 (“the Bill”), at Annex A, be introduced into the Legislative Council.

JUSTIFICATIONS

Business end-user copying and distribution offence

2. Under section 119B(1) (as read with section 119B(2)) of the Copyright Ordinance, a person commits an offence if he, for the purpose of or in the course of any trade or business and on a regular or frequent basis, without the licence of the copyright owner, makes for distribution or distributes an infringing copy of a copyright work in a printed form contained in a book, a magazine, a periodical or a newspaper resulting in a financial loss to the copyright owner (referred hereafter as the “copying and distribution offence”). To ensure that business operations would not be adversely and unreasonably affected, statutory defences are provided under section 119B(14)¹. In addition, the Secretary for Commerce and Economic Development (SCED) is empowered to prescribe by regulation numeric limits within which the copying and distribution offence will not apply.

3. Section 119B was added to the Copyright Ordinance in June 2007. The section is yet to come into operation, pending the prescription of the numeric limits referred to in paragraph 2 above.

¹ The statutory defences are available if the user -

- (a) took adequate and reasonable steps to obtain a licence, but failed to receive a timely response;
- (b) could not, after making reasonable efforts, obtain commercially available copies and could not obtain a licence on reasonable commercial terms;
- (c) did not know and had no reason to believe that the copies he made or distributed infringed copyright; or
- (d) could not, after making reasonable enquiries, ascertain the identity and contact details of the copyright owners.

The preferred numeric limits

4. When drawing up the numeric limits, we have actively engaged the publishing industry. In the process, we have taken care to ensure that the numeric limits are –

- (a) fit for purpose, taking into account the prevailing mode of infringement for different types of printed works²; and
- (b) expressed in terms easily comprehensible to business end-users, so as to avoid inadvertent breaches.

5. The numeric limits that we have agreed with stakeholders after extensive consultation are as follows –

- (a) for newspapers, magazines and periodicals (excluding specified journals³), ***a maximum of 500 A4-size⁴ pages embodying infringing copies of copyright works within any 14-day period***; and
- (b) for books and specified journals, ***a maximum total retail value of \$6,000 within any 180-day period***, where the retail value of a book, an issue of a specified journal or an article in an issue of a specified journal, would be counted towards the total retail value when the user makes for distribution or distributes infringing copies of more than 25% of the number of pages of the book⁵ or the issue, or makes for distribution or distributes a complete copy of the article.

² We submit that *separate* numeric limits should be prescribed in relation to the making or distribution of infringing copies of copyright works contained in (i) books and academic journals (which are more akin to books in nature than, say, magazines), and (ii) newspapers, magazines and periodicals, having regard to the difference in usage and mode of infringements involving these two broad categories of printed works. In terms of the mode of infringement, while it is more common for business end-users to copy a large portion of a book, they are less likely to make extensive copying from a newspaper. Instead, business end-users usually make clippings of articles relevant to their trade or practice from different newspapers and periodicals.

³ The term “specified journals” (as defined in the Bill) essentially refers to academic journals.

⁴ Due mainly to the need for certainty, we propose counting by the number of “A4-size” pages instead of the alternative of counting by the number of “articles” that have been copied. Sub-headings, related background write-up in separate boxes and ancillary illustrations commonly exist in newspaper and magazines. They make it difficult to tell how many “articles” are there to be counted e.g. some may consider that each piece of literary work under a sub-heading should be counted as a separate article, while others may disregard the sub-headings in determining the number of articles present. Since we are drawing a line here beyond which criminal liability may arise, a counting method that gives greater certainty is preferred.

⁵ The original proposal was to have a two tier system (i.e. the retail value of a book would be counted towards the total retail value when the user makes for distribution or distributes more than (a) 15% of the book at one time or (b) 50% cumulatively over 180 days). We propose replacing the two-tier system with the current one to make the relevant numeric limit simpler and more easily comprehensible to business end-users.

The need for amendments to section 119B

6. In working on the draft regulation, the Department of Justice (DoJ) advised us that the above formulation might be inconsistent with the enabling provisions in sections 119B(3)(a), (19) and (20)⁶ of the Copyright Ordinance. This position was confirmed by a Senior Counsel with expertise in intellectual property. The gist of their advice is as follows –

- (a) the enabling provisions require that the numeric limits applicable to each type of copyright work should refer to **both** the **number and** the **value** of infringing copies. Our proposed formulation (of having a “value” limit for books and a “number” limit for newspapers, magazines and periodicals) is beyond the scope of the enabling provisions; and
- (b) the enabling provisions draw no distinction between **copyright work(s)** contained in different types of **printed work(s)**. It may be argued that –
 - (i) the proposed formulation of two separate sets of numeric limits based on **types of printed works** (one for books and one for newspapers, magazines and periodicals); and/or
 - (ii) the proposed use of “A4-size pages” as the basis for the numeric limits for newspapers, magazines and periodicals, which does not give a reliable account of the **number of infringing copies of copyright works** involved since one A4-size page may contain less (or more) than one infringing copy of a copyright work,

are beyond the scope of the enabling provisions.

7. Within the confines as those set out in paragraph 6 above, we have attempted to find ways that accommodate the numeric limits we had hitherto agreed with stakeholders but to no avail.

⁶ Section 119B(20) reads –

“The Secretary for Commerce and Economic Development may, in the regulations made under subsection (19) specify the extent referred to in that subsection by reference to –

(a) the number of infringing copies made or distributed;

(b) the value of those infringing copies; and

(c) any other factors that he may consider relevant,”

8. On the issues raised in paragraph 6(a) and 6(b)(i), given the difference in the nature and mode of infringements involving different types of printed works, it is not feasible to prescribe a set of numeric limits which covers both the value and the quantity of infringing copies of copyright works, irrespective of the type of printed works containing these copyright works.

9. As for the issue raised in paragraph 6(b)(ii), we need to set the numeric limits based on a readily quantifiable unit (i.e. A4-size pages) rather than “copyright work”⁷, lest it would be difficult for lay business end-users to understand and apply.

10. To tackle the vires issues raised in paragraph 6 above, we propose to amend section 119B of the Copyright Ordinance. We also propose to prescribe the preferred numeric limits in a new schedule to the Copyright Ordinance so that both the amendments to the principal legislation and the corresponding numeric limits are put before the Legislative Council in one go.

Exclusion of Intranet Distribution

11. Separately, SCED is empowered under section 119B(3)(b) and (21) of the Copyright Ordinance to prescribe by regulation the manner of copying or distribution of infringing copies to which the copying and distribution offence will not apply. This is to cater for situations where the market lacks suitable licensing schemes.

12. More time is required for the relevant copyright owners to roll out suitable licensing arrangements covering Intranet distribution⁸. Hence, we propose not to apply the copying and distribution offence to Intranet distribution in the meantime. Consistent with the approach set out in paragraph 10 above, we propose to amend section 119B of the Copyright Ordinance and prescribe the exclusion of Intranet distribution in another new schedule to the Copyright Ordinance.

THE BILL

13. The main provisions of the Bill are set out below –

- (a) **Clause 3** amends section 119B of the Copyright Ordinance to provide that section 119B(1) of the Ordinance does not apply in the circumstances set out in the new Schedules 1AA and 1AB to the Ordinance.

⁷ The term “copyright work” is defined under the Copyright Ordinance. A printed work may contain a range of copyright works, including artistic works (such as photographs, drawings, charts and graphs), literary works, typographical arrangements etc.

⁸ We note that so far there is only one licensing scheme (introduced in late 2008) that covers distribution of copies of newspapers and magazines through the Intranet. Another one for books and journals is in the pipeline.

- (b) **Clause 4** adds the new Schedule 1AA and 1AB to the Ordinance to provide for the circumstances in which section 119B(1) of the Ordinance does not apply. In particular –
- (i) section 1 of the new Schedule 1AA defines certain expressions to be used in the Schedule;
 - (ii) sections 2 and 3 of the new Schedule 1AA provide that section 119B(1) of the Ordinance does not apply in circumstances where the making or distribution of infringing copies in relation to magazines, periodicals (other than specified journals) and newspapers, as well as books and specified journals, does not exceed the specified extent;
 - (iii) section 4 of the new Schedule 1AA provides for the calculation of the total number of infringing pages made or distributed in relation to magazines, periodicals (other than specified journals) and newspapers;
 - (iv) section 5 of the new Schedule 1AA provides for the determination of the value of qualifying copies made or distributed in relation to books;
 - (v) sections 6, 7 and 8 of the new Schedule 1AA provide for the determination of the value of qualifying copies made or distributed in relation to specified journals; and
 - (vi) the new Schedule 1AB provides that section 119B(1) of the Ordinance does not apply to distribution of infringing copies through the Intranet.

The existing provisions which we are seeking to amend, namely provisions of section 119B of the Copyright Ordinance, are at Annex B.

LEGISLATIVE TIMETABLE

14. The legislative timetable is as follows –

Publication in the Gazette	24 April 2009
First Reading and commencement of Second Reading debate	6 May 2009
Resumption of Second Reading debate, Committee Stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

C 15. The proposal has economic, financial, civil service and sustainability implications as set out at Annex C. It has no productivity and environmental implications. The Bill does not affect the binding effect of the Copyright Ordinance, and is in conformity with the Basic Law, including provisions concerning human rights.

PUBLIC CONSULTATION

16. The proposed numeric limits in paragraph 5 have been drawn up after extensive discussions with the relevant stakeholders over the past two years. They include (a) the Hong Kong Copyright Licensing Association (HKCLA), representing major newspaper and magazine publishers, and (b) the Hong Kong Reprographic Rights Licensing Society (HKRRLS), representing major book and journal publishers. Both groups support our proposal and have urged for early action. We have also consulted the Panel on Commerce and Industry twice in February and December 2008 respectively regarding the proposed amendments to the Copyright Ordinance and the proposed formulations of the numeric limits. The Panel noted our proposals without objection.

PUBLICITY

17. A press release will be issued today (22 April 2009). A spokesman will be made available to answer public enquiries.

ENQUIRIES

18. Any enquiries on this brief may be addressed to Ms Bonnie Yau, Principal Assistant Secretary for Commerce and Economic Development (Commerce and Industry) at telephone number 2918 7480.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
22 April 2009

A BILL

To

Amend the Copyright Ordinance to provide for the circumstances in which section 119B(1) of the Ordinance does not apply.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Copyright (Amendment) Ordinance 2009.

2. Commencement

This Ordinance comes into operation on the day appointed for the commencement of section 33 of the Copyright (Amendment) Ordinance 2007 (15 of 2007).

3. Offence in relation to making for distribution or distributing on a regular or frequent basis infringing copies of copyright works in printed form contained in books, etc.

(1) Section 119B(3) of the Copyright Ordinance (Cap. 528), as added by section 33 of the Copyright (Amendment) Ordinance 2007 (15 of 2007), is repealed and the following substituted –

"(3) Subsection (1) does not apply in the circumstances described in Schedules 1AA and 1AB."

(2) Section 119B(19), (20) and (21) is repealed.

(3) Section 119B is amended by adding –

"(22) The Secretary for Commerce and Economic Development may,

by notice published in the Gazette, amend Schedules 1AA and 1AB."

4. Schedules 1AA and 1AB added

The following are added immediately after Schedule 1 –

"SCHEDULE 1AA

[s. 119B]

CIRCUMSTANCES IN WHICH SECTION 119B(1) OF THIS
ORDINANCE DOES NOT APPLY (EXTENT OF MAKING
OR DISTRIBUTION OF INFRINGING COPIES)

PART 1

INTRODUCTORY

1. Interpretation

(1) In this Schedule –

"A4 size" (A4尺寸) means a size measuring 29.7 cm x 21 cm;

"infringing page" (侵犯版權頁) means a side of a page that embodies, whether in whole or in part, an infringing copy of any copyright work in a printed form that is contained in a magazine, periodical (other than a specified journal) or newspaper;

"marked retail price" (標示零售價) –

- (a) in relation to a copy of a book, means its retail price as printed in or on it by the publisher;
- (b) in relation to a copy of a publication series or multi-volume set of books, means its retail price as printed in or on it by the publisher; or
- (c) in relation to a copy of an issue of a specified journal, means its

retail price as printed in or on it by the publisher;

"marked subscription price" (標示訂閱價), in relation to a specified journal, means the subscription price of the journal as printed in or on a copy of an issue of the journal by the publisher;

"qualifying copy" (限定複製品) –

- (a) in relation to a book, means a set of pages, whether in a printed or electronic form, that embodies, whether in whole or in part, an infringing copy of any copyright work in a printed form that is contained in a copy of the book, and corresponds to more than 25% of the printed pages of that copy of the book; or
- (b) in relation to a specified journal, means –
 - (i) a set of pages, whether in a printed or electronic form, that embodies, whether in whole or in part, an infringing copy of any copyright work in a printed form that is contained in a copy of an issue of the journal, and corresponds to more than 25% of the printed pages of that copy of the issue; or
 - (ii) a set of pages, whether in a printed or electronic form, that embodies an infringing copy made from the whole of an article in a printed copy of an issue of the journal, and corresponds to not more than 25% of the printed pages of that copy of the issue;

"recommended retail price" (建議零售價) –

- (a) in relation to a copy of a book, means its retail price as recommended by the publisher before any discount is given to traders or consumers;
- (b) in relation to a copy of a publication series or multi-volume set of books, means its retail price as recommended by the publisher before any discount is given to traders or consumers;
- or
- (c) in relation to a copy of an article in an issue of a specified journal, means its retail price as recommended by the publisher before any discount is given to traders or consumers;

"recommended subscription price" (建議訂閱價), in relation to a specified journal, means its subscription price as recommended by the publisher before any discount is given to traders or consumers;

"specified journal" (指明期刊) means a periodical that contains scholarly articles relating to a discipline, normally at least one of which in an issue has been peer-reviewed by one or more than one expert or scholar in the discipline.

(2) Expressions used in this Schedule that are defined for the purposes of Part II (copyright) of this Ordinance have the same meaning as in that Part.

PART 2

EXTENT OF MAKING OR DISTRIBUTION OF INFRINGING COPIES

2. Magazines, periodicals (other than specified journals) and newspapers

(1) Section 119B(1) of this Ordinance does not apply to the making for distribution by a person, within any period of 14 days, of infringing copies of one or more than one copyright work in a printed form that is contained in magazines, periodicals (other than specified journals) or newspapers if the total number of infringing pages made by the person within that period does not exceed 500.

(2) Section 119B(1) of this Ordinance does not apply to the distribution by a person, within any period of 14 days, of infringing copies of one or more than one copyright work in a printed form that is contained in magazines, periodicals (other than specified journals) or newspapers if the total number of infringing pages distributed by the person within that period does not exceed 500.

(3) Part 3 of this Schedule sets out provisions relating to the calculation of the total number of infringing pages for the purposes of subsections (1) and (2).

3. Books and specified journals

(1) Section 119B(1) of this Ordinance does not apply to the making for distribution by a person, within any period of 180 days, of infringing copies of one or more than one copyright work in a printed form that is contained in books or specified journals if the total value of qualifying copies made by the person within that period does not exceed \$6,000.

(2) Section 119B(1) of this Ordinance does not apply to the distribution by a person, within any period of 180 days, of infringing copies of one or more than one copyright work in a printed form that is contained in books or specified journals if

the total value of qualifying copies distributed by the person within that period does not exceed \$6,000.

(3) Section 119B(1) of this Ordinance does not apply to the making for distribution by a person of infringing copies of one or more than one copyright work in a printed form that is contained in a book if the set of pages embodying such infringing copies made by the person does not fall within the meaning of paragraph (a) of the definition of "qualifying copy" in section 1(1) of this Schedule.

(4) Section 119B(1) of this Ordinance does not apply to the making for distribution by a person of infringing copies of one or more than one copyright work in a printed form that is contained in a specified journal if the set of pages embodying such infringing copies made by the person does not fall within the meaning of paragraph (b) of the definition of "qualifying copy" in section 1(1) of this Schedule.

(5) Section 119B(1) of this Ordinance does not apply to the distribution by a person of infringing copies of one or more than one copyright work in a printed form that is contained in a book if the set of pages embodying such infringing copies distributed by the person does not fall within the meaning of paragraph (a) of the definition of "qualifying copy" in section 1(1) of this Schedule.

(6) Section 119B(1) of this Ordinance does not apply to the distribution by a person of infringing copies of one or more than one copyright work in a printed form that is contained in a specified journal if the set of pages embodying such infringing copies distributed by the person does not fall within the meaning of paragraph (b) of the definition of "qualifying copy" in section 1(1) of this Schedule.

(7) Part 4 of this Schedule sets out provisions relating to the determination

of the value of qualifying copies for the purposes of subsections (1) and (2).

PART 3

CALCULATION OF TOTAL NUMBER OF INFRINGING PAGES

4. **Calculation of total number of infringing pages**

(1) This section applies to the calculation of the total number of infringing pages for the purposes of section 2(1) and (2) of this Schedule.

(2) In calculating the total number of infringing pages, the following formula is to be used –

$$A = B + C + D$$

where –

- A means the total number of infringing pages;
- B means the number of infringing pages of A4 size, as adjusted in accordance with subsections (3) and (4), if applicable;
- C means the number of infringing pages smaller than A4 size, as adjusted in accordance with subsections (3) and (4), if applicable;
- D means the number of infringing pages larger than A4 size, as adjusted in accordance with subsections (3) and (4), if applicable.

(3) In calculating the total number of infringing pages made or distributed in a printed form –

- (a) if any of the infringing pages are smaller than A4 size, the number of those infringing pages shall be adjusted downward in

proportion to the difference between the size of those infringing pages and an infringing page of A4 size, with the result expressed to 2 decimal places without rounding off;

- (b) if any of the infringing pages are larger than A4 size, the number of those infringing pages shall be adjusted upward in proportion to the difference between the size of those infringing pages and an infringing page of A4 size, with the result expressed to 2 decimal places without rounding off;
- (c) if any of the infringing pages embody, whether in whole or in part, an image (referred to in this paragraph as "the reduced image") of an infringing copy that has been reduced in size from the image (referred to in this paragraph as "the original image") of the work from which the infringing copy was made, the number of those infringing pages shall be adjusted upward in proportion to the difference between the size of the reduced image and that of the original image, with the result expressed to 2 decimal places without rounding off; and
- (d) if any of the infringing pages embody, whether in whole or in part, an image (referred to in this paragraph as "the enlarged image") of an infringing copy that has been enlarged in size from the image (referred to in this paragraph as "the original image") of the work from which the infringing copy was made, the number of those infringing pages shall be adjusted downward in proportion to the difference between the size of

the enlarged image and that of the original image, with the result expressed to 2 decimal places without rounding off.

(4) In calculating the total number of infringing pages made or distributed in electronic form –

- (a) all images of infringing copies embodied in the documents so made or distributed shall be printed on paper of A4 size and each side of such printout is taken to be one infringing page;
- (b) if any of the infringing pages so printed embody, whether in whole or in part, an image (referred to in this paragraph as "the reduced image") of an infringing copy that has been reduced in size from the image (referred to in this paragraph as "the original image") of the work from which the infringing copy was made, the number of those infringing pages shall be adjusted upward in proportion to the difference between the size of the reduced image and that of the original image, with the result expressed to 2 decimal places without rounding off; and
- (c) if any of the infringing pages so printed embody, whether in whole or in part, an image (referred to in this paragraph as "the enlarged image") of an infringing copy that has been enlarged in size from the image (referred to in this paragraph as "the original image") of the work from which the infringing copy was made, the number of those infringing pages shall be adjusted downward in proportion to the difference between the size of the enlarged image and that of the original image, with

the result expressed to 2 decimal places without rounding off.

PART 4

DETERMINATION OF VALUE OF QUALIFYING COPIES

5. **Determination of value of qualifying copies made from books**

(1) This section applies to the determination, for the purposes of section 3(1) and (2) of this Schedule, of the value of qualifying copies within the meaning of paragraph (a) of the definition of "qualifying copy" in section 1(1) of this Schedule.

(2) A qualifying copy is taken to have the same value as a copy of a book (referred to in this section as a "comparable copy") that –

- (a) is not an infringing copy; and
- (b) contains the copyright work that is the subject of the qualifying copy.

(3) The value of a comparable copy is taken to be –

- (a) the marked retail price of the comparable copy;
- (b) if the comparable copy has no marked retail price, the recommended retail price of the comparable copy; or
- (c) if the comparable copy has neither a marked retail price nor a recommended retail price, subject to subsection (4), the market value of the comparable copy in so far as it is readily ascertainable.

(4) If the comparable copy forms one of the volumes in a copy of a publication series or multi-volume set (referred to in this section as a "comparable

set"), and the comparable copy has neither a marked retail price nor a recommended retail price, the value of the comparable copy is taken to be –

- (a) a fraction of the marked retail price of the comparable set in which the denominator is the total number of printed pages of the comparable set and the numerator is the number of printed pages of the comparable copy, with the result expressed to 2 decimal places without rounding off; or
- (b) if the comparable set has no marked retail price, a fraction of the recommended retail price of the comparable set in which the denominator is the total number of printed pages of the comparable set and the numerator is the number of printed pages of the comparable copy, with the result expressed to 2 decimal places without rounding off.

(5) For the purposes of subsection (3)(a), if the comparable copy has 2 or more than 2 marked retail prices denominated in different currencies, the currency by reference to which the value of the comparable copy is to be calculated shall be determined in accordance with the following order –

- (a) firstly, Hong Kong dollar;
- (b) secondly, United States dollar; and
- (c) thirdly, the currency in which the first marked retail price as printed in or on the comparable copy is denominated.

(6) For the purposes of subsection (4)(a), if the comparable set has 2 or more than 2 marked retail prices denominated in different currencies, the currency by reference to which the value of the comparable copy is to be calculated shall be

determined in accordance with the following order –

- (a) firstly, Hong Kong dollar;
- (b) secondly, United States dollar; and
- (c) thirdly, the currency in which the first marked retail price as printed in or on the comparable set is denominated.

6. Determination of value of qualifying copies made from specified journals (general provisions)

(1) This section applies to the determination, for the purposes of section 3(1) and (2) of this Schedule, of the value of qualifying copies within the meaning of paragraph (b) of the definition of "qualifying copy" in section 1(1) of this Schedule.

(2) If –

- (a) a qualifying copy within the meaning of paragraph (b)(i) of the definition of "qualifying copy" in section 1(1) of this Schedule is made from a copy of an issue of a specified journal; and
- (b) that qualifying copy consists of one or more than one qualifying copy within the meaning of paragraph (b)(ii) of the definition of "qualifying copy" in section 1(1) of this Schedule,

in determining the total value of the qualifying copies referred to in paragraphs (a) and (b), only the value of the qualifying copy referred to in paragraph (a) is to be taken into account.

7. Determination of value of qualifying copies made from specified journals (issues)

(1) This section applies to the determination, for the purposes of section

3(1) and (2) of this Schedule, of the value of qualifying copies within the meaning of paragraph (b)(i) of the definition of "qualifying copy" in section 1(1) of this Schedule.

(2) A qualifying copy is taken to have the same value as a copy of an issue of a specified journal (referred to in this section as a "comparable copy") that –

- (a) is not an infringing copy; and
- (b) contains the copyright work that is the subject of the qualifying copy.

(3) The value of a comparable copy is taken to be –

- (a) the marked retail price of the comparable copy;
- (b) if the comparable copy has no marked retail price, the marked subscription price of the specified journal concerned as printed in or on the comparable copy divided by the number of issues covered in the subscription, with the result expressed to 2 decimal places without rounding off; or
- (c) if the comparable copy has no marked retail price and the specified journal concerned has no marked subscription price as printed in or on the comparable copy, the recommended subscription price of the specified journal concerned divided by the number of issues covered in the subscription, with the result expressed to 2 decimal places without rounding off.

(4) For the purposes of subsection (3)(a), if the comparable copy has 2 or more than 2 marked retail prices denominated in different currencies, the currency by reference to which the value of the comparable copy is to be calculated shall be

determined in accordance with the following order –

- (a) firstly, Hong Kong dollar;
- (b) secondly, United States dollar; and
- (c) thirdly, the currency in which the first marked retail price as printed in or on the comparable copy is denominated.

(5) For the purposes of subsection (3)(b), if the specified journal concerned has 2 or more than 2 marked subscription prices, as printed in or on the comparable copy, denominated in different currencies, the currency by reference to which the value of the comparable copy is to be calculated shall be determined in accordance with the following order –

- (a) firstly, Hong Kong dollar;
- (b) secondly, United States dollar; and
- (c) thirdly, the currency in which the first marked subscription price as printed in or on the comparable copy is denominated.

8. Determination of value of qualifying copies made from specified journals (articles)

(1) This section applies to the determination, for the purposes of section 3(1) and (2) of this Schedule, of the value of qualifying copies within the meaning of paragraph (b)(ii) of the definition of "qualifying copy" in section 1(1) of this Schedule.

(2) A qualifying copy is taken to have the same value as a copy of an article in an issue of a specified journal (referred to in this section as a "comparable copy") that –

- (a) is not an infringing copy; and
 - (b) contains the copyright work that is the subject of the qualifying copy.
- (3) The value of a comparable copy is taken to be its recommended retail price.

SCHEDULE 1AB

[s. 119B]

CIRCUMSTANCES IN WHICH SECTION 119B(1) OF THIS ORDINANCE DOES NOT APPLY (MANNER OF DISTRIBUTION OF INFRINGING COPIES)

1. **Interpretation**

Expressions used in this Schedule that are defined for the purposes of Part II (copyright) of this Ordinance have the same meaning as in that Part.

2. **Manner of distribution of infringing copies**

(1) Subject to subsection (2), section 119B(1) of this Ordinance does not apply to the distribution through a wire or wireless network of an infringing copy to which access is restricted by procedures of authentication or identification.

(2) Subsection (1) does not apply to an infringing copy embodied in a document that is distributed to an electronic mail address or facsimile number."

Explanatory Memorandum

The main purpose of this Bill is to amend the Copyright Ordinance (Cap. 528) ("the Ordinance") to provide for the circumstances in which section 119B(1) of the Ordinance does not apply.

2. Clause 1 provides for the short title of the Bill when enacted.
3. Clause 2 provides for the commencement of the Bill when enacted.
4. Clause 3 amends section 119B of the Ordinance, as added by section 33 of the Copyright (Amendment) Ordinance 2007 (15 of 2007), to provide that section 119B(1) of the Ordinance does not apply in the circumstances described in the new Schedules 1AA and 1AB to the Ordinance.
5. Clause 4 adds the new Schedules 1AA and 1AB to the Ordinance to provide for the circumstances in which section 119B(1) of the Ordinance does not apply. In particular –
 - (a) section 1 of the new Schedule 1AA defines certain expressions used in that Schedule (including "infringing page", "qualifying copy" and "specified journal");
 - (b) section 2 of the new Schedule 1AA provides that section 119B(1) of the Ordinance does not apply in circumstances where the making or distribution of infringing copies in relation to magazines, periodicals (other than specified journals) and newspapers does not, in terms of the number of infringing pages made or distributed, exceed the specified extent;
 - (c) section 3 of the new Schedule 1AA provides that section 119B(1) of the Ordinance does not apply in circumstances where the making or distribution of infringing copies in relation to books and specified journals does not, in terms of the value of qualifying copies made or distributed, exceed the specified extent;
 - (d) section 4 of the new Schedule 1AA provides for the calculation of the total number of infringing pages made or distributed in relation to

magazines, periodicals (other than specified journals) and newspapers;

- (e) section 5 of the new Schedule 1AA provides for the determination of the value of qualifying copies made or distributed in relation to books;
- (f) sections 6, 7 and 8 of the new Schedule 1AA provide for the determination of the value of qualifying copies made or distributed in relation to specified journals; and
- (g) the new Schedule 1AB provides that section 119B(1) of the Ordinance does not apply in circumstances where infringing copies are distributed through an intranet.

Extract from Copyright (Amendment) Ordinance 2007

33. Section added

The following is added—

**“119B. Offence in relation to making for distribution
or distributing on a regular or frequent basis
infringing copies of copyright works in
printed form contained in books, etc.**

(1) A person commits an offence if he does any of the following acts on a regular or frequent basis for the purpose of or in the course of any trade or business—

- (a) without the licence of the copyright owner of a copyright work described in subsection (2), makes an infringing copy of the work for distribution, resulting in a financial loss to the copyright owner; or
- (b) without the licence of the copyright owner of a copyright work described in subsection (2), distributes an infringing copy of the work, resulting in a financial loss to the copyright owner.

(2) The copyright work referred to in subsection (1)(a) and (b) is a copyright work in a printed form that is contained in—

- (a) a book;
- (b) a magazine;
- (c) a periodical; or
- (d) a newspaper.

- (3) Subsection (1) does not apply in circumstances where—
 - (a) the making or distribution of the infringing copies of one or more than one copyright work referred to in subsection (1) does not exceed the extent specified in the regulations made under subsection (19); or
 - (b) the infringing copies of one or more than one copyright work referred to in subsection (1) are made or distributed in the manner specified in the regulations made under subsection (21).
- (4) Subsection (1) does not apply to an educational establishment of any of the following descriptions—
 - (a) an educational establishment specified in section 1 of Schedule 1;
 - (b) an educational establishment exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112); or
 - (c) an educational establishment receiving direct recurrent subvention from the Government.
- (5) Subsection (1) does not apply to the distribution through a wire or wireless network of an infringing copy to which access is not restricted by procedures of authentication or identification.
- (6) Subsection (1) does not apply if the infringing copy—
 - (a) forms part of the special collection of a library or archive owned by the Government, or a library or archive designated under subsection (10)(a); and
 - (b) is distributed solely—
 - (i) for on-the-spot reference use in, or during an activity organized by, a library or archive referred to in paragraph (a); or
 - (ii) for loan to other libraries or archives for the purpose of exhibition or research.
- (7) Subsection (1) does not apply to the making or distribution by a library or archive referred to in subsection (6)(a) of a single copy of any item forming the special collection for the purpose of preserving or replacing the item against loss, deterioration or damage, but the copy may only be distributed for the use referred to in subsection (6)(b).
- (8) In subsections (6) and (7), “special collection” (特別收藏品)—
 - (a) in the case of a library or archive owned by the Government, means a collection consisting primarily of works or articles, or copies of works or articles, donated or given by the public that are, in the opinion of the Director of Leisure and Cultural Services, of cultural, historical or heritage importance or value;

- (b) in the case of a library or archive designated under subsection (10)(a), means a collection consisting primarily of works or articles, or copies of works or articles, donated or given by the public that are, in the opinion of the head or controlling body (by whatever name called) of the library or archive, of cultural, historical or heritage importance or value.

(9) For the purposes of the exception under subsections (6) and (7), an archive owned by the Government includes a museum owned by the Government.

(10) The Secretary for Commerce and Economic Development may, having regard to the advice of the Director of Leisure and Cultural Services—

- (a) by notice published in the Gazette designate for the purposes of subsection (6)(a) any library or archive that is exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112); and
- (b) by regulations prescribe the conditions that a library or archive designated under paragraph (a) must comply in order to be eligible for the exemption provided by subsections (6) and (7).

(11) Without prejudice to section 125, where a body corporate or a partnership has done an act referred to in subsection (1), the following person shall, unless there is evidence showing that he did not authorize the act to be done, be presumed also to have done the act—

- (a) in the case of the body corporate—
 - (i) any director of the body corporate who, at the time when the act was done, was responsible for the internal management of the body corporate; or
 - (ii) if there was no such director, any person who, at the time when the act was done, was responsible under the immediate authority of the directors of the body corporate for the internal management of the body corporate;
- (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.

(12) A defendant charged with an offence under subsection (1) by virtue of subsection (11) is taken not to have done the act in question if—

- (a) sufficient evidence is adduced to raise an issue that he did not authorize the act to be done; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.

(13) For the purposes of subsection (12)(a)—

- (a) the defendant shall be taken to have adduced sufficient evidence if the court is satisfied that—

- (i) the defendant has caused the body corporate or partnership concerned to set aside financial resources, and has directed the use of the resources, for the acquisition of appropriate licences, in accordance with the needs of the body corporate or partnership, to make or distribute, or to make and distribute, copies of the copyright work to which the proceedings relate for the use of the body corporate or partnership;
- (ii) the defendant has caused the body corporate or partnership concerned to set aside financial resources, and has directed the use of the resources, for the acquisition of a sufficient number of copies of the copyright work to which the proceedings relate, which are not infringing copies, for the use of the body corporate or partnership;
- (iii) the body corporate or partnership concerned has incurred expenditure for the acquisition of appropriate licences, in accordance with the needs of the body corporate or partnership, to make or distribute, or to make and distribute, copies of the copyright work to which the proceedings relate for the use of the body corporate or partnership; or
- (iv) the body corporate or partnership concerned has incurred expenditure for the acquisition of a sufficient number of copies of the copyright work to which the proceedings relate, which are not infringing copies, for the use of the body corporate or partnership;

- (b) subject to paragraph (a), in determining whether sufficient evidence is adduced, the court may have regard to, including but not limited to, the following—

- (i) whether the defendant has introduced policies or practices against the making and distribution of infringing copies of copyright works by the body corporate or partnership;

- (ii) whether the defendant has taken action to prevent the making or distribution of infringing copies of copyright works by the body corporate or partnership.

(14) It is a defence for the person charged with an offence under subsection (1) to prove that—

- (a) he has taken adequate and reasonable steps to obtain a licence from the copyright owner in question but failed to get a timely response from the copyright owner;
- (b) he has made reasonable efforts but failed to obtain commercially available copies of the copyright work in question and the copyright owner in question has refused to grant him a licence on reasonable commercial terms;
- (c) he did not know and had no reason to believe that the copies made or distributed are infringing copies; or
- (d) he cannot, after making reasonable enquiries, ascertain the identity and contact details of the copyright owner in question.

(15) It is a defence for the person charged with an offence in respect of an act under subsection (1) to prove that—

- (a) he did the act in the course of his employment; and
- (b) he did the act in accordance with the instruction given to him by or on behalf of his employer in the course of his employment.

(16) Subsection (15) does not apply to an employee who, at the time when the infringing copy in question was made or distributed, was in a position to make or influence a decision regarding the making or distribution of the infringing copy.

(17) A person who commits an offence under subsection (1) is liable on conviction on indictment to a fine at level 5 in respect of each infringing copy and to imprisonment for 4 years.

(18) Sections 115 and 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under subsection (1).

(19) For the purposes of subsection (3)(a), the Secretary for Commerce and Economic Development may, in relation to one or more than one copyright work referred to in subsection (1), make regulations to prescribe that subsection (1) does not apply in circumstances where the making or distribution of the infringing copies of the copyright work or works does not exceed the extent specified in the regulations.

(20) The Secretary for Commerce and Economic Development may, in the regulations made under subsection (19), specify the extent referred to in that subsection by reference to—

- (a) the number of infringing copies made or distributed;
- (b) the value of those infringing copies; and
- (c) any other factors that he may consider relevant,

and provide for a method or methods for determining the number of those infringing copies, and a method or methods for determining the value of those infringing copies, having regard to the retail value of the related books, magazines, periodicals or newspaper, and any other factors that he may consider relevant.

(21) For the purposes of subsection (3)(b), the Secretary for Commerce and Economic Development may, in relation to one or more than one copyright work referred to in subsection (1), make regulations to prescribe that subsection (1) does not apply in circumstances where the infringing copies of the copyright work or works are made or distributed in the manner specified in the regulations, after having regard to—

- (a) the availability of any licensing scheme that covers the making or distribution of copies of the copyright work or works in the specified manner; and
- (b) any other factors that he may consider relevant.”.

Implications of the proposals

Economic Implications

Copyright protection is a cornerstone to maintaining Hong Kong's long term competitiveness. The reasonably balanced proposal should be able to facilitate the normal operation of the business end-users, while preserving the integrity of our copyright regime and safeguarding the financial returns of the concerned copyright owners without hampering the ease of doing business in general.

Financial and Civil Service Implications

2. The proposal paves the way for the commencement of the already enacted copying and distribution offence under the Copyright Ordinance (Cap. 528). While this legislative exercise for the prescription of the numeric limits under the Ordinance will not have additional financial and civil service implications, enforcement of the offence will increase the workload of the Customs and Excise Department. The Department will undertake the additional work with its existing resources.

Sustainability Implications

3. The commencement of the business end-user copying and distribution offence will contribute to the vibrancy of Hong Kong's economy by facilitating the development of the publishing and related creative industries. The reasonably balanced proposal helps ensure that business operations would not be unduly affected.