

香港特別行政區政府
商務及經濟發展局
工商及旅遊科



COMMERCE, INDUSTRY AND TOURISM BRANCH
**COMMERCE AND ECONOMIC
DEVELOPMENT BUREAU**

GOVERNMENT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION

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13 January 2012

Ms Kitty Cheng
Assistant Legal Adviser
Legislative Council Secretariat
Legal Service Division
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Ms Cheng,

Copyright (Amendment) Bill 2011

We refer to your letter dated 12 December 2011 in which you raised questions on various issues within Clauses 1 to 40 of the *Copyright (Amendment) Bill 2011* ("Bill"). Please find below the first batch of our substantive replies to your questions. Our substantive replies to your remaining questions shall follow soon.

New section 22(2A)

Point 2 of your letter

In determining whether a person has authorized another to do an act restricted by copyright, the Bill proposes that one of the factors which the Court may take into account is whether that person has taken any reasonable steps to limit or stop the infringement.

Reasonableness in this context has to be judged objectively in the light of the overall circumstance in a particular case. This flexible and open-ended test involves the application of the "reasonable man" test in which the conduct of the person in question is compared to that of a reasonable or prudent person under similar circumstances.

Without prejudice to the generality of determining reasonableness by reference to the circumstances of individual cases, the following examples illustrate what may qualify as reasonable steps to limit or stop the infringement: -

- (i) upon acquiring actual knowledge or awareness of facts or circumstances that an infringement has occurred or has been taking place on a service provider's online platform, a service provider takes steps to either have the infringing materials removed or disable access to the infringing materials as soon as practicable; and
- (ii) when put on notice that the nature of certain contents of an electronic public bulletin board uploaded by its users for viewing or sharing amongst others is very likely protected by copyright, and upon learning that an effective content filtering system could be easily implemented to prevent the commission of copyright piracy on the board, the operator of the board implements such a measure.

Point 3 of your letter

The new section 22(2A) is not intended to alter the common law meaning of "authorization".

The three factors set out in the new section 22(2A) are non-exhaustive in nature. The court is generally expected to have regard to these factors, if applicable, as well as any other relevant factor in determining whether a person has "authorized" another person to do an act restricted by the copyright in a work (hereinafter referred to as the "question of authorization") (see our further reply to point 4 of your letter).

Point 4 of your letter

Section 22(2A) is not intended to limit the court's jurisdiction to take into account one or more unspecified factor(s) or matter(s) that may turn out to be particularly pertinent to a particular case. Given that the three factors specified in the new section 22(2A) are non-exhaustive in nature, they may be regarded as the appropriate starting points rather than conclusive factors for the court to determine the question of authorization.

In addition, the provisions make it clear that the court may take into account factors (a) and/or (b) should such factor(s) exist in the circumstances of the case. Furthermore, both factors (a) and (b), if relevant to the case, have to be assessed by the court in terms of degree and nature respectively. In this regard, after the court has made findings about the actual degree of the defendant's power to control or prevent the infringement and/or the exact nature of the relationship between the parties, the court needs to further consider if such findings coupled with findings of other material facts are sufficient to support a case of authorization.

Section 22(2A) preserves the court's existing power to admit all relevant evidence which may fall within or outside the scope of the three specified factors, and then attach different weight to the individual evidence as the court thinks fit in determining the question of authorization.

New section 28A

Point 5 of your letter

The new section 28A(4), which contains reference to the word "facilities", by and large preserves the existing to-be-repealed section 26(4) in that the existing restricted act of making available copies of a copyright work to the public under the to-be-repealed section 26 is to be subsumed under "communicating a copyright work to the public", being a new restricted act as defined in the new section 28A.

A material difference between the to-be-repealed section 26(4) and the new section 28A(4) is that the latter no longer adopts the word "physical" to qualify "facilities". That said, neither the existing provisions in the Copyright Ordinance nor the Bill itself seek to define the word "facilities". In other words, the term "facilities" has to be construed by reference to its ordinary and general meanings.

The word "facilities" generally refers to "*buildings, services, equipment, etc that are provided for a particular purpose*" - Oxford Advanced Learner's English Dictionary, 7th Edition.

By virtue of the above, the term “facilities” in the context of section 28A(4) refers to both physical facilities in the form of hardware¹ and intangible facilities in the form of software² for enabling or facilitating the communication of a copyright work to the public.

Point 6 of your letter

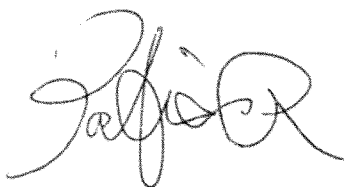
The Chinese version of the word “access” referred to in the new section 28A(3) and (6) is “接達”.

The same Chinese characters have been used for the purpose of defining “access facilities” under regulation 2(1) of the *Building (Planning) Regulations*, Cap 123F which are reproduced below in bilingual terms for reference: -

“access facilities” (接達設施) means facilities for access of telecommunications and broadcasting services, including a room, duct or riser used for the installation of cables, wires and other ancillary equipment for telecommunications and broadcasting purposes

“接達設施”(access facilities)指為接達電訊及廣播服務或為提供該等服務而設的設施，包括用作裝置電纜、電線及其他用於電訊及廣播用途的附屬設備的房間、管道或立管

Yours sincerely,



(Patricia So)

for Secretary for Commerce and Economic Development

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¹ Computers including desktops, laptops, tablets and servers; television sets; antennae; decoders; satellites; and cables, etc.

² Computer programs/software including those for transmission of, hosting of or access to materials on a network; networks or systems that are accessible or available for use by members of the public; and provision of services for or related to the aforesaid items.