
Members	Hong Kong Publishing Federation Anglo-Chinese Textbook Publishers Organisation Hong Kong Educational Publishers Association	Association of American Publishers, USA Publishers Association, UK International Association of Scientific, Technical and Medical Publishers, Netherlands
----------------	---	--

香 港 及 國 際 出 版 聯 盟
Hong Kong and International Publishers' Alliance

Secretariat Hong Kong Reprographic Rights Licensing Society
802 Stanhope House, 738 King's Road, Hong Kong
Tel: (852) 2516-6268 Fax: (852) 3105-1468
E-mail: info@hkrrls.org Website: www.hkrrls.org

By electronic mail (slchan@legco.gov.hk)

24 April 2007

Ms Sharon Chan
Clerk
Bills Committee
Legislative Council
Hong Kong

Dear Ms Chan

Copyright (Amendment) Bill 2006

HKIPA appreciates this opportunity to comment on the most recent proposed amendments to the new Section 119B, which would create a new offence for business end users engaged in the “regular or frequent” unauthorized copying and/or distribution of printed materials protected by copyright. As owners of copyright in these materials, HKIPA members have a vital stake in the drafting of this provision. While we also are concerned about some other aspects of the Copyright (Amendment) Bill 2006, in this submission we confine our comments to the following aspects of new Section 119B: (1) the “safe harbour”; (2) drafting of defences; (3) infringement of multiple works.

The scope of the “safe harbour” that will be recognized pursuant to proposed Section 119B(14) is a critical matter. It will determine, to a great extent, whether or not this provision can achieve its goal: deterring and punishing significant instances of infringement of copyright of printed materials on a commercial scale by businesses. HKIPA is disappointed that the contours of this safe harbour, which will spell out which of these instances of commercial infringement will be immune from criminal

Members

Hong Kong Publishing Federation
Anglo-Chinese Textbook Publishers Organisation
Hong Kong Educational Publishers Association

Association of American Publishers, USA
Publishers Association, UK
International Association of Scientific, Technical and
Medical Publishers, Netherlands

liability, will not be determined by the Legislative Council when it enacts this legislation, but rather by the Secretary for Commerce, Industry and Technology in a subsequent regulation.

In its latest papers, the administration has injected a new level of uncertainty into the “safe harbour” process. It now appears that the safe harbour will address matters ranging far beyond the “numeric limits” that define the level below which copying and distribution will be immune from criminal prosecution. The administration has stated its intention to use the safe harbour to “exclude the application of the new offence to the distribution of works via certain platforms if the application of the offence would affect users’ reasonable use of copyright works (e.g., where there are no available means for users to acquire the appropriate licences to cover the distribution of the works concerned).” Document CB(1)1288/06-07(01), item 8. HKIPA is concerned about this significant expansion of the scope of the safe harbour, for several reasons.

First, it appears that the administration intends to make substantive changes to the legislation in the process of adopting the subsequent regulation. For example, the Bill before the LegCo provides an affirmative defense when the defendant proves that it was unable to obtain a license for the copying or distribution involved. Proposed Section 119B(9)(a) and (b). This defense would be rendered irrelevant (at least as to distribution) if the safe harbour were defined to include all instances in which a license to distribute is unavailable.

Furthermore, in the passage quoted above, the administration provides this scenario as only one example of the broader category of situations in which “the application of the offence would affect users’ reasonable use of copyright works.” This makes it extremely difficult to determine in advance what the boundaries of the safe harbour will be, and the administration’s discretion in drawing those boundaries appears to be almost unlimited. Even after section 119B is enacted, copyright owners will have no certainty about what it covers.

HKIPA questions whether the unauthorized copying and distribution of its members’ copyright works, by businesses, for commercial purposes, in quantities exceeding the numerical limits established in a safe harbour regulation, would ever “affect users’ reasonable use of copyright works,” regardless of the “platforms” used or even whether or not licenses are available. Such activities certainly ought not to be categorically excluded from the scope of the new offence. Yet that is the position

Members

Hong Kong Publishing Federation
Anglo-Chinese Textbook Publishers Organisation
Hong Kong Educational Publishers Association

Association of American Publishers, USA
Publishers Association, UK
International Association of Scientific, Technical and
Medical Publishers, Netherlands

the administration appears to take in its description of its authority to define the safe harbour.

Accordingly, HKIPA submits that the scope of the administration's authority for the safe harbour regulations should be clarified and defined much more narrowly than is currently proposed in Section 119B(15). In this regard we agree with the concern expressed by Ms. Margaret Ng, supported by Dr. Yeung Sum. In order to achieve the needed clarity and to confine the safe harbour regulation to its proper scope of setting numeric limits, we propose that the introductory phrase of that provision be deleted, along with subparagraph (c), and that other adjustments be made, so that the provision would read as follows:

(15) The Secretary for Commerce, Industry and Technology may, in the regulations made under subsection (14), specify the circumstances in which subsection (1) does not apply by reference to –

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

(b) the value of those infringing copies,

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, etc.

With regard to defenses, the administration acknowledges that any defense based on the inability of the defendant to obtain a license after making reasonable efforts to do so (see proposed Section 119B(9)(a) or (b)) must rely on proof of actions taken prior to infringement, not afterwards. See page 7 of Document CB(1)1142/06-07(01). However, the administration does not propose any amendment to the statutory text to reflect this. It does propose to add a new defense (Section 119B(9)(d)) when the copyright owner cannot be identified and located. This defense too should apply only when the reasonable enquiries regarding the copyright owner occur before, not after, infringement. While we appreciate the assurances given in the document cited above, we do not believe it is prudent, on an important matter of statutory construction, to rely upon such assurances contained in a document that does not form part of the legislation and that might never come to the attention of a court charged with applying the law. Accordingly, HKIPA renews its request that the chapeau to proposed section 119B(9) be changed to read, "It is a

Members

Hong Kong Publishing Federation
Anglo-Chinese Textbook Publishers Organisation
Hong Kong Educational Publishers Association

Association of American Publishers, USA
Publishers Association, UK
International Association of Scientific, Technical and
Medical Publishers, Netherlands

defence for the person charged with an offence under subsection (1) to prove that, prior to commencement of the activities giving rise to the offence with respect to a particular copyright work,” and that the following language be added at the end of this subsection: “but only to the extent that, considered without regard to that particular copyright work, his acts described in subsection (1)(a) or (1)(b) with respect to all other copyright works in question are neither regular nor frequent.”

Finally, with respect to the proposed Committee Stage Amendments to Section 119B(1), HKIPA submits that the revised language still may not adequately address the problem of a defendant whose unauthorized copying and/or distribution of a number of copyright works qualifies as “regular or frequent,” but who does not meet that criterion with regard to any particular copyright work. There are at least two ways that the language could be modified to make it clearer that such a defendant may be held liable under this provision. First, the references in both limbs (a) and (b) to “an infringing copy of the work” could be changed to read “an infringing copy of any such work.” Alternatively, a new sentence could be added to the section specifying that, “For purposes of this section, an act specified in subsections 1(a) or (b) that is done to any copyright work to which this submission applies may be considered in determining whether the act was done on a regular or frequent basis.”

Thank you for considering the views of HKIPA on these issues of critical importance to the association and its members.

Respectfully submitted

Simon Li
Convenor (Hong Kong)

(no signature via electronic transmission)