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May 9, 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 certain aspects of the "Outstanding Committee Stage Amendments" to the Copyright (Amendment) Bill, in the form in which they are annexed to Document CB(1)1512/06-07(01), as released on May 3, 2007. Like our previous submission on April 24, this one is confined to 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.

a. Safe harbour

HKIPA commends the Administration for clarifying that there will be two distinct classes of exclusions from the already limited reach of the criminal liability provisions in new Section 119B: a class of exclusions based on quantitative limitations (see proposed subsections (3)(a), (14) and (15)), and a separate class of exclusions based on the "manner" of making or distributing infringing copies (see proposed subsections (3)(b) and (16). HKIPA continues to object that critical

aspects of this new provision – aspects that will determine whether Section 119B will be of any value whatever in discouraging the unauthorized commercial exploitation of the works of HKIPA members – will not be determined by the Legislative Council when it enacts this legislation, but rather by the Secretary for Commerce, Industry and Technology at some later time.

HKIPA is concerned that the potential breadth and sweep of the second class of exclusions continues to expand. When the administration first spelled out that it planned to recognize such exclusions as part of the regulatory "safe harbour" process, it asserted only that it wished 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." Document CB(1)1288/06-07(01), item 8. HKIPA expressed its concern about the breadth of this assertion in its submission of 24 April. But in the proposed statutory language unveiled last week, the Administration seeks an even broader scope, or rather an unbounded scope, under which it could exclude from the operation of the provision copies made or distributed in any manner whatsoever, without regard to concepts of "reasonable use." In other words, the administration is proposing to move the text of section 119B, with regard to the safe harbour, in the exact opposite of the direction advocated by more than one member of the Bills Committee (as noted in our 24 April submission).

We urge once again that proposed subsections 3(b) and 16 be stricken. Alternatively, at a minimum, this second class of exclusions should be strictly limited to the sole set of specific circumstances for which the Administration seeks this expanded "safe harbour" authority: i.e., the circumstances under which criminal remedies would be withheld from the making and/or distributing of unauthorized copies by uploading them to private networks.

HKIPA is heartened that the Administration does "not intend to exclude [from the reach of section 119B] all instances in which a licence to distribute is unavailable." HKIPA wishes to point out once again that any defendant who can prove that he unsuccessfully sought a license before he began to infringe would benefit from a complete defense to criminal prosecution under subsection (9)(a) or (9)(b). Accordingly, any exclusion of a particular "manner" of infringing copying or distribution based on the unavailability of a licence for that "manner" is a redundancy that will breed confusion and invite abuse. A defendant may not bother to seek a licence before infringing if he knows that, if he is caught, he will not be prosecuted unless the prosecution can prove, post hoc, that a licence was available, at the time of

infringement, for the particular "manner" of infringing activity which the infringer chose to employ.

Finally on this point, HKIPA reiterates that when a party chooses to build its business upon the unauthorized "regular and frequent" exploitation of the copyright works of others, his exposure to criminal liability ought not to turn solely upon the terms or even necessarily the availability of a licence for his activity. To the extent that this loophole allows infringers on a commercial scale to evade prosecution, Hong Kong will stand in violation of its obligations under the WTO TRIPS Agreement.

b. New exclusion for libraries, museums and archives

Proposed new subsections 5A-5E would create another exclusion from the provisions of section 119B, allowing libraries, archives, and some museums in Hong Kong to engage in regular and frequent infringing copying and distribution of copyright works under certain circumstances. HKIPA does not have an objection in principle to recognizing a well-defined exclusion for "works of historical, cultural or heritage value." However, the draft put forward last week raises a number of questions which should be resolved before the provisions are enacted. These include:

(i) *Permitted uses.* As drafted, subsection 5A allows an infringing copy to be distributed without authorization for any one of four purposes: (1) "on the spot" reference use in a library, archive or museum; (2) use "during an activity organized by" such an institution; (3) loan to other libraries or archives for exhibition; (4) loan to such institutions for research. The first of these four uses seems confined to use on the premises of a given institution, but the other three probably are not. Is it the administration's intention to allow libraries, archives, or museums to engage in networked or online distribution (including over the Internet) of these materials, without regard to section 119B? If so, we urge that the administration to re-think this conclusion, since certainly such activity brings with it a much greater risk of significant damage to right holders. If not, we urge that the language of subsection 5A be tightened up to exclude this interpretation.

(ii) *Numerical scope*. Copying or distribution covered by subsection 5A would not attract criminal liability even if its volume exceeded the numerical limitations established by regulation pursuant to subsections 3(a), 14 and 15. Is there intended to be any numerical limitation on the number of copies a library, museum or archive could make and/or distribute? For example, if 50,000 Hong Kong people

visited a museum while a particular exhibit was underway, could each visitor be given an unauthorized copy of a work in the museum's "special collections"?

(iii) "*Special collection.*" While this term is defined in proposed subsection 5C, it appears that if a work is included in a collection that consists "primarily" of works of "cultural, historical or heritage importance or value," the work itself that is copied or distributed need not meet those criteria. For instance, a best-selling popular history book, or historical novel set in China, might legitimately be included in a Chinese history collection consisting primarily of works meeting the "cultural, historical or heritage importance or value" test. Would making or distributing copies of the best-seller fall within the exclusion? If this is not intended, the administration should consider confining the exclusion to works which actually meet the cultural/historical/heritage criterion, and not extending it to any work within a "special collection." This would also apply to the exclusion in proposed subsection 5E for preservation or replacement of copies within a "special collection."

c. Reference to section 118

We note that, without explanation, the introductory phrase "Without prejudice to section 118(1)" has been deleted from section 119B(1). This is disturbing because CITB has specifically pointed to provisions of section 118(1) to justify provisions of the proposed new section that would otherwise be extremely problematic. For example, when HKIPA objected to section 119B(5), which states that unauthorized distribution of works over the Internet, on whatever scale, does not violate section 119B, CITB assured us that section 118(1)(f) of current law (renumbered as 118(1)(g)) would continue to apply, and that "distribution of infringing copies of copyright works over the Internet platform to which any person can access is likely to be prejudicial to the relevant copyright owners."[See page 7 of Doc. 1497.] To the extent that this is a satisfactory response, its persuasiveness is undermined by this unexplained change to the text of the statute.

d. Drafting issues regarding multiple works

CITB has rejected HKIPA's proposed amendments to section 119B(1) as "unnecessary" because, in its view, "it is clear from the current drafting of section 119B(1) that the offending act need not be done in relation to the same copyright work." HKIPA would commend to CITB its own drafting in the proposed substitute subsection 3, which refers to "one or more than one copyright work," and suggests that the import of subsections 1(a) and 1(b) would be even clearer if they read:

(a) without the licence of the copyright owner of one or more than one copyright work described in subsection (2), makes an infringing copy of the work or works for distribution…..or

(b) without the licence of the copyright owner of one or more than one copyright work described in subsection (2), distributes an infringing copy of the work or works…..

Thank you for considering the views of HKIPA.

Respectfully submitted

Simon Li
Convenor (Hong Kong)

(no signature via electronic transmission)