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11th July, 2006

Clerk to the Bills Committee
Bills Committee on the proposed Copyright (Amendment) Bill 2006
Legislative Council Building
8 Jackson Road
Central,
Hong Kong

via email: slchan@legco.gov.hk

Dear Sir,

Re: Copyright Exemption

Further to our submission dated 4th July 2006, we wish to make further points for the sake of clarity as regards the issues raised from the Administration's Response to Copyright Exemptions on 6th July 2006. We will not venture to undertake that task if we do not honestly believe that these are the issues which the Administration ought to have taken into consideration as the amendments will have what we call the conceptual crisis in our copyright law. We must admire the creativity of the Administration on this subject matter.

A. Minor Exception:

1. We refer to the comments made by the Administration at page 25 of the CITB's submission to the Bills Committee in respect of the Copyright Exemption under your reference CB (1) 1633/05-06 (01) (Revised version issued on 3.7.2006) under the Administration's response column in respect of Section 43 in which it suggests that,

   "*The Dispute Settlement Body of the World Trade Agreement has confirmed in a decision (WT/DS/160R) that, inter alia**, Article 11 of the Berne Convention** (public performance rights) comprises **the possibility** of providing minor exceptions to the exclusive rights in question. The minor exceptions, as in the case of the other exceptions, are subject to the three–step test in Article 13 of the TRIPS Agreement. We are **satisfied** that the proposed amendments to Section 43 would **comply with the three-step test**.*"

2. Article 11 of the Berne Convention for the Protection of Literary and Artistic Works (" Berne") related to the public performance of dramatic, dramatico-musical works and not other works as included in Section 43 of the Copyright Ordinance. There is no exception expressly provided in this Article.

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3. The other Article 11 *bis* of Berne which was under the consideration of the WTO body in that case decided on ***15th June 2000*** related to the broadcasting rights which has no relevancy for the purpose of Section 43.

4. It has been a subject of the major concern that whether TRIPS is relevant to the interpretation of the minor exception doctrine as Article 13 of TRIPS only came into existence after the agreement between members under Berne. It is sufficient to say that if it were justified for a broader exception, it would need to be the subject of a specific provision along the lines of those contained in Articles 2 *bis* (2), 9 (2), 10 and 10 *bis*. They opine that it must be of a *de minis* kind. In short, the Berne camp does not agree with the TRIPS camp about the opinion of the World Trade Organization Settlement Body on the interpretation of TRIPS in respect of the minor exception under Berne.

5. As the scope of the minor exception is not always clear and it is not expressly relied on Article 9 (2) of Berne (which related to the general exception of the "reproduction right"). The Berne people are of the view that any exception under the national law of a Berne country that is also a member of the TRIPS will need to be consistent with the exceptions as provided for in Berne if it is not, it will be in breach of the non-derogation provision of Article 2 (2) of the TRIPS and also Article 20 of Berne[1].

6. We suggest that we should consider the better view as expressed by the learned authors in the Copinger and Skone James On Copyright[2] in Paragraphs 9-96 at page 520, 5th edition, ***2005***, Sweet & Maxwell, as follows:

> "This exclusion of parents was felt to be necessary in order ***to comply with the Berne convention***[3]**, which does not allow for the granting of exception in relation to a public performance. Thus a school play with all parents or the parents of participants are invited will constitute a public performance and may infringe copyright accordingly".**

7. This is the position adopted by Section 34 of the U.K. Copyright Designs and Patents Act; Section 28 of the Australian Copyright Act 1968[4] (the

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[1] Paul Goldstein, International Copyright: Principle, Law and Practice pp 295 (2001).

[2] This book is considered to be one of the leading authorities of the copyright law and has been frequently referred to in copyright infringement case in our Hong Kong Court. **The Intellectual Property Department** in its opinion on Fair Dealing submitted to Legco in July 2006 also **based on the opinion as expressed in this book**. Please **compare Paragraph 6 of the IPD's Submission and Paras. 9-54 of that book; also Paragraph 7 of the IPD's Submission and Paras. 9-55 and Paras. 9-22 of that book.**

[3] No reference is made to TRIPS and the opinion of the Dispute Settlement body of the WTO.

[4] Section 28 (3) provides that "a person shall **not be taken to be directly connected** with a place where instruction is given by reason only that he or she is a **parent or guardian of a student** who receives instruction at that place.

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Copyright protection regime is more in favor of the users); Section 29.5 of the Canadian Copyright Act 1985[5]; and Section 47 of the New Zealand Copyright Act 1994[6].

B. The Submission of the Intellectual Property Department on Fair Dealing

8. As we have pointed out in our earlier submissions, the proposed fair dealing provisions and all other permitted acts are subject to the primary consideration as set out in Section 37 (3) of the Copyright Ordinance[7] which comprises the second and third step of the three-step test under Article 13 of the TRIPS Agreement. The same view has been found in the Intellectual Property Department in its submission to Legco on 4th July 2006 under the Legco's reference "LC Paper No. CB(1)1913/05-06(01) ("IPD' s Submission").

9. IPD's Submission also suggested that the general principles developed by the U.K. case law would be of relevance in interpretation of the fair dealing provisions under the Copyright Ordinance[8]. **The issue is that unlike U.S. and U.K., Hong Kong court is bound to interpret the 4 fair dealing factors in the context of Section 37 (2).**

10. As we pointed out before, the Supreme Court of the United States stated that there is no bright line test for fair use, it must be adjudicated on a case by case basis[9]. Therefore**, no U.S. Attorney will be able to predict with any certainty that any proposed use will actually qualify as a fair use**.

11. Furthermore, the U.S. fair use doctrine was originated from a body of case law based on its constitutional right[10] and this fair use doctrine was eventually codified into Section 107 of the U.S. Copyright Act 1976.

12. Therefore, with respect, we are **unable to share with the views as expressed by the IPD' s Submission[11] that the U.S. court in interpreting the fair use provision under the U.S. Copyright Act will**

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[5] Section 29.5 provides that ".. before an audience **consisting primarily of students of** the educational institution, instructors acting under the authority of the educational institution or **any person who is directly responsible for setting a curriculum for the educational institution**". See also Section **29.6 in relation o the licensing scheme for education.**

[6] Section 47 (3) provides that "for the purposes of this section, **a person shall not be treated as a person directly connected with the activities** of an educational establishment **by reason only that the person is a parent or guardian of a student** at that educational establishment".

[7] Paragraph 4 at page 2 of the IPD's Submission to Legco.

[8] Paragraph 8 at page 4 of the IPD's Submission to Legco refers.

[9] Campbell V Acuff-Rose Music Inc. 510 U.S. 569,577 (1994).

[10] Section 8 of Article 1 of the U.S. Constitution refers.

[11] Paragraph 11 at page 6 of the IPD's Submission refers.

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be of persuasive value in Hong Kong. Perhaps with the exception of those cases related to the human rights in respect of freedom of expression[12]. Australia has opted for the guidance from the U.K. cases for the interpretation of the 4 fair dealing factors.

13. Pausing here, we wish to point out that on 1st January 1995, United States became a member of WTO. U.S. was obliged to reconsider and to re-examine its domestic legislations if the copyright law had already complied with the TRIPS standards and to make any necessary amendment or change in order to bring the domestic legislation into conformity with its obligations under the TRIPS agreement.

In October 1998, the Fairness in Music Licensing Act was enacted which, among other things, amended Section 110(5) of the Copyright Act. It was signed by the President on 25th October 1998 and entered into force on 26th January 1999. The **United States *was satisfied that the proposed amendments would comply with the three-step test.*** However contrary to its belief, *the Dispute Settlement Body of the World Trade Agreement* by its opinion, as expressed on 15th June 2000, has practically and effectively narrowed the application of the fair use exemption or copyright exemption in U.S.

14. As regards the example referred to in **Paragraph 14 (a) of the IPD's Submission** to the Legco, we agree with them that it is not a fair dealing under the proposed Section 41 A in respect of general exemption for education that the teacher plays a DVD of a current movie to entertain students in the class as they are unable to go outside due to bad weather. **This is exactly the example given by the Information Sheet G 32 of March 2001 on "Videos and Films Screening in Class" of the Australian Copyright Counsel in relation to the interpretation of Section 28[13] of the Copyright Act 1968.**

C. Section 43 (3)

15. As we all agree that the example given in Paragraph 14 above is not a fair dealing, we fail to understand as to why the playing or showing of a sound recording, films or broadcast before the near relatives or guardian of a student at an educational establishment for the purposes of instruction is

[12] **Cases referred in Note 7 at page 4 of IPD's Submission are also referred to in Notes 40 and 41 at page 498 of the Copinger and James Skone On Copyright 15th Ed**. Sweet & Maxell 2005- all related to the freedom of expression cases. Some Hong Kong lawyers also thought that Hong Kong court would follow the U.S.'s case law that "burning a national flag" is a form of exercise of our right of freedom of expression guaranteed under by our Basic Law, but Hong Kong court does not follow such an argument.

[13] See note 4 above.

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not an infringement of copyright. We are unable to follow the justification for the proposed amendment to Section 43 (3).

D. Section 81 A Vehicular Driver Exemption

16. We agree with the view as expressed by the International Federation of Phonographic Industry (Hong Kong Group) dated 29th June 2006 that the playing of radio broadcast by a driver of a vehicle is not playing of a radio broadcast in public as long as it is not being heard by the passengers of the public transport. **As it is not a copyright infringement act and is not restricted by the Copyright Ordinance, we fail to understand why the Administration sees it fit to introduce a non-infringement act of copyright in the form of copyright exemption.** There is no equivalent provision in other jurisdictions and that the reason is plainly obvious.

Perhaps, **the Administration should create more exemptions** in our copyright law based on the non-infringement acts of copyright, **for example watching TV at home with a big 56 inch plasma TV, playing musical sound recordings in a private birthday party at a private home, sale of second hand books (not infringing copies)** etc. As the purported proposed exception is not an act of the copyright infringement. **We do not propose that we should waste our resources in arguing the international obligations.** There is no winner in this argument. Perhaps the Administration should address and deal the other issues which, we consider, have touched and concerned the international norms and obligations.

E. The Concern Group of the Education Sector on Copyright Law

17. We refer to the Copyright Exemption to Submission to The Bills Committee by the Concern Group of the Education Sector on Copyright Law in April 2006 under your reference CB (1) 1385/05-06 (11), the group comprises the leading educators in Hong Kong.

18. However, we note that the Administration has conveniently omitted to include the issues raised by the said Concern Group in its response to the Legco in respect of the copyright exemption. Perhaps if we may, we would like to make an attempt to clarify the issues with them as follows:

a. Paragraph 4: " Under the existing Copyright Ordinance, a teacher or a student can reproduce copyright works if the reproduction falls within the ambit of **"fair dealing" or "permitted act** for educational purposes". Such provision **does not allow the education sector to carry out reasonable endeavours in the courses of its business**."

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Response: Anything which is done **outside the ambit of "fair dealing" or "permitted act" amounts to copyright infringement** and the school will require the licence from the copyright owners.

The present amendment will not change this position.

What they are seeking now to do is to ask for the **copying right** in respect of all kind of works without making any reference to a licensing scheme. They perceive that they will save expenses by expanding the scope of the fair dealing or permitted act for education which will be subject to Section 37 (3) in any event. If a copyright owner sues the school for copyright infringement, it will be entitled to use the non-exclusive 4 fair dealing factors for its defence.

The issue is that they may save a few dollars for paying the licence fee but they might face with a huge legal fee and payment of potential damages claim.

The best solution is to set out a safe-harbour provision for the permitted use in accordance with the international norms and obligations i.e. reasonable portion of free use plus licensing scheme or licensing scheme for permitted use as in the case of the making of the recording of a broadcast or a cable programme and any work included in it.

b. Paragraph 4 (d): "the permitted acts of the recording broadcasts and cable programmes and reprographic copying ….. under **Sections 44 and 45 will be useless** if there are relevant licensing schemes granting authorization for the recording or copying concerned".

Response: it is very **useful to prevent any abuse of the use of the copyrighted materials in the manner** as suggested in this submission by schools.

c. Paragraph 4 (d): "….forcing schools to buy licences from the licensing body, **whether or not the licensing scheme is reasonably priced"**.

Response: schools are **benefited from the licensing scheme** as they will be **able to take the licensing body to the Copyright Tribunal** for any terms which they do not consider reasonable.

d. Paragraph 4 (f): "Law and Guidelines on copyright in education **never be crystal clear".**

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Response: we all agree, even different copyright lawyers have different views as evidenced by the respective submissions made by the Copyright Groups and the Administration. **The licensing scheme will protect the schools from being sued for copyright infringement** with consequence on huge legal costs and possible damages payment.

The school may view the licensing scheme as a form of insurance plan for copyright use beyond **the scope of the permitted use**, which **nobody really understands what it means unless and until we have built up a body of case law of our own**.

e. Paragraph 11: "It is believed that if no such fair dealing provisions *(they refer to the 4 fair dealing factors)* exist, students **and parents** as well, will not, for example, buy a whole book merely to **use only a few pages** of it in the course of learning".

Response: The major concern is not a few pages of a book being copied by a student presumably for the purpose of receiving instruction.

The issue is that a teacher may find the textbook selected by his school is not appropriate to his class based on his experience and his expertise (as he may want to teach more about what he knows best). He will recommend students to make copies of "few pages" from a number of different textbooks on the same subject, both from abroad and from Hong Kong, and the accumulative effect of his action will be to an extent amount to a breach of Section 37 (3). The teacher and the school may be sued by the publishers for copyright infringement.

With an appropriate licence from the copyright owners, both the students and the teachers do not need to worry anything when they want to make a copy of a reasonable portion of a work for educational purposes.

f. Paragraph 12: "we expect that under fair dealing provisions, making for distribution and distributing multiple copies of copyrighted materials in class should be permitted if the amount to be distributed is considered " fair"[14]".

Response:

[14] Please note that they expressed, under Paragraph 4 (f) of their submission that: Law and Guidelines on copyright in education never be crystal clear.

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It must be remembered that it is the copyright works made for or considered suitable for educational purposes that will often be copied in an educational establishment. A wide exemption would undermine the market for such copyright works so that nobody will likely invest in the production of such works[15].

Therefore the issue is that what is the test for "fair"?

Fair to the content creators/providers/investors or to the schools. No doubt, it will be resolved by the court in the context of Section 37 (3) at the end of the day if we follow the Administration's amendment.

However, we have an option here. **We can be and should be the master of our own.** Let us work together as to what amounts to be fair for this kind of situation. We may borrow experience from other jurisdictions.

g. Paragraph 12, "by the same token, **uploading** a **reasonable portion**[16] of copyright works to the school Intranet for student access should also be considered "fair dealing".

Response: Digital copying can never be regarded as fair and even for a small quantity and in particular without proper safeguard of the copyrighted materials posted on the web.

The problem with the schools is that they have problem trying to understand the difference between the analogue mode and digital mode of copying.

h. Paragraph 13, "Fair dealing for education should be **extended beyond** "the purpose of giving or receiving instructions in a course of study provided by an educational establishment" **to cover the fair use of the copyright materials".**

Response: Nobody really understands what it means except that it implies that they need a blanket exemption under the banner of education. However, most of the jurisdictions do not have a blanket exception for education and all must comply with the international norms and obligations.

[15] **See Paragraphs 9-88 at page 515 of the Copinger and James Skone On Copyright** 15th Ed. Sweet & Maxell 2005

[16] They do not consider, under Paragraph 4 of their submission, the amount allowed under the existing fair dealing is reasonable. They want the portion goes beyond that.

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19. Perhaps, the Administration may have a different view on the issues raised in Paragraph 18 above.

F. An Audit on Fair Dealing Provisions as Related to the Film etc.

20. We would like to take an audit of the fair dealing provisions of the present Copyright Ordinance as related to the film industry. For the purpose of this submission, our view points will equally apply to sound recording, broadcast and cable programme works.

21. **Section 41 (2)** of the Copyright Ordinance provides that

"**Copyright in a sound recording, film, broadcast or cable programme is not infringed** by its being copied by making a film or film sound-track **in the course of instructions** or of preparation for instruction, in the making of films or film sound-tracks, if the **copying is done by a person giving or receiving instruction**".

22. The amount of copying is obviously governed by the well-known Section 37 (3). Therefore, there is already a provision covering the fair dealing of use of related rights materials in the course of instructions in educational establishments.

23. **Section 43 (2)** provides that "the playing or showing of a sound recording, film broadcasts or cable programme before such audience at an educational establishment for the purpose of instruction is not a playing or showing of the work in public for the purpose of infringement of copyright".

24. We have always been perplexed as to **why the presence of a guardian of a student in an educational establishment has anything to do with the activity which is for the purposes of instruction at that educational establishment**.

Perhaps, the proposed amendment is intended to cover the situation that all university students may bring his guardian and all his near relatives to attend lecture when a new film would be shown at the lecture theatre for a class unrelated to the film study. If it is for film study, why non-students are allowed to attend class[17].

25. **Section 44 (2)** allows for the **making a recording of a broadcast and a cable programme and/ or any work included in it** by an educational establishment **for educational purposes** and this does not apply to the extent if a licensing scheme is available for such educational purposes.

[17] See Paragraphs 6, 7 and 15 of this submission above.

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This is in line with the international norms and obligations as it has been perceived that if an exception were to be made for use of the recording a broadcast or a cable programme and any work included in it, a nation may do so subject to an equitable remuneration to the copyright owners[18]. The exception will therefore be subject to the availability of a licence scheme[19].

26. We submit that Section 41 (2) has covered most of the normal use of the related rights materials in the course of instruction for school subject to Section 37 (3). Section 43 (2) of the Copyright Ordinance also allows the playing or showing of the film, sound recording and a broadcast or a cable programme for the purposes of instruction in an educational establishment.

The making of a recording of a broadcast or a cable programme and any work included in it for educational purposes in an educational establishment will require a licence if such a licence is available. This is reasonable as most of the television programmes have been targeted and screened for family viewing.

Any use of a broadcast or a cable programme will adversely and unreasonably affect the legitimate interest of the copyright owners as the education sector comprises about 10 % of our population and in particular, those programme which are tailored for education and information to the public such as those commonly found in the discovery channel. The copyright owners are entitled to an equitable remuneration.

G. Educational Establishments, the Administration and the Film Industry

27. It appears that the **educational establishments** would like to have **the copying right**, both for analogue and digital modes of copying, of the copyrighted materials to the maximum allowable under the heading called " fair dealing" for education. It is not surprising for them to find that both Sections 44 (2) and 45 (2) "licensing schemes are useless[20]" as these are obstructive to achieve their end.

However, they do not know what amounts to the limit of a reasonable portion as they admit that "the law and guidelines on copyright in education never be crystal clear"[21]. They perceive that the 4 fair dealing factors will justify its copying right under any circumstances. They rely on

[18] Article 11 bis of the Berne Convention and our submission on Section 44 (2) to Legco dated 4th July 2006. Also See Section 48 (92) of the New Zealand Copyright Act 1994.
[19] Section 35 (2) of the U.K. Copyright Designs and Patents Act 1988.
[20] Paragraph 4 (d) of the submission by the Concern Group Of the Education Sector On Copyright Law refers.
[21] See Paragraph 18 (d) of this submission above.

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the Administration to grant them the **copying right** based on their perception of their need basis with little regards to the ones who create the materials for them.

28. **It appears that the Administration's** response is that it does not know or does not want to know what the education sector wants, it **proposes that if there is any argument on use, please see each other in court and it has nothing to do with the policy any more**. In short, it proposes to let the court to decide the policy behind such educational use.

Otherwise, it would have initiated the policy for defining what is the scope of fair dealing in the most form and manner of use of the copyrighted materials in education[22] such as classroom copying and recording of a broadcast and cable programme. This obviates a lot of unnecessary litigations as the tariff under the licensing scheme will be under the control of the Copyright Tribunal and has always been subject matter of negotiation but the school cannot control litigation cost and damages.

In a purported justification of its positions, it even purports to **suggest that Hong Kong should go back to the "stone age' s level of copyright protection" in the context of the development of our copyright law** despite our advanced and leading development in the copyright law in the international arena.

This is evidenced by its submission to Legco, by bare statement, that Hong Kong has complied with (which we do not agree) **Berne and/ or TRIPS Agreement** which it knows very well that both **only provide the very minimum and basic form and structure of copyright protection**. We suggest that Hong Kong should comply with the international norms and obligations. Hong Kong Copyright Protection has been among the best regimes in the world.

29. **The film industry** has always been **very supportive to educational establishments** which are the breeding ground of our new generation of creative and talented people. Likewise, the new generation of our creative and talented students look to us for providing more career opportunity as may be provided in our film and related entertainment business. This will not happen unless we have the right landscape for investment and development of our cultural industry. Taking school to court for matter related to the use of copyright materials in school is a total waste of our

[22] Guidelines in respect of classroom copying were approved by U.S. Congress during the enactment of the Copyright Act in 1976. H.R. Rep. No. 94-1476, 94th Congress 2nd Sess, 66-72 (1976). These classroom copying guidelines were referred to in **Paragraph 2 at page 2 of the Annex entitled "Major Cases on U.S. Fair Use" as attached to the IPD's Submission.**

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resources which should be well spent for educational causes. This applies to the television industry and recording industry.

30. **In summary, the Educational Establishments want "copying right" in respect of all kinds of works to the extent which is "fair and reasonable" to them.**

The Administration tells them to ask the court as to what amounts to be fair and reasonable as it is different from case to case based on Section 37 (3).

The Film industry (same for the television industry and musical sound recording industry) is bleeding because of the abuse of the permitted use by the teachers who give and students who receive the instruction in the educational establishments and also of the huge budget of legal fees to be accrued for suing schools. The budget could and should be spent for fighting piracy. What the *film industry* would like the Administration to understand is that it *is just fighting for its right of survival* and not against schools.

H. Our Appeal To The Educational Establishments

31. We would like to appeal to the educational establishments to consider that **the amendment as proposed will have a much more devastating effect on the ecosystem of educational establishments and the content creators/ providers/ investors and also an adverse effect to the future of the social, economical and cultural development than the unpopular "85,000 units" housing policy.**

32. ***We believe that*** the schools also would be sane enough to agree with us that fighting fair dealing cases in court is not the good **option for Hong Kong nor the preferred option in other jurisdictions** (with the possible exception of U.S., which is known to have a highly developed litigious culture because of its history). We should work very hard to minimize any unnecessary litigation by working on a sensible guideline for the proper use of the copyrighted materials in schools.

33. ***We believe that*** the Administration's proposal will lead us to a "head on collision course" and we are all losers at the end of the day.

34. ***We believe that*** our educational fund should be used for the purpose of education and not for defending the fair dealing action which can be avoided by making **the proper amendment to our copyright law with a view to minimizing the risk of litigation**. This sensible approach has

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been adopted and welcomed by most of the developed countries in the world.

35. ***We believe that*** a meaningful dialogue as regards what amounts to a fair and reasonable use of copyrighted materials in education which will then be codified in our copyright law among the stakeholders and the educators is the only way to go for the sake of our children.

36. ***We believe that*** we can build an ecosystem based on **symbiosis** and **commensalisms but certainly not on a parasitic relationship**.

37. We urge the members of the Bills Committee to consider the matters objectively and to focus on what is the best policy for Hong Kong in the context of our social, economical and cultural development.

38. Perhaps Hong Kong people should consider to taking a more drastic action if this is the only option in making our government to understand what is the best thing for our society. We must insist on what we believe is the best option for our children.

For and on behalf of
Hong Kong Video Development Foundation Ltd.

Chu Fung Mui, Clera

c.c. Ms Mary Chow - Deputy Secretary for Commerce, Industry and Technology (Commerce & Industry)
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The Hon SIN Chung-kai, JP, the Chairman of Bills Committee on Copyright (Amendment) Bill 2006
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