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Hong Kong and International Publishers' Alliance

Secretariat

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5 June 2009

Clerk to Bills Committee on Copyright (Amendment) Bill 2009

Legislative Council

Legislative Council Building

8 Jackson Road

Central

Hong Kong

Dear Madam

HKIPA appreciates this opportunity to comment on the Copyright
(Amendment) Bill 2009.

General Comments

For far too long, the printed works of HKIPA members have effectively received much less protection in Hong Kong against unauthorized copying and distribution than do many other types of works. Section 118(2A) and (2B) of the Copyright Ordinance provides criminal penalties for possession of infringing copies of five categories of works for use in the course of a trade or business; but literary works embodied in books, or in scholarly or professional journals, are entirely absent from that list. As a result, businesses that deliberately infringe our works, on a regular and frequent basis, for the sole reason of advancing their own business interests, have been able to avoid criminal liability altogether. Unfortunately, but not surprisingly, in the shelter of this immunity, such infringement is widespread in this marketplace, and has a significant negative impact on both the local and imported books and journals available in the marketplace in Hong Kong.. This inequity, which has been a feature of the Copyright Ordinance since 2001, rewards unscrupulous

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businesses, while denigrating the hard work and creativity of honest authors and publishers in Hong Kong and overseas. It must be corrected.

Enactment of this Bill, which would bring into force new Section 119B of the Copyright Ordinance, will be a small but significant step forward toward correcting this long-standing inequity, and bringing Hong Kong's law closer to compliance with its international obligation to provide criminal remedies against all copyright infringements that are carried out on a commercial scale. From the perspective of publishers, it has many shortcomings; but we have concluded that, on balance, it should be enacted, with two amendments that we will discuss below.

Further Expansion of the Safe Harbour Must Be Avoided

The Bill is the product of extensive discussions among publishers, other stakeholders, and the Government. It represents a compromise in many ways. For example, the Bill excludes from criminal liability the making or distribution of infringing copies of a value of less than \$6000. This figure was a compromise between the Administration's original proposal of \$8000 and the publishers' strongly held view that the threshold should be set at \$3000. Similarly, unauthorized copies of books or scholarly/professional journals only count against this threshold if they make up at least 25% of the printed book or journal issue in question (or an entire article from a journal). In earlier versions of the safe harbor, this threshold was set lower, at 15%, for standalone cases.

The scope of the safe harbour provided in this legislation will determine whether section 119B can achieve its goal of deterring and punishing significant instances of infringement of copyright of printed materials on a commercial scale by businesses. HKIPA respectfully submits that the safe harbour reflected in the Bill, which is already the product of extensive debate and significant compromise, ought not be expanded any further, if there is any hope of achieving this goal. The monetary and percentage thresholds already provide a roadmap for unscrupulous businesses who can calibrate the pace and scope of their infringing copying activities in order to avoid criminal liability. Any relaxation of these thresholds would provide further incentives for such behavior. This is not the message the HKSAR should be sending with regard to respect for copyright.

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Specific Suggested Amendments

It is worth emphasizing that this legislation addresses only one part of the problem of business infringement of published works. It is limited to the copying of materials that are originally in printed form, not to the unauthorized making and distribution of copies of digital originals. Of course, with the increasing digitization of the publishing business, section 119B is far from a complete solution. For this reason, it is essential that the prohibition clearly cover as broad as possible a range of forms of electronic distribution of infringing copies of printed originals. Otherwise, the legislation risks becoming much less relevant to the widespread business infringement problem that exists today in Hong Kong. In this regard, HKIPA suggests two amendments to the Bill.

1. Treatment of Intranets. The Copyright Ordinance already excludes from the criminal offence “distribution through a wire or wireless network of an infringing copy to which access is not restricted by procedures of authentication or identification.” Section 119B(5).¹ The Administration now proposes, in Schedule 1AB, to exclude “distribution through a wire or wireless network of an infringing copy to which access is restricted by procedures of authentication or identification.” This would mean that networked distribution of infringing copies is entirely excluded from the scope of the section 119B(1) offence, but for the situation described in Section 2(2) of Schedule 1AB: “an infringing copy embodied in a document that is distributed to an electronic mail address or facsimile number.”

¹ At the time this provision was adopted in 2007, it was explained as follows: “It is already an offence under the existing section 118(1)(f) of the Copyright Ordinance (revised as section 118(1)(g) after the enactment of the Bill) if any person distributes an infringing copy of a copyright work to the extent that prejudicially affects the copyright owner. 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. Hence, we do not consider it necessary for applying the proposed copying/distribution offence to such a mode of distribution.” See

<http://www.legco.gov.hk/yr05-06/english/bc/bc01/papers/bc010315cb1-1142-1-e.pdf>

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We appreciate that the drafters of Schedule 1AB intended to exclude from criminal liability the distribution of infringing copies over an Intranet. HKIPA questions whether such an exclusion is appropriate, since deliberate distribution of infringing material through such means can clearly be extremely damaging to the intellectual property rights of publishers. But even if it were appropriate to exclude Intranet distribution from the scope of the offence, proposed Schedule 1AB sweeps much too broadly, and depends upon technological distinctions that ought to be irrelevant. For example, if a business were to send out infringing copies (that are otherwise covered by section 119B(1)) to a mailing list of current or prospective customers via e-mail (or facsimile), it would be subject to criminal liability. However, if instead it posted these infringing copies on a secure web site or similar Internet location, and distributed passwords or other identification tokens to the same list of current or prospective customers, its activities would fall outside the scope of the offence, due to Schedule 1AB. This perverse outcome would be avoided, and the intent of excluding true Intranet communications would be better achieved², by amending Section 2(1) of Schedule 1AB to read as follows (added language *italicized*):

(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, *to persons affiliated with the operator of the network in the capacity of employees, students or a similar status*, by procedures of authentication or identification.

2. E-mail/Facsimile Distribution. Furthermore, while HKIPA is pleased to note that Schedule 1AB specifically contemplates that criminal liability would attach when infringing copies are distributed via e-mail, it is disappointed that the Administration has omitted language appearing in earlier drafts that specified how such distribution should be treated for purposes of applying the threshold levels for qualifying copies. Accordingly, HKIPA recommends that the following language be inserted at the appropriate place in sections 5, 7 and 8 of Schedule 1AA:

² The same 2007 government document gives as an example of distribution to which the offence apparently should not apply “uploading the scanned copies onto the company’s intranet for access by its staff.” While HKIPA does not agree that such infringing distribution should be immune from criminal liability, the language it proposes more effectively carries out the drafters’ stated intent.

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If one or more infringing copies of a copyright work is embodied in a document that is distributed to an electronic mail address or facsimile number, unless there is evidence to the contrary, a copy of each such copyright work is taken to have been distributed to each individual addressee for the purposes of section 3(2).

Thank you for considering the views of HKIPA.

Respectfully submitted

Simon Li

Convenor (Hong Kong)

(no signature via electronic transmission)