

## **Bills Committee on the Copyright (Amendment) Bill 2009**

### **Operation of the Numeric Limits and Other Related Matters**

#### **Introduction**

At the Bills Committee meeting on 9 June 2009, Members requested the Administration to (a) explain and illustrate, by example, how the numeric limits operate under the Copyright (Amendment) Bill 2009 (“the Bill”); (b) give information about copyright laws in other jurisdictions which prescribe similar monetary numeric limits within which the relevant criminal offence would not apply; and (c) explain the reason for defining “infringing page” in the Bill by reference to “a side of a page”. This paper provides the information requested.

#### **Operation of the Numeric Limits**

##### *Magazines, periodicals (other than specified journals) and newspapers*

2. Under section 2(1) and (2) of Schedule 1AA, the copying and distribution offence does not apply to the making for distribution or distribution by a person, within any period of 14 days, of infringing copies of one or more than one copyright work in a printed form that is contained in magazines, periodicals (other than specified journals) or newspapers if the **total number of infringing pages**<sup>1</sup> made or distributed by the person within that period does not exceed **500**.

3. Section 4 of Schedule 1AA sets out the method by which the total number of infringing pages is calculated, as summarised below :

- (a) where the infringing pages are of A4 size, the number of such infringing pages will count towards the numeric limit;

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<sup>1</sup> An “infringing page”, as defined under section 1 of Schedule 1AA, generally means a side of a page that embodies an infringing copy (in whole or in part) of any copyright work contained in a magazine, periodical (other than a specified journal) or newspaper.

- (b) if the infringing pages are smaller or larger than A4 size, the number of such infringing pages shall be adjusted downward or upward, as the case may be, in proportion to the difference in size between each infringing page and an infringing page of A4 size; and
- (c) if the infringing pages embody an image of an infringing copy that has been reduced or enlarged in size, the number of such infringing pages shall be adjusted upward or downward, as the case may be, in proportion to the difference in size between the image and the original size of the copyright work.

4. For example, if a company regularly distributes newspaper cuttings to each of its 20 employees without the licence of the copyright owner, resulting in the following number of infringing copies within a certain 14-day period :

- 40 A4-size pages containing copies of news articles (original size)
- 20 A4-size pages containing copies of news articles which have been reduced in size by 30% (i.e. 70% of the size of the original articles)

then the total number of infringing pages distributed is :

$$\begin{aligned} &= 40 \text{ (pages)} \times 20 \text{ (copies)} + 20 \text{ (pages)} \times 100/70 \\ &\quad \text{(upward adjustment to bring the image of news} \\ &\quad \text{articles back to the original size)} \times 20 \text{ (copies)} \\ &= 1,371 \text{ (pages)} \end{aligned}$$

In this case, the relevant numeric limit (i.e. 500 infringing pages) has been exceeded.

5. For infringing pages made or distributed in electronic form, pursuant to section 4(4) of Schedule 1AA, the images of infringing copies so made or distributed would be printed on A4-size paper and the number of pages so printed will be counted towards the numeric limit in the same way as described in paragraph 3 above.

Books and specified journals

6. Under section 3(1) and (2) of Schedule 1AA, the copying and distribution offence does not apply to the making for distribution or distribution by a person, within any period of 180 days, of infringing copies of one or more than one copyright work in a printed form that is contained in books or specified journals if the **total value of qualifying copies<sup>2</sup>** made or distributed by the person within that period does not exceed **\$6,000**.

7. Section 5 of Schedule 1AA sets out the method by which the total value of qualifying copies of *books* is determined, as summarised below :

- (a) a qualifying copy has the same value of a non-infringing copy of a book containing the copyright work that is the subject of the qualifying copy (known as the “comparable copy”) (by virtue of subsection(2));
- (b) the value of a comparable copy<sup>3</sup> is taken to be (by virtue of subsection(3)) :
  - (i) its marked retail price<sup>4</sup>;
  - (ii) if the comparable copy has no marked retail price, its recommended retail price<sup>5</sup>; or
  - (iii) if the comparable copy has neither a marked nor a recommended retail price, its market value insofar as it is readily ascertainable.

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<sup>2</sup> A “qualifying copy”, as defined under section 1 of Schedule 1AA, generally means a set of pages that corresponds to more than 25% of the printed pages of the relevant book or specified journal, or a set of pages that embodies a whole article in the case of a specified journal.

<sup>3</sup> Section 5 also contains provisions for determining the value of a comparable copy that forms one of the volumes of a multi-volume set.

<sup>4</sup> “Marked retail price”, as defined under section 1 of Schedule 1AA, means the retail price as printed in or on the book or specified journal by the publisher.

<sup>5</sup> “Recommended retail price”, as defined under section 1 of Schedule 1AA, means the retail price as recommended by the publisher of the book or article in question before any discount is given to traders or consumers. Such recommended retail prices could usually be found on the booklists that publishers issued for retailers’ information as well as major book-selling websites.

8. Sections 6, 7 and 8 of Schedule 1AA set out the method by which the total value of qualifying copies of *specified journals* is determined.

9. For example, if a company distributes the following copies from books and specified journals in a series of seminars within a 180-day period (assuming each book has 100 pages) :

- 10 pages from Book A with a marked retail price of \$100 (50 copies) [10 pages = 10% of Book A, i.e. it does not exceed the 25% threshold. Hence, not a qualifying copy by definition.]
- 30 pages from Book B without a marked retail price but with a recommended retail price of \$100 (30 copies) [30 pages = 30% of Book B, i.e. it exceeds the 25% threshold, hence a qualifying copy]
- 80 pages from Specified Journal C with a marked retail price of \$100 (10 copies) [80 pages = 80% of Specified Journal C, i.e. it exceeds the 25% threshold, hence a qualifying copy]
- a complete article (8 pages) from Specified Journal D with a recommended retail price of \$30 (10 copies) [Although, page wise, it does not exceed the 25% threshold, a copy of a complete article of a specified journal is also a qualifying copy by definition ]

then the total retail value of the qualifying copies distributed is :

$$\begin{aligned} &= \$100 \times 30 \text{ (copies) [Book B]} + \$100 \times 10 \text{ (copies)} \\ &\quad \text{[Specified Journal C]} + \$30 \times 10 \text{ (copies) [complete} \\ &\quad \text{article from Specified Journal D]} \\ &= \$4,300 \end{aligned}$$

In this case, the relevant numeric limit (i.e. \$6,000) has not been exceeded.

10. If the comparable copy of a book has 2 or more than 2 marked retail prices denominated in different currencies, the currency by reference to which the value of the comparable copy is to be calculated shall be determined in accordance with the following order :

- (a) firstly, Hong Kong dollar;
- (b) secondly, United States dollar; and
- (c) thirdly, the currency in which the first marked retail price as printed in or on the comparable copy is denominated.

11. Major publishers have advised us that, in the vast majority of cases, the books that are commonly used by business end-users carry marked retail prices and/or recommended retail prices. Insofar as the recommended retail price for books is concerned, it would have been made available on major book-selling websites or notices issued by the publisher concerned.

12. In some rare cases, a book without a marked retail price may also have no recommended retail price (for instance, where the relevant publisher has ceased operation). In such cases, the market value of the book could be used insofar as it is readily ascertainable (e.g. from the websites of the distributors if applicable).

### **The use of monetary numeric limits in the copyright law of other jurisdictions**

13. From our research, we note that two jurisdictions, namely the US and Taiwan, adopt or once adopted monetary numeric limits in their copyright laws to define the circumstances under which a criminal offence does not apply. The relevant provisions are set out below :

Jurisdictions	Relevant Provisions
The US	Under <b>§506(a)(1), Title 17 of the United States Code</b> (Copyright Act), criminal sanction is imposed on, amongst others, willful copyright infringement by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000.

Jurisdictions	Relevant Provisions
Taiwan (this provision was amended in September 2004 with the numeric limits deleted)	(Translated text of <b>Article 91 of Taiwan’s Copyright Act</b> before September 2004)  Article 91 declares :  (1) ... (2) A person who infringes on the economic rights of another person by means of reproducing the work without the intent to profit, <i>where the number of copies reproduced exceeds five, or where the total amount of infringement calculated by the market value of lawful copies of the work at the time of seizure exceeds NT\$30,000</i> , shall be punished by imprisonment for not more than three years, detention, or in lieu thereof or in addition thereto a fine of not more than NT\$750,000.

14. In both the US and Taiwan cases, there is no detailed provision governing how the monetary numeric limits operate in practice. In Taiwan, the numeric limits as stated in the above table were considered “unclear” and as a result repealed in September 2004.<sup>6</sup> The current regime<sup>7</sup> gives the prosecution and the court wide discretion to consider whether or not to prosecute or sentence an infringer having regard to the extent of infringement in terms of amount and quantity in a particular case.

15. We would like to think that the Bill has provided clear and detailed provisions to govern how our proposed numeric limits are to operate. That gives a higher degree of certainty to local business end-users.

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<sup>6</sup> The expression “without the intent to profit” was also removed in the same legislative amendment exercise in 2004, as it was considered difficult to prove in practice.

<sup>7</sup> Under the current Taiwanese laws, copyright infringement by reproducing a copyright work or reproducing such work with intent to sell or rent is punishable by imprisonment and/or fine. The explanatory note to the new Article 91 states, among others, “至於即使是超越合理使用，構成侵害者，是否舉發、是否處罰，檢察官與法官請考量侵害之金額及數量等，依法裁量。”

**“A side of a page”**

16. In section 1 of Schedule 1AA, the term “infringing page” is defined as “*a side of a page*” that embodies, whether in whole or in part, an infringing copy of any copyright work in a printed form that is contained in a magazine, periodical (other than a specified journal) or newspaper”.

17. To avoid ambiguity, we adopted the use of “a side of a page” in the proposed definition, after noting the following :

- (a) a “page” may refer to one side of a leaf of a book, etc., or refer to a complete leaf of a book, etc. and thus have two sides<sup>8</sup>;
- (b) the use of a “side” in relation to a “page” is grammatically correct<sup>9</sup>; and
- (c) the use of “a side of a page” excludes the possibility that a sheet of paper with words, pictures, images, etc. printed on both sides is construed as one page only.

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<sup>8</sup> The dictionary meaning of “page” includes: (1) “Either side of a leaf of a book, manuscript, letter, etc. Also, a complete leaf of a book, etc.” (Shorter Oxford English Dictionary, Sixth edition); and (2) “one side or both sides of a sheet of paper in a book, newspaper, etc” (Longman Dictionary of Contemporary English, 1999).

<sup>9</sup> An example of usage as given by the dictionary is: “Some forty-seven pages, printed on one side only.” (Shorter Oxford English Dictionary, Sixth edition).