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11 January 2012

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Deputy Secretary for Commerce and Economic Development
(Commerce and Industry) 2
Commerce and Economic Development Bureau
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Central Government Offices
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Tamar, Hong Kong

Dear Mr Wong,

Copyright (Amendment) Bill 2011

I enclose herewith some questions on the legal and drafting aspects of the Copyright (Amendment) Bill 2011 (clauses 41 to 80) and would be grateful for your reply in bilingual form at your earliest convenience

Yours sincerely,

Kitty Cheng
Assistant Legal Adviser

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Copyright (Amendment) Bill 2011

Questions on the legal and drafting aspects (clauses 41 to 80)

New section 65A (Temporary reproduction by service providers)

1. New section 65A seeks to provide that the copyright in a work is not infringed by the making and storage of a copy of the work by a service provider if the conditions specified in subsections (a) to (f) are fulfilled.
2. In new subsection (b), the specified condition is that "the making and storage of the copy forms an automatic and essential part of a technological process, and that process neither modifies the work, nor interferes with the lawful use of technology to obtain data on the use of the work". In relation to this condition -
 - (a) please explain (and illustrate with examples, if possible) what is meant by "automatic and essential part of a technological process";
 - (b) please clarify whether "neither modifies the work, nor interferes with the lawful use of technology to obtain data on the use of the work" refers to (i) the technological process itself, or (ii) the effect (or result) of the technological process.
3. In new subsection (c), the specified condition is that the storage of the copy is *temporary*. Please explain in terms of the timeframe, the meaning of "temporary".
4. In new subsection (d), the specified condition is that the service provider updates the database in which the copy is stored in accordance with *reasonable industry practice*. Please explain what is meant by "reasonable industry practice". Who has the duty to establish or prove the "reasonable industry practice" when the issue is brought up in legal proceedings? Would there be any guidelines issued in respect of the "reasonable industry practice"?

New section 76A (Copying sound recordings for private and domestic use)

5. New section 76A(1) seeks to provide that "copyright in a sound recording or in any literary, dramatic or musical work included in a sound recording

is not infringed by the making of a copy of the sound recording (private copy)" when all the 4 conditions as set out in subsections 76A(1)(a), (b), (c) and (d) are met.

6. New section 76A(2), however, seeks to provide that a private copy that, but for subsection 76A(1), would be an infringing copy is to be treated as an infringing copy if it is used otherwise than for the purpose mentioned in subsection 76A(1)(b), or the condition mentioned in subsection 76A(1)(c) or (d) is broken. Please explain the purpose of new section 76A(2) in the light of the requirements of new section 76A(1)
7. What are the respective meanings of "private use" and "domestic use" in new subsection 76A(1)(b)?
8. In new subsection 76A(1)(b), who is a "member of the household (住戶中的成員)" in which the owner (of the original copy) lives? Does he or she have to be an immediate member of the owner's family? Or, can he or she be just an occupant of the property, for example, a tenant or a licensee (e.g. a relative or friend from overseas living temporarily in the owner's property)?
9. It is noted that "家居" and "住戶" have been used as the Chinese rendition of "household" in other legislation, in the light of different contexts. You may wish to review the Chinese rendition of "住戶中的成員" in new subsection 76A(1)(b) to more accurately carry the meaning of "household" in new provision.

New section 88A (Definitions)

Definition of "standard technical measures"

10. Please explain the criteria for determining the "technical measure *widely accepted by the industry*" in the definition of "standard technical measures".
11. Who has the duty to establish or prove a technical measure is "widely accepted by the industry" when the issue is brought up in legal proceedings?
12. Please explain the meaning of "broad consensus" in paragraph (b) of the definition of "standard technical measures" and the criteria for

determining the technical measure which "has been developed through an open, voluntary process by *a broad consensus* of copyright owners and service providers".

13. Who has the duty to establish or prove a technical measure "has been developed through an open, voluntary process by a broad consensus of copyright owners and service providers" when the issue is brought up in legal proceedings?
14. Would there be any guidelines issued in respect of the "reasonable and non-discriminatory terms" provided in paragraph (c) of the definition of "standard technical measures"?
15. In paragraph (d) of the definition of "standard technical measures", "standard technical measures" means any technical measure widely accepted by the industry that (inter alia) "does not impose substantial costs on service providers or substantial burdens on the systems or networks controlled or operated by or for service providers".
16. The word "substantial" (costs / burden) may bear, inter alia, the following dictionary meanings -
 - (a) "real or existing (實質的)" (vis-à-vis nominal or negligible)
 - (e.g. (i) "無實質利益 (no substantial benefit)" in section 5(2)(a) of the Married Persons Status Ordinance (Cap. 182);
 - (ii) "實質識別 (substantially identify)" in new section 88C (3)(b) in the Bill;
 - (iii) "實質部分 (substantial part)" in new section 202(1)(c) in the Bill);
 - (b) "large in size or amount (重大的)"
 - (e.g. "重大危險 (substantial risk)" in section 2GE of the Arbitration Ordinance (Cap. 341)); or
 - (c) "of real importance or value (重要的)"
 - (e.g. "法院覺得重要的(理由) (grounds which appear to the court to be substantial)" in section 48(5)(b) of the Bankruptcy Rules (Cap. 6A)).
17. Please clarify which of the above is intended to be the meaning of "*substantial* costs" and "*substantial* burden" in the paragraph (d).

18. Assuming that "substantial costs" means costs which are "large in size or amount (重大的)" in paragraph (d), please explain why the Chinese text is rendered as "成本有重大增加" in the Bill.

New section 88B (Limitations on liability of service providers)

19. New section 88B(1) seeks to provide that if the specified conditions are complied with, a service provider is not liable for damages or *any other pecuniary remedy* for infringement of the copyright in a work that occurs on the service provider's service platform merely because the service provides or operates facilities for online services. Please explain what is the "other pecuniary remedy" in law.
20. Under new section 88B(2)(a)(iii), a service provider who wishes to limit his liability, should take reasonable steps to limit or stop the infringement as soon as practicable after the service provider "became aware of facts or circumstances that the would lead inevitably to the conclusion that the infringement has occurred". Does this provision impose an objective test or subjective test in respect of the conclusion that the infringement has occurred? Who has the burden of proof and what is the standard of proof?
21. Please explain the meaning of "industry practice (行業常規)" in new subsection (4)(a)(i) and "accepted industry practices ("獲接受的行業常規") in new subsection (4)(a)(iii). What are the criteria for determining "industry practice" and "accepted industry practices"? Who are the persons that accepted such industry practices?
22. Who has the duty to establish or prove the existence and the nature of "industry practice" and "accepted industry practice" when the issues are brought up in legal proceedings?

New section 88C (Notice of alleged infringement)

23. Under new section 88C(2), a notice of alleged infringement must be in writing, must be signed or otherwise authenticated by the owner of the alleged infringed copyright or his authorized representative *and* must be provided to the designated agent of the service provider by electronic or other means. Similar requirements are also imposed under new section 88D(4) with respect to a counter notice. Please provide examples in the

Laws of Hong Kong where a notice which must be in writing, signed and provided by electronic means.

24. New section 88C(3)(b) seeks to provide that a notice of alleged infringement must substantially identify the copyright work that is alleged to have been infringed or, if the notice alleges that multiple copyright works have been infringed at a single online site, must identify "a representative number of such works (屬一個有代表性的數量)". Please explain what amounts to "a representative number of such works".
25. New section 88B(1) seeks to limit the liability of services providers in that if a service provider complies with the conditions specified in new section 88B(2), he is not liable for damages or any other pecuniary remedy for copyright infringement. One of these conditions is that the service provider has taken reasonable steps to limit or stop the infringement as soon as practicable after he received a notice of alleged infringement (new section 88B(2)(a)(i)).
26. Under new section 88C(4), a notice of alleged infringement that does not comply with new sections 88C(2) and 88C(3) (requirements and contents of a notice of alleged infringement) "is of no effect for the purposes of" new section 88B(2)(a).
27. Please advise on the following issues with respect to the operation of new sections 88B(1), 88B(2) and 88C(4) -
 - (a) The service provider has no control over the form or the contents of the notice of alleged infringement. A notice of alleged infringement which does not comply with new subsections 88B(2) and (3) is probably due to the fault of the complainant. If the notice of alleged infringement does not comply with new subsection 88B(2) and (3), by virtue of new section 88C(4), would a service provider be able to rely on the provisions of new section 88B(1) to limit his liability at all?
 - (b) Does a service provider have a duty to take reasonable steps to limit or stop the infringement as soon as practicable even if he knows that a notice of alleged infringement does not comply with new subsections 88C(2) and (3)?
 - (c) Will a service provider who has received a notice of alleged infringement which does not fully comply with new sections 88C(2) and (3) be regarded as "became aware that the infringement has

occurred" or "became aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred" as provided in new sections 88B(2)(a)(ii) and (iii)?

New section 88D (Counter notice)

28. In the light of the questions on new section 88B(2)(a)(iii) (paragraph 20 above), please explain the meaning of "became aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred" in new section 88D(2).

New section 88F (Civil liability for making false statements)

29. Under new section 88F(1), any person who makes a false statement in a notice of alleged infringement or counter notice is liable in damages any person who "suffers loss or damage as a result of the making of the statement". In new section 88F, "loss or damage", in relation to a statement, "*means* loss or damage that is reasonably foreseeable as likely to result from the making of the (false) statement" (subsection (2)).
30. It seems that loss or damage actually suffered by a person as a result of the false statement may be or may not be foreseeable. Similarly, loss or damage which is foreseeable may or may not have been actually suffered by that person. Please clarify whether the loss or damage referred to in subsection (1) includes loss or damage which is -
- (a) actual but not foreseeable; and
 - (b) foreseeable but not actual.

New section 88G (Exemption of service providers from liability for removal of material, etc)

31. In the light of the questions on new section 88B(2)(a)(iii) (paragraph 20 above), please explain the meaning of "became aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred" in new section 88G(3).

New section 88H (Evidence of compliance with conditions)

32. Please explain the standard of proof required from the service provider in adducing "evidence tending to show ..." in court proceedings and the standard of proof in respect of the "evidence to the contrary" in new section 88H.

New section 88I (Code of practice)

33. Under new section 88I(3), the Secretary for Commerce and Economic Development may from time to time revise the whole or part of the code of practice and any reference to the code of practice in the Ordinance (when the Bill is enacted) is to be construed as a reference to the code as so revised. From a legal point of view, is the Secretary empowered to revise the code of practice with transitional provisions?

34. If the Secretary is empowered under the Bill to revise the code of practice with transitional provisions, are those transitional arrangements or commencement of the revised code of practice subsidiary legislation subject to the scrutiny by the Legislative Council under the Interpretation and General Clauses Ordinance (Cap. 1)?

35. Please also explain the operation of the transitional arrangements of the revisions, if any, under new section 88I(3).

New section 118(2AA) and section 118(8C) (Offences in relation to making or dealing with infringing articles, etc)

36. The existing section 118(1)(g) of the Copyright Ordinance provides that a person commits an offence if he, without the licence of the copyright owner of a copyright work, distributes an infringing copy of the work to such an extent as to affect prejudicially the copyright owner. New section 118(2AA) in the Bill seeks to provide that in determining whether any distribution of an infringing copy of the work is made to such an extent as to affect prejudicially the copyright owner, the court *may* take into account all the circumstances of the case and *in particular* those factors specified in that subsection.

37. Please explain the operation of new section 118(2AA) in the light of the questions on new section 31 raised in my letter to the Administration dated 12 December 2011 (LC Paper No. CB(1)618/11-12(01), at paragraphs 7-9 of the enclosure).
38. Please also explain the operation of new section 118(8C) which contains similar provisions.

New Section 229(3A) (Meaning of "infringing fixation")

39. Please explain the meaning of "private and domestic use" in the light of the questions in relation to new section 76A (paragraphs 5-9 above).

New sections 245(1A) and 245A (Recording, copying or communication by educational establishments)

40. New section 245(1A) seeks to provide that "a person authorized by an educational establishment may, *without infringing the rights conferred by this Part*, communicate to an authorized recipient a recording or copy of a recording of a broadcast or cable programme that has been made in accordance with subsection (1) if certain specified requirements are met.
41. Is the phrase "without infringing the rights conferred by this Part" a condition for the communication to an authorized audience or the legal consequence for such communication? Please refer to the questions on new section 45(1A) raised in my letter to the Administration dated 12 December 2011 (LC Paper No. CB(1)618/11-12(01), at paragraphs 21-27 of the enclosure) and review the use of the phrase "without infringing the rights conferred by this Part" in new section 245(1A).
42. Please also review the possible interpretations of this provision in new section 245A(2).

New section 252A (Temporary reproduction by service providers)

43. It seems that the qualifying words "一旦"(實際知悉) in the Chinese text of new section 252A(1)(f) do not appear in the English text of the provision. Please review.