

香港特別行政區政府
商務及經濟發展局
工商及旅遊科

香港添馬添美道二號
政府總部西翼二十三樓



COMMERCE, INDUSTRY AND TOURISM BRANCH
COMMERCE AND ECONOMIC
DEVELOPMENT BUREAU

GOVERNMENT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION

23/F, WEST WING
CENTRAL GOVERNMENT OFFICES
2 TIM MEI AVENUE
TAMAR, HONG KONG

Your ref. : LS/B/21/10-11
Our ref. : CITB 07/09/17

Tel. no. : 2810 2862
Fax no. : 2147 3065

17 February 2012

Ms Kitty Cheng
Assistant Legal Adviser
Legislative Council Secretariat
Legal Service Division
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

By Fax (2877 5029)

Dear Ms Cheng,

I attach at Annex the Administration's response to your questions raised in points 7 to 31 of your letter dated 12 December 2011 about the Copyright (Amendment) Bill 2011.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Patricia So', written in a cursive style.

(Patricia So)

for Secretary for Commerce and Economic Development

c.c. LA
CCS(1)3

Copyright (Amendment) Bill 2011 (“the Bill”)

Clause 15 - New section 31(3)

1. Points 7 to 9 of your letter

- (a) The court has unfettered discretion to consider one or more factor(s) which it considers relevant by reference to the overall circumstance of a case in determining whether or not infringing copies have been distributed to such an extent as to affect prejudicially the copyright owner. The new section 31(3) is not intended to fetter the court’s discretion.
- (b) Taking into account concerns that have been expressed by Internet users about possible inadvertent breaches of the law stemming from the lack of clarity surrounding the question of “prejudice”, the Administration seeks to provide through the bill greater legal certainty by introducing a non-exhaustive list of factors that the court may take into account when determining whether infringing copies have been distributed to such an extent as to affect prejudicially the copyright owners. In other words, the general rule continues to apply and the court has unfettered discretion to consider one or more factor(s), if at all, in any case in question.
- (c) It follows that these five factors, if pertinent to the case in question, are to be assessed by the court. Ultimately, it is for the court to attach appropriate weight to each or any one of them in determining “prejudice”.
- (d) Your suggestion in point 9 of your letter is noted. We will consider your proposed drafting.

Clause 17 – New section 35(7)(ma) & 76A(2)

2. Point 10 of your letter

- (a) The term “private and domestic use” has been used as a prescribed condition attached to several copyright exceptions under the existing provisions of the Copyright Ordinance, such as sections 30, 79, 80, 118(1) and 120(1). A user has to meet all the prescribed conditions before he is qualified to enjoy the relevant copyright exception.

- (b) The Administration intends to attach the same qualifying condition on “private and domestic use” to the proposed copyright exception under the new section 76A concerning the making of copies of sound recordings.
- (c) “Domestic use” signifies that the use is purely in connection with the context of home or family. In other words, the use is solely for non-commercial purpose as opposed to for the purpose of or in the course of any trade or business.

Clause 18 - New section 37(6) & (7)

3. Point 11 of your letter

- (a) Where a legitimate copy of a work made by virtue of the relevant permitted act has been subsequently “dealt with”, the copy shall be treated as an infringing copy. It is the Administration policy intent to elaborate this concept so as to achieve better clarity. Where the legitimate copy is exhibited or distributed for the purpose of or in the course of trade or business *not by a person permitted to make and/or use the copy pursuant to the permitted act in question*, the copy would be considered to have been “dealt with” and shall be treated as an infringing copy.
- (b) In the light of the above explanation, the third party who exhibits a copy of the work in public within the scope of the “dealt with” provision would at least have to acquire possession, if not ownership, of the copy in question.
- (c) To better reflect the policy intent as per point (a) hereinabove, the Administration is revising the drafting of the “dealt with” provisions in various parts of the Bill, and shall keep the Legislative Council posted of any proposed amendment.

4. Points 12 and 13 of your letter

Your questions are the same as points 7 and 8 of your letter. Accordingly, please refer to the Administration’s response as per points 1(a) to 1(c) hereinabove.

Clause 25 - New section 41(6)

5. Point 14 of your letter

Your question is the same as point 11 of your letter. Accordingly, please refer to the Administration's response as per point 3 hereinabove.

6. Points 15 to 17 of your letter

Paragraph (e) of the definition of "dealt with" in the new section 41(6), as presently drafted, in essence refers to subsequent communication of the work to the public otherwise than for the purpose specified in section 41(3). The provision is akin to the corresponding provision in section 32(5)(b) of the UK Copyright, Designs and Patents Act 1988. We consider that the meaning of the provision is sufficiently clear.

Clause 26 - New section 44(2) & (4)

7. Points 18 and 19 of your letter

- (a) The condition "knew or ought to have been aware of that fact" is not newly introduced by the new section 44(2). The existing "to-be-repealed" sections 44(2) and 45(2) of the Copyright Ordinance governing the respective permitted acts of the recording or copying of broadcasts and cable programmes, and reprographic copying made by educational establishments or pupils of passages from published works, also contain the same condition.
- (b) The mental status of the person who "ought to have been aware of that fact" has to be judged objectively by the "reasonable man" test in the light of all the circumstances of a case. This in essence requires an objective consideration and assessment of the underlying circumstances. For instance, if there is a licensing scheme readily available to educational establishments for the relevant acts of recording, copying or communication, and information about such licensing scheme is widely publicized to members of the educational sector, e.g. through newsletters, a person from the educational sector would reasonably be expected to be aware of that licensing scheme based on an objective assessment of the underlying circumstance.

- (c) We consider that there is no material difference in substance between the terms “ought to have known” and “ought to have been aware of”. We prefer keeping the use of “ought to have been aware of” in the relevant provisions as the expression is now used throughout the Copyright Ordinance in similar contexts.

8. Point 20 of your letter

Your suggestion which was also raised in point 17 of your letter is noted. Paragraph (e) of the definition of “dealt with” in the new section 44(4), as presently drafted, covers a communication of the work to the public otherwise than for the purpose set out in the new section 44(1A). We consider that, like the provision in paragraph (e) of the definition of “dealt with” in the new section 41(6), the meaning of the provision in paragraph (e) of the definition of “dealt with” in the new section 44(4) is sufficiently clear.

Clause 27 - New section 45(1A) & (4)

9. Points 21 to 26 of your letter

Your suggestion in point 24 of your letter is noted. We consider that the expression “without infringing copyright” in the new sections 45(1A) and 51A(1), when placed in the context, is sufficiently clear for spelling out the legal consequence of the permitted act in question, and could not be interpreted as imposing a condition for such act.

10. Point 27 of your letter

This point and point 19 of your letter raise a common issue. Accordingly, please refer to the Administration’s response as per point 7 hereinabove.

11. Point 28 of your letter

The issue raised in this point is the same as that under points 14 to 17 of your letter. Accordingly, please refer to the Administration’s response as per points 3, 5 and 6 hereinabove.

Clause 33 - New section 51A

12. Point 29 of your letter

- (a) Examples of “appropriate measures” that may be practically taken by a specified library, museum or archive to prevent users from making further copies or communicating the copy to others include measures that disable users from saving, downloading, printing and/or forwarding the material for or to others.
- (b) Given the rapid advance in information technology, the Administration does not consider it advisable to set out in the Bill a list of “appropriate measures”. What measure is “appropriate” has to be determined by reference to the circumstances underlying the communication made by individual libraries, museums or archives, such as the mode and scale of communication. The Administration considers that the law should provide adequate flexibility for specified libraries, museums and archives to take measures which they deem fit in the light of their own circumstance. A flexible approach also obviates the need to amend the law whenever any measure specified in the Bill becomes obsolete or any advanced measure emerges in the future.

13. Point 30 of your letter

The issue raised in this point is the same as that under points 21 to 26 of your letter. Accordingly, please refer to the Administration’s response as per point 9 hereinabove.

14. Point 31 of your letter

This point and point 19 of your letter raise a common issue. Accordingly, please refer to the Administration’s response as per point 7 hereinabove.