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12 December 2011

Mr Wong Kwok Bun, Christopher, JP
Deputy Secretary for Commerce and Economic Development
(Commerce and Industry) 2
Commerce and Economic Development Bureau
Commerce, Industry and Tourism Branch
23/F, West Wing
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 1 to 40) 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 1 to 40)

New section 22(2A)

1. New section 22(2A) seeks to provide that in determining whether a person has authorized another person to do any of the acts restricted by the copyright in a work, the court *may* take into account all the circumstances of the case and, *in particular* -
 - (a) the extent of that person's power (if any) to control or prevent the infringement;
 - (b) the nature of the relationship (if any) between that person and that other person; and
 - (c) whether that person has taken any reasonable steps to limit or stop the infringement.
2. Please explain what reasonable steps are expected from that person in limiting or stopping the infringement.
3. Please clarify if it is a mandatory requirement for the court to take into account all the 3 factors set out in new section 22(2A).
4. Is the court bound to determine a person has authorized another person to do an act restricted by the copyright in a work if the court finds that the answers to the 3 questions in new section 22(2A) are all in the affirmative? Moreover, are they conclusive factors? On the other hand, is the court empowered to determine that a person has authorized another person to do an act restricted by the copyright in a work when only 1 or 2 of the factors are established?

New section 28A

5. New section 28A(4) seeks to provide that the mere provision of *facilities* by any person for enabling or facilitating the communication of a work to the public does not of itself constitute an act of communicating the work to the public. Please explain the meaning of "facilities" (and to provide examples, if possible) in the context of this provision.

6. Please explain whether the Chinese rendition "接達" for "gaining access (to what is available)" (new section 28A(6)(a)) has been adopted in other existing legislative provisions.

New section 31

7. New section 31(3) seeks to provide that in determining whether any distribution of an infringing copy of a work is made to such an extent as to affect prejudicially the owner of the copyright, the court *may* take into account all the circumstances of the case and, *in particular* the factors set out in subsections (a) to (e). Please clarify if it is a mandatory requirement for the court to take into account all the 5 factors set out in new section 31(3).
8. Again, is the court empowered to determine that the distribution of an infringing copy of a work is made to such an extent as to affect prejudicially the owner of the copyright when only some but not all of the factors set out in subsections (a) to (e) are established? Moreover, are they conclusive factors?
9. From a drafting point of view, should the qualification "if any" be added to subsections (b) (the commercial value) and/or subsection (e) (the economic prejudice caused to the owner), as in new section 22(2A)?

New section 35(7)(ma) & 76A(2)

10. Please explain, in the context of making a copy of sound recording, the meaning of "domestic use".

New section 37(6) & (7)

11. The meaning of "dealt with" in new section 37(6), in relation to a copy of a work, includes "exhibited in public or distributed for the purpose of or in the course of any trade or business". Please clarify whether the first limb of the subsection, namely, the person who "exhibited (a copy of the work) in public", must have ownership or possession of the copy.
12. New section 37(7) seeks to provide that in determining whether any distribution of a work is made to such an extent as to affect prejudicially the owner of the copyright, the court *may* take into account all the circumstances of the case and, *in particular* the factors set out in subsections (a) to (e). Please clarify if it is a mandatory requirement for

the court to take into account all the 5 factors set out in new section 37(7). Moreover, are they conclusive factors?

13. Again, is the court empowered to determine that the distribution of a work is made to such an extent as to affect prejudicially the owner of the copyright when only some but not all of the factors set out in subsections (a) to (e) are established?

New section 41(6)

14. The meaning of "dealt with" in new section 41(6)(c), in relation to a copy of a work, includes "exhibited in public or distributed for the purpose of or in the course of any trade or business". Please clarify whether the first limb of the subsection, namely, the person who "exhibited (a copy of the work) in public", must have ownership or possession of the copy.
15. New section 41(6)(e) seeks to provides that "dealt with", in relation to copy of a work, means (inter alia) "communicating to the public, *unless* that communication is not an infringement of copyright by virtue of subsection (3) (of the Copyright Ordinance)".
16. Under section 41(3) of the Copyright Ordinance, copyright is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions. From a drafting point of view, the definition provision of new section 41(6)(e) seems to produce a "double negative" situation ("unless ..." and "not an infringement"), which may not be easy to appreciate.
17. Does new section 41(6)(e) in fact mean "communicating to the public *but not including those acts referred to in section 41(3) of the Copyright Ordinance*" (i.e. for the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions)? If this is the case, would the Administration consider improving the drafting of new section 41(6)(e)?

New section 44(2) & (4)

18. New section 44(2) seeks to provide that recording, copying or communicating to authorized recipients is not authorized by new section 44 if, or to the extent that, licenses under licensing schemes are available authorizing the recording, copying or communication in question and the

person making the recording, copies or communication in question *knew or ought to have been aware of that fact*.

19. Please explain what would be the mental state of the person involved for the condition of "ought to have been aware of that fact". Furthermore, is there any difference between "ought to have known" and "ought to have been aware of"?
20. Please also review the drafting of the meaning of "dealt with" in new section 44(4) in the light of the query about new section 41(6) as mentioned above (para. 15).

New section 45(1A) & (4)

21. New section 45(1A) seeks to provide that subject to certain specified conditions, a person authorized by an educational establishment may communicate a copy of an artistic work, a passage from a published literary, dramatic or musical work or an extract from a published sound recording or film, that has been made by an educational establishment or a pupil under section 45(1) of the Copyright Ordinance.
22. The English text of new section 45(1A) reads as follows -

"A person authorized by an educational establishment may, *without infringing copyright*, communicate to an authorized recipient a copy of artistic work ... if -

(a) ... ; and

(b)"
23. The English text of the provision may give an impression that the phrase "*without infringing copyright*" is a condition for the act of communicating (在不侵犯版權下) instead of the legal consequence, i.e. such act of communication does not constitute copyright infringement (便不屬侵犯版權).
24. In contrast with the existing section 45(1) of the Copyright Ordinance, the phrase "without infringing copyright", which is placed at the end of the provision, clearly conveys the message that it is the legal consequence of the acts.

25. It is also noted that in the new section 52A(1) (playing or showing by librarians, curators or archivists: sound recordings or films) the phrase "without infringing copyright in the sound recording or film or any work included in the sound recording or film" is provided after the description of the acts of playing or showing, hence clearly indicates that it provides for the legal consequence of those acts.
26. By reason of these observations, would the Administration review the drafting of the English text of the new section 45(1A)?
27. Please also explain the effect of new section 45(2) in the light of the query about new section 44(2) (ought to have been aware of that fact) as mentioned above.
28. Please also review the drafting of the meaning of "dealt with" in new section 45(4) in the light of the query about new section 41(6) as mentioned above.

New section 51A

29. New section 51A(1) seeks to provide that if the conditions specified in subsection (2) are complied with, the librarian, curator or archivist may communicate a copy of an item in their permanent collection to users or staff. The conditions in subsection (2) include "that the library, museum or archive takes *appropriate measures* to prevent users from making further copies or communicating the copy to others". Please explain the "appropriate measures" which are expected to be taken by the library, museum and archive and whether such measures should be expressly provided in the Bill.
30. Please also review the drafting of the phrase "without infringing copyright" in new section 51A(1) in the light of the query about new section 45(1A) as mentioned above.
31. Please explain the effect of new section 51A(3) in the light of the query about new section 44(2) (ought to have been aware of that fact) as mentioned above.