

Reprographic Rights and Fair Dealing
Paper to the LegCo Panel on Commerce and Industry
Hong Kong General Chamber of Commerce

Introduction

1. This paper is presented by the Hong Kong General Chamber of Commerce (HKGCC) to the Legislative Council Panel on Commerce and Industry for its meeting on 12 April 2001 wherein the Panel will discuss “Enforcement Action taken by the Government following the commencement of the Intellectual Property (Miscellaneous Amendments) Ordinance”.
2. HKGCC is a champion of intellectual property rights and has actively promoted the benefits of IPR protection to the business community. We are a strong supporter of the Amendments Ordinance in combating copyright infringement in the course of business. As a matter of fact, the Chamber contributed substantially to the consultation on combating IPR infringement in April 1999, which gave rise to the current Amendments Ordinance.
3. However, we object to the application of the Amendment Ordinance to casual photocopying in the workplace. We consider that such photocopying should not be regarded as copyrights infringement.

Fair dealing and casual photocopying

4. The current position of the government is that since the Amendments Ordinance has come into effect, anyone photocopying any newspaper article in the workplace, without first obtaining a license, may be committing a criminal offence. We find such an application of the law highly problematic.
5. The intention of the Amendments Ordinance is to combat copyright infringement “in the course of business”, such as unauthorised copying of computer software. By contrast, most businesses do not need to photocopy newspapers “in the course of their business”; they make copies for convenience, not for profit. While they may pass a copy of a newspaper article for information around the office, what they do can hardly be likened to pirating a computer software programme. It defies common sense to criminalise such photocopying.
6. HKGCC observes that there is already considerable confusion amongst the general public over this aspect of the law, and it is causing massive inconvenience to the education, business and public sectors. In our view, a speedy solution is readily at hand, through invoking the principle of “fair dealing” into the debate.
7. The concept of fair dealing is well established in intellectual property law. It enables copying to be done provided that it is “reasonable”. Although there is no hard and fast rule on “reasonableness”, common sense would dictate that most casual photocopying is reasonable and therefore legal. Indeed, it is not uncommon in other jurisdictions for casual photocopying to be allowed, e.g. Ireland, Italy, Luxembourg. The Chamber believes that the right way forward would be to accommodate this principle of fair dealing, either through an

interpretation of the law by the Administration, or through a legal amendment to reflect it more explicitly in the law.

HKGCC recommendation

8. Before the Ordinance was in force, HKGCC Chairman Mr CC Tung has written to the Secretary for Commerce and Industry asking the government to consider an interpretation of the Amended Ordinance which excludes its application to photocopying of newspaper and magazine articles. If this cannot be done, then the Chamber would advocate a change in the law, by incorporating the concept of “fair dealing” into the Amendments Ordinance as described above.
9. The advantage of the Chamber recommendation is that the spirit of the Ordinance will be preserved in full, while the draconian element will be removed. The “fair dealing” concept enables users to do casual photocopying within the law. With this principle in place, there is no need to pinpoint newspaper copying or to make any exclusion to any specific sector. Since there will be no special treatment in the Ordinance for any sector, there is no danger of the law being unravelled, thus the integrity of our copyright laws is fully preserved.

Administration of reprographic rights

10. We would stress that our aim is not to undermine the Amendments Ordinance, but to remove its apparently draconian element. Furthermore, for the avoidance of doubt, the Chamber is not against reprographic rights of newspapers itself. We do recognise that in some cases, for example news clipping services or research companies, the enforcement of reprographic rights of newspapers may indeed be justified.
11. However, because of the diverse nature of reprographic rights, the administration of copyrights is a difficult task. The experience of many other jurisdictions is that collective administration by copyright licensing bodies should be the way to go. While we do not dispute that, HKGCC believes a credible system of collective administration for reprographic rights has yet to be established.
12. The complex nature of reprographic rights administration should not be underestimated. Apart from the varied nature of rights holders (newspapers, magazines, books, journals, etc), the users are also highly diversified. The International Federation of Reproduction Rights Organisations has listed no fewer than ten major categories of users, namely, education, government and public administration, trade and industry, publicly funded bodies, church administration, professions, public and research libraries, cultural institutions, research bodies, and photocopy shops. Needless to say, the needs of different users are different and there is no one-size-fits-all scheme to administer reprographic rights.
13. The Chamber encourages the rights holders (publishers) to develop, based on the principle of fair dealing, a credible system of collective administration of copyrights that would cater to the different needs of different sectors in a fair and reasonable manner. Collective administration seems also to be the way preferred by the Administration. Since the legitimacy of copyright licensing

bodies are implied by our law, we believe that government also has a responsibility to regulate these bodies so as to ensure a balance between the rights of copyright owners and that of users. The government clearly recognises the need for such regulation, and the “Registration of Copyright Licensing Bodies Regulation” is to provide such a regulatory framework. However, we note that the Regulations are not yet in force.

14. In the discussion over the Regulations in March last year, the Chamber again contributed our views constructively to the government consultation. We have advocated the use of a code of practice for copyright licensing agencies, to ensure that their operations are transparent and that they will not become profit-making entities with monopoly power. We also called for more diverse means of collective administration, to be developed by the private sector, so as to offer users more choices. Moreover, we highlighted the importance of government responsibility through appropriate regulatory frameworks. The current debate over newspaper photocopying has highlighted the fact that in respect of reprographic rights, much more needs to be done in all of these areas.

Conclusion

15. HKGCC calls on the Legislative Council, the government and the community to restore good sense in the debate over newspaper photocopying. With common sense and goodwill, we believe the problem can be resolved satisfactorily. We believe a speedy solution is at hand through bringing back the well-established concept of fair dealing. This should be the guiding principle in our discussion and in the administration of the copyright laws. If necessary, it should be incorporated into the Amendments Ordinance more explicitly.
16. We conclude by upholding the spirit of the Amendments Ordinance in relation to copyright of material used in the course of business. It is out of support for the spirit of the Ordinance that we feel necessary to object to its application to casual photocopying.