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29 December 2001

Clerk to Panel
(Attn : Ms Christina Shiu)
Legislative Council Secretariat
3rd floor Citibank Tower
3 Garden Road
Central
Hong Kong

Dear Ms Shiu,

**LegCo Panel on Commerce and Industry
Review of Certain Provisions of Copyright Ordinance**

I refer to your letter ref. CB1/PL/CI of 23 November 2001 and would like to forward herewith the views of staff of this Council on the Consultation Document on Review of Certain Provisions of Copyright Ordinance.

Yours faithfully,


(Mrs Louisa Wong)
for Executive Director

Encl.

LW/tc

Comments Regarding the Review of Certain Provisions of Copyright Ordinance from the Perspective of an Educational Organization

Re. Paragraph 1.11

Chapter 1 - Criminal Provisions Related to End-user Piracy

- (a) Criminal sanction should NOT apply to the possession of an infringing copy of a copyright work in 'business' activities of a non-profit-making nature because educational organizations like the Vocational Training Council generally have a high degree of awareness regarding copyright protection and there is no need to impose such a criminal sanction on them. In fact it is possible that teachers may receive infringing copies of work from their students. Criminal sanction is therefore unfair to teachers who cannot "control" the source of the work they receive.
- (b) Employees in possession of an infringing copy supplied by the employer for use in business should NOT be criminally liable because they do not purposely acquire the infringing copy for their own profit. It is fair to impose penalty only on the employer who purposely acquires and uses the infringing copy for profit.
- (c) As It is hard to classify rampant piracy, it will be fair to treat all types of copyright work equally.
- (d) Certain acts of the end-user which infringe copyright but which do not give the end-user any commercial advantage or private financial gain should be EXEMPT from criminal liability. A teacher may occasionally photocopy a newspaper article or print a picture downloaded from a website for archival or teaching purposes. These acts generally do not conflict with a normal exploitation of the work by the copyright owner or unreasonably prejudice his legitimate interest. Hence these acts should be exempt from criminal liability.
- (e) The expression "for the purpose of, in the course of, or in connection with, any trade or business" introduced by the Amending Ordinance has cast the criminal net too wide. The phrase "in connection with" should be deleted. The criminal net cast by the Amending Ordinance has embraced teachers whose teaching activity has nothing to do with making profit out of the trading of infringing copies.

Re. Paragraph 2.13

Chapter 2 – Permitted Acts for Educational Purposes

- (a) For clarification of the meaning of “to a reasonable extent” and “passages” in sections 41 and 45 of the Copyright Ordinance, a definitive approach should be taken because under normal circumstances, most teachers simply would not risk doing the copying based on their personal interpretation of what is “a reasonable extent of the work”, although the copying may in fact be allowed by the Copyright Ordinance. A clear definition of “to a reasonable extent” and “passages” will not affect the protection of copyright, as there is still a primary consideration that the copying must not conflict with normal exploitation of the work by the copyright owner, or unreasonably prejudice his legitimate interests.
- (b) By taking a statutory approach, the most important thing is to define the maximum percentage of a published work that may be copied within a certain period of time, and the number of copies allowed. This is the most straight forward definition that is easily understood by all teachers. Effective implementation of the Ordinance depends on whether the terms used in the Ordinance are easily understood by the parties concerned.
- (c) The act of recording or copying permissible under sections 44 and 45 of the Copyright Ordinance should be permitted no matter licences under licensing schemes are available or not, the rationale being that the act itself is already subject to the condition that it does not conflict with a normal exploitation of the work by the copyright owner, or unreasonably prejudice his legitimate interests. Hence there is no need to put up another hurdle.
- (d) A new permitted act should be provided under the Copyright Ordinance to facilitate the uploading of copyright works to a school Intranet for access within the a school, with the condition that the act does not conflict with normal exploitation of the work by the copyright owner, or unreasonably prejudice his legitimate interests. This is a compromise between the use of technology in education and the protection of copyright owners’ interests.

Re. Paragraph 4.9

Chapter 4 – Permitted Acts Related to Free Public Showing or Playing of Broadcast or Cable Programme

- (a) Yes, the statutory exemption in paragraph 4.2 of the consultation document should be extended to cover all underlying copyright works included in the broadcast or cable programme.
- (b) Yes, the exemption should be extended but there needs to be a clearer definition for “where goods or services are supplied at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme” to avoid abuse by copyright users and to provide copyright owners with the protection they deserve.

Re. Paragraph 5.14

Chapter 5 – Parallel Importation of Copyright Works Other Than Computer Software

- (a) Yes, the civil liability and criminal sanction against parallel importation of and subsequent dealing in all types of copyright work should be removed. However, this should not apply to film and movies or other copyrighted products for which the copyright owners have fixed “window” periods for different territories and different channels of distribution.
- (b) Yes, the current 18-month threshold should be reduced.
- (c) Yes, the civil liability and criminal sanction imposed on end-users of parallel imported copies of copyright works in business should be removed.

Re. Paragraph 6.12

Chapter 6 – Unauthorised Reception of Subscription Television Programmes

- (a) Yes, criminal sanction against fraudulent reception of subscription television programmes should be introduced.

- (b) Yes, civil remedy against fraudulent reception of subscription television programmes should be introduced.
- (c) Yes, criminal sanction and civil remedy against the possession of an unauthorised decoder for commercial purposes should be introduced.

Re. Paragraph 7.13
Chapter 7 – Licensing Bodies

- (a) There is no pressing need to replace the Copyright Tribunal with an arbitration system to adjudicate disputes between copyright users and licensing bodies because to the parties involved in the dispute, appointing an experienced arbitrator does not seem to have much difference from appointing a legal representative.
- (b) Licensing bodies should be mandated to be registered and to publish their scales of royalty charges. The regulatory regime can also have a number of benefits to users of copyright works, like verifying the representation of the registered licensing bodies, and making sure that they are properly operated. Many users of copyright works are not sure of the actual representation of the licensing bodies and often are unable to verify. The mandatory registration and listing of licensing bodies also helps users of copyright works to find out which licensing body they should talk to. Regarding the resources needed to manage the regulatory regime, part of it could be recovered from the registration fee collected from the licensing bodies. Although the fee may eventually be borne by the users of copyright works, the service to verify the representation of the licensing bodies and making sure that they are doing genuine business will make it worthwhile.