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香 港 及 國 際 出 版 聯 盟
Hong Kong and International Publishers' Alliance

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July 11, 2005

Clerk to Panel on Commerce and Industry
Legislative Council Secretariat
3/F Citibank Tower
3 Garden Road, Central
Hong Kong

Dear Madam or Sir:

RE: Submission on CITB Proposals on Various Copyright-Related Issues

The Hong Kong and International Publishers' Alliance (HKIPA) appreciates this opportunity to submit comments on the proposals released last month (document CB(1)1792/04-05(05)). We also look forward to participating in the July 19 public session of the Panel on this topic.

HKIPA participated actively in the consultation process carried out by CITB since last December. We appreciate CITB's willingness to discuss and consider our viewpoint. Further details on many of the issues discussed below may be found in the submissions we made to CITB, or in which we joined, on February 11, March 17, and April 18, 2005. This submission focuses on the sections of the CITB document related to business end-user criminal liability, and copyright exemptions (paragraphs 7-31).

1. Scope of business end-user criminal liability (paragraph 8)

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Publishers continue to object to the unequal treatment provided to the copyrighted works of HKIPA members under the suspension of end-user criminal liability that has been in effect since 2001. The recommendation to make this unfair treatment a permanent feature of Hong Kong law is wrong. It rewards unscrupulous businesses while denigrating the hard work and creativity of honest authors and publishers. It also places Hong Kong in violation of its obligations under Article 61 of the WTO TRIPS Agreement, since infringing activity on a commercial scale would not be subject to criminal penalties if it involves works falling outside the four categories listed in the initial suspension legislation.

2. New criminal liability for copying/distribution of copyright infringing printed works (paragraphs 9-15)

The CITB correctly notes that this proposal only partially fills the gap created by the decision to make permanent the discrimination against the works of HKIPA members with regard to criminal liability. We have the following comments on this proposal:

a. The new criminal prohibition must cover unauthorized copying and distribution of the digital versions of books, reference materials and academic journals, as well as of their printed versions. Otherwise, a business that makes works published in digital formats electronically available to all its employees without authorization might escape criminal prosecution, while an employer that photocopies even a lesser number of copies of a printed work could be criminally liable. This discrepancy makes little sense; indeed the unauthorized distribution of material published in digital formats may be more threatening to the interests of the copyright owner, since no scanning or digitization of such materials is required in order to make them available on a network or by other digital means.

b. HKIPA supports the decision to treat academic journals on the same basis as books, rather than as periodicals. We urge that it be made clear that this classification includes professional, technical and medical journals as well.

c. With regard to a “safe harbour” against criminal liability (paragraph 10(b)), HKIPA believes it is essential that a combination of thresholds be used, so that the safe harbour applies only if none of the criteria is satisfied. To put it another way,

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the user must meet all elements of the safe harbour (percentage of book copied, retail value of copied material, number of infringing copies made) in order to eliminate exposure to criminal liability. It should also be possible to overcome the quantitative safe harbour in an egregious case in which a particularly significant harmful impact on the copyright owner can be proven. HKIPA looks forward to working with CITB and this Panel to fashion appropriate quantitative thresholds for the safe harbour.

d. HKIPA is concerned about the first two “statutory defences” proposed in paragraph 11. Criminal liability for intentional, massive copying for business purposes should not be forfeited simply because the copyright owner failed to respond to a licensing request in a fashion later determined to be “timely”, or because the licensing terms that it offered to a user are later deemed not to be “commercially reasonable”. Indeed, a copyright owner must retain the right to refuse to license a particular use at all, and it should not forfeit criminal enforcement for doing so. We also question whether these statutory defences should apply in any case in which parallel importation of the materials by the user involved is immunized (see paragraph 38). We believe that these two statutory defences require further study.

e. HKIPA strongly objects to the decision to exempt from criminal liability all non-profit schools, and those for-profit schools that receive Government subventions. To the extent that these institutions engage in systematic and high-volume infringements of copyrighted materials, they deserve to face criminal sanctions.¹ We also believe CITB is mistaken in its conclusion (paragraph 14) that HKIPA’s compromise proposal on this issue would “hinder classroom teaching”. Our proposal to CITB on April 18 would have accepted an exemption from criminal liability for non-profit educational establishments if the exemption --

(i) expired after a finite time period, to give establishments time to enter into licensing arrangements;

(ii) were accompanied by a government review of the practices of educational establishments and the extent to which they have entered into available licensing arrangements;

(iii) applied only to bona fide uses in the course of instruction; and

(iv) did not apply to infringement of textbooks or other materials

¹ Similarly, we oppose the suggestion of some LegCo members that “welfare organizations” should be exempted from criminal liability. Such organizations carry out important functions, but they must respect the law in doing so.

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marketed primarily for instructional uses.

Under the HKIPA compromise proposal, there would be no impact on classroom teaching so long as copying was confined to publications not directed to the educational marketplace (e.g., textbooks), or so long as schools began to take advantage of available licensing opportunities. We believe that these are very reasonable conditions to impose. Conversely, it is unreasonable for schools to insist on permanent immunity from criminal liability even for unlimited copying of textbooks and similar materials that could destroy the market for these items in Hong Kong.

3. Directors’/partners’ criminal liability (paragraph 18)

HKIPA supports this proposal so long as it is made applicable to the new criminal offense proposed in paragraph 9.

4. Fair dealing for education and public administration (paragraphs 21-25)

HKIPA has consistently questioned the importation into Hong Kong law of a non-exhaustive fair dealing approach to exceptions to copyright protection. Because a non-exhaustive fair dealing approach is new to Hong Kong law, HKIPA strongly recommends that, if such an approach is adopted in the areas of education and/or public administration, it should be codified in a provision stating that no exception in Hong Kong’s law (either fair dealing or a specific exception) may be applied –

- (a) in other than special cases;
- (b) in a way that conflicts with a normal exploitation of the work; or
- (c) in a way that unreasonably prejudices the legitimate interests of the right holder.

Such a provision would provide needed guidance to the courts that they must respect international norms in their interpretation of fair dealing (and other exceptions). While such a provision may overlap to some extent with Section 37(3) of current law, the change from an exhaustive to a non-exhaustive fair dealing approach for education and public administration purposes (see paragraph 21) fully justifies codifying these rules as explicit guidance for the courts. It will also help officials of schools and

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government bodies better understand the scope of the exceptions applicable to them.²

With respect to fair dealing in the educational environment, any such exception should be drafted in a way that encourages voluntary agreements between right holders and schools. Thus the exception should be inapplicable when the user knew or ought to have been aware that licenses were available that covered the activity in question. At the very least the law should specify that a detrimental effect on the potential market for or value of the work may be presumed whenever it is shown that such licenses were available.

Furthermore, any new exception should explicitly recognize the fact that a school's unauthorized use for instructional purposes of any substantial portion of a textbook or other material marketed for instructional purposes will ordinarily have a significant detrimental effect on the potential market for such a work.

Finally, the application of fair dealing (or any other exception) in the educational environment becomes much more complex if it is applied to making copyrighted material accessible over a network. Not only are exclusive rights beyond the reproduction right implicated, but the danger that an initial limited use will spiral out of control is much greater. If a fair use exception is to apply at all in this context, technological safeguards should be in place to ensure that the exception remains within carefully defined boundaries that meet international standards. These safeguards, which could be subject to standards promulgated by appropriate educational authorities, should include both access controls – so that access to the material may be restricted, e.g., to students enrolled in a particular course – and use controls, to prevent or inhibit unauthorized downloading, printing, or further dissemination.

We do not agree with CITB's assertion (paragraph 25) that such safeguards are currently unavailable or too expensive. To the contrary, without such safeguards, the "exception" provided by an educational fair dealing provision could easily swallow

² We note, for instance, that when CITB compiled, in Annex D, the "relevant provisions of the Copyright Ordinance" concerning exceptions to protection, it did not even include Article 37. This illustrates how easily these crucial limitations on exceptions can be overlooked unless they are explicitly spelled out within the fair dealing provisions themselves.

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the “rule” of copyright protection in the online environment. Additionally, while we appreciate CITB’s observation that peer-to-peer sharing and Intranet-based digital libraries “are unlikely to constitute fair dealing”, the whole point of a non-exhaustive fair dealing provision is it is subject to interpretation by a court on a case-by-case basis. HKIPA respectfully suggests that publishers should not bear the entire risk that a court in the future might disagree with CITB’s considered opinion on this question. Requiring schools to adopt and implement reasonable procedures and safeguards to prevent such abuses is the minimum that should be done to manage this risk.

Regarding a fair dealing exception for public bodies, we are unaware of any showing of necessity for expanding existing provisions of the Copyright Ordinance in this area. Simply to state that “public administration has become increasingly complex” (paragraph 21) is far from a sufficient justification. A sweeping exception in this area could cripple the Hong Kong market for legal materials, medical publications, and many reference works for which public bodies constitute a significant share of the market. HKIPA urges that this proposal be studied further.

5. Permitted acts for education (paragraph 26)

HKIPA does not object in principle to the proposals in this paragraph, and we recognize that greater interactivity in the teaching environment may call for some adjustment of existing exceptions. However, our ultimate conclusion about these proposals depends on the breadth and scope of the exceptions recognized.

6. Permitted acts for libraries (paragraph 28)

This is a new proposal that we believe requires further study including a demonstration of the need to expand existing exceptions for libraries. The decision to release a particular product in a new medium should be left to the marketplace; a broad format shifting exception for libraries for replacement copies would undermine this principle. We are unaware of any evidence that the market is not responding to the reasonable needs of libraries in this area. Furthermore, we have stated above our concerns about provisions under which infringement liability would turn on whether a court ultimately decides that a publisher’s response to a user is “timely”. In this instance, such a determination could decide, not simply whether criminal remedies are available, but whether a library’s conduct is infringing at all.

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7. Proposed permitted acts proposed by the Government in 2002 (paragraphs 29-31)

HKIPA's main concern here is the proposal (referenced in paragraph 30(a)) to repeal Section 45(2) of the Ordinance, which limits the scope of the reprographic copying exception for schools whenever licenses allowing such copying are available. HKSAR should continue to recognize that the best and most efficient way to manage educational uses is to encourage voluntary agreements between right holders and schools. Repeal of section 45(2) is completely antithetical to this goal and would replace market forces with a government dictate. CITB's comment in paragraph 31, that the existing exception "does not allow free making of multiple copies without restriction," is irrelevant; repeal of section 45(2) would certainly allow schools to copy, without charge and without liability, to an extent that is now covered by licenses that are now readily available to such schools. In effect, it would encourage schools to ignore these licenses and instead take their chances on whether the scope of their copying activities will ultimately be deemed "reasonable." This is the wrong direction to take the law in Hong Kong.

Respectfully submitted,

Simon Li
Convenor (Hong Kong)

(no signature via electronic transmission)