

**Submissions by various organizations on the Copyright (Amendment) Bill 2006  
after the Administration's introduction of proposed Committee Stage Amendments  
( as of 30 April 2007 )**

<b>(III) Copyright Exemption</b>			
	<b>Organizations</b>	<b>Views / Concerns</b>	<b>Administration's Response</b>
3.1	<p><b><u>Publication industry</u></b></p> <ul style="list-style-type: none"> <li>• The Anglo-Chinese Textbook Publishers Organisation</li> <li>• Chung Tai Educational Press</li> <li>• Enrich Publishing</li> <li>• Happy Mind Ltd</li> <li>• Hong Kong Educational Publishers Association</li> <li>• HK Educational Publishing Co.</li> <li>• Hong Kong and International Publishers' Alliance (HKIPA)</li> <li>• HK Publishing Federation Ltd</li> <li>• Jing Kung Education Press</li> <li>• Precise Publications Ltd</li> <li>• Hong Kong Reprographic Rights Licensing Society (HKRRLS)</li> <li>• Modern Education Network Ltd</li> </ul>	<p><u>Fair dealing for education</u></p> <p>The book publishers welcome the Administration's proposed CSAs to restrict the use of the fair dealing provision when applied to the online environment. However, they consider that the technological measures required of educational establishments (especially tertiary institutions) should also cover copy-control measures to restrict "the downloading, printing, forwards or other subsequent use of the work beyond those uses necessary for giving or receiving instruction in the specified course of study in question or for the purpose of maintaining or managing the network". They suggest imposing this additional condition on tertiary institutions in the Bill and to review the availability or otherwise of such technologies to primary and secondary institutions in one or two years.</p> <p>On the two proposed conditions, the book publishers comment that the copies stored in the school network systems should not, in any event, be kept longer than "the end of the academic year during which a copy of the work was first stored in the network."</p>	<p><u>Fair dealing for education</u></p> <p>The proposed CSAs (that restrict the use of the fair dealing provision when applied to the online environment) are intended to address copyright owners' worries about possible abusive use of their works in school networks. We are wary that the conditions so imposed should not be too stringent. Otherwise, they would unreasonably impair the operation of the fair dealing provision in the school network environment. We believe that the two proposed conditions have helped us to strike the right balance.</p> <p>We have considered using the term "academic year" in the relevant provision. It is noted that this term may not give a clear meaning in respect of some courses provided by certain educational establishments (e.g. certain short-term courses run by tutorial schools) which are not tied to academic year. We are of the view that our proposed</p>

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	<ul style="list-style-type: none"> <li>• Modern Educational Research Society Ltd</li> <li>• Oxford University Press (China) Ltd</li> <li>• Sino United Publishing (Holdings) Ltd</li> <li>• <i>International Association of Scientific, Technical and Medical Publishers (STM)(16 April 2007)</i></li> </ul>	<p>The book publishers reiterate their earlier suggestion that the fair dealing provision should not apply to works that are marketed primarily to education institutions, or at a minimum, to make a presumption that, where the work is a textbook or similar product that is primarily marketed in Hong Kong to educational establishments, it should be presumed that the dealing of the work will have a significant detrimental effect on the potential market for or value of the work.</p>	<p>formulation of “no longer than 12 consecutive months” provides more certainty and clarity to schools as well as copyright owners. The condition requires that a copy of a work should not be stored in the school network for a period longer than is necessary for the purposes of giving or receiving instruction in the specified course of study and in any case no longer than 12 consecutive months. The determining factor is whether it is necessary to retain the copy in the network for instruction purposes. The 12-month period only sets out the maximum period for the purpose of certainty.</p> <p>We do not agree that the fair dealing provision should not apply to textbooks. This would unduly limit the scope of the fair dealing provision. Moreover, we do not consider it appropriate to expressly set out what activities are presumed to have detrimental effect on the potential market for or value of the work. Under the proposed provisions, the court would take into account all the circumstances of the cases (including the four factors set out in the new section 41A(2)) when determining whether any dealing with a work is fair dealing. The effect of the dealing on the potential market for or value of the work is one of the factors to be</p>

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		<p>They also opine that “fair dealing by or on behalf of a teacher” can potentially cover commercial activities of copyshops. They suggest limiting the scope of coverage to a clerk or other school employee working under the supervision of a teacher.</p> <p><b>STM makes the following suggestions –</b></p>	<p>taken into account. It should be up to the court to determine whether certain dealing with a work has detrimental effect on the potential market for or value of the work, having regard to the specific circumstances of individual cases.</p> <p>As regards the book publishers’ suggestion to replace “on behalf of a teacher” with “clerk or other school employee working under the supervision of a teacher” at section 41A, we consider that our proposed formulation provides more flexibility as to who may act on behalf of the teacher. We do not wish to limit the persons who could act on behalf of teachers to school employees. Moreover, we do not consider it reasonable to exclude copyshops altogether from the fair dealing provision where they are acting on the instructions of a teacher to facilitate his/ her teaching activities. It is noted from previous enforcement experience that illegal copying of copyright works by copyshops usually involved copying of the entire works in a massive volume. We believe that such kinds of activities would not be considered as fair dealing even if the copyshops claim that they made the copies on behalf of a teacher.</p> <p><b>We disagree with STM’s suggestion (a).</b></p>

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		<p>(a) copying of published materials especially designed for the educational sector should be expressly not allowed under educational fair dealing;</p> <p>(b) the scope of copying under the fair dealing provision should be defined precisely and include elements such as the portion of work copied, time limits in connection with the instruction, and connection of the copying and the person doing the copy with the instruction.</p>	<p>Excluding materials especially designed for the educational sector (such as textbooks) from the operation of the fair dealing provision would unduly limit the scope of the fair dealing provision. As regards STM's suggestion (b), as pointed out above, it is up to the court to determine if a dealing constitutes fair dealing. The amount and substantiality of the portion dealt with in relation to the work as a whole would be one of the factors the court will consider in determining whether such a dealing is fair. We do not consider it desirable to specify the portion of work copied or time limits in connection with the instruction as such an approach would undermine the flexibility that the fair dealing provision seeks to provide. On the question of connection of the copying and the person doing the copy with the instruction, we would like to point out that the application of the fair dealing provision for education is already clearly confined to dealing for the purposes of giving or receiving instruction in a specified course of study. Only students, teachers or persons acting on behalf of teachers can make use of the fair dealing provision.</p>

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		<p><u>Retention of section 45(2) and related amendments to section 41A</u></p> <p>The book publishers welcome the Administration's proposed CSA to retain section 45(2) (this section provides that reprographic copying to a reasonable extent will not be a permitted act if there is a licensing scheme available authorizing the copying in question). They, however, object to the proposed CSA to section 41A (the fair dealing provision) which stipulates that the making of copies which does not fall within section 45 does not mean that it is not covered by section 41A. They suggest that section 41A should not apply if there is a licensing scheme available authorizing the copying in question, or that at a minimum the court should be instructed to presume that such copying will have a significant detrimental effect on the potential market for the work in question.</p>	<p><u>Retention of section 45(2) and related amendments to section 41A</u></p> <p>The proposed CSA to section 41A will clarify that educational establishments may still rely on the fair dealing provision to make a small number of reprographic copies to facilitate teaching, even if a licensing scheme is available authorizing the copying in question. Ultimately, it is for the court to determine whether the fair dealing provision should apply. We consider that the proposed retention of section 45(2) and the related amendments to section 41A have helped strike a reasonable balance.</p> <p>We do not favor the suggestion of introducing a presumption. As pointed out above, we take the view that it is for the court to consider all the circumstances of the case and take into account the four factors set out at the new section 41A(2)(the effect of the dealing on the potential market for or value of the work being merely one of the factors)when determining whether any dealing with a work is fair dealing. It should be up to the court to determine whether certain dealing with a work has detrimental effect on the potential market for or value of the work, having regard to the specific</p>

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		<p><b>STM suggests that the fair dealing provision should be clarified such that copying under the fair dealing provision should be subsidiary to any licensing schemes in place.</b></p> <p><u>Fair dealing for public administration</u>                      The book publishers suggest elaborating the factors under section 54A(2), in the interest of preventing the fair dealing provision from adversely affecting the current or future licensing arrangements between publishers and governmental bodies. They suggest adding –</p> <p>(a) “including whether the work is primarily marketed in Hong Kong to the Government, the Executive Council, the Judiciary or to District Councils” after “the nature of the work”;</p> <p>(b) “including whether and to what extent licences are available authorizing the dealing in question and the person making the dealing knew or ought to have been aware of that fact” after “ the effect of the dealing on the potential market for or value of the work”.</p>	<p>circumstances of individual cases.</p> <p><b>STM's suggestion is similar to what the book publishers have made. Please see our response above.</b></p> <p><u>Fair dealing for public administration</u>                      As with other fair dealing provisions, the court will consider the facts and circumstances of each individual case when determining whether certain dealing with a work is fair. The four factors (modeled on the fair use provision in the US Copyright Act) merely set out matters that are important and of general application for the court's consideration.</p> <p>In the Bills Committee paper no. CB(1)1913/05-06(01), we have set out the outcome of our research into the relevant US case law as to what constitutes fair dealing. As illustrated by cases in the US, one way of proving market harm is for the plaintiff to show that should the challenged use become widespread, it would adversely affect the potential market for the copyright work. The court will look at the traditional, reasonable, or likely to be developed markets for this purpose. The approach taken by the</p>

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		<p>STM suggests adding a definition for “urgent business” as “an unforeseeable, unavoidable situation that does not allow the administrative body to contact the Hong Kong collecting society in order to get permission before copying a work because the delay caused would lead to an irreversible damage”.</p>	<p>US courts in interpreting the fair use provision under the US Copyright Act will be of persuasive value to the Hong Kong courts in considering the proposed fair dealing provisions in Hong Kong. Therefore, we take the view that the market for licensing agreements is likely to be a relevant issue when considering the fourth factor (i.e., the effect of the dealing on the potential market for or value of the work).</p> <p>In view of the above, we do not consider it necessary or appropriate to further elaborate the factors as suggested by the book publishers.</p> <p>We do not consider it desirable to provide a legal definition for “urgent business”. Instead, the plain and ordinary meaning of “urgent” (i.e., needs to be dealt with immediately) would be adopted. Whether there is a need for something to be dealt with immediately depends largely on the circumstances at the material time.</p>
3.2	<b><u>International Federation of the Phonographic Industry (HK Group) Ltd.</u></b>	<p><u>Proposal to expand the composition of audience under Section 43</u></p> <p>IFPI disagrees with the Administration's view that the proposed amendment to section 43 is in compliance with</p>	<p><u>Proposal to expand the composition of audience under Section 43</u></p> <p>The proposal to expand the composition of the audience to include the near relatives of</p>

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		<p>the three-steps test under Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO). It reiterates that the WTO panel might find the amendments not in line with the TRIPS and Berne Convention.</p>	<p>pupils is to address the concern raised by the education sector. They consider the existing scope too restrictive and out of step with the practical needs of educational establishments in present-day circumstances.</p> <p>We are satisfied that the proposed amendments would comply with the three-steps test.</p> <p>Separately, in light of the comments made by Bills Committee members on the scope of the “near relatives” proposed in the revised section 43, we are considering an alternative drafting approach that does not require defining “near relatives” in the law. The revised formulation should give flexibility to educational establishments in a reasonable way when carrying out this permitted act, without at the same time expanding the scope of the permitted act excessively. We will submit the proposed CSA for the Bills Committee’s consideration.</p>
3.3	<b><u>Hong Kong Institute of Certified Public Accountants (HKICPA)</u></b>	<p><u>Fair dealing provisions</u> HKICPA comments that the fair dealing provisions should be able to achieve a reasonable degree of certainty without introducing an arrangement that is overly rigid and unable to deal effectively with real practical circumstances.</p>	<p><u>Fair dealing provisions</u> Noted.</p>



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		<p>It also suggests introducing a fair dealing provision for regulatory and professional bodies in carrying out their statutory or regulatory functions.</p> <p><u>Permitted act for persons with a print disability</u>                      HKICPA comments that the proposed section 40B(5) would prohibit a person with a print disability from selling an accessible copy at cost after he finished using it. It considers this condition too restrictive, especially in comparison with section 40D(6) which allows a specified body to charge for lending or transferring an intermediate copy at cost.</p>	<p>In the public consultation exercise which ended in early 2005, copyright owners raised objections against the introduction of a fair dealing provision, whereas views from users were divided. Having carefully considered the views received, we proposed in the Bill that specific fair dealing provisions for education and public administration purposes should be introduced to accommodate the needs for use of copyright works in these two sectors. It should be noted that there is already a permitted act under the existing Copyright Ordinance (section 59) which provides a copyright exemption for the doing of particular acts specifically authorized by Ordinances unless the Ordinances provide otherwise. Hence, regulatory or professional bodies which do any acts specifically authorized by Ordinances already enjoy copyright exemption under the existing copyright law.</p> <p><u>Permitted act for persons with a print disability</u>                      Generally speaking, subsequent dealing (including selling, letting for hire, offering or exposing for sale or hire) of copies made under a permitted act (e.g. sections 41, 44 and 45) is not allowed so that the legitimate interests of the copyright owners would not</p>

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			<p>be unreasonably prejudiced. Copies made under permitted acts, if dealt with subsequently, are to be treated as an infringing copy for the purpose of that dealing and, if that dealing infringes copyright, for all subsequent purposes. It is our starting position that this should equally apply to the making of accessible copies by persons with a print disability and "specified bodies".</p> <p>Organizations which look after the welfare of persons with a print disability reflect to us that they are required to produce accessible copies (such as Braille version) on a regular basis to the beneficiaries of their organizations and the production of accessible copies can be expensive. Having examined the practical needs of such organizations and educational establishments (which may have persons with a print disability as students), we consider it reasonable to make specific provision so that such bodies will be allowed to recover the costs for making and supplying accessible copies. On the other hand, it is considered not unreasonable for individual persons with a print disability to bear the costs of making accessible copies for their own personal use.</p>