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1 December 2006

Mr Christopher K B Wong
Deputy Secretary for Commerce, Industry
and Technology (Commerce and Industry)
Commerce, Industry and Technology Bureau
Level 29, One Pacific Place
88 Queensway
Hong Kong

Dear Mr Wong

HKIPA appreciates this opportunity to comment on the "Proposed Amendments to the Copyright (Amendment) Bill 2006," which was presented to the Bills Committee by CITB at its meeting on 20 November. Our comments focus mainly on five issues. We present these comments as provisional, since in some cases our reaction to the proposed amendments will turn upon their actual wording, which is not yet available.

(1) Fair dealing for education (Annex A, Part I, item 12, pages 8-9)

We are pleased that CITB has recognized (item 12a) the principle that an educational institution must put some technological safeguards in place before claiming the new fair dealing exception for networked use of copyright materials. We are disappointed that they have applied these principles only to access controls, and not to technological controls on what may be downloaded or printed from a network. These activities all involve the exercise of exclusive rights and thus the new fair dealing exception is relevant to them. At a minimum, tertiary institutions should be required to have use control technologies in place before claiming the fair

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dealing exception, and there should be a review in one or two years regarding the availability of such technologies to primary and secondary institutions.

It should be specified that the time limit for holding copies on the school network system cannot exceed one academic year, or the duration of the specific course in question, whichever is shorter. This should prevent confusion about the “any longer than is necessary” standard in item 12b.

We are also disappointed that CITB continues to propose to apply the fair dealing exception to dealings in textbooks and similar material specifically directed to the educational marketplace. We understand that the effect of the dealing upon the potential market for the work is one factor that would be taken into account in applying the fair dealing exception; but it is only one factor among four that the courts must consider (and courts may consider other factors as well). If a court were to give insufficient weight to this factor, there is certainly a risk that a use which has an adverse impact on the potential market for a work could be ruled to be fair dealing.

We continue to believe that the educational fair dealing exception should not apply at all to works that are marketed primarily to educational institutions. But at a minimum, to reduce the risk described above, we urge that the Bill be amended to instruct courts to presume, in the absence of persuasive evidence to the contrary, that unauthorized uses of such materials by schools will have a significant detrimental effect on their potential market.

Finally, we note that the Bill currently covers fair dealing “by a teacher or pupil”. CITB proposes to expand this to activities “on behalf of a teacher”. This risks the creation of a commercial market for “fair dealing” services performed “on behalf of a teacher”, e.g. a commercial copyshop catering to teachers at a nearby institution. To prevent this, we believe that the exception should be limited to activities of a clerk or other school employee working under the supervision of the teacher.

(2) Section 45(2) (Annex A, Part I, item 14, pages 10-11)

HKIPA commends CITB for agreeing to leave Section 45(2) in the statute without change. However, as we read it, their further proposal in item 14(b) would undermine Section 45(2) to a considerable extent. Under it, even if certain copying were covered by an existing license, a teacher could make the copies without paying and defend that action on the basis of fair dealing, although not on the basis of section 45. Whether the extent of copying was “reasonable” would not be the sole factor,

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but rather one of four factors that the court must consider (and it could consider other factors) in applying the fair dealing test. Nor would the fact that a license was available be a determining factor in the fair dealing analysis, even though (as explained above) the copying would have a detrimental effect on the market for the work. This result would undermine existing licensing schemes and discourage the development of new ones. We propose that the fair dealing provisions (section 41A) should not apply to copying covered by section 45(2), or that at a minimum the courts should be instructed to presume, in the absence of persuasive evidence to the contrary, that such copying will have a significant detrimental effect on the potential market for the work in question.

(3) Fair dealing for public administration (Annex B, item 2, page 1)

We appreciate CITB's oral assurance that the application of this new fair dealing provision should not have an adverse impact on current or prospective licensing arrangements between publishers and governmental bodies. However, we do not think there is a sufficient basis for confidence in this assurance, for the reason already stated: the impact of a dealing on the potential market for a work is only one of at least four factors the courts would consider in applying the fair dealing exception. The uncertainty this new provision would cause could be reduced to some extent, at least, by a provision instructing the courts to presume, absent persuasive evidence to the contrary, that dealings with materials for which a copyright license was available, or which are primarily marketed in Hong Kong to governmental agencies, will have a significant detrimental effect on the potential market for the work in question.

(4) Parallel importation (Annex A, Part I, item 16, page 12)

HKIPA continues to believe that the need to change Hong Kong's laws in this area has not been demonstrated, and that the government proposal to do so should be withdrawn. Distributors, businesses and the local community as a whole have been well served by the current provisions on this topic.

(5) Business end-user liability

HKIPA continues to object to the government's decision to withhold from Bills Committee consideration the detailed legislative provisions on the so-called "safe harbor" within which criminal liability will not attach to the copying or distribution of copyright infringing printed works by businesses. The proposal should be considered in its entirety, so that all parties know the boundaries of the behavior to

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which the new offence will apply. Since, under the government's approach, the Bills Committee will not be considering the "safe harbor" provisions at this time, HKIPA will submit its views on them separately.

Respectfully submitted

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Convenor (Hong Kong)

(no signature via electronic transmission)

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