

By electronic mail (ckb_wong@citb.gov.hk)

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Mr Christopher K B Wong
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and Technology (Commerce and Industry)
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Dear Mr Wong

We appreciate this opportunity to comment on the “Proposed Committee Stage Amendments to the Copyright (Amendment) Bill 2006 (up to clause 24)”.

I. Section 41A: Fair dealing for purposes of giving or receiving instruction

A. Section 41A(1) (page 22)

The Bill currently covers fair dealing “by a teacher or pupil”. The CSA 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. We do not believe this to be CITB’s intention, and suggest the following language (proposed new text underlined):

(1) Fair dealing with a work by a teacher, by a pupil, or by a clerk or other employee of an educational establishment working under the supervision of a teacher, for the purposes.....

B. Section 41A(2) (page 22)

While we continue to believe it is inappropriate to make a fair dealing defence available for otherwise infringing uses of textbooks and other works primarily directed to the educational marketplace, if this approach is not taken the statute should create a negative presumption about such uses. This could be accomplished by adding the following proviso to proposed section 41A(2)(d):

(d) the effect of the dealing on the potential market for or value of the work; provided, that where the work is in the form of a textbook or similar product that is primarily marketed in Hong Kong to educational establishments, the effect of the dealing on the potential market for or value of the work shall be presumed, unless it is proven to the contrary, to be significantly detrimental to such market or value.

C. Section 41A(4A) (pages 24-25)

Any networked dissemination of copyright works should require the use of access controls in order to qualify as fair dealing (as the January 4 revisions to the document make clear), and use controls should also be required for tertiary institutions, which can be expected to be in a position to employ them. The following redlined text implements these recommendations.

(4A) Where any dealing with a work involves the making available of copies of the work through a wire or wireless network wholly or partly controlled by an educational establishment –

- (a) in the case of any educational establishment, if the educational establishment fails to –
 - (i) adopt technological measures to restrict access to the copies of the work through the network so that the copies of the work are made available only to persons who need to use the copies of the work for the purposes of giving or receiving instruction in the specified course of study in question or for the purposes of maintaining or managing the network; or
 - (ii) ensure that the copies of the work are not stored in the network for a period longer than is necessary for the purposes of giving or receiving instruction in the specified course of study in question or, in any event, for a period longer than the end of the academic year during which a copy of the work was first stored in the network

the dealing is not fair dealing under subsection (1); or

- (b) in the case of an educational establishment that is a tertiary institution, if the educational establishment fails to adopt technological measures to restrict the downloading, printing, forwarding, 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 purposes of maintaining or managing the network, the dealing is not fair dealing under subsection (1); and

- (c) if none of the conditions stated in subparagraphs (a) or (b) applies,

subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

D. Relationship of fair dealing to section 45 exception

We propose two options to ensure that the enactment of the educational fair dealing defence does not unnecessarily undermine existing section 45(2):

Redline to proposed section 41A(4B) (pages 25-26)

Option 1:

(4B) Without affecting the generality of section 37(5), where any dealing with a work involves the making of reprographic copies, the fact that the making of the copies does not fall under section 45, for any reason other than the applicability of section 45(2), does not mean that it is not covered by this section, and subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

Option 2:

(4B) Without affecting the generality of section 37(5), where any dealing with a work involves the making of reprographic copies, the fact that the making of the copies does not fall under section 45 does not mean that it is not covered by this section, and subsection (2) applies in determining whether the dealing is fair dealing under subsection (1), except that in a case to which section 45(2) applies, the effect of the dealing on the potential market for or value of the work shall be presumed, unless it is proven to the contrary, to be significantly detrimental to such market or value.

II. Section 54A: fair dealing for public administration (pages 28-29)

The following amendments are proposed to carry out CITB's stated intent to avoid any adverse impact of the new defence on current or future licensing arrangements between publishers and governmental bodies:

(2) In determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular –

- (a) the purpose and nature of the dealing, including whether the dealing is for a nonprofit-making purpose and whether the dealing is of a commercial nature;
- (b) the nature of the work, including whether the work is primarily marketed in Hong Kong to the Government, the Executive council, the Judiciary or to District Councils;
- (c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and
- (d) the effect of the dealing on the potential market for or value of the work, including whether and to what extent licenses are available authorizing the dealing in question and the person making the dealing knew or ought to have been aware of that fact.

III. Section 119B (business end-user offence for copying or distributing copies of printed works)

A. Regular or frequent copying of multiple works (pages 44-45)

We understand that the goal of the changes to proposed section 119B(1)(a) and (b) is to clarify, as CITB has stated, that the offence should apply to one who “does the relevant act,

whether or not in relation to the same copyright work, on a regular or frequent basis". [Cite] In order to make this intention clearer, we suggest that the phrase "a copyright work" in these two paragraphs be changed to read "any copyright work".

B. Unrestricted network distribution (page 45)

Proposed section 119B(5) continues to concern us because it seems to immunize from criminal liability the distribution via the Internet, for business purposes, of copyrighted material owned by us. We understand that there might be two justifications for this provisions: first, that the situation it covers will be addressed by future amendments to the Ordinance; and second, that this behavior may in some cases already be covered by existing or revised offences involving distributing infringing copies (e.g., proposed section 118(1)(e) or (g)). We do not believe that either justification is sufficient to justify inclusion of this potentially misleading provision; first, because a dangerous gap will be left during the time that future amendments are proposed, considered, enacted, and brought into force; and second, because the scope of the section 118(1) offences is sufficiently uncertain that criminal liability under proposed section 119B ought to be available. We urge that proposed section 119B(5) be stricken.

C. Defence of inability to obtain license, etc. (pages 49-50)

We continue to believe that criminal liability for business uses of copyrighted materials owned by its members should not be forfeited simply because a court later determines that the copyright owner failed to respond to a licensing request in a "timely" fashion, or because the licensing terms it offered to a user are later deemed not to be "commercially reasonable". However, if these defences are to be recognized, along with the proposed new defence that the copyright owner could not be identified or located, they should be based on proof of what occurred prior to the time of the infringement, not based on evidence that is manufactured afterwards. Furthermore, since the acts constituting an offence could involve several different copyright works, the defence should not be operative when it applies only to a few such works and the defendant "regularly or frequently" infringed other works in the manner denounced by the statute. Accordingly, we suggest that the chapeau to proposed section 119B(9) be changed to read, "It is a defence for the person charged with an offence under subsection (1) to prove that, prior to commencement of the activities giving rise to the offence with respect to a particular copyright work", and that the following language be added at the end of this subsection: "but only to the extent that, considered without regard to that particular copyright work, his acts described in subsection (1)(a) or (1)(b) with respect to all other copyright works in question are neither regular nor frequent".

Thank you for considering our views.

Respectfully submitted

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(no signature via electronic transmission)

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