



COPYRIGHT AGENCY LIMITED

18 January 2006

Ms Mary Chow
Deputy Secretary for Commerce, Industry and
Technology (Commerce and Industry)
Level 29, One Pacific Place
88 Queensway
HONG KONG

email - mary_chow@citb.gov.hk

Dear Ms Chow,

I write to you in my capacity as Chief Executive of Copyright Agency Limited [CAL], as Vice President of the International Federation of Reproduction Rights Organisations [IFRRO] and as Chair of IFRRO's Asia Pacific Committee.

CAL seeks to submit its comments on the "Refined Proposals on Various Copyright Related Issues" published by Legco in November 2005.

CAL supports the submissions made by the Hong Kong and International Publishers' Alliance (HKIPA), by IFRRO and by the Singapore society, CLASS. We wish to comment on both the proposed changes to the fair dealing exception and on the proposal to amend section 45(2) of the Hong Kong *Copyright Ordinance*.

Fair Dealing Exception

We note the proposal to amend section 38 of the *Copyright Ordinance* to include the effect of the dealing on the potential market for or value of the work as a factor relevant to reasonableness of any dealing.

This proposed amendment will go part of the way to addressing one aspect of compliance with international treaty obligations. That is, under Article 9(2) of the Berne Convention, the requirement that an exception to copyright must be:

- for certain special cases,
- that do not conflict with the normal exploitation of the work, and
- do not unreasonably prejudice the legitimate interests of the author.

Nevertheless, it is CAL's view that an exhaustive list of fair dealing exceptions is preferable for both copyright users and owners in the enhanced certainty it provides.

Permitted acts for education – s.45(2)

CAL views with great concern the proposal to remove the existing restriction on unremunerated copying in section 45(2) of the *Copyright Ordinance* where there is a relevant licensing scheme in place.

We submit that this proposal is not in line with international treaty obligations or with national copyright laws currently in place in other countries.

As noted above, the 3 step test in the Berne Convention for copyright exceptions requires that an exception must not conflict with the normal exploitation of a work. Clearly, the licence schemes now in place in Hong Kong form a part of such “normal exploitation”, and to remove the reference to them in section 45 must weaken those schemes.

We submit that this proposal is in direct conflict with the copyright laws of other countries, and note that links to the relevant legislation and websites to demonstrate laws and practices in UK, Australia, Singapore and Canada were set out in the submission by IFRRO dated 11 January 2006. In particular:

- the UK *Copyright Act* limits the fair dealing for education purposes to where a licence is not offered by the rightsholders;
- the Canadian *Copyright Act* does not extend the fair dealing exception to education, so that Canadian education institutions must acquire a licence from the Canadian RRO, Access Copyright; and
- the Australian and Singapore copyright laws provide statutory schemes permitting educational uses on compliance with a number of conditions, including payment.

We take this opportunity to emphasise that, under the statutory scheme created by the Australian *Copyright Act 1968*, an educational institution [whether non-profit or for-profit] must formally agree to pay for the use of copyright works before they can carry out any reproduction or communication of a copyright work in reliance on that scheme.

In addition, CAL submits that this proposal has the potential to create confusion as to the effect of amended section 38(3). To amend section 45(2) in the manner indicated will weaken the effect of the current Hong Kong *Copyright Ordinance* in encouraging reliance on the licence schemes offered in your territory by approved licensing bodies.

As a result, it will adversely affect the potential market for and value of the licensed works. This will be in direct conflict with amended section 38(3) and with the international treaty obligations which the new section 38(3) seeks to address.

We therefore respectfully submit that the proposal to amend section 45(2) by removal of that obligation should not proceed.

Yours sincerely,

Michael Fraser
Chief Executive