

A Submission to
LegCo Panel on Commerce and Industry
in response to
Government Preliminary Proposals on
Various Copyright-related Issues

by
the Concern Group of the Education Sector on Copyright Law

July 2005

This submission is made by the Concern Group of the Education Sector on Copyright Law and represents the collective views of 26 educational organizations in Hong Kong regarding the current review of certain provisions of the Copyright Ordinance.

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Foreword

In December 2004, the Government released the consultation document *Review of Certain Provisions of Copyright Ordinance*. In response to the document, the Concern Group made a submission to the Commerce, Industry and Technology Bureau (CITB) in February 2005. On 17 June 2005, the Secretary for CITB, Mr. John C Tsang, gave a talk at a luncheon hosted by the Hong Kong Intellectual Property Society, during which he outlined Government proposals on various copyright-related issues. The full text of the Concern Group submission is available at <http://www.hkbu.edu.hk/~copyright/index2.html> while the text of Mr. Tsang's speech as well as the paper to the LegCo Panel on Commerce and Industry for discussion at its meeting on 19 July 2005, are available at the homepage of the CIB <http://www.info.gov.hk/cib/ehhtml/main.html>

2. With regard to the Government proposals in the LegCo paper, the Concern Group is of the view that in general the Government has taken into account the concerns expressed by the education sector about the impending legislative amendments to the Copyright Ordinance. The Concern Group believes that the proposals outlined in the paper, if fully implemented, will be a relief to the education sector with regard to the use of copyright materials in teaching and learning (and for the purpose of this submission, "teaching and learning" shall include research), and is congruent with the spirit of the enactment of the Copyright Ordinance.

3. While the Concern Group is eager to see that those proposals which have positive impacts on the quality of teaching and learning will be incorporated in a clear and unequivocal manner in the Ordinance, it hopes the Government would give further consideration to some of the suggestions the Concern Group earlier proposed (in the February 2005 submission) but not yet covered in the recent Government proposals. In addition, the Concern Group would also like to respond to some of the points raised in the LegCo paper that require further clarification/discussion. Herein below is our next submission.

Copyright Exemption

Permitted acts for private study and research

4. The Concern Group welcomes the Government proposal to retain all the existing permitted acts in the copyright law pertaining to the right of an individual to use copyright materials for private study and research. It believes that the proposal will provide a legitimate right for an individual, particularly a student, to gain access to information without going through the complicated and often costly way of obtaining permission. The existing copyright permitted acts will continue to facilitate learning and the pursuit of knowledge.

5. The Concern Group notes the Government proposal of adopting a non-exhaustive fair dealing approach for use of copyright works. Besides lifting the restriction that a licence must be obtained by copyright users for making copies of copyright works should the relevant licensing scheme be available, the Government will incorporate in the Copyright Ordinance the following four factors for the consideration of the court with regard to whether or not certain acts constitute fair dealing:

- (a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit making purpose;
- (b) the nature of the work;
- (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 upon the potential market or value of the work.

6. We also note the reluctance of the Government to introduce a quantitative test to determine the threshold above which the amount and substantiality of the copyright works used are considered not fair dealing and hence making the copyright users liable.

7. We are given to understand that only if *all* of the four conditions mentioned in paragraph 5 are in favour of the copyright owner, the copyright user may then be found liable in the court.

8. In the ideal world where a reasonable threshold in the use of copyright materials without authorization is laid down in the law, the mind of the users, particularly teachers and students, will be at ease when using copyright materials. However, the Concern Group accepts the Government proposals given the four conditions above.

Use of copyright materials in the digital environment

9. In the existing Copyright Ordinance, the copyright permitted act provisions are restricted to making copies through reprographic means. The relevant sections of the Ordinance were drafted long ago when the internet environment was not yet in existence. With the advance of technology and the widespread application of information technology (IT) in education, the said restriction is outdated and has created great hindrance to teaching and learning.

10. The Concern Group is puzzled why teachers and students can make reprographic copies lawfully under prescribed conditions while the same cannot be done in the digital environment. The argument that the digital environment will make downloading (and subsequent printing) of copyright works relatively easy is not sound. The Concern Group is of the view that with proper access control, the potential impact on the copyright owner regarding the use of copyright works via the digital means will be the same as that via the reprographic means.

11. The Concern Group therefore recommends that the relevant sections of the Copyright Ordinance be amended to make the fair dealing approach technologically neutral, i.e. there is no distinction between using copyright works through reprographic or digital means.

12. The above-mentioned provision will particularly benefit teachers and librarians in posting reference materials on the intranet for dissemination to students concerned, an act which not only is convenient but also environmentally friendly. This mode of communication will also facilitate interactive teaching and learning. The provision will be essential in the teaching of liberal studies, one of the four core subjects at the senior secondary level under the new 3+3+4

curriculum.

Permitted acts for education

13. The Government has proposed to extend the scope of permitted acts (of using copyright works) for education to cover not only the acts done by teachers but also those by students in order to accommodate the needs of interactive teaching. At the same time, the composition of audience in school/university performances which involve the use of copyright works has been expanded to cover immediate family members of students.

14. The Concern Group welcomes this positive approach and considers it conducive to family-school cooperation. It however wishes to point out that it is not uncommon for the school/university performances to include a small number of invited guests who are in one way or another connected to the school/university and whose presence is contributing to the success of such performances. Hence the Concern Group proposes that the Government take into consideration of the above when drafting the law.

Prescribed acts for libraries

15. The Government proposes to prescribe conditions to allow libraries to make replacement copies involving medium shifting if reasonable and adequate steps have been taken to seek authorization from copyright owners but which fail to yield a response within reasonable time.

16. While the Concern Group welcomes the above move, it is of the view that the libraries' need to circumvent copy protection in DVDs or CD-ROMs to make a copy for preservation or archiving purposes has not been fully met. Furthermore, librarians have to preserve copyright works stored in outdated format (such as LD or Betamax) into a format that is more easily accessible (e.g. DVD). Experience of the librarians is that the authorization for such medium shift endeavours is difficult to obtain or involves a prolonged process. It is to be noted that the proposed circumvention restriction is being proposed to combat regional piracy and the libraries, and in turn the public, should not be its unintended victims.

Business End-user Criminal Liability

Scope of business end-user possession criminal liability

17. The Government proposes to maintain the existing scope of business end-user possession criminal liability to cover only the four categories of copyright works, namely, computer programs, movies, television dramas, and musical recordings. At the same time, it proposes to introduce a new criminal offence for significant infringing acts of copying with the intention to distribute to staff or participants copies of copyright works published in four specific types of printed works, namely, newspapers, magazines, periodicals and books. The proposed offence would cover both the acts of providing the infringing copies physically or making available the copies by digital means.

18. However, noting the need of teachers, the Government proposes to exempt non-profit making educational establishments and educational establishments subvented by the Government from the proposed criminal provision to facilitate teaching.

19. The Concern Group holds the view that any further extension of the expanded criminal liability to other copyright works, including printed works, would undoubtedly impose an adverse psychological effect on copyright users, particularly those in the education sector, in making use of printed copyright works even within the boundary of the law. The Concern Group considers civil remedies to be a sufficient and more appropriate means of deterrence. The Concern Group is therefore pleased to see that in recognizing the serious consequences the expansion of such criminal provision would have on teachers and students, exemption is given to the education sector.

20. The Concern Group would like to draw to the attention of the Government the fact that there are some private schools in Hong Kong that are not profit-making. It is the sincere wish of the Concern Group that educational endeavours of this group of schools should also be provided with the said criminal liability exemption.

21. The Concern Group notes the concerns expressed by copyright owners, particularly the publishers, about the alleged copying of textbooks and materials

marketed primarily for instructional users on a “significant” scale by the education sector. The Concern Group wishes to make it known that it does not support such acts and is given to understand that principals and teacher unions have, in their earlier submissions, given their pledge that such acts will not be tolerated in the education sector. The Concern Group also wishes to point out that the criminal liability now imposed on copy-shop owners will further restrict the said form of copying by students. It is hoped that the minds of the copyright owners can be put at ease with the above assurances.

Employees’ defence against criminal liability

22. Under the existing Copyright Ordinance, employees who are instructed by their employers to use infringing copies of copyright works (e.g., computer programs) in the course of their business may be vulnerable to the business end-user possession criminal liability. The Government proposes that a specific defence should be provided to employees who are not in a position to influence or decide on the acquisition or removal of the infringing copies for use in business (including the education sector). The Concern Group appreciates the proposal but wishes to point out that teachers with limited management responsibility (e.g., department heads, panel/subject chairs) and students who are student organization officials should not be considered as those in a position to influence or decide.

Proof of infringing copies of computer programs in end-user liability cases

23. The Concern Group applauds the Government proposal to defer consideration, as suggested by the software industry, of the requirement on the part of the end-users to keep records of licensed computer programs for a certain period as proof of compliance. The requirement, if implemented, is in violation of the common law principle of placing the burden of proof on the plaintiff and must be justified by special reasons.

Circumvention of Technological Measures for Copyright Protection

Circumvention of technological measures

24. The Government proposes civil remedies against circumvention of technological measures but in order not to hinder scientific research, an exemption for research into cryptography would be introduced.

25. The Concern Group welcomes the exemption proposed but would suggest that the exemption should not be so narrowly defined as to cover only research into cryptography, as such a description will not satisfy the limitless boundary of scientific research. The original intention of this proposal is not to prevent the invention of circumvent technologies but to prevent the application of circumvention technologies in gaining access to copyright works for the sake of infringing rights. Along the same vein, the Concern Group strongly opposes the proposal that such exemption will be invalid if the concerned act of circumvention or the subsequent publication of research information would prejudicially affect copyright owners. The Concern Group would categorically state that the mere publication of the research information (research paper) does not make the researcher a party to the subsequent act of circumvention. The way the Government proposal is worded, it is not clear what constitutes a prejudicial impact on the interest of the copyright owners.

26. It is therefore proposed that only research papers which set out *intentionally* to create an adverse impact on the interest of a copyright work will be subject to civil liability under this provision.

27. The Concern Group wishes to reiterate its earlier request that teachers and librarians be allowed to circumvent technological access controls so that digital works legally purchased abroad can be used locally.

Parallel Importation of Copyright Works

Parallel importation

28. The Concern Group welcomes the Government proposal to give educational establishments and libraries criminal and civil liability exemption for importation, possession and use of parallel imports of copyright works for their education and library uses, notwithstanding the fact that it proposes to retain all the existing restrictions on parallel imports of copyright works.

29. Such a proposal will not only facilitate the import by educational establishments of copyright works that are considered to be of low or no commercial value and therefore not distributed by local suppliers, but will allow them to lawfully acquire educational and research materials worldwide where such materials are more readily available and at affordable price.

Rental Rights for Films and Comic Books

Rental of films and sound recordings

30. University, school and public libraries often have to keep stock of films and sound recordings for educational purposes. These materials are kept, in the case of school/university libraries, to support teaching and learning and, in the case of public libraries, to provide a public service to the community.

31. The Government proposes to introduce rental rights for films and comic books and to provide civil remedies for violation of these rights. However, such provision will only begin to be enforceable when a reasonable amount of copyright items available in the existing rental market have been covered by rental licensing schemes.

32. The Concern Group holds the view that school, university and public libraries should be exempted from the stated civil liability if no rental is levied on the loan of film and sound recording items for the reasons stated in paragraph 30.

Internet Piracy (Use of Copyright Works in Digital Environment)

The internet era

33. The views of copyright users and copyright owners on the use of copyright works in the digital environment are diverged. The Concern Group opines that the worries expressed by copyright owners that the use of copyright works in the digital environment will lead to rampant infringement are uncalled for. The Concern Group maintains that the advance of technology has come to a stage that forbidding an appropriate use of copyright works in the digital environment will be a disservice to society because it will inevitably suffocate effective teaching and learning, both of which have become increasingly dependent on the support of the internet. The Concern Group hopes that in the next round of consultation, the Government would, in spite of the divergence of the views of the copyright owners and the copyright users, find a way out that would not deprive the education sector of the use of the internet tools.

Summary and Conclusion

Summary

34. In brief, the Concern Group proposes the following for Government consideration:

- (a) the relevant sections of the Copyright Ordinance on fair dealing be amended to make the fair dealing approach technologically neutral (paragraph 11);
- (b) the audience of school performances to include a small number of invited guests (paragraph 14);
- (c) libraries be allowed to circumvent copy protection in DVDs or CD-ROMs for preservation or archiving purposes (paragraph 16);
- (d) private schools that are not profit-making be given exemptions in business end-user criminal liability (paragraph 20);
- (e) teachers with limited management responsibility (e.g., department heads, panel/subject chairs) and students who are student organization officials be given a statutory defence against criminal liability in the use of copyright works (paragraph 22);
- (f) wider interpretation be given to researches related to circumvention, exemption of these researches from civil liability, and only the act of publishing research work which intentionally sets out to create an adverse impact on the interest of a copyright work be not exempted from civil liability (paragraph 26);
- (g) teachers and librarians be allowed to circumvent technological access controls so that digital works legally purchased abroad can be used locally (paragraph 27); and
- (h) school, university and public libraries be exempted from civil liability on the loan of films and sound recordings if no rental is levied on the

loan of such items (paragraph 32);

Conclusion

35. The Concern Group would like to express its gratitude to the Government for having attended to the needs of the education sector with regard to the use of copyright works in teaching and learning. It would like to reiterate that striking a balance between the interest of the copyright users and the larger interest of the community in its pursuit of knowledge is important.

About the Concern Group of the Education Sector on Copyright Law

The Concern Group of the Education Sector on Copyright Law was set up by educational organizations in March 2004. As of now, there are 26 educational organizations in the Concern Group, which are listed in alphabetical order as follows:

Membership

City University of Hong Kong (CityU)

香港城市大學

Grant Schools Council (GSC)

補助學校議會

Hong Kong Association of Heads of Secondary Schools (AHSS)

香港中學校長會

Hong Kong Association of Sponsoring Bodies of Schools (HKASBS)

香港辦學團體協會

Hong Kong Baptist University (HKBU)

香港浸會大學

Hong Kong Direct Subsidy Scheme Schools Council (HKDSSSC)

香港直接資助學校議會

Hong Kong Education City Limited (HKECL)

香港教育城有限公司

Hong Kong Federation of Education Workers (HKFEW)

香港教育工作者聯會

Hong Kong Private Schools Association Limited (HKPSA)

香港私立學校聯會

Hong Kong Professional Teachers' Union (HKPTU)

香港教育專業人員協會

Hong Kong Special Schools Council (HKSSC)

香港特殊學校議會

Hong Kong Subsidized Primary Schools Council (HKSPSC)

香港津貼小學議會

Hong Kong Subsidized Secondary Schools Council (HKSSSC)

香港津貼中學議會

Hong Kong Teacher-Librarians Association (HKTLA)

香港學校圖書館主任協會

Joint University Librarians Advisory Committee (JULAC)

大學圖書館聯席諮詢委員會

Lingnan University (LU)

嶺南大學

The Chinese University of Hong Kong (CUHK)
香港中文大學

The Hong Kong Academy for Performing Arts (HKAPA)
香港演藝學院

The Hong Kong Association for Computer Education (HKACE)
香港電腦教育學會

The Hong Kong Institute of Education (HKIEd)
香港教育學院

The Hong Kong Library Association (HKLA)
香港圖書館協會

The Hong Kong Polytechnic University (PolyU)
香港理工大學

The Hong Kong University of Science and Technology (HKUST)
香港科技大學

The Open University of Hong Kong (OUHK)
香港公開大學

The University of Hong Kong (HKU)
香港大學

Vocational Training Council (VTC)
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