

International
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Organisations



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CONSULTATION DOCUMENT TO REVIEW CERTAIN PROVISIONS OF THE HONG KONG COPYRIGHT ORDINANCE

IFRRO welcomes the open approach chosen by the HKSAR in consulting all stakeholders. We gladly take this opportunity to respond to the discussion paper of 21 June and to follow up our comments in the submission of 3 February 2005 as well as the ones made by HKIPA.

GENERAL

Print material¹, i.e. books, academic and scientific journals and other periodic publications, is the single most important contributor to the economic growth triggered by the copyright industries in a large number of developed countries. Beyond this economic worth, print material embodies cultural values and generates scientific and cultural development. We are therefore surprised to see that print material is treated less favourably than other categories of copyrighted works in CITB's proposal to the Legislative Committee. Criminal liability for business-end-user possession only extends to four categories of copyrighted works discriminating against print material by not including it. Print material is further adversely affected by the removal of the restriction under which the exception for reprographic copying of passages by educational establishments applies only where no licences are available.

We therefore respectfully urge that this be remedied by the Legislative Committee. Reducing legal protection for copyright works not only sends wrong signals to copyright infringers, the general public and the copyright industries. It also seriously limits Hong Kong's endeavours to fight piracy effectively, which we have understood to be of prime concern to the Hong Kong government.

¹ This term includes publications on paper as well as in digital format and is used in this sense throughout the document

Furthermore, we see this in sharp contrast to the proposal to introduce civil and criminal remedies to protect technical protection measures and rights management information systems, a proposal that we highly welcome.

INDIVIDUAL PROPOSALS

Licensing

We applaud the proposal not to introduce a general non-exhaustive fair use regime. The introduction of such a system would stand the risk of creating legal uncertainty and frequent need to resort to the courts. This is particularly undesirable if infringing the law attracts criminal liability.

We strongly oppose the removal of the restriction that reprographic copying of passages from published works in educational establishment will only be permitted subject to no licence being available. We fail to understand the concern that the availability of a licence would hinder education if an educational establishment obtains it. This proposal is particularly problematic because this provision was the basis for the building up of licensing and collective management in Hong Kong. If this provision is taken away, it also removes the prime incentive for educational institutions to take up a licence for the reproduction of copyright works. It puts Hong Kong out of step with the rest of the developed countries.

We fail to see the need to introduce a non-exhaustive fair dealing regime in addition to the existing catalogue of exceptions for educational purposes and for the purposes of public administration. Access to copyright works is today offered through licensing mechanisms offered by HKRRLS. These licences include a worldwide repertoire enabled by bilateral arrangements which HKRRLS has signed with other Reproduction Rights Organisations in membership of IFRRO. Removing incentives to ensure that reproduction is covered by licensing arrangements will send a negative signal to copyright holders worldwide.

The 'new system' as proposed by CITB could create an unacceptable degree of legal uncertainty and an incommensurate need to call upon courts to decide upon policy matters. This is particularly unfortunate as the exception would also appear to apply to digital uses. Digital uses are of particular concern to rights holders because of the capacity to proliferate.

In CITB's proposal it is stated that there are currently no safe digital protection measures and the proposal itself acknowledges on page 10 that institutions would not employ such measures in any event. Assuming this to be correct, CITB foresees that there will be no protection of digital copyright works for the use in educational and public administration as they presupposes that protection measures will not be used and users will omit protecting the works or control the use of them. On top of this, they propose to avoid any incentive, including existing ones to encourage the institutions to obtain a licence from the rights holders or the collective management organisations for the use of copyright works.

We fail to see how the educational sector or the public administration could be changing to an extent justifying this very broad and vague exception proposed by CITB. Rather, the arguments listed in Annex B (p. 4 'expand the current list'), are the very items which are normally subject to licensing in other countries such as the US, the UK, Spain and Australia. There is no reason why Hong Kong should differ in this respect.

Therefore, rather than improving the dissemination of works and contribute to the public good, the proposal by removing the incentive for user to obtain licences for the use of copyright works could lead to the risk of increased unauthorised reproduction and piracy. This would provide a disincentive to produce cultural and scientific works again leading to a disservice to the public. The proposal would then be counter-productive to the developing of a healthy copyright industry in Hong Kong.

Criminal offence

While we welcome the direction the CITB is taking to extend criminal liability to infringement of copyright print material, we are concerned about the specific proposals. We reiterate our earlier statement that we do not advocate two separate approaches for different types of print works. Furthermore, we also fail to see why print material should be considered less important to the HKSAR than other copyright material and therefore being treated as a second class category by affording it lesser protection. In CITB's specific proposal it would be preferable to include such conduct in the offence that affects rights holders prejudicially even if it is not in the course or for the purposes of business. We further urge the HKSAR to ensure that aiding and abetting or assisting the defined offence would be equally liable conduct.

The conditions for the offence to apply are problematic and often close to impossible to prove. Presumably the prosecutor bears the burden of proving financial loss. To show the specific loss resulting from each transaction complained of nears the impossible. It should therefore be made clear that the showing of this requirement in the abstract is sufficient. The criterion of numerical thresholds could lead to abuse if it is not supplemented with qualitative requirement because offenders could structure their businesses to remain just under the thresholds.

As to the size of the thresholds if it is to be introduced, we would like to draw the Legal Commission's attention to the approaches in the UK and New Zealand for determining the extent of reprographic copying for the purposes of the exception for educational establishments. It has been limited to 1% per quarter in the UK, while New Zealand limits the use to 3% of the work or 3 pages.

Finally, we do not see the need for CITB's proposal to exempt the non-profit educational sector. On the one hand the impact of unauthorised reproduction and piracy in educational establishments is considerable. Furthermore, class room teaching stands a higher chance of being hindered if teachers do not understand the exceptions in the law. This only applies if the exception is unclear and vague. If the exception remains as it is in the current legislation that is not the case. We therefore respectfully urge that CITB's proposal in this respect not be accepted.

Yours sincerely



Olav Stokkmo
Secretary General