

UNION INTERNATIONALE DES EDITEURS
INTERNATIONALE VERLEGER - UNION

INTERNATIONAL PUBLISHERS ASSOCIATION
UNION INTERNACIONAL DE EDITORES

Clerk to Panel on Commerce and Industry
Legislative Council Secretariat
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3 Garden Road, Central
Hong Kong

Sent by Email: slchan@legco.gov.hk

Cc: Division 3, Commerce and Industry Branch: co_review@citb.gov.hk

11 July 2005

Dear Sir or Madam,

**Proposals on Various Copyright-Related Issues (CB(1)1792/04-05(05)):
Concerns of International Publishers**

The International Publishers Association (IPA) is the international federation of trade associations representing book and journal publishers worldwide. Established in Paris in 1896, it now counts 78 national, regional and specialised publishers associations from 66 countries (including many from the Asia-Pacific region) among its members. IPA is an accredited non-governmental organisation enjoying observer status to United Nations organisations, including the World Intellectual Property Organisation. One of IPA's main goals is the development and protection of copyright.

IPA's members are concerned by specific items mentioned under the "Proposals on Various Copyright-Related Issues" (the "Proposals") presented by the Legislative Council Panel on Commerce and Industry on 21 June 2005 in document CB(1)1792/04-05(05). We therefore welcome the invitation to comment in this new round of consultations.

We would take this opportunity to remind the Legislative Council of the general obligation to comply with international treaties, in particular WTO TRIPS, when revising its copyright laws. In relation to the introduction of any new copyright exception, this would be the three-step test enshrined in TRIPS Article 13; in relation to the introduction of criminal liability for copyright infringement TRIPS Article 61.

Publishers believe that most Proposals do not satisfy the TRIPS provisions. This is particularly worrisome for the local Hong Kong publishing industry which will be hit first by the negative impacts of the Proposals. However, it will also be detrimental to the international publishing industry which will have to consider foregoing Hong Kong as a potential market, given that the core of their business –the copyrighted work- is not

sufficiently protected. Despite our concerns regarding a large number of Proposals, we would like to draw your particular attention in this submission on the following aspects:

- Scope of business end-user possession criminal liability;
- New criminal liability for copying/distribution of copyright infringing printed works;
- Fair dealing for education and public administration

We reserve the right to comment on other proposals.

1. Scope of business end-user possession criminal liability (para. 8)

Publishers strongly disagree with the Legislative Council's refusal to restore its original provision defining the scope of business end-user possession criminal liability to include printed copyright works. Whereas other categories of copyright works are rightly protected by the current scope of criminal liability, the provisions discriminate against printed works. Given the main purpose of printed works and in particular school textbooks, i.e. the information and education of the public as well as the preservation of culture for the public good, these should be accorded at least the same level of protection as other artistic works.

Imposing criminal liability on these aspects of commercial scale piracy of printed works will in no way negatively impact on the free flow of information or on the possibility of using materials in classroom teaching as suggested. Rather, lack of such protection will, to the contrary, deter investment in the creation of literary works, including teaching and information materials. Unless all aspects of commercial scale piracy are sufficiently covered by the law, local and international authors and publishers will have a reduced incentive to create the works which are tailored to local needs and the special circumstances of Hong Kong.

Moreover, by failing to provide a full range of criminal sanctions for commercial-scale infringements of copyright in printed works, Hong Kong falls short of its obligations under TRIPS Article 61 to provide adequate and effective IP protection and enforcement.

IPA therefore reiterates the plea already submitted to the Legislative Council on several occasions by IPA members that printed works be treated at par with other copyright works so that the unjust discrimination comes to an end.

2. New criminal liability for copying/distribution of copyright infringing printed works (paras 9-15)

IPA does not believe that the proposed introduction of criminal liability for distribution in a business context adequately meets the concerns of copyright owners of printed works in relation to end-user possession criminal liability. First, as noted above, the protection is incomplete when compared to protections afforded to other categories of copyrighted works. Moreover, the Proposal raises several issues which greatly concern publishers:

Firstly, the Proposal does not cover unauthorised copying and distribution of digital versions of printed materials, which is quite threatening to the interests of copyright owners, as no scanning or other digitisation of such materials is required before making them available on a network or by other digital means.

Secondly, the Proposal is subject to three unsatisfactory defences: The defences contained in paras 11(a) and (b) unduly interfere with the right of the copyright owner to freely decide whether, and if so, on which terms to licence her/his works. S/he should not risk having to forfeit criminal enforcement for doing so. Moreover, as currently worded, the defences are open to abuse as it is not clear what would amount to a “timely response” (para. 11(a)) and who decides on the “reasonableness” of commercial terms.

Thirdly, the Proposal exempts “non-profit making educational establishments” and “educational establishments subvented by the Government” from criminal liability. This is unacceptable for publishers. Firstly with respect to the commercial damage caused to the publisher it is irrelevant whether an establishment makes a profit. Whether or not an educational establishment is liable for infringing acts should not depend on its commercial health. Given the increasing intertwining of publicly funded and quasi commercial courses, classes or special teaching activities the distinction between profit and not-for-profit establishments are increasingly blurred. Even highly commercial schools may receive some minor subvention which appears to make them eligible for an exemption under this clause.

This Proposal again is very harmful for local educational publishers who lose any incentive to develop and tailor-make educational materials for the Hong Kong market. In the long run, therefore, it will be the exemption - rather than the copyright as suggested in the Proposal - which “hinders classroom teaching”.

Finally, we are concerned about the “safe harbour” proposal found in paragraph 10(b). One can easily cause significant commercial damage to copyright holders without meeting any numerical threshold set. We believe that any numerical threshold set should be combined with other factors (such as other measures of the value of the material, number of copies made, and so forth) in determining criminal liability. Furthermore, the provision should be kept open to allow for cases in which users are able to meet the thresholds but infringement is especially damaging.

We therefore urge the Legislative Council to reconsider the wording of the Proposals contained in paragraphs 9 to 15 so as to ensure compliance with TRIPS as well as avoid harm to the local Hong Kong publishing industry in particular, as well as to international publishers operating in Hong Kong.

3. Fair dealing for education and public administration (paras 21-25)

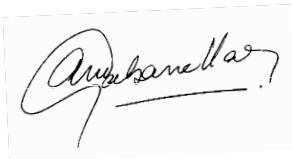
The Proposal to introduce a non-exhaustive fair dealing exception for the use of copyright works for education and public administration is currently not sufficiently tight so as to ensure compliance with the three-step-test of TRIPS Article 13. It ignores that workable solutions can be found in collective licensing schemes as the examples of

countries with well-established fair dealing exceptions show (see for example UK) and which are currently being established under the Hong Kong Reprographic Rights Licensing Society. Also, it ignores the recent international developments in copyright laws that have demonstrated that the best solution is always found in individual negotiations between the parties concerned. This is the only way to ensure freedom of expression, commercial freedom – and freedom to exchange information. The law should encourage such cooperation, rather than discourage this important dialogue.

With regard to public administration, IPA strongly objects to a blanket exception for all “urgent business” by “public bodies.” This provision risks severely damaging the market for legal, medical and similar reference books and journals. IPA is not aware of any circumstances within governments generally that would necessitate such an appalling crippling of market forces. IPA urges the Legislative Council to closely examine this provision.

IPA respectfully requests the Legislative Council to review its Proposals in the light of our comments and to revise the proposed exceptions in the light of the three-step-test. Only then will the right balance between publishers and users be found – and hence the basis for a thriving local and international publishing industry providing the materials for all purposes, including information and education.

Yours faithfully,



Ana Maria Cabanellas
IPA President