



29th June, 2006

The Hon SIN Chung-kai, JP
Chairman of Bills Committee on Copyright (Amendment) Bill 2006
Room 410, West Wing
Central Government Offices
Hong Kong

Dear The Hon SIN Chung-kai, JP,

Re: Copyright Exemption

We refer to the meeting of Legco Bills Committee on the Copyright Amendment Bill 2006 in the morning of 19th June 2006 during which the learned Legco councilors have expressed their views and concerns as to the approach taken by the Administration in this important issue.

As regards the copyright exemption for education, it is worth noting that **Hong Kong does not have a litigious culture** and that the teachers would like to carry out their teaching duty within the ambit of the law, it appears that the teachers would like to know the precise scope of the exemption rather than to perform their teaching duty by guessing what is or what is not within the exemption based on the 4 factors as suggested by the Administration. We have noted that the learned Legco Councilor has already pointed this issue out in the said meeting of the Legco Bills Committee of 19th June. **This reflects the desire of our Hong Kong culture to work together to build a harmonious society.**

In this connection, we wish to refer to the “Submission to the Bills Committee on the Copyright Amendment Bill 2006 in respect of the Copyright Exemption” made by the CITB on 19th June 2006 under your reference [CB(1)1633/05-06(01)] (the “Submission”).

The response from the Administration as expressed in the Submission is that whatever copyright exemption in the amendment calls into doubt, please invite the court to decide if the act in question will be within the ambit of section 37 (3) of the Copyright Ordinance. **This clearly reflects the desire of the Administration to ask the court to take over the policy issues as related to the scope of the copyright exemption.**

Executive Summary

We wish to point out in this submission that

(i) The TEACH Act of USA

The TEACH Act of USA will support our concern over the approach taken by the Administration in the copyright exemption for education in the context of digital environment and also lend support to our view that the school which intends to use the digital technology for its teaching purpose must be prepared to manage the control over the copyrighted materials used for teaching purpose in the digital environment.

(ii) The Licensing Schemes for Education

The educators and the content creators/providers are the best judges for the scope and the limit of copyright exemption in respect of the forms and manners of use of the copyrighted materials which have been repeatedly, routinely and widely done or practiced in the educational establishments. Any use beyond such scope and limit should be covered by the relevant licensing schemes. This avoids uncertainty and unnecessary litigations for copyright infringement against the schools. The fair dealing defence would still be available for other uses of copyrighted materials in educational establishments. We submit that the United Kingdom model may be a very useful and convenient reference point for consideration in Hong Kong.

(iii) The proposed Vehicular Driver Exemption is unnecessary if it amounts to the private playing of the sound broadcast as long as a sound broadcast is being heard by the driver only and not the passengers of a public vehicle. There is no equivalent of the vehicular driver exemption provision in other jurisdictions in the world.

We wish to set out our views as follows:-

A. TEACH Act of USA

As you may note, the Submission under the title “**COPYRIGHT EXEMPTION**” was made in response to the issues raised on 8th May during the meeting of the Legco Bills Committee on the Copyright (Amendment) Bill 2006. In the paragraph 1.3 under the Views/Concerns Column, the CITB said that the view of the IFPI (Hong Kong) Group is that “the TEACH Act stipulates that in order to be covered **by the exemption concerned**, a non-profit educational institution is required”

Readers of the Submission may feel deranged by the highlighting of the sentence “**without a need to obtain a license or rely on fair use**” under the “Administration’s Response” column.

The “**copyright exemption**” by definition is an act which permits a person deals with copyrighted material “**without a need to obtain a licence**” from copyright owner. It is an exempted or a permitted act of copyright infringement and therefore fair use defence is irrelevant.

The purported response to our submission on TEACH Act **indicates that the Administration has misunderstood or misinterpreted the contents of the IFPI (Hong Kong Group)’s submission on that issue.** In other words, the CITB has **failed** to appreciate the issues of the TEACH Act in the context of the copyright exemption in the digital environment.

We wish to clarify as follows:

I **the Issue**

1. It is in the context of our statement in our 30th April submission that

” The school must be shouldered with the responsibility of ensuring their teaching materials be used within its terms and conditions specific for its teaching needs and shall not go beyond what it is needed for such teaching needs.”¹

which we made reference to the TEACH Act as the starting point for consideration when dealing with the use of the digital rights management system for on-line teaching in schools.

2. The administration’s response merely echoed our view as stated in paragraph 51 of our submission, namely, the TEACH Act broadens the exemption under section 110 of the U.S Copyright Act 1976, but it is short of any response to the relevancy or irrelevancy of the TEACH Act in our context.

II **Section 110 of the U.S. Copyright Act 1976**

3. Section 110 allows “performances” and “displays” in the face-to-face traditional classroom setting. The TEACH Act repeals the **earlier version** of section 110 (2) which was **drafted principally in the context of close circuit television.**

4. The TEACH Act expands the scope of educators' rights to “**perform and display**” **works** and to make the copies integral to **such**

¹ Paragraph 50 of our submission dated 30th April 2006 refers.

performances and displays for digital distance education, making the rights closer to those we have in **face-to-face teaching**.

III Works Explicitly Excluded by TEACH Act

5. The TEACH Act² specifies that “**mediated instructional activities**” do not encompass the use of textbooks and other materials “which are typically purchased or acquired by the students.” An instructor is therefore not allowed to include, in a digital transmission, copies of materials that are specifically marketed for and meant to be used by students outside of the classroom in the traditional teaching mode. **Its clear intention is to protect the market for commercially available educational materials.**

IV Works Explicitly Allowed by TEACH Act

6. It further provides that it only allows the performance of a nondramatic literary; nondramatic musical work; or the performances of any other work, including dramatic works and audiovisual works, but only in “reasonable and limited portions” or display of a work in an amount comparable to that which is **typically displayed in the course of a live classroom session**. The key words are "reasonable and limited portions" for audiovisual works and any other works including musical sound recordings.

V The Manner of Use of TEACH Materials Under the Exemption

7. It is imperative to understand that under the TEACH Act, **whatever use of the TEACH materials must be comparable to what is typically displayed in the course of a live classroom session**. It does **not** cover materials which an instructor may want his/her students to **study, read, listen to or watch on their own time outside of class**.
8. The performance or display to be made by an instructor must be in connection with and as an integral part of a classroom offered as part of the ***systematic mediated instructional activities***³.
9. It **only covers in-class performances and displays** and not, other use such as digital delivery of supplemental reading materials. It is

² Section 110 (2) of TEACH Act.

³ Section 110 (2) (A) provides that “the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution”.

important to emphasize that **it does not cover reproduction, distribution or creation of derivatives works**. Therefore the proposed use other than those prescribed by the TEACH Act will be subject to the fair use defence.

The Supreme Court of the United States has made it clear that there is **no bright line test for fair use**, it must be adjudicated on a case by case basis⁴.

Therefore, the **difficulty in claiming fair use is that there is no predictable way to guarantee that any proposed use will actually qualify as a fair use**. One may believe that his use qualifies, however, if the copyright owner disagrees, the copyright owner will sue for the copyright infringement and the dispute must be resolved by court. Even if the court rules that his use was in fact a fair use, **the expense and time involved in litigation may well outweigh any benefit of using the material in the first place**.

10. The TEACH Act only **allows the transmission** of copyrighted materials to students for a limited time **for performing and displaying** of the works for a limited time while preventing dissemination that could undermine the market for the works.

VI Technological controls on storage and dissemination

11. The TEACH Act requires educational institutions to apply technological protection measures that reasonably prevent retention of the work for a period longer than necessary and that **prevent downstream copying and dissemination of the file**⁵. **As it is meant for the face to face teaching**.

This means that copyrighted images and graphics should be made available in a format limiting printing and saving controls. **Copyrighted electronic materials such as video and audio shall be streamed to avoid the downloading and saving of the file.**

VII Others

12. As mentioned in our 30th April submission⁶, **the TEACH Act focuses primarily on the behaviour of the educational institutions** and not the actions of the instructors. Therefore an **institution must impose**

⁴ Campbell V Acuff-Rose Music Inc. 510 U.S. 569,577 (1994).

⁵ Section 110 (2) D (ii) (I) refers.

⁶ Paragraph 53 of our submission dated 30th April refers.

restrictions on access, develop new policy and disseminate copyright information to the students and teachers.

13. The TEACH Act grants a **limited right to the digitalized portion of an analog work** for use in an on-line course for the purpose of displaying or performing the work **only if a digital version is not available**. If such a digital version is available, the school is not allowed to interfere with technological measures used by copyright owners to prevent retention or distribution of copies⁷.

VIII Our Views

14. The TEACH Act is an opportunity, but it is also a responsibility. It imposes certain requirements on the use of TEACH materials in distance education. In fact, the TEACH Act is more restrictive than the law allowing face-to-face instructional use of copyrighted materials.
15. The TEACH Act was referred in our previous submission for the purpose of raising the issues related to the use of the copyrighted materials in education in the digital environment. We are not suggesting in any way that Hong Kong must or should follow the U.S. approach. **Perhaps the licensing scheme approach may be the better option for Hong Kong as it is more flexible and is subject to the control of the Copyright Tribunal.** Needless to say, any licensing scheme will take issues raised in the TEACH Act into consideration.
16. In short, **there is no blanket exemption for educational use in the US**. May we conclude our view by borrowing the words of the former U.S. Register of the Copyrights who said in 1965⁸ that

“The present blanket exemption has become too broad in its application to the new conditions of today and would involve serious dangers to the author’s right if continued into the future.”

This statement is still valid in our Hong Kong situation.

B. The Licensing Schemes For Education

1. As our members have expressed their grave concern over the approach taken by the Administration on the copyright exemption for educational establishments, and in particular the proposed removal of

⁷ Section 110 (2) D (ii) (II) refers.

⁸ “Supplementary Report of the Register of Copyrights on the General Revision of the US copyright Law : 1965 Revision Bill, part 6, House Committee on the Judiciary, 89th Cong 31.

the licensing scheme under section 44 (2) of the Copyright Ordinance, we must therefore look at this matter from the perspective of a copyright owner of all kinds of copyright works in order to advance our views clearly and unambiguously as what are the issues related to the licensing schemes for education and what is proper approach or way to deal with these issues.

We will deal with the Reprographic Copying first as this is the most important and common form of use of copyrighted materials in the educational establishments. The same argument will be equally applied to the licensing scheme under section 44 (2) of the Copyright Ordinance.

I The Proposed Removal of the Licensing Scheme For Reprographic Copying

2. We wish to point out that it is highly desirable to have a licensing scheme included in the education exemption as **the number of users/beneficiaries and the volume of copyrighted materials for teaching under the education exemption are much larger than other permitted acts such as criticism review and news reporting.** Therefore *the accumulative prejudicial effect of any exemption in education against the legitimate interests of the copyright owner will be much larger than the other permitted acts such as criticism, review and news reporting.*

Furthermore the licensing scheme for education will provide a cost effective and efficient way of dealing with the licensing issues as the educational establishments may simply deal with one collecting society rather than different copyright owners. This is on that basis that why most of the jurisdictions have the licensing schemes for education but few for other permitted acts.

3. It is worthwhile to take a note that section 198 defines **reprographic copy** refers to a copy **made by means of** a reprographic process and it further clarifies that Reprographic Process means **a process** (a) for making facisimile copies or (b) involving the use of an appliance **for making multiple copies** and includes, in relation to **a work held in electronic form, any copying by electronic means**, but does not include the making of a sound recording or film.
4. Therefore the licensing scheme under section 45 (2) includes both analogue and digital modes of copying of a work other than a sound recording or film. The removal of the section 45 (2) will allow a

school to make both physical and electronic copies for whatever quantity, in its opinion, falls within the proposed 4 fair dealing factors. If the copyright owner does not agree, the dispute will be resolved by court.

5. As pointed out above, even under the U. S. TEACH Act, the school will only be allowed to “stream” an electronic copy of a work or reasonable portion thereof for playing or showing to a student receiving the instructions as if it were in the “face to face” traditional classroom teaching environment. Student is not allowed to make a copy thereof or to further disseminate the same to others as the streaming of copyrighted material is controlled by the relevant digital rights management system.

II The Licensing Schemes for Education in Australia

6. **The *Australia Copyright Act 1968*, which was amended in 2001, provides the fair dealing defence based on U.S. 4 fair use factors of defence for fair dealing in education⁹. This is the approach which the Administration has now proposed to follow. However, the amended Copyright Act 1968 now contains two educational licence schemes for the copying and communication of works by educational institutions:**
 - i. **the Hardcopy Education Licence under Division 2, Part VB of the Copyright Act 1968** which prescribes the limits which the educational institution may make copies of works for educational purposes under the licence.
 - ii. **The Electronic Reproduction and Communication Education Licence** under Division 2A, Part VB of the Copyright Act 1968 which prescribes the limits of works which may be electronically reproduced and communicated for the purpose of education under the licence.
7. It would be worthwhile to take a note that even the *Australia still provides the licensing schemes for the use of the copyrighted materials in education* albeit it adopts the U.S. fair use defence approach for the fair dealing in education. This avoids a lot of unnecessary copyright infringement litigations against the school in Australia as at the end of the day, **the judge will still have to rule, among other things, what amounts to be the reasonable quantity**

⁹ Section 40 (2) of the Australia Copyright Act 1968.

which may be copied by the school after the learned judge has been referred to the case law in U.K. and Australia respectively.

III The Position in the United Kingdom

8. **The U.K. Copyright Designs and Patents Act¹⁰** allows the school to copy **less than 1%** of a work in any quarter without the consent of the copyright owner. However, copying is not permitted by this section if, to the extent that, licences are available authorising the copying in question¹¹. But any terms of such licences purportedly restrict the proportion of a work which may be copied to less than that 1% will be to that extent of no effect¹².

IV Our Recommendations

9. **We respectfully submit that the approach taken by U.K. is the best option for Hong Kong as the educational establishments will know very well the exempted limit of a work which may be reprographically copied for teaching purpose. Any copying of a work beyond the exempted limit will require a relevant reprographic licence.**
10. In Hong Kong, **it is highly undesirable to let the court decide as what amounts to be the fair dealing for any use of the copyrighted materials in the forms, formats and manner which have been routinely and widely done by the schools for teaching purpose.** This could have been settled and included in our copyright law after consultation with the education sector and the copyright owners before the passing of the proposed Copyright (Amendment) Bill. It is better to do it slowly and get it right rather than to have the matter hastily done and get it very wrong with grave consequence to both the educational establishments and to the copyright industry. The losers will be our education system and our children.

V Section 44 (2) of the Copyright Ordinance

11. As regards the recording of broadcast by educational institutions, section 135E (1) of the Australia Copyright Act 1968 provides that :

¹⁰ See section 36 (2) of the U.K. Copyright Designs and Patents Act 1988 which provides that not more than one per cent of any work may be copied by or on behalf of an establishment by virtue of this section in any quarter.

¹¹Section 36 (3) of the U.K. Copyright Designs and Patents Act 1988.

¹²Section 36 (4) of the U.K. Copyright Designs and Patents Act 1988.

“The copyright in a broadcast, or in any work, sound recording or cinematograph film included in a broadcast, is not infringed by the making or communication, by or on behalf of an administering body, of a copy of the broadcast if a remuneration notice, given by or on behalf of the administering body of an institution to the collecting society is in force.

In the circumstances, the existing section 44 (2) is in line with the international practice and norm and obligations¹³.

As the usual forms and manners of use of broadcast and cable programme are important and prevalent in our educational establishments, it is highly desirable to have the matter resolved and included in the Copyright (Amendment) Bill by the educators and the copyright owners in the first place rather than to have the matter referred to and resolved by the court.

C. The Vehicular Driver Exemption

I The Private Playing of the Sound Broadcast by A Driver

1. We understand that the purported copyright exemption is limited to a **driver** of either private or public vehicle and not for the passengers of the vehicle. The subject matter of the copyright exemption will also be limited to the broadcast of sound recordings or sound broadcast and not other copyright works underlying such sound recordings or sound broadcast such as television broadcast, cable program, films, musical compositions, literary and dramatic.
2. **The principle is that the performance takes place wherever it can be heard**¹⁴. The expression “public performance” is a matter of law and a useful test is whether the persons coming together by a domestic or private tie, or by an aspect of their public life¹⁵.
3. Therefore the playing of sound broadcast which can only be heard by a driver and not the passenger of a public vehicle has never been a

¹³ See section 35 (2) of the U.K. Copyright Designs and Patents Act 1988. Also, Article 10 (2) of the Berne Convention states that it is a matter for an individual country to permit the use of works for illustration in publications, broadcasts, sound recordings or films for teaching, provided that this is compatible for “fair practice”. The legislation in different jurisdictions reflects that **remuneration for such use of works under a licence may make the use more “compatible with fair practice.”** See also Article 6 of the Phonograms Convention to which Hong Kong is a member which provides that compulsory licences are only permitted if the of the following conditions are met: (a) the duplication is solely for the purpose of teaching or scientific research; (b) the licence is valid for that territory and does not extend to export and (c) equitable remuneration is paid.

¹⁴ Performing Right Society Ltd. v Camelo (1936) 3 All E.R. 557.

¹⁵ Australian Performing Right Association Ltd. V Commonwealth Bank of Australia (1992) 25 I.P.R. 157 at page 171.

restricted act under section 22 of the Copyright Ordinance. The act amounts to the private playing of the broadcast as the sound broadcast can only be heard by the driver alone and not the passenger. **There is no need for such a vehicular driver exemption.**

4. **That is why there is no equivalent copyright vehicular driver exemption as proposed by the Administration in all other jurisdictions in the world. This reflects the intention and the consensus of the international community on the norms and scope of the copyright exemption.**

II the Playing of Sound Broadcast in the Public

5. However it is not the case if a sound broadcast is being heard by the passengers who are members of the public in a public vehicle.
6. For illustrations, the following examples are found to be playing of a radio broadcast in public:
- (i) The playing of a radio broadcast in a private room adjoining a restaurant, but which could be heard in the restaurant¹⁶.
 - (ii) The playing of a radio broadcast through a loudspeaker to the workers at a factory during working hours¹⁷.
 - (iii) The playing of a radio broadcast in a private room of a public house but which could be heard in the adjoining public bar¹⁸.
 - (iv) The playing of a radio broadcast in a private room of a public house but the public was able to use that room as a saloon bar freely¹⁹.

III the Proposal

7. The response from the Administration is that whether a passenger of a public vehicle hears the sound broadcast amounts to the playing of the broadcast to the public will be subject to the 2 step test of section 37 (3) of the Copyright Ordinance.
8. There is no dispute that public vehicle is within the scope of a public place as any member of the public may gain access. There is also no doubt that the performance takes place in that public vehicle if the passenger hears the sound broadcast. This amounts to the playing of

¹⁶ See cases referred in note 14 and 15 above.

¹⁷ Ernest Turner etc Ltd v Performing Right Society Ltd (1943) CH.167.

¹⁸ Australian Performing Right Association Ltd v Canterbury-Bankstown League Club Ltd (1965) N.S.W. R. 138.

¹⁹ See case referred in note 14 above.

the sound broadcast to the public which is a restricted act under section 27 (4) of the Copyright Ordinance.

9. If the CITB agrees that the presence of the audiences from the public will change the character of the performance from private to the public, this will be an issue for the Copyright Tribunal to decide in the event that the public vehicular owner does not agree with the terms and conditions of the licence and the Copyright Tribunal may take into account the percentage of the time within the business hours of a public vehicle is without any passenger and the average number of passengers taken by the public vehicle per trip, the average air time of playing sound recordings other than the announcement of the public information by radio stations etc.
10. As the **playing of the sound broadcast** is in the public place **in a commercial context** and the members of the public are present in that place, we fail to understand the justification of the exemption under section 37 (2) if it is meant for covering both the passenger and driver. It is not even justifiable under the first step of the 3-step test.
11. We hereby invite the Administration to consider amending section 81 of the Hong Kong Copyright Ordinance in line with section 72 of the United Kingdom Copyright Designs and Patents Act 1988.
12. The practical effect of the proposed amendments and of the Administration's response is to invite the court to decide as to which circumstances in which the public passengers are present in the public vehicle who can hear the sound broadcast are or are not within the ambit of section 37 (2) based on the number of case law including those referred to in paragraph C (II) 6 above. This again reflects the position of the Administration on the proposed amendments to the Copyright Exemption.

D. Conclusion

1. We hereby urge the learned Legco councilors to consider the above issues carefully in respect of the proposed Copyright (Amendment) Bill 2006 and, in particular, we respectfully submit that, ***Hong Kong must have the relevant licensing scheme which covers at least most of the situations***, (such as reprographic copying and playing or showing of audiovisual materials), ***for the use of the copyrighted materials in the forms and manners which a school would commonly and routinely use and done for its teaching purpose.***



2. The common form and manner of use of copyrighted materials for teaching purpose will be best judged by the educators and the content creators/providers. The fair dealing defence would still be available for other situations in education. This will avoid uncertainty and unnecessary litigations against the schools for copyright infringement.

3. The proposed amendments create a grey area in the scope of the exemption in education sector and leave each teacher to guess what is or what is not within the scope of the exemption which does not require licence. This will create a lot of uncertainty as what amounts to fair dealing. More importantly, the perceived limit may vary from school to school. Uncertainty aside, the combined effect of the many exemptions proposed for education will pass the wrong message to the schools community and will cause irreparable damage to the market of the copyright works in particular those that are popular among school children as well as those targeted for educational use and/or for the school children. **A "catch me if you can" sub-culture** will be developed among our students. The abuse of the exemptions may spill over to the family of the students. How would the people of Hong Kong learn to respect intellectual property rights from our education system?

Thank you for your kind attention.

Yours truly,

For and on behalf of the International Federation of the
Phonographic Industry (Hong Kong Group) Ltd

Ricky Fung
Chief Executive Officer

c.c. IFPI (Hong Kong Group) Committee