Members Hong Kong Publishing Federation
Anglo-Chinese Textbook Publishers Organisation
Hong Kong Educational Publishers Association
Association of American Publishers, USA
Publishers Association, UK
International Association of Scientific, Technical and Medical Publishers, Netherlands

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Hong Kong and International Publishers' Alliance

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By electronic mail (mary_chow@citb.gov.hk)

9 January 2006

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

Dear Ms Chow

HKIPA is grateful for this opportunity to comment on the "Refined Proposals on Various Copyright-Related Issues." We also appreciate the extent to which these proposals acknowledge our previously expressed comments and concerns. We look forward to working with the Administration and LegCo in further development of these proposals, and in the drafting process.

Our comments focus on four topics. In the order in which they appear in Annex A to the "Refined Proposals" document, these are topics 1 (Scope of Business End-User Possession Criminal Liability); 2 (New criminal liability for copying/distribution of copyright infringing printed works); 6 (Fair dealing for education and public administration); and 7 (Improvements to the existing permitted act provisions and introduction of new permitted act provisions). In addition to the detailed discussion below, HKIPA would like to register its continued concern with the reduction of the applicable time period for protection against parallel importation from eighteen months to nine months, as noted in previous submissions.

1. Scope of Business End-User Possession Criminal Liability

HKIPA keenly regrets what now appears to be a final decision that the possession of pirated copies of the works of its member companies for use in a business in Hong Kong will not attract criminal liability. We do not accept the categorical statement made in Annex A that such conduct is never "willful copyright piracy on a commercial scale." We believe that label ought to apply to a commercial enterprise that builds its business upon using infringing copies of our members' publications. To the extent that this is so, under the Administration's proposal the current provisional violation by Hong Kong of its obligations under TRIPS Article 61 will be made permanent.

Wholly apart from the Article 61 question, the reason for according journals, reference materials, original databases, and other literary works second class treatment under the copyright law (compared to the treatment of the four "favored classes" of works) has never been satisfactorily explained. We reiterate that this treatment rewards unscrupulous businesses and denigrates the hard work and creativity of honest authors and publishers in Hong Kong. This is not the message that Hong Kong should seek to be sending to its citizens and to the rest of the world.

2. New criminal liability for copying/distribution of copyright infringing printed works

a. Limitation to printed versions

HKIPA was pleased to see the following statement on page 16 of Annex A, in the column headed "Administration's Response":

"We would like to reiterate that the Copyright Ordinance is technology-neutral in that protection conferred on copyright works as well as the copyright exemption provisions should apply to works stored in both physical and electronic media."

We note that, according to a press release from the Hong Kong Economic and Trade Office in Washington DC, available at http://www.hketowashington.gov.hk/dc/circle/dec05/Articles/article03.htm, Secretary Tsang made virtually the same representation in his speech to the APEC Ministerial Meeting in Korea:

"Mr. Tsang explained that in Hong Kong the copyright law was technologically neutral, which accorded the same level of protection to works stored in physical and digital format."

It is therefore surprising to note that the Refined Proposals, released just a few days before Secretary Tsang's speech in Korea, clearly violate the principal of technological neutrality that he set forth there. The Administration's proposal would extend criminal sanctions to certain acts of copying and distributing works in printed form. But it would withhold any such sanctions for copying and distributing the identical works under identical circumstances if they were in other formats. These disfavored formats include transportable digital copies (e.g., on CD-ROM), as well as copies made through downloading and re-dissemination online.

Adequate protection of works published by our members in all formats is extraordinarily important to our industry. We note that the Administration's letter dated 15 June 2005, stated that protection of works in the digital environment would be taken up late in the year. We understand that the consultation process on this topic is set to begin early this year and we look forward to working with the Administration to craft appropriate provisions to ensure that our members' works enjoy comprehensive and non-discriminatory protection in all formats.

b Coverage of journals

We commend the Administration for including academic journals within the scope of the proposal, and to treat them on the same basis as books. We reiterate the importance of defining this category to include professional, technical and medical journals as well. We welcome the invitation to discuss with the drafters the proper definitions of these terms.

c. Safe harbor

HKIPA accepts in principle the concept that criminal liability should focus on "regular or frequent" infringements by businesses, rather than on those that are "casual or ad hoc." However we are concerned that the safe harbor criteria proposed do not accurately demarcate between "regular" and "casual" infringements. For example, consider a popular financial planning text with seven chapters of equal size,

one of them on investment advice for equities markets, one on bond markets, and one on derivatives markets. As we understand the proposed safe harbor, a firm providing financial advice could, without permission, copy and routinely distribute the entire investment chapter to every one of its investment clients in Hong Kong, even if there are thousands of such clients, without ever risking any criminal liability. Indeed, it could distribute all three chapters to all its clients within a single 180-day period. In this scenario, the retail value of the infringing copies that would be counted against the $8000 semi-annual limit would be zero. The firm would thus be free (as far as criminal liability is concerned) to copy and distribute $7999 worth of other books – including full texts – within the same 180-day period. Clearly such behavior exemplifies "regular and frequent" infringement, and could have a devastating impact on the Hong Kong market for these books; yet it falls short of what is necessary to establish a criminal case under the Administration's proposal.

We are aware that the $8000 retail value limit may have been influenced by the presence in U.S. law, of a US$1000 threshold for criminal liability in certain cases.[1] But that threshold, which appears in 17 USC § 506(a)(1)(B), applies only when the case involves an infringement that is carried out for a purpose other than commercial advantage or private financial gain. If either of these motivations is present, the $1000 retail value threshold does not apply, and a willful infringement involving even a single copy with a value of less than $1000 can attract criminal liability (17 USC § 506(a)(1)(A)). Virtually by definition, any infringement subject to the proposed new business user provision under Hong Kong law would be undertaken for commercial advantage or financial gain. Accordingly, the proposed new provision, which immunizes infringement below the $8000 level, would be far more restricted in scope than comparable U.S. law, and it would be misleading to assert otherwise.

If there is to be a retail value threshold below which willful infringement for business purposes is not a criminal violation in Hong Kong, that threshold should be set much lower than $8000 per 180-day period, and all such copying that is more than de minimis should count against that threshold.

[1] HK$8000 = US$1032.

d. Exclusion of non-profit and state-subvented schools

HKIPA is disappointed that the Administration has seen fit to dismiss our reasonable and measured proposal about the conditions under which non-profit and state-subvented schools might be immunized from criminal liability for massive unauthorized copying for business purposes of books and periodicals. We accept that some accommodation for the purpose of classroom teaching is warranted, and submit that our proposal amply accommodated all legitimate activities that deserve exclusion from criminal liability. The Administration has provided no reasoned explanation of why, in order to accommodate legitimate educational interests, criminal liability must be ruled out altogether and forever, even for a school that decides to reduce its book acquisition budget to zero and simply copies all the books it needs for all purposes, instructional and otherwise.

6. Fair dealing for education and public administration

We are pleased that the Administration recognizes that in the transition to a non-exhaustive fair dealing approach to educational uses of copyright works, there is a realistic threat that such an exception will be abused. We look forward to providing suggestions on drafting methods to minimize the risk of such abuse. We also believe that it is advisable to provide guidance to the courts in their interpretation of an open-ended new exception such as the one proposed, particularly on the topics identified in our previous submissions (e.g., the market impact on textbook publishers of asserted “fair dealings” with their works by educational institutions for instructional purposes).

Similarly, it seems to be acknowledged that abuse could occur when the claimed fair dealing involves networked access to copyright works. The applicability of the exception ought to differ with respect to institutions (particularly in the higher education market) depending on whether they do or do not have in place reasonable technological safeguards to prevent or at least reduce this abuse. The terms of the exception ought to reflect this difference, and could do so in a way that takes into account the practical realities and costs of putting such safeguards into place.

Finally, with regard to uses in public administration, we urge the Administration to craft a narrow definition of the “urgent business” to which a fair dealing exception might apply, in order to reduce the risk of the routine and

widespread reliance upon the exception that HKIPA fears could occur.

We look forward to working with the drafters to draw up the specific provisions in these areas.

7. Permitted acts – expanded and new provisions

a. Medium shifting by libraries

HKIPA welcomes the Administration's recognition that a delicate balance needs to be struck in determining the conditions under which libraries would be entitled to engage in unauthorized format shifting of works in their collections. We look forward to working with the Administration to develop specific statutory and regulatory provisions in this area that recognize that, in many cases, the market is already responding to the legitimate needs of libraries.

b. Educational permitted acts

We remain quite concerned that the Administration is determined to repeal section 45(2) of the Copyright Ordinance.[2] The fact that copying by educational institutions to an "unreasonable" extent would still be infringing is of very little comfort once the main mechanism for defining what is "reasonable" in these circumstances – voluntary licensing between publishers and educational users --- has been undermined, which will surely be the result of enactment of this change. We urge the Administration to incorporate in the law clear guidelines about the volume and kind of copying that will be permitted under the expanded exception. Otherwise, the increased uncertainty about what is and is not permissible that this change would engender would be harmful to publishers and users alike. We note that such guidelines have already been agreed upon by user groups and rightholders under the

[2] As part of its justification, the Administration points out that permitted acts for educational institutions under the law of Singapore, Canada and Australia apply whether or not licenses are available for the conduct in question. But in Singapore and Australia, at least, there is also a statutory license for educational establishments, which guarantees publishers some compensation for specified uses of their works in educational settings. Hong Kong law lacks this feature, and thus repeal of Section 45(2) would dramatically increase the risk to publishers of greatly expanded and totally uncompensated copying in the educational sector.

existing legal regime and therefore provide a good model for legislation or subsidiary regulation in this area.

Respectfully submitted

Simon Li
Convenor (Hong Kong)

(no signature via electronic transmission)