

Proposals for Strengthening Copyright Protection in the Digital Environment

**Written Submission from
Hong Kong Library Association**

Hong Kong Library Association

The Hong Kong Library Association (hereinafter called the “Association”) is a professional organization representing the interests of the librarians and information workers serving in different local library sectors, namely, the academic libraries, the public libraries, the school libraries and the special libraries.¹ For background information of the Association, please refer to the homepage at <http://www.hkla.org>.

The Proposal and the Concerns

The members of the Association are aware that the proposal has brought in criminal sanctions against those who *initiate* unauthorized communication of copyright works to the public via any mode of electronic transmission:-

1. In the course of business conducted for profit; or
2. Where it is made to such an extent as to affect prejudicially the copyright owners.

Looking into the very nature of library and information services, the Association is of the concern that the introduction of criminal sanctions to the communication of copyright works, without explicitly specifying their scopes, may adversely and unnecessarily affect the daily works of the libraries in information dissemination, which are regarded as the core business of library services.

¹ Academic libraries refer to the libraries in the universities and other institutes of higher education. Public libraries refer to the Hong Kong Public Libraries system managed by the Leisure and Cultural Service Department of HKSAR Government as well as some community libraries operated by non-profit organizations and open to the public. School libraries mean the libraries in the secondary and primary schools. Special libraries generally mean the libraries or information service units in some Government Departments, commercial sectors such as banks, accountant firms, law firms, news and media companies, etc.

Libraries are generally regarded as information hub and sources of knowledge for citizens in a community. Library collections mainly consist of copyright works such as books, newspapers, magazines, maps or microforms as in their traditional printed formats, tapes, CDs, DVDs, CD-ROM as in their audio-visual recording formats as well as other intangible formats such as E-books, E-journals and online databases. Librarians who are managers to these collections may also be regarded as the manager of these copyright works. Being information professionals, the librarians normally work as intermediaries between information and library users who will readily and actively make available the information from these copyright works to library users who request information to suit their needs in pursuing knowledge for their cultural, educational or recreational needs. Very unlikely to be profit making in this profession worldwide, the mission of a librarian is to safeguard the free flow of uncensored information and to provide information to whoever in need as far as possible. It is very likely that when the scopes and concepts of “business”, “profits”, “fair use”, especially in the context of digital “right of communication” under the proposal, are not clearly stated that the librarians will easily be caught in the criminal nets. Say for instance, whether a librarian will be alleged as to “initiate” a communication if he so ardently and proactively searches from the above-mentioned copyright works and provides such information to a library user? To the worse, the profession will turn paralyzed and no longer be able to fulfill the library’s conviction of providing free information if the librarians are hindered by the possible threats to be criminalized. Needless to say, the community will be seriously and adversely affected under such an extreme and both the sustainable development of library profession and the society will be severely endangered.

As intermediaries between information and library users, librarians generally make use of all kinds of digital media to best carry out their tasks of searching and providing information to library users. Amongst, commercial online databases are commonly subscribed by all sectors of libraries for this purpose and normally, both librarians and library users are opened to use such digital facilities. Under such an intermediary circumstance, the members of the Association opine that it is rather important to clarify whether a library will be cast as an Online Services Provider (OSP), though maybe secondary or non commercial. Subsequently, whether a library will be required to execute all the code of practices for OSPs as prescribed in the proposal needs explicit clarifications and definitions.

The Recommendations

In consideration of the concerns from members, the Association suggests the Government to consider the below recommendations of introducing a “Statutory Exceptions for Libraries” when proceeding to any amendments or revisions to the Copyright Ordinance with a view to enhancing copyright protection in the digital environment.

The Association strongly requests the Government to take into account the working nature of libraries and, same as other educational sectors, to include the libraries, irrespective of types or sectors, into the statutory exceptions from criminal sanctions to facilitate the librarians to provide reasonable or fair use of copyright works and to disseminate information to whoever in need and so as to safeguard the free flow of uncensored information.

Governing by the code of ethics for the profession and by exercising due diligence in performing daily duties in information services, it provides an environment conducive to the sustainable development of the libraries and being advantageous to the daily works of librarians only with an exception from possible but sometimes unclearly defined criminal sanctions. Though it is a principle of the common law that criminal sanctions should not be levied where criminal intents are not proved, the Association opines that all library practitioners are only able to work under free and unthreatened atmosphere with the statutory exception from the criminal sanctions.

Some libraries task at salvaging heritages by collecting, preserving and archiving old documents that are unique evidences to the local history. Under most circumstances, these documents are regarded as “orphan” documents that their copyrights are unclaimed or their intellectual properties holders are no longer identifiable. Nonetheless, under the criminal sanctions, the libraries may possibly worry about the possession of such precious materials and for distribution for further scholarly activities. The statutory exceptions for libraries primarily address such issues as reproduction of copyrighted works, no matter in printed format or in electronic format, for purposes such as private research and study, preservation and replacement of materials, and document supply and interlibrary lending. Without such an exception, these unique and precious heritage materials will likely be lost permanently and sink into oblivion.

Conclusion

The Association in principle supports the strengthening of copyright protection in the digital environment and to combat large-scale and unlawful infringing activities that cause prejudice to the copyright owners yet the Association opines that any measures taken need to strive for a balance that the possible adverse implications of such measures may impose on the free flow of information, and further affect the healthy development of the community in terms of information accessibility. Being recognized professional services providers of information, the libraries and the librarians play an important role in ensuring and safeguarding the free flow of uncensored information for the entire community. The Association would recommend the Government to critically consider the aforesaid recommendations and to take appropriate exception measures for the library sectors in the legislation.

Hong Kong Library Association
11th January 2010

Comments from the JULAC Copyright Committee on the *Proposal for Strengthening Copyright Protection in the Digital Environment* for the Hong Kong Library Association Council

Paragraph 4

- Agree that technology neutrality (not just streaming) makes sense

Paragraph 5

- Still consider that civil remedies should be enough

Paragraph 8

- Since it looks like the Admin is determined to make some criminal sanctions against those who initiate unauthorized communication in a business or "affects prejudicially the copyright owners", I hope that the Govt. will make clear the "appropriate exceptions" that they suggest for the Education and Library sectors. Basically I really agree w/ the section from the HUCOM document that states:

"6. With an aim to resolving uncertainty and doubts that might deter the development of online teaching and learning activities in the educational context, the Task Force urges that adequate and appropriate exceptions covering fair and reasonable uses of copyright works on digital platforms via any mode of transmission by the education and library sectors be included in the proposed amendment to the Copyright Ordinance."

Introducing a statutory limitation of liability regime for OSPs in dealing with online piracy (paragraphs 9 to 13 of the Proposals)

Agree that it's good to have a code of conduct that OSPs, Govt. & Copyright owners agree to.

Would universities and other education institutes be considered as OSPs in this case? If so, would gov't. help subsidize the extra costs of administration & record keeping (since universities would have a hard time recovering costs from users).

We like the suggestion in the HUCOM submission that:

"Consideration could be given to allowing OSPs to levy a reasonable charge for requests from copyright owners for such information, to offset the expenses (by OSPs) to provide the required information. "

Introducing a copyright exception for temporary reproduction of copyright works by OSPs (paragraphs 14 and 15)

We agree that a copyright exception for temporary reproduction of copyright works by OSPs is reasonable and necessary, on the ground that this reproduction is of insignificant economic value, is only transient, and that it is an integral part of the technological process for efficient retrieval of information in pursuit of knowledge. In these days of technological advances, ‘convenience’ and ‘speed’ are essential in everything, in ‘information finding’ in particular when users are engaged with research and in education endeavour. Therefore, any limitation to that will only slow down the process and will negate human progress/improvement.

Introducing a Media Shifting Exception for sound recordings Paragraphs 18-19

While we welcome the introduction of a media shifting for sound recordings, we think all media (including movies) should be covered so as to avoid confusion and misunderstanding to users in possession of a non-infringing copy of copyright works. It seems illogical to say “yes, you can shift your legally purchased CD to your I-pod, but you can’t download your legally purchased DVD to watch on your I-pod Touch.

Media shifting of video is especially important in the education sector where at least 3 mutually exclusive formats have been widely used in the last 20 years (VHS, Laser Disc, and DVD). We hope that new media shifting ordinance exceptions will be technology neutral.

It would also be useful for the Administration to create guidelines on media shifting for replacement or preservation. For example, guidelines on what a “good faith effort” to purchase a copy in the marketplace for media shifting or replacement consists of (how to document it) and how long records on the good faith effort must be kept; and what to do if a legal version appears in the marketplace after good faith effort and media shifting has taken place.

An example at present is the film 甜蜜蜜 (Comrades, Almost a Love Story). This has been unavailable (out of stock, out of print) on DVD for a number of years now. What if a library made a good faith effort to find a legal copy for sale on DVD, couldn’t find it, shifted it from LD to DVD (because LDs are obsolete) and then two years later it was re-issued on DVD. Would a library then be considered to hold an “infringing” copy?

Also, the proposed conditions against circumvention of the technological measures, including access control and copy control restrictions, would make it hard for libraries

and archives to actually do the media shifting exception impracticable. This would need to be addressed.

Introducing a media shifting exception for sound recordings (Paragraph 18 and 19)

The proposal focuses only on the personal and private user, and does not mention the setting of a library or the education sector. We remember that back 2007, we submitted a proposal to CITB of the Commerce and Economic Development Bureau on the need for media shifting in JULAC libraries (dated 19/11/2007) for preservation, archiving, and dissemination of information purposes, requesting exemption of copyright for:

- (a) converting AV materials from outdated/obsolete format to current/popular format, as from VHS to LD to VCD,
- (b) uploading an e-copy of an AV item on the University network, and;
- (c) that it would not be necessary for the Library to maintain the original copy after the duplicated/transformed copy is made, etc.,

However none of these issues have been addressed in the present Proposals. Unless and until these issues have been resolved, academic libraries in Hong Kong will continue to operate in a state of uncertainty, with the potential risk that some of the daily or routine actions taken by us may be or have been in contradiction to existing legislation. Furthermore, we are not satisfied with a media shifting exception for sound recordings only. It would be better if exceptions could be extended to cover other types of works such as films, videos, etc.

Final words

We appreciate that the Administration continues to solicit the opinion of members of the education and library sectors and listen to them.

We agree that it is very important to safeguard that artists, scientists, and companies that create and disseminate new works are able to enjoy the fruit of their labor, it is also important that art and information are able to flow and be preserved as part of the common culture of humanity.