

A Submission to
Commerce, Industry and Tourism Branch
of the Commerce and Economic Development Bureau

in response to

Preliminary Proposals for Strengthening Copyright Protection
in the Digital Environment

by

Task Force on Copyright in Education

established under

the Heads of Universities Committee (HUCOM)

August 2008

Preamble

1. This submission from the HUCOM Task Force on Copyright in Education (the “Task Force”) represents the collective views of the eight UGC-funded tertiary institutions in Hong Kong (Appendix 1). The Task Force welcomes the commitment of the Government, as demonstrated in the “Preliminary Proposals for Strengthening Copyright Protection in the Digital Environment” (the “*Proposals*”), in providing an environment conducive to the sustainable development of Hong Kong into an internet service hub.
2. The Task Force is of the view that a fair balance should be struck between the protection of intellectual property of the copyright owners and the legitimate use of copyright works by the educational community in general. Free flow of ideas and information is indispensable to enable, and also to encourage, the education sector to make use of copyright works, to a reasonable extent, in teaching and learning. Such endeavours, in today’s digital era, are almost inevitable. So ways and means should be identified to facilitate the nurturing of creativity among students through the reasonable use of copyright works in the digital era, rather than discouraging such use by imposing restrictions and/or sanctions. Set out below is the Task Force’s response to Government’s proposed introduction of measures aiming at strengthening copyright protection in the digital environment. Furthermore, the Task Force will also address the issue of media shifting exception.

Biased Ground of the Proposals

3. As stated in the *Proposals*, the Government would like to “provide an environment conducive to the sustainable development of our creative industries”. (*Proposals*, para. 2) Nevertheless, the *Proposals* puts emphasis on strengthening copyright protection to such an extent that the majority of the preliminary proposals sets out in section (a) to (f) are concerned with the rights/privileges of the copyright owners, but not the rights of the public in general whose interests should be rightly represented and protected, too. While it is crucial to “uphold a robust copyright protection regime” (*Proposals*, para. 2), the Government should by no means overlook its responsibility to strike a balance among the interests of all stakeholders. It is of paramount importance that the existing rights under the *Copyright*

(Amendment) Ordinance 2007 will be upheld as a result of the *Proposals*, and that these rights will not be diminished in any way as to further restrict the dissemination of knowledge and free flow of information.

4. Rather than focusing on the “challenges posed by advances in technology” (*Proposals*, para. 3) and how copyright protection should be strengthened to nurture the development of creative industries of Hong Kong, more open public discussion of the *Proposals* should be promoted to encourage different groups of stakeholders to recognize potential opportunities brought by the advancement in technology and innovation in disseminating digital content. The Task Force opines that well-balanced copyright legislations would be fundamental and essential to the development of Hong Kong into a knowledge-based economy and an internet service hub.
5. The *Proposals*, as it is worded, appears to emphasize the need to strengthen copyright protection in the digital environment. The Task Force regrets that there is not enough mention in the *Proposals* that the general public should also be entitled to take advantage of the digital era in the use of, to a reasonable extent and as permitted under the prevailing law, copyright works in digital formats. In fact, there is no direct conflict between copyright protection and uses of copyright works. To the copyright owners, they should be convinced that adopting a more flexible approach would actually enhance the popularity, and hence awareness, of a copyright work, and such flexibility would ultimately bring benefits to the copyright owners, be they tangible or intangible. The above will mean a win-win situation for both parties. The Task Force urges the Government to bear the above in mind in conducting the current consultation exercise.

All-embracing Right for Copyright Owners to Transmit their Works to the Public (paras. 9-12)

6. Without re-defining the “fair dealing” of digital works, the introduction of a right of communication covering all modes of electronic transmission for copyright works would threaten fair educational use of information. It might also prevent the general populace of Hong Kong from making a record of their favourite programmes for personal and private use, when they are away from home. Furthermore, not-for-profit educational establishments

have been relying on recording TV programmes for instructional purposes in the classrooms, an act permissible under the existing law. It is very much hoped that the proposed all-embracing right would not adversely affect such endeavours which are permitted under current legislations.

7. “In the interest of clarity and certainty on one hand while ensuring that legitimate / fair use of copyright works would not be affected on the other” (*Proposals*, para. 11), the Task Force urges that the Government should ensure fair access and use of any information content created and stored in digital form. Also, the Task Force proposes that the educational use of copyright works in the digital environment be included as other instances of “special circumstances” so that reasonable and fair use by the education sector does not lead to criminal sanctions.
8. While the proposed criminalization of unauthorized communication in the “business context” is in line with the existing sanctions against distribution of infringing copies for profit, the Task Force believes that the criminalization of unauthorized communication of copyright works by technological neutral “streaming” in the “non-business context” would hamper the fair use of the streaming technology in education. The criminalization of any infringing acts in a digital environment connotes the use of public money to enforce private commercial rights. More importantly, it would dampen business incentives to find new business models in the ever-changing digital environment.
9. The *Proposals* states that “streaming” is “at present one of the most common forms of copyright infringement causing undue prejudice to owners” (*Proposals*, para. 12). It assumes that large-scale, rampant infringing “streaming” activities have taken place, which causes the copyright owners tremendous loss in revenue. The Task Force asks that evidence for emerging large-scale infringement and the subsequent significant loss in copyright owners’ revenue be provided to the Hong Kong public to support such assertions.
10. Nowadays, it is common for teachers to make use of “streaming” technology to develop an interactive web-based video platform for critical analysis of significant classroom and research activities and events. In teaching, if the application of “streaming” technology to make available various copyright

works for e-teaching is to be classified as affecting prejudicially the copyright owner, it would lead to uncertainty and doubts in the education sector, and thus deter teachers from providing online teaching and learning activities. It would be our next generation who stands to lose the opportunity to construct their knowledge through viewing, analyzing and learning from preceding superior works. On the research side, unreasonable restriction on “streaming” would inhibit research development. Hence, the Task Force stresses that new legislations, if any, should actively safeguard and facilitate user interests, especially concerning uses for educational and research purposes.

Copyright Exemption for Temporary Reproduction of Copyright Works (paras. 13-15)

11. The Task Force welcomes that the scope of copyright exemption for temporary reproduction of copyright works is proposed to cover the “caching” activities undertaken by OSPs, “which is transient or incidental in nature, and is technically required for the transmission process to function efficiently” (*Proposals*, para. 13). With the adopting and qualifying of the “three-step test” laid down under TRIPS, it is expected that the proposed exemption would facilitate efficient data transmission on the Internet and benefit the society as a whole.

Role of Online Service Providers in relation to Combating Internet Piracy (paras. 16-18)

12. To ensure the free flow of information and development of the internet industry, the *Proposals* states that OSPs should play an active role in combating internet piracy. The Task Force believes that the Government should not put in place a code of practice for OSPs without considering the possibility of providing any economic incentives for them. Expenses resulting from legal compliance, if rested solely on the OSPs, might force smaller-scale commercial OSPs out of the market, and thus hindering healthy competition and development in the internet sector. Hence, the Task Force advocates that such expenses should be shouldered by the copyright owners concerned.

13. The Task Force suggests that the proposed code of practice, if adopted, should be restricted to the deterrent function, without legal and cost implications to OSPs for activities by a third party on its network. Besides, the voluntary code of practice for OSPs should take into consideration different kinds of OSPs. The Task Force recommends that the code of practice for Internet Service Providers should be different from that for e-Learning Service Providers.
14. At this stage, since we do not know the content of the code of practice, it would be difficult for us to accept its next step, i.e. “to provide incentives for OSPs to comply with the code of practice”. The Task Force agrees to the *Proposals*’ suggestion of amending the law such that compliance with the code of practice would be a factor that the court shall take into account when determining whether or not an OSP has authorized an infringement committed on its service platform” (*Proposals*, para. 17).
15. The *Proposals* does not define clearly whether not-for-profit organizations, such as universities, schools and research organizations that have their own web hosting services for their user community, would be classified as OSPs in the legal context. Would they face the same liability as those of commercial OSPs for copyright infringement? If affirmative, in order to comply with the legal requirement in terms of the log details and retention period concerned, the not-for-profit organizations might face ominous cost implications which they could not pass to their users. More importantly, such implications would likely result in prohibitive and restrictive guidelines to be imposed on the education sector that will inevitably and adversely affect the exploitation of the internet resources, an indispensable tool for general / liberal education for schools and universities.

Facilitating Copyright Owners to Take Civil Actions against Online Infringement (paras. 19-21)

16. The Task Force opposes the disclosure of the alleged infringer identity without going through the necessary judicial scrutiny, which under the prevailing law, is a deviation from the protection of personal data privacy. The Government should uphold the status quo whereby copyright owners

could rely on the “Norwich Pharmacal” principle to initiate proceedings enforcing disclosure of log records from the relevant OSP, otherwise, abuses would be inevitable.

17. Per para. 15 above, it is arguable to require OSPs to retain records of the relevant infringing activities by the alleged infringer, as a line of conduct for inclusion in the code of practice for OSPs. A recent U.S. district court ruling on *Google v. Viacom* ordered Google to turn over as evidence a database with login names and internet protocol (IP) addresses of YouTube viewers, together with viewing data such as what and when. This production of 12 terabytes of data is equivalent to the text of roughly 12 million books, which would be expensive, time-consuming and a serious threat to users’ privacy.¹ The Task Force asks that the Government takes into account the above possible legal and cost implications of the proposed requirements regarding the preservation of log details and appropriate retention period to be stipulated in the voluntary code of practice.

Statutory Damages for Copyright Infringement (paras. 22-23)

18. Given the lack of any example of statutory damages in our intellectual property rights, the Task Force agrees that the introduction of statutory or prescribed damages for copyright infringements should be avoided.

19. Setting aside the potential “substantive difficulties in specifying a range (or ranges) of damages ...over a wide spectrum of infringements” (*Proposals*, para. 22), the Government should not enact a legislation in the interest of a particular group of stakeholders, i.e. to relieve copyright owners of the burden of proving actual loss and the necessary legal cost.

¹ “YouTube ordered to reveal who watches which video clips” *South China Morning Post*, EDT 8, 5 July 2008. “Ruling on YouTube user data sparks privacy fears,” *South China Morning Post*, BIZ 5, 5 July 2008.

Legal Liability for Unauthorized Downloading and Peer-to-Peer (P2P) File Sharing Activities of Copyright Works (paras. 24-26)

20. The Task Force agrees that the Government should refrain from introducing additional and specific criminal sanctions against unauthorized downloading and P2P file-sharing activities. As stated, the more effective way of combating copyright infringements in the digital environment is to focus on upstream infringements and infringements in the business context (*Proposals*, para. 26). While for non-commercial, not-for-profit activities such as education, any criminal liability to be imposed would certainly hamper the free flow of information and the Government's endeavour of turning Hong Kong into a regional internet service hub.

Copyright Exemption for Digital Media Shifting (paras. 27-28; Annex B)

21. As stated in Annex B of the *Proposals*, "there is growing recognition by the industry worldwide that media shifting by consumers is a fact of life" (*Annex B*, para. 4). The Task Force salutes Government's initiative to introduce copyright exemptions for digital media shifting to provide "greater certainty to users, without prejudicing the interests of copyright owners" (*Annex B*, para. 7). It must be stressed that the provision of greater certainty to users and the interests of copyright owners are not necessarily in conflict.

22. As regards the types of copyright works to be covered under the exemption, the Task Force recommends that the same exception be applied to all categories of works so as to avoid causing confusion and misunderstanding to both users and copyright owners.

23. Customers should be permitted to repeatedly shift content for private and domestic use on different devices in their lawful possession, just in case the formats and playback devices fade out or become obsolete in the market and consumers replace an old player with a newer version. The Task Force proposes that restricting the use of the copy solely for "personal and private use" is impractical in light of the possibility of collective ownership of the work within the household and the realities of format shifting in the context of family-owned computers, media centres and car stereos.

24. The *Proposals* does not mention if format shifting would be allowed for works published, purchased or copied after the exception takes effect. The Task Force proposes that whenever format shifted copies have been made, all copies should be allowed to be retained lawfully, provided that the related conditions are fulfilled.
25. The Government should also provide exemptions to cover the backup activities of libraries and archives. This is because, on one hand, the quality of works stored in some obsolete formats, such as video and audio cassettes, would deteriorate in correlation with the number of uses and the ‘age’ of the copies. On the other hand, teachers and students do not usually have the appropriate equipment to use the formats that are obsolete or becoming obsolete outside the libraries. In some cases, those formats are not always compatible with the hardware in classrooms. In brief, it is crucial that the libraries and archives continue to be allowed to make back-up copies for preservation and replacement purposes.
26. The proposed prohibition against activities to circumvent the technological measures applied by copyright owners would render the media shifting exceptions impracticable, in particular for libraries and archives. As the use of circumvention technology is becoming common, such restriction would paralyze any attempts of the libraries and archives to keep pace with the fast-changing technological innovation on formats of the copyright work.
27. In line with the “fair-dealing” principle, the Task Force proposes that the education sector be permitted to make electronic copies of non-infringing extracts of copyrighted materials available on a strictly temporary basis within a password-protected intranet for giving or receiving instructions, for research and private study, and for library reference use.
28. The Task Force asks that the Government looks into how far current consumer practice around format shifting has actually affected the copyright owners before imposing any stringent restrictions at the expense of the public. Rather than introducing limitations / restrictions on society in general, the Government should encourage the copyright owners to develop new business models adaptable to the advances in technology and changing behaviour of consumers in the use of copyright works in digital form.

Concluding Remarks

29. The Task Force proposes that the Government visits schools and universities to learn more about how they make use of the internet and intranet resources in teaching, learning and research, and conduct meaningful exchanges with teachers and students to understand more about the effect the *Proposals* might have on their educational / research activities, especially in e-learning and the submission of project works.

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HUCOM Task Force on Copyright in Education

The Heads of Universities Committee (HUCOM) is a body formed by the Presidents and Vice-Chancellors of the following University Grants Committee (UGC) funded institutions:

City University of Hong Kong;
The Hong Kong Baptist University;
Lingnan University;
The Chinese University of Hong Kong;
The Hong Kong Institute of Education;
The Hong Kong Polytechnic University;
The Hong Kong University of Science and Technology; and,
The University of Hong Kong.

This Task Force (formerly ‘The HUCOM Inter-Institutional Task Force on Reprographic Rights Licensing’) was formed in June 2000, with the following Terms of Reference:

- (a) The Task Force will consist of one representative from each of the UGC-funded institutions, and a representative from the Joint Universities Librarians Advisory Committee. One of the above will be elected as Convenor upon endorsement from the HUCOM;
- (b) The Task Force will monitor developments in Reprographic Rights Licensing and Government proposed amendments to the Copyright Ordinance, with particular attention paid to their impact on the tertiary sector, including but not limited to issues concerning copying printed materials and using electronic/digital copyright materials for teaching and research purposes;
- (c) The Task Force will represent the UGC institutions in liaison and negotiations with all interested parties, including local and international licensing bodies, concerned groups in the copyright arena, Hong Kong Government departments and the Legislative Council, on issues raised in (b) above in order that the views of the

UGC-funded institutions are fully understood and taken into account;

- (d) The Task Force will give reports to the HUCOM on the progress of any such discussions and negotiations as and when necessary.

Current Members of the HUCOM Task Force on Copyright in Education are as follows:

<i>Institutions</i>	<i>Name of Representative</i>	<i>Post</i>
City University of Hong Kong	Prof. Steve CHING	University Librarian
The Hong Kong Baptist University	Mr. CHIU Ping Kwan (Convenor)	Director of General Administration
	Miss Cassty LEE (Secretary)	Executive Officer, General Administration Office
Lingnan University	Mr. YEUNG Kai-yin, Tommy	Associate Librarian
The Chinese University of Hong Kong	Dr. Colin STOREY	University Librarian
	Mrs. Shirley LEUNG (Representative from JULAC)	Head of Public Services, Library
The Hong Kong Institute of Education	Ms. Connie WONG	Council Secretarial and Administration Manager
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