



香港特別行政區大學圖書館長聯席會

Joint Universities Librarians Advisory Committee

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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
JULAC Copyright Committee

August 2008

This submission is made by The JULAC Copyright Committee and represents the collective views of the eight Libraries in UGC-funded tertiary institutions in Hong Kong.

Introduction

1. Libraries are the heart of any university. They have a responsibility to disseminate and preserve knowledge, for both their individual institutions and the broader community. Joint University Librarians Advisory Committee (JULAC) member libraries strive to facilitate the free and convenient flow of information in the pursuit of knowledge for teaching, research, and cultural development.
2. At the same time, JULAC members deeply respect the legal rights and market expectations of copyright owners in terms of their published content - in print or in electronic form, and in any medium. JULAC libraries understand their obligations, duties and liabilities to ensure protection of such copyrighted materials and will continue to work to safeguard the rights of copyright owners under Hong Kong law.
3. As members of the JULAC Copyright Committee, we are pleased to note that after the Consultation that ended in April 2007, the majority view was against casting the criminal net to catch unauthorized downloading activity.

“Introduce a right of communication covering all modes of electronic transmission for copyright works, with related criminal sanctions against the breach of this right.” (*Preliminary Proposals*, p.2)

4. The JULAC Copyright Committee agrees that an all-embracing right to communicate copyright works to the public should be introduced into the copyright law of Hong Kong to ensure that copyright works would be adequately protected irrespective of the form of communication technology through which they are disseminated. The introduction of such an all-embracing right should be on the premise that freedom of expression and dissemination of information will not be compromised.
5. However, Committee members strongly oppose the proposed criminal sanctions when the communication is “made for the purpose or in the course of business (being a business conducted for profit)” because of its possibly stifling effects. Hong Kong citizens may be deterred from exercising their rights to use copyright works under the fair use principle for fear of committing a crime.
6. Although work at the UGC funded institutions are non-profit and there are already permitted acts in the present Copyright Ordinance for non-profit educational use, the presence of criminal sanctions may lead people to be reluctant in using web resources in the digital era.

“Criminal sanctions should be introduced against acts of making/initiating unauthorised communication to the public in defined circumstances, namely –

(a) where communication is made for the purpose or in the course of business (being a business conducted for profit, which includes the provision to the public of a service consisting of unauthorised communication of copyright works); or
(b) where, other than for the purpose or in the course of business, communication is made by “streaming” the copyright work to the recipients and the communication is made to such an extent as to affect prejudicially the copyright owner.” (*Preliminary Proposals*, p.3-4, para.11)

7. The JULAC Copyright Committee believes that the present Ordinance section 118(2A) that criminalizes infringing copies used in a business context should be sufficient to embrace the communication of such infringing works.
8. Committee members have concerns over the inclusion of the term “streaming” in the proposal. Streaming is a technology. As such it is neutral, and to highlight one particular technological means of communication as liable for criminal sanctions may have a chilling effect on the use of streaming technologies, and future technologies used in legitimate contexts.

“This would tackle the proliferation of such unauthorised communication of copyright works, which is at present one of the most common forms of copyright infringement causing undue prejudice to owners” (*Preliminary Proposals*, p.4, para.12)

9. The JULAC Copyright Committee wonders whether copyright owners can show that there is such a proliferation of streaming done in a business context that cannot be handled by the existing civil remedies and copyright law.
10. Committee members further wonder who such a proposal is aimed at – the corporate owners of streaming sites like YouTube, or the individual users who watch such sites. The purpose of the inclusion of this proposal appears opaque.

“Introduce a copyright exemption for temporary reproduction of copyright works by online service providers (“OSPs”) which is technically required for (or enables) the transmission process to function efficiently.” (*Preliminary Proposals*, p.4)

11. The JULAC Copyright Committee heartily welcomes the proposal that exempts the normal activities that make the internet function efficiently.

“Facilitate the drawing up a voluntary code of practice for OSPs in combating internet infringements, the compliance with which or otherwise will be prescribed in law as a factor that the court shall take into account when

determining whether or not an OSP has authorized infringing activities committed on its service platform.” (*Preliminary Proposals*, p.5)

12. The Committee believes that OSPs should be encouraged to develop, together with copyright owners, appropriate guidelines on good industry practices or codes of practice binding all operators to combat online piracy activities.
13. Committee members have a concern that a “voluntary” code that may be a factor in future court proceedings is not, in reality, voluntary. Instead, it is likely to be confusing for OSPs who do not know if or what part of such a “voluntary” code of practice they should follow.

“Many would agree that OSPs are well placed to help combat internet piracy and hence should play an active role in this fight.” (*Preliminary Proposals*, p.5, para.16)

14. The Committee is not among “the many” who agree with this statement. OSPs are no more “well placed” to combat internet piracy than telephone companies are well placed to combat violent crimes, triad activities, fraudulent commercial activities, or government corruption. OSPs should not be singled out to play an active enforcement role on behalf of copyright owners.

“We will establish a tripartite forum comprising representatives from OSPs, copyright owners and users to explore the merits of different systems (e.g. a “Notice and Notice” system) and to draw up details and plans for implementing the agreed system(s), such as authentication of the notices, indemnity and cost implications, etc.” (*Preliminary Proposals*, p.6, para.17)

15. Despite the above mentioned concerns about whether such a code of practice is truly “voluntary”, the Committee welcomes the intention to include OSPs and members of the public in addition to copyright owners in the discussions for drawing up such a code.
16. Committee members believe that such self-regulatory guidelines for the concerned parties to adhere should be non-intrusive (to personal privacy). They should also not place an undue burden on OSPs, particularly small operators, because that would lead to less variety in the marketplace and

prevent newcomers from becoming OSPs.

“Continue to rely on the “Norwich Pharmacal” principles, as opposed to introducing an alternative infringer identity disclosure mechanism that is not subject to scrutiny by the court” (*Preliminary Proposals*, p.6)

17. The Committee is pleased that the courts will continue to rely on “Norwich Pharmacal” principles relating to identity disclosure mechanisms.

“That said, we stand ready to explore other ways to facilitate the copyright owners in taking civil actions against online infringements.” (*Preliminary Proposals*, p.7, para.21)

18. The Committee questions whether it is right and proper for Government to work to facilitate one group of citizens (copyright owners) to take civil action against other groups of citizens. For example, does Government actively work to facilitate landlords to take civil action against tenants, or vice versa?

“Prescribe in law additional factors to assist the court in considering the award of additional damages, in lieu of introducing statutory damages for copyright infringement actions” (*Preliminary Proposals*, p.7)

19. The Committee is pleased that Government is not planning to introduce statutory damages for the civil tort of copyright infringement.
20. The Committee notes with concern the plan to introduce “additional damages” (or punitive damages) to be awarded beyond actual provable loss. The Committee believes that punishment should be meted out in criminal courts, rather than in the civil courts. We consider it an exception to the general legal principles, namely that damages awarded in Hong Kong are compensatory in nature and that the party claiming damages has to prove the loss.
21. The committee notes with concern that among the factors to be considered by the court in awarding “additional damages” is the conduct of the defendant after the infringement. The Committee believes that any damage awarded should be related to the violation itself and not behavior afterwards. Such considerations seem to be more fitting for criminal cases, such as attempts to hide a murder victim’s body.

“Refrain from introducing new criminal liability pertaining to unauthorised downloading and peer-to-peer (P2P) file-sharing activities” (*Preliminary Proposals*, p.8)

22. The Committee welcomes the Government’s decision to refrain from introducing such criminal liability and its decision to focus on upstream infringement and infringements in the business context.

New Issue - Media shifting (Annex B) – A Limited Exception for Digital Media Shifting (Preliminary Proposals, p.10)

23. Although the JULAC Copyright Committee primarily concerns itself with the institutional side of copyright issues, it welcomes the plan to introduce exceptions that allow Hong Kong people who have bought legitimate copies of copyrighted material to shift them to their various personal media devices. Overall, a combination of the Australian and New Zealand model would be good.

The JULAC Committee on Copyright suggests the following:

| Type of Works | Proposed Exception | Limitations or Prescriptions |
|---------------|---|---|
| Printed works | The owner of a non-infringing copy of a <i>book, newspaper or periodical publication</i> may make <i>a copy</i> of a work contained in the book, newspaper or periodical publication into <i>a different format</i> , for his or her private and domestic use (including the private and domestic use of his or her family and household member). | <ul style="list-style-type: none"> • No more than 1 copy per device • Dealing with (such as sale, hire or distribution of) the private use copy is not allowed. • Disposal of original copy may be made by means of paper recycling or rubbish collection when keeping the original would place an undue burden on householders in terms of space or convenience (e.g. keeping shelves of yellowing disintegrating paper). |
| Photographs | The owner of a non-infringing copy of a <i>photograph</i> may make <i>a copy</i> of the photograph, in <i>hard copy form if the original photograph is in electronic form</i> or in <i>electronic form if the original photograph is in hardcopy form</i> , for his or her | <ul style="list-style-type: none"> • No more than 1 copy per device • Dealing with (such as sale, hire or distribution of) the private use copy is not allowed. • Disposal of an original hard |

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| | private and domestic use (including the private and domestic use of his or her family and household member). | copy may be made by means of paper recycling or rubbish collection when keeping the original would place an undue burden on householders in terms of space or convenience. |
| Videos | The owner of a non-infringing copy of a <i>videotape, LD, DVD, etc. embodying a cinematograph film</i> may make <i>a copy</i> of the film in <i>electronic form</i> , for his or her private and domestic use (including the private and domestic use of his or her family and household member). | <ul style="list-style-type: none"> • No more than 1 copy per device • Dealing with (such as sale, hire or distribution of) the private use copy is not allowed. • Disposal of original copy may be made by means of plastic recycling or rubbish collection when keeping the original would place an undue burden on householders in terms of space or convenience. <p>For example, a collection of legally purchased LDs when it is almost impossible to find an LD player to play them; DVDs will likely have the same scenario in the next 10 years.</p> |
| Sound Recordings | The owner of a non-infringing copy of a <i>sound recording</i> may make <i>a copy</i> of that recording <i>multiple times</i> into <i>any format</i> for his or her private and domestic use (including the private and domestic use of his or her family and household member) on all <i>devices he or she owns</i> . | <ul style="list-style-type: none"> • No more than 1 copy per device • Dealing with (such as sale, hire or distribution of) the private use copy is not allowed. • Disposal of an original hard copy may be made by means of plastic recycling or rubbish collection when keeping the original would place an undue burden on householders in terms of space or convenience. |

“We consider that the proposed new exception should not confer any right to circumvent such technological measures so as to enable copyright owners to develop appropriate business model in face of the proposed new exception.”
(Preliminary Proposals – Annex B, p.3, para.8(b))

24. The Committee considers this ill advised. If Hong Kong citizens have a right in law to do something (e.g. copy a song from a CD they legally purchased onto an MP3 player) but the CD itself is blocked with DRM that prevents them from exercising that right, and the law prevents them from using technological means to exercise their right, then it is no right at all.

Conclusion

25. The JULAC Copyright Committee believes that one of the objectives of the Copyright Ordinance is to create an environment conducive to the creation and preservation of knowledge and the transmission of information. We hope that government will continue to balance the needs of Hong Kong citizens as users and modifiers of information with the needs of Hong Kong citizens and companies as information creators and publishers.

Appendix II

About the JULAC Copyright Committee

1. Re-established in April 2008, Joint University Librarians Advisory Committee (JULAC) Copyright Committee was set up by libraries at the eight UGC-funded tertiary institutions in Hong Kong,

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.

2. The terms of reference for the JULAC Copyright Committee are summarized as follows:

- (a) to address issues and make recommendations as appropriate in relation to copyright matters
- (b) to provide a focal point amongst members to assist in the resolution of issues of mutual concern related to copyright matters
- (c) to enhance communication of copyright matters with other local organizations that are related to copyright reform and development.

Current Members of the JULAC Copyright Committee:

| Institutions | Members |
|--|------------------------|
| The Chinese University of Hong Kong | Shirley Leung, Chair |
| The Chinese University of Hong Kong | John Bahrij, Secretary |
| City University of Hong Kong | K.S. Yeung |
| Hong Kong Baptist University | Andrew Yeung |
| The Hong Kong Institute of Education | Sidney Cheng |
| The Hong Kong Polytechnic University | Winnie Chim |
| Hong Kong University of Science and Technology | Victoria Caplan. |
| Lingnan University | Tommy Yeung |
| The University of Hong Kong | Irene Shieh |