

Submission

to

**Commerce, Industry and Tourism Branch,
Commerce and Economic Development Bureau**

in response to

**Proposals for Strengthening Copyright Protection
in the Digital Environment**

by

The Task Force on Copyright in Education

established under

the Heads of Universities Committee (HUCOM)

January 2010

Preamble

This submission by the HUCOM Task Force on Copyright in Education (Task Force) represents the collective views of the eight UGC-funded tertiary institutions in Hong Kong (see Annex). Considering the challenges brought by advances in technology, the Task Force welcomes the Government commitment in maintaining the efficacy of a robust copyright protection regime in the digital era.

2. The Task Force is of the view that while the Administration strives to refine the proposals for strengthening the copyright protection in the digital environment with a goal of sustaining further development of creative industries in Hong Kong, equal emphasis should also be placed on the free flow of information which is also vital for creative development, as well as protection of personal data privacy.

3. Regarding the proposals in the consultation paper, the Task Force is concerned about the possible adverse consequences arising from the suggested enhanced copyright protection measures. With a view to facilitating teaching and learning in the digital era, it is imperative for the Administration to safeguard fair and reasonable uses of copyright works by the education sector. Set out below is the Task Force's responses to the refined proposals.

Recognizing copyright owners' right to communicate their works through any mode of electronic transmission, with criminal sanctions against infringement (paragraphs 4 to 8 of *Government Proposals for Strengthening Copyright Protection in the Digital Environment* [LC Paper No. CB(1)341/09-10(08)] (the Proposals))

4. To encompass future developments in electronic transmission, the Task Force supports that it would be necessary to make the proposed criminal sanctions under this proposal technological neutral, rather than confine the sanctions to unauthorized communication using the streaming technology only. It is also noted that the proposed criminal sanctions against infringers who initiate unauthorized communication of copyright works in the "business context" is in line with the existing sanctions against unlawful acts of uploading and disseminating copyright infringing works for commercial advantage or financial gain.

5. In considering the introduction of criminal sanctions to infringing activities, irrespective of their purposes, where they are made to such an extent as to affect prejudicially the copyright owners, the Task Force hopes that the proposed all-embracing right would not adversely affect the scope of permitted acts, particularly those for the education sector, under the "fair dealing" provision of the Copyright Ordinance.

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.

7. It is to be noted that streaming is a technology often used by the tertiary education sector in passing electronically research data, which often include raw data that might be copyright protected, from a researcher to his/her partner(s), and that the sole purpose of including the said raw data is merely for academic purpose, and thus should be considered as a permitted act.

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

8. The Task Force approves the Administration efforts, in collaboration with the Tripartite Forum comprising representatives from OSPs, copyright owners and users, to draw up a voluntary Code of Practice which sets out the conduct expected of OSPs when notified of infringing acts occurring on their service platforms.

9. Compliance with conditions prescribed in the proposed Code of Practice would be one of the qualifying factors to be considered by the court for a limited liability in copyright infringement cases. The Task Force opines that the proposal would provide incentives for OSPs to cooperate in combating online piracy, and absolve OSPs from the liability of having the identity and contact of the offender reported.

10. Taking note of the proposed Code of Practice, the Task Force urges that the Administration should clearly spell out whether web hosting services hosted by not-for-profit organizations, such as universities, schools and research organizations, would be classified as OSPs in the legal context. If affirmative, not-for-profit organizations might face ominous cost implications for the legal requirement concerned, such as costs arising from the “Notice and Notice” and “Notice and Takedown” systems, costs that they could not pass to their user community.

11. In this connection, it is advisable to have the requirement for infringement claim by copyright owners and that for counter-notice by alleged infringers discussed and outlined to avoid possible misuses or abuses of the systems. 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 to 15 of the Proposals)

12. With regard to facilitating digital transmission on the Internet, the Task Force supports the introduction of an exception for temporary reproduction of copyright works by OSPs, which is transient or incidental in nature and an integral part of a technological process of making and receiving a communication that does not constitute copyright infringement.

13. Given that the scope and conditions attached to the exception will be fine-tuned, the Task Force proposes that the Administration should consider exempting proxy web caching by education institutions, as practised in Australia, if the reproductions are made by a computer system merely to facilitate later access to the works by staff and students for educational purposes.

Prescribing additional factors for considering the award of additional damages (paragraphs 16 to 17 of the Proposals)

14. Having regard to the envisaged difficulties in specifying appropriate ranges of statutory damages to compensate for a wide spectrum of infringements, as well as the difficulties copyright owners may encounter in proving the extent of actual loss in the digital environment, the Task Force supports the addition of specific factors to assist the court in considering and determining the award of damages that are closer to the prejudice likely to have been suffered by the copyright owners concerned.

Introducing a media shifting exception for sound recordings (paragraphs 18 to 19 of the Proposals)

15. The Task Force requests the introduction of a media shifting exception including but not limited to sound recordings for personal and domestic uses, as practised in Australia, so as to avoid confusion and misunderstanding to users in possession of a non-infringing copy of copyright works. This is especially vital for video usage 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). The Task Force hopes that the new media shifting ordinance will be technology neutral.

In the interest of providing greater clarity and certainty, the Administration should also make it clear whether format shifting would be allowed for works published, purchased or copied before the proposed exception takes effect. It would also be useful for the Administration to create guidelines on media shifting for replacement or preservation.

16. While the existing exception covers backing up activities for the purpose of preservation and replacement, the proposed conditions against circumvention of the technological measures, including access control and copy control restrictions, applied by copyright owners to protect copyright works would render the media shifting exception impracticable, in particular for libraries and archives.

Other responses to refined proposals

17. The Task Force echoes the Administration position that an alternative to the “Norwich Pharmacal” principles, a copyright infringer identity disclosure mechanism that is not subject to the judicial scrutiny, would be unnecessary. The application of the principles in overseas jurisdictions, including those in the U.K., Singapore, Australia and New Zealand, demonstrate its adequacy and effectiveness in facilitating civil actions by copyright owners against online infringements.

18. In respect of unauthorized downloading and Peer-to-Peer file-sharing activities on the Internet, the more effective way of combating copyright infringements in the digital environment is to focus on upstream infringements and infringements in the business context. The Task Force reiterates that the Administration should refrain from introducing additional and specific criminal liability against copyright infringements. The case of Chan Nai-ming charged with uploading and disseminating infringing copies of films via Peer-to-Peer file-sharing programs demonstrates that prejudicial distribution is an offence punishable in the law, and that the existing legal regime would be adequate enough to catch those with guilty intent.

Concluding remarks

19. The Task Force thanks the Administration for having attended to the views and opinion of the education section and catered for its need, as reflected in the refined proposals for strengthening copyright protection in the digital environment. While the commercial and intellectual property interests of copyright owners obviously need to be addressed, it is equally, if not more, important that the Administration should consider interests of the user community at large, including but not limited to the education sector, in their pursuit of knowledge and artistic creativity; and the training of future leaders for society.

20. To keep abreast of rapidly changing technological advancements, it is necessary to take a forward looking and flexible approach in any amendments of the Copyright Ordinance. Reviews on the provisions pertaining to copyright protection in the digital environment should be launched from time to time to evaluate their effectiveness and possible adverse impact, if any, on the free flow of information as well as fair and reasonable uses of copyright works by the public.

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;

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 (JULAC). 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 education 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:

Institutions	Name of Representative	Post
City University of Hong Kong	Prof. Steve CHING	University Librarian
Hong Kong Baptist University	Mr. CHIU Ping Kwan (Convenor) Miss Cassty LEE (Secretary)	Director of General Administration, General Administration Office Executive Officer, General Administration Office
Lingnan University	Mr. YEUNG Kai-yin, Tommy	Associate Librarian
The Chinese University of Hong Kong	Dr. Colin STOREY Mrs. Shirley LEUNG (Representative from JULAC)	University Librarian Head of Public Services, Library
The Hong Kong Institute of Education	Ms. Connie WONG	Council Secretarial and Administration Manager
The Hong Kong Polytechnic University	Mr. Steve O'CONNOR	University Librarian
The Hong Kong University of Science and Technology	Ms. Victoria CAPLAN	Access Services Manager, Library
The University of Hong Kong	Ms. Alice LEE	Associate Professor, Department of Law