11-JAN-2010 16:23 LCSD HKPL TPU +852 2851 6797 P.01

LC Paper No. CB(1)865/09-10(27) (English version only)

Fax: 2978 7569

Panel on Commerce and Industry Legislative Council Secretariat

11 January 2010

Dear Members,

Proposals for Strengthening Copyright Protection in the Digital Environment Past perfect, present tense, future problematic?

In response to the paper issued by CITB in November 2009, I would like to comment on the proposed communication right and exception of media shifting from a librarian's perspective.

Communication right of copyright works

As stipulated in the WIPO Treaty, there are always exceptions¹ for any new protection of copyright as to keep the right balance between right holders and users. Libraries, with functions of preserving knowledge and disseminating information, are an important stakeholder in the copyright system and enjoy exception on copyright. For this "communication right" which is borrowed from the Copyright Directive of the European Union, there are also expressed provisions² delineating this library exception. In 2008, the European Commission has issued a green paper contemplating for more relaxation of copyright for libraries and archives³.

At the national level, many countries have transported this right into their national laws together with the library exception⁴. Hence, the "possible exception for the library sector" mentioned in the paper is a must if Hong Kong is to follow the international norm.

Being intermediaries by making available authors' works to public, librarians initiate communication of all kinds of copyright works to public in daily work. Hence, it is paramount that librarians are confident that they are communicating works lawfully. If they need to obtain authorisation from right holders every time they communicate, I anticipate there would simply be little or no information flow at all.

98%

This is not an exaggeration when we look back in 2004 where the National Library of Ireland was threatened to be sued by James Joyce's estate who objected Joyce's "Ulysses" being displayed and read in public during the Bloomsday Festival even without the issue of any commercial interests affected. This manifests how distorting this right could be if civil rights are vigorously enforced, not to mention the more serious criminal sanctions that the Government is now contemplating.

Communication is an essential human need and is recognized by many, a basic human right. I believe that people create to express themselves and communicate to others, and they can always set restriction of use on their works if they want to. Initiatives like the Creative Commons and the Open Access Movement well demonstrate people's willingness to share. Yet a negative approach as the proposed right would stifle creativity as creativity does not come from vacuum. We all understand that a harmonised society is better than a litigious one.

Media shifting

I am not sure whether the new exception of medium shifting covers the library sector. Even if it does, it would be too narrow to limit to sound recordings when compared with relevant legislation elsewhere⁵. Library collection consists of all formats of copyright works and many of them have become obsolete due to the fast pace of technology development. Hence, taking reference to other jurisdictions, I recommend to amend the existing provision of s.51⁶ of the Copyright Ordinance by broadening the existing scope of literary, dramatic or musical work, sound recording or film etc. to ALL formats of copyright works; and by revising the prescribed condition of "not reasonably practical to purchase" to "not being obtained within a reasonable time at an ordinary commercial price".

This is in line with the growing awareness of strengthening the collective consciousness and building shared memories in the society. Libraries and archives can contribute if they are allowed to better maintain their permanent collections, in print or non-print formats. Our heritage shaped our past, and by knowing and understanding them, it influences our lives in the future.

Recent copyright legislation

I would also like to comment on the newly created rights of s.119B (offence in distribution of infringing copies) and s.273A (offence in circumvention of technological measures) which demonstrate an overprotection of rights and has already defeated the historical balance of copyright. By stipulating a very narrow scope of exception for libraries, it results that the exception only applies to "special collection" instead of the entire library collection; and the exception of circumvention of technological measures to reproduce digital content can only apply to libraries and archives excluding "public". The entailed criminal liability without the requisite mens rea of willful intent, both exceeds the international three-step test principle of TRIPS and deviates from the common law principle.

In similar vein, I am concerned with the proposed legislation. Whether the future is perfect, tense, or problematic depends on how well we strike a balance of interests among all stakeholders in the copyright legislation.

Conclusion

Given the trend of relaxation on copyright worldwide as cited above, I appeal to the Legislative Council take special reference to the library exception, which is but best serves public interests.

Digital access is literacy in today world. And libraries have a duty to promote literacy and mitigate the digital divide, but only if libraries are given the chance.

Yours sincerely,

Ramona CHEUNG

c.c. Government Librarians Association

98%

1 Article 10 of WIPO Copyright Treaty

² Preamble 34, Articles 5(2)(c) and 5(3)(n) of EU Copyright Directive 2001/29/EC

European Commission's Green Paper "Copyright in the Knowledge Economy", Part 3.1 Exceptions for libraries and archives:

Question 8 on format shifting & scanning of entire collection

Question 9 on make available of the scanned collection searchable on the Internet

4 Library exception on communication right

Section 49 Libraries and archives can reproduce and communicate articles and works to users

DADVSI Act (Loi sur le Droit d'Auteur et les Droits Voisins dans la Société de l'Information) provides library exception for reproduction without the right holder's permission.

Section 53a of the German Copyright Act (Urheberrechtsgesetz) allows library to copy and deliver copies of article or other short works via electronic modes for education or research purpose if the publisher has not made the work available to public on reasonable terms at places of users' choosing

5 Library exception on media shifting

Section 51A (4)(a) of Copyright Act 1958 allows libraries to make and communicate reproduction of a works if the works held in the collection cannot be obtained within a reasonable time at an ordinary commercial price.

Canada

Section. 30.1(b) of Copyright Act allows library, archive or museum to reproduce one copy of copyright works for its permanent collection in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable.

Gower' second stage consultation on Copyright:

Recommendation 257, Amend section 42 of the CDPA to permit libraries to copy the master copy of all classes of work in permanent collections for archival purposes and to allow further copies to be made from the archived copy to mitigate against subsequent wear and tear.

Recommendation 258. Enable libraries to format shift archival copies to ensure records do not become obsolete.

⁶ Section 51 of CAP 528, Copying by librarians: replacement copies of works

4

97%