

**A Submission to the Commerce, Industry and Tourism
Branch, Commerce and Economic Development Bureau in
response to the Public Consultation paper on *Updating Hong
Kong's Copyright Regime (2021)***

Made by the JULAC Copyright Committee. A committee under the Joint
University Librarians Advisory Committee (JULAC)

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This submission is made by the Joint University Librarians Advisory Committee and
represents the collective views of 8 UGC-Supported University Libraries in Hong Kong
regarding the current review of Updating Hong Kong's Copyright Regime

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Preamble

The Joint University Librarians Advisory Committee (JULAC)¹ was established in 1967 by the Heads of Universities Committee (HUCOM). It is a forum to discuss, coordinate, and collaborate on library information resources and services among the libraries of the eight tertiary education institutions funded by the University Grants Committee (UGC) of the Hong Kong SAR.

The JULAC Copyright Committee (JCC) consists of one staff member from each JULAC Library and is constituted to deal with the following:

- a. Under the direction of JULAC, the JULAC Copyright Committee will 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 is related to copyright reform and development;
- d. The JCC will represent JULAC libraries 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 LegCo, on library-related copyright & licensing issues.

Response to Consultation Document

New copyright exceptions [2.9 (a), p. 8]

(a) to provide greater flexibility to the education sector in communicating copyright works when giving instructions (especially for distance learning), and to facilitate libraries, archives and museums in their daily operations and in preserving valuable works;

2. We appreciate and welcome the proposed flexibility to the education sector in communicating copyright works, not only for the purposes of instruction but also for a wider scope of non-profit educational activities that take place in the educational establishments, including libraries, archives and museums.

¹ More detailed introduction is in Appendix I.

3. In universities, these activities include: facilitate virtual learning (which has become inevitable since the outbreak of COVID-19), facilitating materials' preservation and other daily operational work.

To allow media shifting of sound recordings for private and domestic use [2.9 (c), p. 8)

(c) to allow media shifting of sound recordings for private and domestic use (i.e. the making of an additional copy of a sound recording from one media or format into another, usually for the purpose of listening to the work in a more convenient manner), which technically is an act of copying and is restricted by copyright

4. We welcome the proposed exemption on the media shifting of sound recordings for private and domestic use, which appears similar in nature to the existing exemption for libraries, in Section 51 of the CO for replacement copies of works.

5. However, it would be more ideal to allow media shifting to cover more format shifting for all media types for academic and educational use. Formats, software and hardware of digital materials become obsolete fast. Libraries, museums and archives preserve valuable works, not just the physical item like a cassette tape, but “the ability to reconstruct streams of bits in a meaningful way that computers and humans can interpret, use, repurpose, and understand at any arbitrary point in the future”².

6. Digitalization has been an important way to preserve print materials. Various strategies such as migration, emulation, normalisation are adopted to preserve digital materials³. While these strategies involve media shifting, the exceptions of media shifting may be extended to include libraries, museums and archives to enable digital preservation with various strategies.

7. Apart from media shifting of sound recordings, we request that the changes to the CO clarify that the exceptions include videos, microform, digital images, websites, e-

² Hedstrom, M. (2003). *It's about time: Research challenges in digital archiving and long-term preservation*. p. 7. http://www.digitalpreservation.gov/documents/about_time2003.pdf

³ Digital Preservation Coalition. (2015). *Digital Preservation Handbook*. 2nd ed. <http://www.dpconline.org/advice/preservationhandbook>

books, and other digital formats. This would facilitate preservation of valuable works (print, sound, and moving image) as technology continues to evolve, rapidly rendering today's formats obsolete tomorrow. This will facilitate libraries, museums and archives to act as a living force for education, culture and information, which would be beneficial to society.

New Fair Dealing Exemptions [2.10, p. 9]

- “(a) **use for the purposes of parody, satire, caricature and pastiche**, which are common means for the public to express views or comment on current events, and such use is usually critical and transformative in nature and should unlikely compete with or substitute the original works;
- (b) **use for the purpose of commenting on current events**; and
- (c) **use of a quotation the extent of which is no more than is required by the specific purpose for which it is used**, so as to facilitate expression of opinions or discussions in the online and traditional environment.”

8. We welcome these changes which allow further exemptions as described above. However, the terms “use of a quotation the extent of which is no more than required by the specific use for which it is used” : the language is vague and confusing.

9. Instead, we suggest that the amendment to the CO use language similar to the other “fair dealings” (such as in sections 41A and 54A)

- “In determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular—
- (a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;
- (b) the nature of the work;
- (c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and
- (d) the effect of the dealing on the potential market for or value of the work.”

Safe Harbour (2.12, p. 10)

“To provide incentives for OSPs to cooperate with the copyright owners in combating online piracy, and to provide sufficient protection for their acts, safe harbour provisions will be introduced to limit OSPs’ liability for copyright infringements on their service platforms caused by subscribers, provided that they meet certain prescribed conditions,

including taking reasonable steps to limit or stop a copyright infringement when being notified. The provisions would be underpinned by a voluntary Code of Practice which sets out practical guidelines and procedures for OSPs to follow after notification.”

10. We generally support the proposal of introducing safe harbour provisions for Online Service Providers (OSP) for copyright infringement.

11. However, some of us are concerned that even with such a “Safe Harbour” provision to limit the liability of OSPs, that copyright owners will use such mechanisms as “takedowns” to have the OSPs do their copyright enforcement work for them. Thus, we suggest that the law and any voluntary Code of Practice should include that an OSP should disclose the personal particulars of any alleged offenders of online copyright infringement only when a relevant court order has been obtained by the copyright owners.

Additional damages in Civil Cases (2.13, p. 10)

12. We oppose the introduction of “additional” damages for copyright infringement in Hong Kong. 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.

Exhaustive vs. Non-Exhaustive (3.2 and 3.3, p. 12-13)

13. We generally do not object to the continued use of the exhaustive approach to copyright exceptions, maintaining the status quo of Hong Kong Copyright and in alignment with the approach adopted by Australia, Ireland, New Zealand and the UK. At present it is adequate for the tertiary education sector’s needs, although in many ways still constraining.

14. However, continuing to use the exhaustive approach often presents difficulties when we apply it in the daily operations in the education sector. Academics and students are often puzzled by the four points, whether their “purposes”, “amount” and “substantiality of the portion” fit into the law. It is also difficult for students and teachers to estimate “the effect of the dealing on the potential market for the value of the work”. These factors can hinder them from a legitimate use of copyright works in knowledge exchange, research, teaching and learning in the education sector; producing a “chilling effect”.

15. Thus some of us also do not object to a more flexible “non-exhaustive” approach to fair dealing for educational purposes (research and study, teaching and learning, cultural preservation), as seen in the “Fair Use” approach used in Israel, the Philippines, Singapore, South Korea, and the USA.

16. As the consultation document noted, the non-exhaustive approach aligns better with the expectation and behaviors of users. Furthermore, such a non-exhaustive approach would save government-supported bodies staff time and money. For example, the small amount of copying involved in the regular Research Assessment Exercise (RAE) conducted by the UGC (in which usually up to four assessors in most of the cases look at individual Hong Kong submitting academic staff members’ research outputs via a password protected file system, for up to a year) would likely fall under this sort of non-exhaustive (“Fair Use”) activity. This point is further elaborated on page 8.

Contract Override (4.1, p. 17 and 4.7. p. 20)

17. Most of us agree that there is no strong reason to introduce provisions to restrict parties from using a contract to override copyright exceptions. Most of us support the Government to maintain a non-interference approach to contractual arrangements agreed between copyright owners and users.

18. At the same time, if the Government did introduce such a system, it would be best that the rights of the users, and the public good of education and cultural development be given heavy weight in any such provisions.

Illicit Streaming Devices [5.12, p. 25]

Hong Kong should not introduce specific provisions to the CO to govern devices used for accessing unauthorised contents on the Internet, including set-top boxes and Apps.

19. It is considered that devices are not the cruxes for infringing copyrights and the use of such devices may not necessarily involve illegitimate activities. Hence, Hong Kong should not introduce provisions to the CO to govern devices used for accessing unauthorized content on the Internet. As pointed out in the consultation paper, there is no genuine need as existing legislation can combat such problems, as seen in the “Magic Box” case of 2014.

Judicial Site Blocking [p. 26-30]

20. We believe Hong Kong should not introduce a copyright specific judicial site-blocking mechanism to the CO. As pointed out in the consultation document, there are problems of evidence that the current legislation is inadequate, costs of compliance work by the Government, and concerns about freedom of access to information.

21. We have concerns about the introduction of provisions to enable site blocking. The standards of setting site blocking are core to ensure the level of freedom of browsing information available on the Internet. It is not easy to create a set of standards balancing the freedom of access to information and blocking malicious websites or copyright infringed websites. Keeping freedom of access to information online is essential to open academic enquiry necessary for upholding quality research output by the education sector.

Extension of Copyright Term of Protection [7.1., p. 31]

22. We strongly support keeping the current term of copyright protection to life plus 50 years. We object to an extension of the term to life plus 70 years.

23. We see no benefit to the public, nor to the creators of original works to extend copyright protection from 50 years after the death of the creator to 70 years after their death. Instead, it is likely to have a dampening effect on the creators and the creative industries in Hong Kong, postponing for a further 20 years the release of works to the public domain and the creation of derivative works.

Introduction of specific copyright exceptions for text and data mining [7.1.b, p. 31]

24. We support an introduction of specific copyright exceptions for text and data mining in this amendment to the CO, to facilitate research and innovation.

25. The higher education sector could benefit from introducing specific legislation that allow exceptions for text and data mining. Text and data mining is becoming more and more popular among professors, research staff and advanced students as digital scholarship grows as a field. It may also help attain Hong Kong's objective to become a Smart City.

AI and Copyright [7.1.c. p. 31]

26. We agree that it is worthwhile for the Government to consider the copyright issues relating to the development of AI and its use in the educational sector. AI is related heavily to entrepreneurship initiatives.

27. We strongly suggest that whether and how AI-created work is protectable by copyright should be clearly stated in any drafted legislation.

Acts of copying in the service of the State [not listed in the Consultation document]

28. Twice in the past decade the UGC has conducted a Research Assessment Exercise among UGC-Supported universities: RAE 2014 and RAE 2020.

29. In both cases, in preparation and after RAE 2014 and RAE 2020, many hours of labour and tens of thousands of dollars were spent by both the UGC and all 8 universities in order to clear copyright **for the panels of experts** (in which usually **up to four assessors** in most of the cases) examined each research output.

30. This work included contacting hundreds of publishers to seek permission for royalty-free use of Hong Kong submitting academic staffs' selected works for RAE 2014 https://www.ugc.edu.hk/doc/eng/ugc/rae/cp_publishers.pdf and RAE 2020 https://www.ugc.edu.hk/doc/eng/ugc/rae/2020/acknowledgement_publishers.pdf to seek permission for a limited number of assessor to look at a research output (commonly a published academic journal article) made temporarily available on a secure, password protected site.

31. When permission was not granted, copyright clearance was obtained via payment to the Hong Kong Reprographic Rights and Licensing Society (HKRRLS).

32. In Australia, similar exercises the Australian Research Council <https://www.arc.gov.au/policies-strategies/policy/copyright> depend on section 183(1) of the *Australian Copyright Act*:
<https://www.legislation.gov.au/Details/C2021C00407>

“183 Use of copyright material for the services of the Crown

(1) The copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, or in a sound recording, cinematograph film, television broadcast or sound broadcast, is not infringed by the Commonwealth or a State, or by a person authorized in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State.”

33. We urge that CEDB and the IPD consider amending the CO to allow something like “acts done for the services of the Government such as RAE”, or to allow an exception for something like “Copying by Government-supported educational establishments such as universities, or by the Government, its representative(s) and/or authorized body(ies)/ person(s) like the UGC and Research Grants Council (RGC) for the purposes of quality assurance, assessment, and evaluation...”

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Membership composition

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The Chinese University of Hong Kong	Mr. John Bahrij (Acting)
City University of Hong Kong	Dr. Teresa To – JULAC Chair 2021-22
The Education University of Hong Kong	Dr. Sidney Cheng
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