A Submission to the Intellectual Property Department in response to

Consultation on Proposed Subsidiary Legislation for Specification of Libraries, Museums and Archives and Prescribed Conditions for Certain Permitted Acts under the Copyright Ordinance (Cap. 528)

(2024)

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

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Preamble

- The Joint University Librarians Advisory Committee ("JULAC") was 1. 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 Special Administrative Region ("SAR") of the People's Republic of China.
- The JULAC Copyright Committee ("**JCC**") consists of one staff member from 2. each JULAC Library and is constituted to deal with the following:
 - Under the direction of JULAC, the JULAC Copyright Committee will address issues and make recommendations as appropriate in relation to copyright matters;
 - To provide a focal point amongst members to assist in the resolution of h. issues of mutual concern related to copyright matters;
 - To enhance communication of copyright matters with other local c. organizations that is related to copyright reform and development;
 - The JCC will represent JULAC libraries in liaison and negotiations with d. 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.

Introduction

- 3. Academic libraries generally provide copies to library users (researchers) in three ways, which the proposed amendments to the Copyright Ordinance may affect:
 - Document supply or document delivery service ("DDS"), often called by its sister service, interlibrary loans ("ILL");
 - Replacement or preservation copying for own institutional use; b.
 - Replacement copies for other institutions. c.
- 4. This response from JULAC mainly addresses these three services. The other provisions discussed in the consultation paper are less central to current JULAC

¹ More details about JULAC and JCC in Appendix I.

practice, but as information professionals, it is important for JULAC to address those too.

Document Delivery Service (DDS)

5. DDS can be defined as "the provision of material that may be retained by the users. This is in contrast to ILL, which is the lending of an item from one library to another". ² Much of document supply for a library's own users is done under sections 47, 48 and 49 of the Copyright Ordinance ("CO", Cap. 528). Libraries as institutions exist to facilitate access to human knowledge, and thus, document supply of copyright work for another institution's users via library-staff-mediated means occurs under CO s. 50. DSS is a regular and very important service provided by library staff at academic and research institutions across the world.

Making of replacement copies of copyright work for own institutional use

6. Usually, replacement copies are made within an institution, often because of outdated format, loss through damage, or to prevent future loss. Making replacement copies of work for an institution's own users is covered in CO ss. 51, 51A & 52.

Making of replacement copies for another institution

7. Replacement copies for another institution are rarely made among JULAC libraries. It is an infrequent but important practice. It is also covered in CO s. 51(1)(b).

Response to the consultation document

Part 1: Proposed Specifications of Libraries, Museums and Archives

- 1.1 Proposed specification for Libraries (for Sections 47, 48, and 50)
- 8. The legislative proposal proposes to introduce a new definition of "specified libraries" pursuant to a subsidiary legislation to be enacted under CO s.46(1)

² Penelope Street and David Orman. "Document Delivery", in *International Encyclopedia of Information and Library Science* (2nd ed.), edited by John Feather and Paul Feather, 145-147. London: Routledge, 2003.

- granted statutory waiver of copyright restrictions for engaging in "permitted acts" facilitating their respective library patrons' "research and private study" activities. JCC collected views from all JULAC member institutions. All of the university libraries represented by JULAC welcome this proposed change.
- 9. We agree that the distinction drawn between for-profit libraries and libraries not conducted for profit is appropriate for the purposes of determining eligibility for the statutory waivers of copyright restrictions for engaging in the said "permitted acts".
- 10. We note that university libraries in Hong Kong also supply DDS for libraries outside of Hong Kong. These libraries may not fit into the description in point (a) and (b) of the proposed new specification, but are adequately covered in point (c)(ii).
- 11. Specifically, regarding proposed changes to CO s. 50 on copying by librarians for supply of copies to other libraries, we support this change to better facilitate resource sharing among libraries, such as through DDS and ILL. Most of us agree that the proposed specification can strike a balance between the rights of copyright owners and users of copyright works.
- 12. However, some JULAC member institutions are concerned that the proposed changes may impose an implied obligation to supplying libraries to verify the non-profit status of a recipient library. A few JULAC member institutions question the necessity to exclude for-profit libraries (such as libraries of private companies), when DDS or ILL is the only way for the end-user to access the requested information, from a copyright work that may be out-of-print or otherwise no longer circulating in the market.
- 13. The requirement that the recipient library's collection of copyright works have to be "generally accessible to the public" also raises concerns among some JULAC member institutions as to their own eligibility. JULAC libraries primarily serve their institutions' staff and students. These university libraries' collections are not "readily accessible to the public". We suggest excluding this requirement in CO s. 50. However, since the status of UGC-funded university libraries as recipient libraries appears to be covered point (b) of the proposed specification for libraries, most JULAC member institutions think that the requirement for recipient libraries' collections to be "generally accessible to the public" to become eligible for receiving statutorily permitted

DDS or ILL would not impinge our ability to receive DSS and ILL under this section if the "generally accessible to the public" requirement remains.

- 1.2 Proposed specification for Libraires, Museum and Archives (for Sections 51, 51A, 52, 52A, 53, 245B and 246)
- 14. We welcome the proposed changes to CO s. 51 to allow all libraries, museums, and archives, regardless of non-profit status, to be "sourcing libraries, museums and archives" to supply preservation and replacement copies to statutory recipient libraries, museums, and archives. We note Singapore's *Copyright Act* 2021 contains a similar provision in section 234.
- 15. Current statutory exceptions in CO s.51(2) stipulating that making preservation or replacement copies is only acceptable "where it is not reasonably practicable to purchase a copy of the item in question to fulfill that purpose" appears to be sufficient to prevent this provision from being abused.
- 16. Some JULAC members have concerns about the provision for communication of digital copies through the use of a computer terminal installed within the premises of the library, museum or archive pursuant to CO s. 51A, especially of works that are too aged, unique or otherwise too precious to be made available for frequent contact with users. Some JULAC members suggest expanding the mode of access to these copies to allow remote access by authorized users (usually only one concurrent user at a time) via secure online authentication. Many copyright owners of electronic resources regularly permit remote access to copyright works by authorized users affiliated with contracting university libraries in relevant licensing agreements. Permitting remote access by one concurrent user removes the need for library patrons to visit a library museum or archive in person to access the digital copy from a computer terminal installed within the premises. Remote access (instead of access via single computer terminal on the premises) will also facilitate access for those with special needs (physical or otherwise) that may prevent them from accessing the material in the premises. This could also help in extraordinary situations as the recent global pandemic, COVID-19. In truth, in this day and age, most library users expect remote access to digitized material from any location at any time, 24/7.
- 17. JULAC members opinions are divided, but not contradictory on the making and supply of copies of unpublished works by librarians, curators and archivists pursuant to CO s. 52. Some JULAC members posit that restrictions on the

copying and distribution of unpublished works hosted at libraries, museums and archives should be further relaxed by permitting redistribution and digitization of unpublished works which the copyright has lapsed along the same timeline stated in CO ss. 17-21 (akin to the 2019 changes³ to Australia's *Copyright Act 1968* s. 33). These JULAC member institutions tend to adopt a more expansive interpretation of CO s. 17 governing the duration of copyright in literary, dramatic, musical, or artistic works to apply to both published and unpublished works.

- 18. Some other JULAC member institutions, however, hold a more conservative view that if original authors and creators of unpublished works have not chosen to publish their works in their lifetime, then these unpublished works should continue to circulate only limitedly pursuant to CO s.52(2)(b), if there is a civil contractual arrangement made to that effect and thus the librarian, curator or archivist is aware that the copyright owner has prohibited copying of the work. Regarding this more restrictive interpretation of CO s. 17, there are contrasting views among JULAC member institutions. Some are concerned that such a stance allowing the original author or creator to have a perpetual copyright to unpublished works may encourage copyright owners to permanently prohibit the copying or sharing with the public of a work even after the duration of copyright has expired and thus prevent a public good: an unpublished work entering the public domain and being shared for the greater knowledge and artistic development of society.
- 19. As for playing or showing of sound recordings or films by librarians, curators or archivists pursuant to CO s. 52A and 245B, some JULAC member institutions again suggest expanding the mode of access as per point (a) to also permit remote access one-at-a-time by authorized users via secure online identification. There are still some uncertainties around whether these two sections can be construed to also include unpublished sound recordings or films. Some JULAC member lean towards a more expansive interpretation that the provision applies to both published and unpublished works. One member would like the legislation to clarify whether such showing or playing to the public of works for which no licensing scheme is available and copyright owner cannot be contacted also applies to published works.
- 20. Understanding that CO ss. 53 & 246 confers a special copyright waiver reserved for articles of cultural or historical significance, which is a unique

³ Clause 4, Schedule 2, Amendment (Disability Access and Other Measures) Bill 2017.

feature in Hong Kong copyright law and not commonly seen in other jurisdictions abroad, one of the members would like to propose to rewrite ss. 53 & 246(1) as follows:

"The librarian, curator or archivist of a specified library, museum or archive may make a copy of an article of cultural or historical importance or interest and deposit the copy at the library, museum or archive without infringing any copyright in respect of the article if the article is <u>already lost or</u> likely to be lost to Hong Kong through sale, export <u>or looting</u>."

Compare current provision:

"The librarian, curator or archivist of a specified library, museum or archive may make a copy of an article of cultural or historical importance or interest and deposit the copy at the library, museum or archive without infringing any copyright in respect of the article if the article is likely to be lost to Hong Kong through sale or export."

The proposed rewritten section will additionally include articles of cultural or historical importance or interest that "have already been lost", as well as articles lost to Hong Kong through looting.

- 21. A small number of JULAC member institutions maintain that the current provisions in CO ss. 53 & 246(1) provide sufficient justifications for librarians, curators and archivists of libraries, museums and archives not conducted for profit to make the needed copies of articles of cultural or historical importance that are likely to be lost to Hong Kong through sale or export. In most scenarios, these important cultural properties have already gone out of copyright, therefore there is no legal reason to prevent anyone from making copies. A more urgent issue, though, is perhaps to further clarify whether for-profit libraries, museums and archives can also qualify for this statutory exception where they might be able to cite justified need.
 - 1.3 Remarks on "Libraries", "Museums" and "Archives" which are "Conducted for Profit".
- 22. All JULAC member institutions agree that the terms "library", "museum" and "archive" should be given their own ordinary meaning without the need for any statutory definition. Since the functions of libraries, museums and archives

change over time, leaving these terms to their own ordinary meanings brings a welcome flexibility.

23. JULAC libraries agree that the proposed definition for the term "conducted for profit" is sufficiently clear. We are pleased that the current proposal does not insert a "non-profit" requirement for supplying libraries, museums, and archives, so these proposed provisions do not impose an undue burden on the recipient libraries, museums and archives to conduct due diligence to verify supplying libraries' non-profit status.

Part 2: Proposed Prescribed Conditions for Permitted Acts of Specified Libraries, Museums and Archives under the Ordinance

- 2.1 Proposed specification for Libraries (for Sections 47, 48, and 50)
- 24. The proposed changes to CO s. 47 will require persons requesting a copy under this section to furnish a declaration to librarians stating that they have not previously been supplied with the same copy, or if they were previously supplied with the same copy, it has been lost, damaged or destroyed. The relevant statutory provisions will not prescribe a specific form for the declaration, but there will be a list of information which must be included in the declaration. Specified libraries can prescribe their own declaration forms so that they can revise or update these declaration forms whenever necessary.
- 25. Some JULAC members seek clarification if such declarations can be collected electronically. Others already collect and maintain copyright declarations electronically. Further, JULAC members note that it is impossible for libraries to verify the objective truthfulness of these declarations.
- 26. Moreover, JULAC as a whole suggests inserting an additional clause to legalize making and supply of copies of research output: articles in periodicals (usually in academic research journals) and single chapters of books (usually academic monographs) for the periodic UGCs Research Assessment Exercises ("RAEs").

In RAE 2014 and RAE 2020, UGC Secretariat staff spent many working hours seeking copyright permission from around 145 identified leading academic publishers for UGC-funded research universities to submit published articles for review by appointed reviewers of research output in the RAE and keeping track of the permission status. At the same time, JULAC member institutions staff spent long hours seeking permission from other independent publishers,

and clearing copyright with the Hong Kong Reprographic Rights Licensing Society ("HKRRLS"), to whom they then pay copy royalties (partially subsidized by the UGC). This in our opinion is not an excellent use of Hong Kong public money, noting the work hours both staff at the UGC Secretariat and UGC-funded research universities commit to complete these copyright clearance procedures in preparation for the RAE and royalty payments for government supported research output.

The UGC conducts RAEs routinely every five to six years to evaluate research output performance of UGC-funded research universities. The current statutory provisions only permit supply of copies to a single requester for "research and private study purposes". These provisions fail to cover RAEs which involve making and supply of copies of research output for a panel of multiple (no more than five) appointed reviewers per research output.

27. We suggest inserting an additional provision to grant permission for libraries affiliated to UGC-funded research universities undergoing RAEs to:

"Place an electronic copy of an article in a special password-protected repository for the duration of research assessment exercises for use by authorized personnel: assessment panel members, reviewers, and staff administering the assessment. The number of panel members or reviewers would not number more than five."

We believe that such a provision in copyright law for research assessment exercises (most notably current RAEs and occasional academic review of individual faculties as may be practiced at some universities in Hong Kong) grants only a limited statutory waiver of copyright and will not easily lead to abuse or substantial loss of profit for the copyright owners. It should be able to balance the need for the public good of expert evaluation of Hong Kong government-supported research with the interests of publishers.

28. The proposed reform to CO s. 47 does not address the common scenario that a supplying library receives repeated requests for same copies of materials from a same librarian at a recipient library on behalf of different library patrons at that recipient library.

Most international DDS/ILL agreements prohibit recipient libraries from hosting local copies of supplied DSS materials transmitted by fax, e-mail or other online electronic means. The recipient library must destroy all copies on

its temporary cache after providing the requesting library patrons with the requested material.

When a different library patron requests the same material through via the same recipient library, the recipient library will then request the same copy from the supplying library again. It then delivers the material to the requesting library patron and destroys the locally cached copy again. This pattern may repeat in the future if another library patron needs it. In that vein, the rewritten provision should not be understood to be a legislative solution to reduce repeated DDS requests for same materials that supplying libraries may receive from time to time. Indeed, such purely logistical issues should not be resolved through legislation.

29. Regarding the proposed changes to CO s. 50, several JULAC member institutions are concerned the revised provision might place certain statutory obligations on JULAC libraries as supplying libraries when they supply requested copies.

First, the supplying libraries fear they will need to verify if the recipient library fulfils the "non-profit" requirement. Checking on the status of all recipient libraries would add to the administrative burden of supplying libraries.

Second, JULAC libraries might also need to check whether a recipient library may have previously been supplied with the same copy. As stated above in paragraph 28, repeated requests for the same material from a same recipient library is often unavoidable because most international DSS/ILL agreements prohibit recipient libraries from hosting local copies of supplied DSS materials transmitted by fax, email or other online electronic means. At the same time, a supplying library usually does not have the means or authority to obtain real evidence to ascertain if a recipient library might have received identical copies of the same materials before from another source.

30. Some JULAC members also would like to seek clarification whether point (a)(iii) in the proposed specification for the revised CO s. 50 will prohibit the supplying library from making and supplying a copy if it is commercially available for online purchase. To assuage these worries, they suggest that the provisions in the revised legislation be made explicit for supplying articles between libraries (document supply) as in Singapore's copyright law. For reference, below is an excerpt from section 234(c)(iii) of Singapore's Copyright Act 2021 which deals with this issue:

- "[I]f the copy requested for is a copy of the whole of an authorial work (other than an article in a periodical publication) or a portion of the work that exceeds a reasonable portion —
- (A) that the copy is made and supplied as part of an inter-library arrangement; and
- (B) that the arrangement does not have the effect or the purpose of enabling participating libraries to systematically copy and supply copies of authorial works, and thereby obtain copies of authorial works without having to subscribe to or buy the authorial works."
- Q1. Should we apply the 10 per cent illustration to the definition of "a reasonable proportion of a work" in favour of the existing "word-counting" approach? Should the deeming approach or the definitive approach be adopted? Alternatively, should we leave the term "reasonable proportion" undefined and determine it on a case-by-case basis?
- 31. JULAC welcomes abolishing the archaic word-counting approach. Most members support leaving the term "reasonable proportion" undefined and adding 10 per cent as a reference point.
- 32. JULAC members' opinions are divided whether to adopt a definitive or deeming approach. Some JULAC member institutions prefer the definitive approach. They think it will provide more protection for librarians. Others prefer the deeming approach analogous to the Singaporean version. They see it as a pragmatic solution, with enough flexibility to cope with unexpected real-life scenarios.
- 33. Some of us point out that the proposed changes still fall short in clarifying how the 10 per cent reference point will apply. For example, if it only allows copying only 10 per cent of a journal article, DDS will be rendered largely useless to library patrons. In that vein, these JULAC member institutions propose inserting more details in the revised provision stating that the 10 per cent reference point should operate on the title level, for example the full text of a book, or a whole issue of a periodical.

- 2.2 Proposed Prescribed Conditions for Libraries, Museums and Archives (for Sections 51, 51A, 52, 52A, 53, 245B and 246)
- 34. The revised CO s. 51 will regulate the making and supply of preservation and replacement copies of items in a "permanent collection" by a supplying library, museum or archive to another recipient library, museum, or archive.

Some suggest permitting "short term loans" in point (d)(ii) such that a specified library, museum or archive can make their "permanent collection" available on "short term loan" to other libraries, museums and archives. Our views regarding consultation O2 are detailed in the next section.

- 35. According to the consultation document, CO s. 51A will remain unchanged. Some JULAC member institutions note that the current statutory provision in CO s. 51A(2)(a) only permits single-user access to a supplied copy at any one time: "only 1 user may access the copy at any one time". The current wording implies prohibition of redistribution of these copies by university libraries to a class comprising of multiple students for teaching and learning purposes, which would ordinarily be allowed under section 41A.
- 36. As for making and supply of copies of unpublished works, some JULAC member institutions query if legitimate requests for copies of unpublished material still in copyright may be made on behalf of different users at different times.

Similar to the views expressed in paragraphs 17 and 18 above, some JULAC members lean towards a more expansive interpretation of CO s. 17 that the duration of copyright for unpublished works is identical to that of published works.

Other JULAC members referring to the current CO s.52(2)(b) think that copyright owners can provision restrictions on the circulation and supplying of copies of unpublished works by making civil contractual arrangements with the library, museum or archive being entrusted with the unpublished work to the effect that the librarians, curators or archivists are prohibited from copying the deposited unpublished works at any time in the future.

37. The same questions emerge surrounding statutory authorization for playing or showing of unpublished sound recordings or films pursuant to revised CO ss. 52A & 245B.

Again, some JULAC member institutions suggest the statutory authorization for playing and showing of sound recordings or films inside library premises under CO s. 245B(1) should expand to permit remote access one-at-a-time by authorized users via secure online identification. Also, some seek clarification as to whether library staff's presence is required for the playing or showing of sound recordings or films.

Q2. Should the term "permanent collection" be defined according to the proposed definition under paragraph (d) above?

38. An overwhelming majority of JULAC member institutions believe that it is unnecessary to introduce a statutory definition for the term "permanent collection". Many are concerned that the suggested statutory definition for the term "permanent collection" will not be helpful. The proposed wording is too restrictive and cannot flexibly address evolving collection management practices at different libraries, museums, and archives in Hong Kong.

First, some JULAC members question the necessity of including in point (c)(ii) of the proposed specifications the requirement that "permanent collections" have to be "not accessible to the public". Some JULAC libraries currently do not open their collections to the public, or do not expect to open their collection to the public in foreseeable future. The modes of access may not necessarily be "on-the-spot reference use" only. This legislative proposal cannot accommodate their current collection development policies and practices nor their future plans and vision for their collection management. The proposed statutory definition may erect extra hurdles for libraries to regularly engage in collection development activities which also includes weeding.

Second, in the past, the relevant provisions operated well without a statutory definition for "permanent collections". As explained in point (c) of the proposed definition, the UK statute does not provide for an express definition for "permanent collection" either. There are insufficient reasons why Hong Kong will deviate from the current practice shared with the UK.

39. For those JULAC member institutions that are partially open to the proposal to introduce a statutory definition for the term "permanent collections", they suggest further revising the wording as follows.

Rewrite point (b) of the proposed definition for "permanent collection" under CO s. 51(1)—

"While the Ordinance does not provide a definition for "permanent collection", such term apparently refers to works that are considered as unique, valuable or worthwhile to be preserved in the collection of a specified library, museum or archive on a permanent basis."

Compare original proposal:

"While the Ordinance does not provide a definition for "permanent collection", such term apparently refers to works that are considered as unique, valuable or worthwhile to be preserved in the collection of a specified library, museum or archive on a permanent basis and are mainly or wholly kept for on-the-spot reference use rather than for general lending to the public."

40. That said, most of JULAC foresees that introducing a statutory definition may create more problems than solutions. Since the current provisions work well without it, most of us do not feel convinced this change needs to be made.

Conclusion

- 41. Generally speaking, JULAC welcomes the proposed law reform to rewrite a number of CO provisions relating to certain aspects of library operations that closely pertain to several issues our university libraries may run into frequently.
- 42. We appreciate this opportunity to share with the Intellectual Property Department our perspectives.
- 43. Moving forward, we urge the Intellectual Property Department to consider our suggestions collected from experienced librarians and frontline library staff, as well as views from other invited stakeholders and members of the general public who might participate in this consultation exercise. Hopefully, the proposed law reform to revise the CO and its subsidiary legislations will build

n a solid foundation based on productive conversations with stakeholders and ommunity consensus.					
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About the Joint University Librarians Advisory Committee (JULAC)

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The JULAC Copyright Committee ("JCC") is a sub-committee under JULAC to address issues and make recommendations as appropriate in relation to copyright matters. The sub-committee represents 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 and licensing issues.

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