



PROPOSED SUBSIDIARY LEGISLATION UNDER THE COPYRIGHT ORDINANCE (CAP. 528)

LAW SOCIETY SUBMISSION

1. The Law Society makes this submission in response to the Government's consultation on its proposed legislation for specification of libraries, museums and archives and prescribed conditions for certain permitted acts under the Copyright Ordinance (Cap. 528) ("**Ordinance**").

General Comments

2. We welcome and support the Government's initiative to update and facilitate the carrying out of certain permitted acts of specified libraries, museums and archives set out in the consultation paper ("**Permitted Acts**") to facilitate research and private study, and preservation and conservation of works for cultural heritage.
3. We believe there is, in principle, no objection to the Permitted Acts provided there are practical safeguards against potential abuse and legitimate interests of copyright owners are not unreasonably prejudiced.
4. Given the advancement of photocopying, replication (such as 3-D printing) and blockchain technologies, we strongly recommend the Government to consider asking libraries, museums and archives to employ such technologies to mark copies which are made and provided under the Permitted Acts. This will not only identify that the reproductions are "copies" but perhaps also enable such copies to be traced back to the persons supplied with them. We believe this will help to deter abuses and to assure copyright owners that the value of the "originals" is preserved. If

such technologies can be practically employed to deter potential abuses, then many of the measures suggested in the consultation paper to safeguard against abuse may be relaxed or dropped. At the same time, accessibility to the copy may be widened.

5. We set out below our specific observations and suggestions.

Written declarations

6. To satisfy a librarian, curator or archivist that a copy of a work can be provided under the Permitted Acts for research or private study, the person who requests the copy shall provide a signed declaration to declare that: (i) the copy is required for purposes of research or private study, and will not be used for any other purpose; (ii) he is not furnished with more than one copy of the same article or with copies of more than one article contained in the same issue of a periodical; (iii) his requirement for the copy is not related to any similar requirement of other persons; (iv) he has not previously been supplied with the same copies, or if he was previously supplied with the same copies, such copies have already been lost, damaged or destroyed.
7. The Ordinance does not require the new Regulations to prescribe a specific form for the declaration and the UK does not have a standard form either. Hence the Government proposes that to allow flexibility to suit the different needs of individual libraries, the new Regulations list out the information which must be included in the declaration and allow specified libraries to prescribe their own declaration forms so that they could be revised or updated by these institutions whenever necessary.
8. We believe it is most likely that non-government libraries would like to follow the format and contents of declarations used by government libraries and it will be more beneficial to everyone to use or model on a prescribed form. In particular, the form should remind that the making of a false declaration can attract criminal sanction. Under Section 36(c) of the Crimes Ordinance, any person who knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular, such statement being made in any oral declaration or oral answer which he is

required to make by, under or in pursuance of any enactment for the time being in force, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 2 years and to a fine.

Copyright reminders

9. The Government proposes that as additional conditions for the supply of electronic copies, the librarians should give notice to the person being supplied the copy (i) to use only for the purposes of research or private study; (ii) not to use for any other purpose, (iii) not to further reproduce, communicate or otherwise disseminate without licence of the copyright owner; and (iv) that any unauthorised reproduction, communication or otherwise dissemination of the copy may constitute copyright infringement attracting civil and/or criminal liabilities.
10. Although electronic copies may be more easily abused because of the ease to replicate and disseminate, in principle, the same reminders or conditions should apply to the provision of physical copies too.
11. We suggest that the above reminders/conditions be included in the written declaration as the acknowledgments of those requesting the copy.

Number of copies

12. Section 51(1A) of the Ordinance provides that where copies are made under the Permitted Acts for preservation or replacement copies of works, the total number of copies made must not exceed 3 at any one time, and only 1 of those copies may be accessible to the public at that library, museum or archive. Besides preventing abuses, we do not see a particular need for such restrictions and note that there are no such restrictions in the UK.
13. Section 51A stipulates that in respect of communicating a copy of an item in the permanent collection of a library, museum or archive made under section 51 (copying for preservation or replacement) to the users or staff of the library, museum or archive, by making it available online to be accessed through the use of a computer terminal installed within the

premises of the library, museum or archive, only one user may access the copy at one time. Likewise, we do not see the need for such restriction, Moreover, as a condition to make available the copy, the library, museum or archive is already required to take appropriate measures to prevent users from making further copies or communicating the copy to others.

Reasonable proportion of a work

14. The Government proposes that for the purposes of sections 47 and 48 of the Ordinance which allow providing a reasonable proportion of a work to facilitate research and private study, not more than ten (10) per cent of a published literary, dramatic, musical or artistic work, sound recording or film will be regarded as a reasonable proportion of the work. The Government points out that this percentage formulation is also adopted in Australia and Singapore as a benchmark for determining “reasonable portion” of a literary, dramatic and musical work in those jurisdictions (not including artistic works).
15. We note that at the briefing session held by the Intellectual Property Department of the Government (“IPD”) on 4 March 2024, a number of questions were raised about how the 10% would be measured. In reply, IPD stated that 10% could be taken to mean 10% of the content of a work, and that different measuring methods are to be adopted for different kinds of work, e.g. electronic work may be calculated by bytes, while a song could possibly be calculated by time.
16. We understand the ease and convenience of using a quantitative formula and consider that it would be very helpful if the Government could give more guidelines in due course how such quantitative test is to apply to different types of copyright works, in particular, artistic works. For example, in respect of, say, a digital photograph, would the supply of the image of the whole photograph in a much lower resolution (say, 1/10 of the original resolution) be a reasonable proportion and is there a difference between reasonable proportion and a reasonable portion? Or would artistic works like sculptures, paintings etc. be measured by dimension for the purpose of the application of the 10 per cent guideline?

Consistency

17. We observe that in the relevant sections, to ascertain if the copying is outside the bounds of Permitted Acts, the test of the knowledge of librarians, curators or archivists, or staff of specified libraries, museums or archives is either “knows, or could by reasonable inquiry ascertain” or “knew or ought to have been aware”. Are those tests meant to be interchangeable? If not, it seems clearer to use the “reasonable inquiry” test throughout.

Conclusion

18. We are aware that some of our observations and suggestions made in this submission require an amendment of the Copyright Ordinance (for example, our suggestions above regarding number of copies) and that is not the dominant purpose of this exercise. We still feel strongly that we should raise those points so that if they are considered beneficial, amendments can be introduced when the earliest opportunity arises.
19. We look forward to working further with the Government on copyright consultations and amendments to keep our law up to date with the pace of technology, international trends and changing operating environments and expectations.

The Law Society of Hong Kong
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