

**Notes of the 3rd Working Group Meeting
On ‘ Development of non-statutory guidelines
in clarifying the expression
“reasonable extent” in the permitted acts
for educational purposes under the Copyright Ordinance’**

Held on 4 July 2002

**At the Intellectual Property Department
Room 2501, 25th Floor, 213 Queen’s Road East,
Wanchai, Hong Kong**

Present : Hong Kong Subsidized Secondary Schools Council

Hong Kong Professional Teachers’ Union

Task Force on Reprographic Rights Licensing
established under Heads of Universities Committee
(HUCOM)

The Hong Kong Association for Computer Education

The Hong Kong Academy for Performing Arts

Hong Kong Reprographic Rights Licensing Society

Joint University Librarians Advisory Committee
(JULAC)

Hong Kong Library Association

Hong Kong Publishing Federation Limited

Hong Kong Educational Publishers Association

The Anglo-Chinese Textbook Publishers Organisation

Hong Kong Copyright Licensing Association
(HKCLA)

Mr Phillip CHAN
Commerce, Industry and Technology Bureau

Mr CHAN Hau-wing
Education Department

Mr Stephen SELBY (Convenor)
Intellectual Property Department

Mr Andy LAU (Secretary)
Intellectual Property Department

**Absent with
apologies :** Hong Kong Subsidized Primary Schools Council

The meeting commenced at 3:10 p.m.

Agenda Item I: Confirmation of Notes of 2nd Working Group meeting

1. Mr Stephen SELBY asked whether the Working Group members had any comments on the English version of the Notes of the 2nd Working Group Meeting. . The Chinese version would follow once it became available.
2. The representative of HUCOM proposed the following amendments:
 - (a) In paragraph 2, the term "制作" should be changed to "製作".
 - (b) In paragraph 36, it would be clearer if the words "for the purposes of research and private study" were added.
 - (c) In paragraph 16, the words "Notwithstanding (a) and (b)", should be added.

The members accepted the proposed amendments.

Matters Arising

Agenda Item II(a)

3. Mr SELBY suggested that the issues in Matters Arising section did not have to be resolved immediately. The Working Group could look at the whole Points for Discussion document first and then revisit those issues which required further discussion after we had gained a basic understanding of the members' positions on the main issues.
4. The representative of the Hong Kong Subsidized Secondary Schools Council ("HKSSSC") noted that the education reform process encouraged schools and

teachers to create and use their own materials. Teachers might consult 5 or 6 textbooks and then put together a course pack for a particular course. He said he had discussions with the Education Department and HKRRLS and reached an understanding. He did not agree that a course pack should be used as a substitute for a textbook. He believed that even if there was no ideal textbook for a particular course, the school should still prescribe a textbook which it believed to be the most suitable. The school could then supplement the textbook with notes. In that case students would still be buying and using textbooks. He suggested that if it would make it easier for discussions to proceed, course pack could be excluded at this stage, although it might be necessary to revisit the issue at a later stage.

5. Mr SELBY noted that there was still some reservation about excluding "course pack" from the guidelines. He suggested the item be kept on the Agenda and the members could come back to it later on.

Agenda Item II(b)

6. Mr SELBY referred to paragraphs 16 and 17 of the Notes of the 2nd Working Group Meeting and noted that the proposal made by the members of the publishing industry might not satisfy the needs of teachers in practice. He invited the members of the publishing industry to let the Working Group know whether there had been further developments on this issue.
7. The representative of ACTPO confirmed that a meeting had been held by the publishing industry the day before. On the issue of multiple copying for distribution to students, he said the request for multiple copying was reasonable, but the permitted scope of copying would need to be narrower than single copying for teachers' own use. He said the publishing industry would be seriously affected if the same figures of 5% and 10% were applied to multiple copying. The proposed terms for multiple copying were the same as the terms for single copying, except that the figures of 5 percent and 10 percent would be changed to 2 percent and 5 percent respectively.
8. Mr SELBY clarified with the representative of ACTPO that the proposal for multiple copying was based on the proposal for single copying as contained in paragraph 16 and 17 of the Notes of the 2nd Working Group Meeting. In the new proposal, clause (a) in paragraph 16 would become "less than 2% of a book

within one month", and clause (b) would become "less than 5% of a book in aggregate and without time limit". Mr SELBY further clarified with the representative of ACTPO that the effect of clause (c) was "Notwithstanding (a) and (b), not exceeding one chapter of a book".

9. The representative of ACTPO confirmed that copies made under the multiple copying proposal could be distributed to students, with each student receiving one copy. Clause (d), which was specific to single copying, could be omitted in the proposal for multiple copying. He also confirmed that clause (e) was to stay the same.
10. Mr SELBY suggested that a page in a book often contained more than one photograph or illustration. The representative of ACTPO replied that even if that was the case, only one photograph or illustration could be copied under the multiple copying proposal.
11. Mr SELBY went through the considerations set out in paragraph 17 of the Notes of 2nd Working Group Meeting, and the representative of ACTPO confirmed that all the considerations would also apply to the proposal for multiple copying. Mr SELBY then invited views from the members.
12. The representative of Hong Kong Academy of Performing Arts ("HKAPA") queried that if on the same page of a book there were two photographs of Hong Kong for comparison purposes, whether the teacher would have to cover up one of them when making a copy of that page.
13. The representative of Hong Kong Educational Publishers Association ("HKEPA") suggested the teacher could ask the copyright owner for permission. He thought the publisher would not have objection to this kind of request.
14. Mr SELBY said that under the U.S. Classroom Guidelines, if more than one illustration was on the same page than the limit on illustration could be exceeded. He suggested that the same should apply under the multiple copying proposal.
15. The representative of HKEPA noted that it was a new suggestion which had not been discussed at the publishing industry meeting. He was not in a position to answer that question but said he would convey the suggestion to the other members of the publishing industry.
16. Mr SELBY thanked the publishing industry for their efforts in coming up with a reasonable proposal.

17. The representative of HUCOM said the effect of the new proposal was that any books with less than 50 pages could not be copied. He suggested that one page should be allowed as a minimum.
18. A member queried the average number of pages of textbooks. The representative of HKEPA said that it was very difficult to say as the number of pages varied a lot.
19. The representative of the Hong Kong Association for Computer Education ("HKACE") agreed that one page should be the minimum. He said a similar "rounding up" provision was in the U.S. Classroom Guidelines. He thought it would be too troublesome for users to have to cover up part of a page.
20. Mr SELBY clarified that the new proposal only applied to Hong Kong textbooks for kindergartens, secondary and primary schools.
21. The representative of ACTPO queried whether college publishers might have concern over the proposal for multiple copying.
22. The representative of HKRRLS said that she had discussed the issue with overseas publishers. They did not want to be treated differently and they preferred to have a single set of guidelines which applied to all published works.
23. Mr SELBY expressed the view that if the multiple copying proposal was accepted, it would be to the benefit of the overseas publishers because the amount of copying allowed would be less than that allowed under a licence. Effectively a teacher could choose between various methods -- 2% under the guidelines for distribution to students, a higher percentage under a licence, or an even higher percentage by asking for permission from the copyright owner on a case-by-case basis.
24. The representative of the Hong Kong Copyright Licensing Association ("HKCLA") asked whether the licence provided by HKRRLS included newspapers. The representative of HKRRLS replied in the negative.
25. The representative of HKACE said that if it was agreed that all publishers should receive the same treatment then he would suggest going back to a higher limit. He thought the publishers should have a consensus amongst themselves first.
26. Mr SELBY suggested that the members could come back to this issue later on. He asked whether the multiple copying proposal was for not-for-profit education

institutions only.

27. The representative of ACTPO believed it would be unreasonable to include for-profit educational institutions because of their business nature. He said the view of the publishing industry was quite firm on this issue.
28. Mr SELBY suggested it might not be easy to define "for-profit" as all educational institutions had to be registered with the Education Department whether they were profit-making or not, and the Copyright Ordinance did not distinguish those educational establishments that could benefit from the provisions of section 45.
29. The representative of HKSSSC said that when registering a school as an educational institution it needed to state its tax status - whether it was not-for-profit. He commented that he represented not-for-profit schools and had no other comments on this issue.
30. Mr SELBY expressed the view that teachers might find it difficult to understand the differentiation between the two types of educational institutions. However he emphasised that he would defer to the members' views on this issue.
31. Mr H. W. CHAN observed that while there was no clear definition for "not-for-profit" schools, it was clear as to whether an organisation was a charity for tax purposes.
32. The representative of HKACE had no objection to the publishers' view. But from the perspective of students, he did not think there was a big difference between the needs of students in for-profit and not-for-profit schools.
33. The representative of HKCLA suggested that section 88 of the Inland Revenue Ordinance might assist in the determination of whether an organisation was a charitable body.
34. Mr SELBY noted that some tuition schools were run by charities such as Caritas. However the issue was whether the tuition schools were for-profit organisations.
35. The representative of HKPFL did not think schools run by Caritas would be a problem. He queried whether schools under the Direct Subsidy Scheme ("DSS") were not-for-profit organisations, although he personally did not have a problem even if DSS schools were included in the guidelines. However he felt there was a need to provide a clear definition for educational establishments.
36. The representative of HKSSSC thought those schools which received subsidies

from the government would be not-for-profit schools. Private schools were clearly for-profit organisations.

37. Mr Philip CHAN expressed the view that Caritas was not an educational establishment. Instead it was a social services organisation providing tuition services as part of its functions. He did not think section 45 of the Copyright Ordinance would apply in this case.
38. The representative of HKSSSC thought that an organisation had to register with ED if it was involved teaching.
39. Mr H. W. CHAN noted that there were specific criteria for exemption from registration and he could not comment on the details.

Agenda Item II(c)

40. Mr SELBY invited views on the revised clauses.
41. The representative of HKSSSC felt that the proposed period of time that would be deemed as "unreasonable" was too arbitrary. Some might question the basis on which one week or one month was chosen, and it might be difficult for the Working Group to justify its choice without proper research. He also considered that "spontaneity" and the time period between decision and use could not be proved in practice. He suggested that the time factor should not be defined. The important factors were the quantity to be copied and whether the school was a for-profit organisation.
42. The representative of the Hong Kong Library Association considered that permission could be obtained from licensing bodies very quickly by using the Internet. He thought it would be desirable to have a fixed time period for clause D(iv).
43. The representative of JULAC believed some publishers did not have a mechanism to deal with requests for permission to copy. She agreed that the concept of "spontaneity" could be retained, although different circumstances could produce different outcomes.
44. Mr SELBY noted that under the U.S. Classroom Guidelines, the time period between decision and use was not defined.
45. The representative of HKACE queried the effect of dropping the "spontaneity" concept.

46. Mr SELBY said that in the U.S. it was felt that if there was plenty of time then it was unreasonable for teachers not to ask for permission before making copies. He noted that Hong Kong did not have to follow the U.S. approach, but that was the background of the concept of "spontaneity".
47. Mr Philip CHAN suggested the use of the term "impracticable".
48. The representative of HKACE thought that teachers might find it difficult to use if the term was not defined.
49. Mr SELBY believed some teachers wanted the guidelines to contain very specific details, while some others did not. It would be difficult to satisfy everyone.
50. The representative of ACTPO considered the condition of "spontaneity" to be very difficult to enforce. He believed there was not a lot of difference in whether the term was defined. But if the users felt more comfortable with a definition then the publishers did not mind. He noted however it would still be difficult to reach a consensus on the actual time period between decision and time.
51. The representative of HUCOM thought the situation in the U.S. in 1976 was very different. The publishers did not favour multiple copying and so they made it necessary for users to comply with certain conditions. If the conditions for multiple copying in Hong Kong were easily satisfied, then he thought the overseas publishers might feel that Hong Kong was not providing sufficient protection to them. He believed the "spontaneity" factor should stay. It should be defined as "without any detailed planning". The time factor should not be mentioned.
52. The representative of ACTPO agreed that "spontaneity" should be kept and the time factor could be removed.
53. Mr SELBY suggested that Clause (iv) in Part D be amended for the purpose of further discussion at the next meeting.
54. In relation to clauses D(v) and E(iii)(f), the representative of HKLA felt that it might be too tedious for the teacher if he/she had to explain the copyright notice to the students all the time.
55. The representative of HKACE suggested that teachers should explain the copyright notice only when copies were made and distributed to students.
56. Mr SELBY agreed that only those teachers who made copies had to explain to

students. The teacher could simply ask whether any student did not understand the meaning of the notice and the teacher would only have to explain if a student put up his/her hand.

57. The representative of JULAC suggested some old materials might not have details of the source or the author.
58. Mr SELBY suggested clause E(iii)(f) could be amended to say "Author (if known)".
59. The representative of HKSSSC believed that if these clauses were adopted, schools would prepare a stamp for the purpose of putting a copyright notice on the copies made under the guidelines. The students would see the copyright notice on their copies of notes, and he believed this was a form of education to the students. He thought there could be difficulty in enforcing the requirement that in every school term the teachers had to explain to the students the content of the copyright notice. He also thought the date of making the copy should be added to clause E(iii)(f).
60. Mr SELBY agreed that the date of making the copy should be included.
61. Both the representative of the Hong Kong Professional Teachers' Union and HUCOM thought that the last sentence of E(iii)(f) in the Chinese version should be removed.
62. Mr SELBY agreed that it could be omitted.
63. Mr Philip CHAN commented that the Working Group was not "explaining" the term "reasonable extent" in section 45 of the Copyright Ordinance, as this could only be done by the courts. The Working Group was really trying to agree on the meaning of the term "reasonable extent". It was going to be an agreement between the copyright owners and users.
64. The representative of HUCOM suggested that the first sentence in clause E(iii)(f) in the Chinese version be amended to read: "這份資料是根據《版權條例》第45條複製".
65. The representative of HKACE queried if another teacher wished to make further copies of a copy whether the teacher should obtain and use the original work rather than the copy. Mr SELBY believed the teacher should get hold of the original work before making copies under the guidelines.

Agenda Item II(d)

66. Mr SELBY noted that the figures in square brackets came from the U.S. Classroom Guidelines. IPD had sent mail to the U.S. Copyright Office requesting for information on the rationale behind the figures. He also noted that clauses E(iii)(a) and (c) were discussed at the last meeting and no objection was raised. In terms of E(iii)(b), he was unable to explain why the figure "9" was adopted.
67. The representative of HKSSSC thought perhaps "9" was still a single digit and did not seem to be allowing too many instances of copying. He queried what constituted "one instance".
68. Mr SELBY thought it meant "on one occasion", even if copies were made from different works. If the quantity was exceeded then permission from the relevant copyright owners would be required. If there were no restriction on the number of instances then the guidelines would have little binding force.
69. The representative of HKSSSC said that it might be preferable to use "school year" rather than "school term" as some schools had 4 terms in one school year instead of the normal 3 terms.
70. Mr SELBY suggested "school term" was derived from the U.S. Classroom Guidelines and did not have to be followed. He suggested using "academic year" instead of "school term". He noted that the number of instances would also need to be changed. He suggested that the figure be left out at this stage.

Agenda Item III(a)

Clause E(iii)(d)

71. The representative of HKCLA said that articles and illustrations in newspapers came from a lot of different sources, and she was concerned that the newspapers might not have authority to allow copying by teachers.
72. Mr SELBY expressed the view that such copying should be within the exemption under section 45. The guidelines would only seek to clarify the expression "reasonable extent" by stipulating a quantity.
73. There were no other comments on this clause.

Clause E(iii)(d)(2)

74. Mr SELBY noted that the figures would apply to both English and Chinese works. He invited views from the members on whether the figures were acceptable.
75. The representative of HKACE considered it difficult to cover all languages.
76. The representative of HUCOM believed the figures were acceptable.
77. There were no other comments on this clause.

Clause E(iii)(d)(3)

78. The representative of HKRRLS said she would discuss this clause with overseas publishers to see whether there should be separate guidelines for textbooks and other printed works.

Clause E(iii)(d)(4)

79. The representative of HKAPA suggested that the rounding up provision be increased to cover a complete movement of a piece of music. She also queried whether musical work could be covered by a licence.
80. The representative of HKRRLS confirmed that IFRRO and HKRRLS could grant licences covering musical works.
81. Mr SELBY noted that some classical music had only one movement. He proposed that the clause be kept as it was.

Clause E(iii)(d)(5)

82. The representative of HKSSSC queried whether textbooks were included in "other works". If not then it would be clearer to say "other works except textbooks".
83. Mr SELBY said that a special section for textbooks would be provided for in the guidelines. When the Points for Discussion document was drafted the issue of textbooks had not been discussed. He agreed that the suggested amendment should be made.

Agenda Item III(b)

Clause E(iii)(e)

84. The representative of HUCOM suggested the limitations should not apply to

current periodicals and newspapers.

85. Mr SELBY noted the suggestion might affect the licences granted by HKCLA. He proposed that the issue be discussed at the next meeting.

Agenda Item IV

86. The representative of HUCOM believed it was important to define the term "fair dealing" and to what extent could teachers make single copies for their own use under section 38 of the Ordinance. He acknowledged that the Working Group might not be authorised to deal with the matter but suggested that a set of agreed interim guidelines would be useful to the teachers.
87. Mr SELBY expressed the view that the issue was something the Working Group could discuss. He agreed that there was a need to explain the "fair dealing" provisions, but it was a matter of giving priority in the Working Group's work programme to multiple copying under section 45.
88. The representative of HUCOM felt the libraries were concerned as well. He thought the issue could be even more urgent than the "reasonable extent" under section 45. He felt that the Working Group was in an ideal position to deal with the issue as well.
89. Mr SELBY said that while the U.S. Classroom Guidelines included a section on single copying by teachers, his preliminary view was that teachers in Hong Kong could utilize section 38 and therefore the issue did not have to be specifically dealt with at this stage. He also explained that the single copying provisions in the U.S. Classroom Guidelines were not included in the Points for Discussion document as it was too clumsy and not suitable to local circumstances.
90. Mr Philip CHAN agreed that section 38 was an issue which needed to be dealt with. He explained that in a brief to LegCo, the Bureau proposed that the fair dealing provisions be redrafted along the lines of the U.S. fair use provisions. He believed section 45 not only allowed teachers to make multiple copies for distribution to students, but also single copies for the teachers' own use.
91. The representative of HUCOM welcomed the information that the fair dealing provisions in the Ordinance would be amended along the lines of the U.S. fair use approach.
92. Mr SELBY said that the amendment might take a little while - at the earliest 9

months to introduce the Bill into LegCo, then it would take time to pass the Bill.

93. Mr Philip CHAN said that quite a few items in the Ordinance would be amended and it would not be done within a few months. He could not give a more definite timeframe, but emphasised that the policy direction was towards the open-ended U.S. fair use approach. He believed single copying by teachers could be covered by section 45.
94. Mr SELBY added that any amendment would not exceed the conditions set out in section 37(3) of the Ordinance and the "three-step test" under the TRIPS Agreement.

Agenda Item V

95. The next meeting would be held on 16 July 2002 at 3 p.m. at IPD.

The meeting closed at 5:35 p.m.