

**Notes of the 7th 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 6 September 2002

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

Present : The Hong Kong Association for Computer Education
(HKACE)

The Hong Kong Academy for Performing Arts
(HKAPA)

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

Hong Kong Subsidized Secondary Schools Council
(HKSSSC)

Hong Kong Subsidized Primary School Council
(HKSPSC)

Hong Kong Copyright Licensing Association
(HKCLA)

Hong Kong Reprographic Rights Licensing Society
(HKRRLS)

Joint University Librarians Advisory Committee
(JULAC)

Hong Kong Library Association (HKLA)

Hong Kong Publishing Federation Limited (HKPFL)

Hong Kong Educational Publishers Association
(HKEPA)

The Anglo-Chinese Textbook Publishers Organisation
(ACTPO)

Ms Laura TSOI
Commerce, Industry and Technology Bureau

Mr CHAN Hau-wing
Education Department

Mr Peter K. F. CHEUNG (Convenor)
Intellectual Property Department

Mr Andy LAU } (Joint
Intellectual Property Department } Secretaries)

Miss Joey HUNG }
Intellectual Property Department }

Absent with Hong Kong Professional Teachers' Union
apology : (HKPTU)

The meeting commenced at 3:00 p.m.

1. Mr CHEUNG, the Deputy Director of Intellectual Property, consulted the Members if anyone would like to act as convenor for the meeting. No views were raised by the Members. Mr CHEUNG then enquired if any one of them would then object him to continue to act as such. No one raised any objection. Mr CHEUNG then took the role of convenor.

Agenda Item I

Confirmation of Notes of the 6th Working Group Meeting (English)

2. No Member raised any comments. The notes were approved by the Members.

Confirmation of Notes of the 5th Working Group Meeting (Chinese)

3. Mr. H.W. CHAN proposed to change “融資” on the 1st and 4th lines of paragraph 37 to “資助”.
4. The Members accepted the above proposed changes.
5. The Working Group proceeded to examine the restructured “Points for Discussion” document (version 5 - 22/8/02) (as tabled) in conjunction with the Agenda (as tabled).

For-profit educational establishments – Definition in Part D(Agenda Item II(a))

6. Mr. LAU said that the definition of “Educational Establishment” contained in Part D had been revised by including the list of approved charitable institutions and trusts of a public character under the Inland Revenue Ordinance. The list could be viewed at the website of Inland Revenue Department. The revision was made following ED’s suggestion that a practical way to differentiate for profit and not-for-profit educational establishments was to look at their charitable status. He added that the definition as revised was made on the assumption that the Members accepted the publishers’ views that the guidelines should only cover not-for-profit educational establishments.
7. Ms. TSOI expressed preference for the guidelines to cover “for-profit” educational establishments as well. She said that section 45 did not distinguish between “for-profit” and “not-for-profit” educational establishments. The intention of providing the permitted act in section 45 was to cater for the use of copyright works by educational establishments from the perspective of free flow of knowledge and information. It would not be desirable if “for-profit” educational establishments were to be excluded from the guidelines. However if the copyright owners, despite all said and discussed, still insisted on such exclusion, she would not insist.
8. The representative of HKEPA showed to the Working Group a piece of newspapers clippings which reported on serious copying activities by tutorial schools. He said they were selling copies of copyright works to the students for profit. They were in essence not educational bodies. The frustration was that even they were excluded from the guidelines, they might still be able to make multiple copies.
9. Mr CHEUNG mentioned three scenarios as follows:-
 - (a) copying within the reasonable extent would not be regarded as copyright infringement under section 45 of the Copyright Ordinance;
 - (b) copying exceeding the reasonable extent permitted by section 45 would be regarded as copyright infringement giving rise to civil remedy; and
 - (c) certain infringing acts would attract criminal liability under the Ordinance

He said the Working Group was holding discussion on (a) above. He invited views from the Members towards the inclusion of “for-profit” educational

establishments in the guidelines but with different provisions on percentage of works allowed to be copied.

10. The representative of HKACE expressed the view that the Working Group was not in a proper position to discuss another set of guidelines for “for-profit” educational establishments as none of the Members represented them.
11. The representative of HKSPSC shared the view of the representative of HKACE. He added that as far as they were concerned, it would be a waste of time and cost if “for-profit” educational establishments were now joined in the discussion.
12. The representative of HKSSSC said that it was very clear that “for-profit” educational establishments were also entitled to make copies under section 45. However, in his view, the question as to whether and how another set of guidelines should be developed for “for-profit” educational establishments should be separately dealt with and left to the copyright owners and IPD for consideration.

Clause C(ii) (Agenda Item II(b))

13. Mr CHEUNG moved on to discuss the **Agenda Item II(b)**.
14. Mr LAU explained that the words “which are primarily” were added as a result of discussions at the 5th Working Group meeting. The representative of HKSSSC suggested the amendment so as to ensure that textbooks containing small amount of exercises were not inadvertently excluded under this clause.
15. Mr CHEUNG asked the Members if any one of them had a different view. No contrary views were raised. The clause was agreed to by the Members.

Clause C(iii) and Definition in Part D (Agenda Item II(c))

16. Mr LAU explained that clause C(iii) was added as a result of the Members’ consensus. The revised definition of “Course Pack” was a simplified version of the definition used by the Copyright Licensing Agency in U.K. (“CLA”). The numerical limit in square brackets (i.e. “4”) originated from the CLA definition but was open to discussion by the Members.
17. Mr CHEUNG read out the revised definition verbatim. He asked the Members if the numerical limit, “4”, was acceptable to them.
18. The representative of HKACE was of the view that the meaning of the term

“photocopied extract” should be clarified first before deciding on the propriety of setting the numerical limit at 4.

19. The representative of HKSSSC told the Working Group that the meaning of the term could be ascertained from the a subsequent clause regarding copying of textbooks, whereby it was provided that not more than 5 % of the number of pages of the textbook could be copied.
20. Mr CHEUNG, noting that there were no other contrary views from the Members, summed up that the numerical limit, “4” be adopted following UK’s position. No one raised any objection.
21. Mr LAU added that U.K. adopted the phrase “a course of study” in its definition but it was replaced with “a course” in the simplified definition. He asked whether “a course” should be defined since its meaning, which was quite clear in the context of primary and secondary schools, might not be so clear in the context of universities.
22. The representative of HUCOM did not see any problem with using the term “a course” or other terms like “a programme”, since how it was described was subject to change all the time. The main concern was rather about the numerical limit that was to be inserted in the clause.
23. Mr CHEUNG suggested that the phrase be changed to “a course/programme”.
24. The representative of HUCOM said that the suggestion was probably acceptable.
25. The representative of HKSSSC said that one should use common sense to interpret the term, “a course”.
26. The representative of HKLA agreed with the view of the representative of HKSSSC.
27. Mr H. W. CHAN noted that “a course” also appeared in clauses F (i) and F(iii)(b). He enquired if there was any contradiction in the numerical limits used in this clause and clause F (iii) (b) which allowed 27 stances of copying for one course in one academic year.
28. The second representative of HKRRLS was of the view that the term should be clearly defined. A clear definition would assist a court to make decisions in cases of dispute.

29. The representative of HUCOM expressed the view that if “a course” had to be defined, it was going to be a long discussion. He specifically raised a point that the gist of the guidelines was the spontaneity requirement which largely governed the copying activities.
30. The representative of ACTPO, referring back to Mr H. W. CHAN’ s enquiry, explained that clause C (iii) was to exclude “course pack” from the guidelines whereas clause F (iii) (b) dealt with “non-course packs” situation.

Clause C (iv) (Agenda Items II (d))

31. Mr LAU explained that the clause was added following the proposal of HUCOM and JULAC. At the last meeting, this clause was not fully discussed as the representative of HUCOM was absent at that meeting. He was of the view that there was no reason why single copying would be disallowed if multiple copying was permitted under Section 45.
32. The representative of HUCOM related to the Working Group the teachers’ concern: whether the making of the transparencies, etc. for the purposes of instruction would be permitted under the section 45. They made the proposal to remove any doubt about this matter although he believed that the right to do so would probably be implied.
33. Mr CHEUNG raised a concern of incoherence if this clause was included in the guidelines which dealt with multiple copying.
34. The representative of HKSSSC said that he understood the teachers’ concern but at the same time agreed that the addition of this clause which was not subject to spontaneity requirement would go against the central theme of the guidelines, which was, the copying activity was restricted by reference to spontaneity requirement.
35. Mr CHEUNG invited the views of the Members if this clause should be made as an exception.
36. The second representative of JULAC expressed the view that this clause should be included in the guidelines.
37. The representative of HUCOM shared the view of JULAC. Inclusion of this clause had the effect of removing any doubt about the matter.
38. The representative of HKACE did not reject the idea of including this clause

into the guidelines.

39. The representative of ACTPO said that the Working Group was discussion multiple copying for classroom use while the clause was dealing with making slides, etc. for teaching purposes. He considered that there would be a technical problem if this clause was included in the guidelines.
40. Ms TSOI said that the guidelines were intended to provide guidance on the interpretation of “reasonable extent” in section 45. The section did not distinguish between single or multiple copying.
41. The second representative of HKRRLS queried if the use of “other similar presentation materials” in the clause was appropriate.
42. The representative of HKSSSC said that there words were necessary since it was practically impossible to set out in exact terms each and every kind of presentation materials.
43. The second representative of JULAC repeated that single copying should not be subject to the spontaneity restriction set out in clause E iv). The permitted act of single copying should be spelt out in the guidelines and for clarification, “for teachers’ instruction purpose” could be added in the clause.
44. The representative of HUCOM shared the view of the JULAC.
45. Mr CHEUNG suggested that the drafting of the clause be improved and an improved version be footnoted to the guidelines.

Clause F (iii)(d) (3) (Agenda Item II (e))

Clause F (iii)(d) (6) (Agenda Item II (f))

46. Mr LAU explained that the additional clause F (iii) (d) (3) was basically the proposal of the American Association of Publishers ("AAP").
47. Mr CHEUNG asked the Members if they agreed to adopt U.S. standard as HK standard.
48. No Member raised any objection.
49. The representative of ED enquired what would fall within the “other works (except textbooks)” category (clause F (iii) (d) (6)).
50. Mr LAU cited the example of reference books. He went on to explain that the

words in italics in clause F (iii) (d) (6) originated from AAP's proposal. AAP proposed that only an excerpt not exceeding 1,000 words or 10 % of the number of pages of the work, whichever was less, would be allowed to be copied. JULAC had expressed the view that they considered the proposed limit of 1,000 words to be too restrictive and they preferred the 10% formulation. On the other hand, HKRRLS had indicated that the numerical limit could be increased in order to cater for the practical needs of the users. The numerical limit of 3,000 in the revised clause was therefore proposed for further discussions on this issue. Mr LAU also suggested that the Members could consider an alternative of figure 2,500, which is the same figure used in clause F (iii) (d) (3).

51. The representative of HKEPA noted that if the limit was set at 2,500 words, this would be too generous for kindergarten and primary schools as the textbooks used by them were not large in volume.
52. The representative of HUCOM reminded the other Members that “textbooks” would not be covered by this clause. They were separately dealt with in clause F (iii) (f). HKEPA’s concern was therefore unnecessary.
53. Mr CHEUNG invited the views of the Members towards the adoption of the figure, “2,500”.
54. The representative of HKRRLS found it acceptable.
55. The representative of HKAPA indicated that post secondary colleges would be buying licences anyway.
56. Ms TSOI enquired if “2,500” was adopted in clause F (iii) (d) (6), what the difference between this clause and clause F (iii) (d) (3) would be.
57. Mr. CHEUNG said clause F (iii) (d) (6) covered an inventory of references.
58. The second representative of HKRRLS said all other printed works, such as references used in post secondary colleges, would be covered by clause F (iii) (d) (6).
59. The representative of HUCOM enquired if deletion of clause F (iii) (d) (3) was feasible.
60. Mr CHEUNG asked if the Members wished to combine two sub-clauses F (iii) (d) (2) & (3) into one.
61. The representative of HKSSSC suggested that clause F (iii) (d) (2) be deleted

and clause F (iii) (d) (3) be retained. Such suggestion was agreed to by the Members.

Clause F (iii) (e) (Agenda Items II (g))

Clause F (iii) (e) (1)

62. Mr LAU explained that this clause was added following the proposal of HKCLA to limit the number of works to 9.
63. The representative of HKCLA explained why they made such proposal: newspapers should be treated differently from other categories of works because each newspaper aggregated many works from different authors and so it was not practical to adopt the same measurement applicable to other categories of works for newspapers.
64. Mr LAU queried the effect of the proposal as primary and secondary schools could make copies exceeding the set limit without having to pay extra fees as the licence fees had been waived.
65. The representative of HKCLA clarified that waiver of licence fees only applied to copying for instruction purposes and number of copies made should not exceed one fifth of the total number of students of a school.
66. The representative of HKSSSC enquired what was meant by “title”.
67. The representative of HKCLA said that it referred to newspapers.
68. The representative of HUCOM then enquired why “newspapers” was not used instead in substitution of “same title of publication”.
69. The representative of HKLA said that the meaning of “title” was very clear from the perspective of librarians. It should refer to newspapers but not an article or a column.
70. The first representative of JULAC suggested using “same newspaper title”. Other Members agreed to adopt this revised version.
71. The representative of HUCOM suggested that the Working Group also consider “current news’ exception (clause F (iii) (g)) (*Agenda Item II (h)*).
72. Mr LAU clarified that clause F (iii) (g) should be re-phrased as follows,
“(g) The limitations stated in (b) and (e) above do not apply to current news

sections of newspapers and periodicals.”

73. The representative of HKCLA enquired what was meant by “current news”.
74. The representative of HKSSSC said supplements in a newspaper were not regarded as “current news”.
75. The representative of HKCLA further enquired if all the local news and world news reports in a newspaper would be considered current news.
76. The representative of HKSSSC expressed the view that in such case, it would be practically easier to buy a newspaper instead of making copies.
77. Mr CHEUNG drew the attention of the Members to the definition of “current news” as shown on page two of the Points for Discussion document. He read it out verbatim for the Members’ consideration.
78. The representative of HUCOM who proposed this definition pointed out that they merely adopted the version used by a U.K. court in a case last year concerning Princess Diana. The definition was not the one devised by them.
79. The representative of HKCLA explained why not more than 9 works might be copied from the same title. The reason was that they wished to set a limit on use of works by users. She said that at the last meeting, the other representative of HKCLA had expressly stated that for many cases seeking licence for copying exceeding the prescribed limit, they would not demand licence fee. All that they did was just to keep a record only.
80. The representative of HUCOM said that the US guidelines containing current news exception had been in force since 1976 and he was not aware of any newspaper in the U.S. proposing to change the guidelines. He considered HKCLA’s concern was not necessary.
82. The second representative of JULAC said that the Working Group was discussing the reasonable extent a user was allowed to do the permitted act of copying. It was the right of the users under the Ordinance anyway. It was not necessary to seek permission from the copyright owners.
83. The representative of HKCLA said that the limit set in the proposed clause was already sufficient for users’ practical needs. On average, a user could make a copy of a work once every two days having regard that they had 15 members and there were 9 months of teaching in a year.

84. The representative of HUCOM replied that for themselves, they had already bought licences from HKCLA for copying newspapers clippings for reading by selected university staff. He himself would not make any copy. However, he could not speak for individual teachers in this respect. Further he considered the scope of application of the exception to be fairly narrow as current news reports were mainly used in social science subjects. In addition, users should be given a choice to copy quality news.
85. The representative of HKCLA also explained why they set such limit in the proposed clause: to encourage users to use other newspapers.
86. The representative of HKAPA said that for certain social issues, such as, June 4 and Tian An Man Democracy Movement and 911 Attack, a great deal of copying of news would be envisaged for discussion purpose. As such, there should be current news exception.
87. The representative of HKSSSC also said that current news were something nobody could expect when to happen. Setting a limit to the number of copies one might make of current news would hinder students' discussion thereof. In fact, according to the present arrangement, a school was allowed to make copies of current news so long as the total number of copies made did not exceed one fifth of the total number of people in the school. Users should be encouraged to use quality news.
88. The representative of HKCLA believed that to enable them to better assess the users' practical needs of making copies of current news, it would be desirable for the users to obtain and supply them with some figures in support.
89. The representative of HUCOM counter proposed that HKCLA should enquire of the U.S. newspapers about the reason why they had not proposed for the past 26 years any change to the U.S. guidelines. He also raised the point that copying of current news was still subject to the "spontaneity requirement". Accordingly, a user would not be able to copy the same piece of current news used by him last year for the next year. In the latter case, licence for copying had to be obtained.
90. The representative of HKCLA said she would relate the users' request and position to their members. She asked if "9" was not adopted and a "2-digit" figure was preferred for the purpose of Clause F(iii)(e)(1), what the suggested figure would be.

91. Mr. CHEUNG asked the Members if they would prefer “25”.
92. The representative of HKAPA considered “current news” to be a kind of social assets which the newspapers should not make their private possession.
93. The representative of HKCLA drew the Members’ attention to Section 39 which allowed fair dealing with a work for purpose of reporting current events.

Clause F (iii) (e)(2) and (3) (Agenda Items II (g))

94. Mr. LAU said that the numerical limits “3” and “9” in these clauses had been previously discussed. For the purposes of clarity and consistency, the phrase “for one course” was added in these clauses.
95. Mr. CHEUNG added that these were only cosmetic amendments which, he believed, should meet with the Members’ approval. No objection to these amendments was raised.

Definition of ‘Textbook’ in Part D and Clause F(iii)(f) (Agenda Item II (i))

96. The representative of HKSSSC said that “the Hong Kong Examinations Authority” in the definition in Part D should be changed to “Hong Kong Examinations and Assessment Authority”. He also said that for books relating to TOEFL, they would be excluded from the definition since it was not prescribed by Hong Kong Examinations and Assessment Authority.
97. Mr. LAU said that for these books, they would fall within the “Other Works” category and be subject to the limits set out in that clause.
98. The first representative of HKRRLS said that they had discussed about the definition with the publishers. They now agreed to delete “or the Hong Kong Examinations Authority” from the definition.
99. Mr. LAU drew the Members’ attention to the additional words “for one course in any one academic year”. He explained that without a time limit in the clause, once a work had been copied up to the percentage limit, it could never be further copied under the guidelines. He asked the Members to consider if this limitation would cause any operational problems.
100. The representative of ACTPO said that the clause as drafted would allow successive years of copying which would have the effect of making a whole copy of a textbook.

101. The representative of HKSSSC clarified that copying under this clause needed also be subject to the “spontaneity” requirement. As such, it was not the case that a user could make copying of a work every year as they wished as long as copying did not exceed 5% limit per year. He still needed to observe the “spontaneity” requirement. Publishers’ concern expressed above had been overstated.
102. The representative of HUCOM added that the guidelines as a whole had already been made very restrictive.

Agenda Item III

103. Mr. CHEUNG invited the Members’ views towards the following:-
 - (a) Whether another working group meeting be convened for purpose of continuing the discussion on development of the guidelines;
 - (b) Or alternatively, the convenor be authorised to prepare a convenor’ s draft guidelines setting out the agreed items and a possible consensual solution for outstanding items for consideration at a plenary meeting to be held on a date to be agreed.
104. The first representative of JULAC expressed their members’ concern about the need to have a set of guidelines for photocopying of copyrighted materials by users of libraries as he was aware that the guidelines now discussed were only applicable to educational establishments for instruction purposes. In this connection, he suggested that the header of the documents be amended to clarify that the guidelines were intended for use by teachers and lecturers only and not by users of libraries.
105. Mr. CHEUNG noted JULAC’ s concern which, he said, might be put up for consideration at a plenary meeting. He explained that the drafting work of new copyright library regulations which would govern the photocopying of copyright works by users of libraries was still in progress. In the meantime, the librarians could make reference to the old regulations which were still in force.
106. The representative of HUCOM considered the preparation of a convenor’ s draft guidelines mentioned by Mr. CHEUNG a very good suggestion. They also wished to have the guidelines introduced as soon as possible.
107. No contrary views were raised by other Members.

108. The Working Group proceeded to consider when the 2nd Plenary Meeting be held.

Date of 2nd Plenary Meeting

109. The Members agreed that the 2nd Plenary Meeting be held on Friday, 20/9/02 and, tentatively, in the morning. They would be notified of the exact time of the meeting in due course.

The meeting closed at 6:00 p.m.