

**Notes of the 5th 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 30 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
(HKSSSC)

Hong Kong Professional Teachers' Union (HKPTU)

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

The Hong Kong Association for Computer Education
(HKACE)

The Hong Kong Academy for Performing Arts
(HKAPA)

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 Stephen SELBY (Convenor)
Intellectual Property Department

Mr Andy LAU (Secretary)
Intellectual Property Department

Miss Joey HUNG
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 the 4th Working Group Meeting (English)

1. The representative of HUCOM proposed the following changes:
 - (a) Paragraph 34 - After the word "licences" add: "from HKCLA for copying newspaper clippings for reading by selected university staff".
 - (b) Paragraph 41 - Add at the end of the paragraph: "for copying beyond the approved limited".
 - (c) Paragraph 56 - change the word "preparation" to "production".
 - (d) Paragraph 57 - change the word "prepare" to "produce".
2. The Members accepted the above proposed changes.

Confirmation of Notes of the 3rd Working Group Meeting (Chinese version)

3. The representative of the HKCLA noted that the name of their organisation needed correction.

Agenda Item II

4. Mr SELBY suggested that the Working Group go through the whole Points for

Discussion document (version 3). He said the wording in the document was not fixed and was open to suggestions. While the document was yet to be finalised, he believed at this stage everyone had a clearer understanding of the issues.

5. There was no objection to the suggestion and the Working Group proceeded to examine the Points for Discussion document.

Paragraph A

6. Mr SELBY raised the issue of "not-for-profit/for-profit" educational establishments for discussion. He noted that under the Copyright Ordinance, no differentiation was made between "not-for-profit" and "for-profit" educational establishments. Therefore "for-profit" educational establishments would be able to make copies under section 45 even if they were not bound by the guidelines. Excluding "for-profit" educational establishments from the scope of the guidelines did not mean they could not make copies under the Section 45 exception.
7. The representative of JULAC queried whether private schools were equivalent to "for-profit" schools.
8. Mr H. W. CHAN said that private schools were not necessarily "for-profit". He also said that for-profit organisations could operate not-for-profit schools. He believed the best way to ascertain the status of a school in this regard was to see whether the school was registered with the Inland Revenue Department as a "charitable" organisation.
9. Mr SELBY said the definition in footnote 1 could be further clarified, but the most important issue was the effect of excluding for-profit educational establishments from the guidelines. They would still have the legal right to make copies pursuant to section 45. But they would not have any guideline to apply. Lack of a guideline was not a basis to infer that they could copy less than those who had a guideline. Indeed, they might even argue they could copy more if they were not bound by restrictions in the guideline.
10. The representative of ACTPO said the publishing industry felt it would be prejudicial to their interests if for-profit educational establishments were allowed to make copies of their materials. However he indicated that ACTPO would consider two different sets of guidelines - one applicable to not-for-profit educational establishments, the other applicable to for-profit educational establishments.
11. Mr SELBY said he was concerned that there might be a misunderstanding that if

for-profit educational establishments were not covered by the guidelines then they would need to seek permission for multiple copying. He emphasised that the exception in section 45 of the Ordinance applied equally to not-for-profit and for-profit educational establishments.

12. The representative of ACTPO said he understood the point raised by Mr SELBY. He acknowledged that for-profit educational establishments also had rights under section 45 of the Ordinance.
13. The second representative of HKRRLS said he had spoken to publishers in the U.S. on this issue and was informed that for-profit organisations in the U.S. could not enjoy the benefit of the fair use provisions.
14. Mr SELBY said while that might be the position under U.S. law, it was not so under Hong Kong law. He suggested that if for-profit educational establishments were not bound by the guidelines, they might be able to make multiple copies exceeding the amount agreed under the guidelines.
15. The representative of ACTPO said if that was the case, the publishers could take legal action against those establishments. He said if for-profit educational establishments were included in the guidelines they would be able to make copies "legally". It was something the publishers could not accept. He said the publishers were quite prepared to take any such cases to court.
16. Mr SELBY said that if the guidelines were applicable to for-profit educational establishments, and if they copied in excess of the amount allowed in the guidelines, the publishers could take legal action against them. In these circumstances, the courts were likely to take the guidelines into consideration in reaching its decision. On the other hand, if the for-profit educational establishments were excluded from the guidelines, it would be up to the court to determine the meaning of "reasonable extent" without having regard to the guidelines. Mr SELBY expressed the view that it would be preferable to have guidelines covering all educational establishments.
17. The representative of HKSSSC suggested not to place any restriction on the meaning of "educational establishment" in the guidelines. He believed there was a consensus at the last meeting on the protection of the publishers' interests. He also suggested that amendments be made to Clause E(iii)(d)(5). He agreed that if for-profit educational establishments were not covered by the guidelines then the courts might conclude that they could copy more than the amount stipulated in the guidelines. This would in fact go against the intention of protecting the publishers'

interests.

18. Mr SELBY noted that the guidelines represented an agreement between various parties and would not affect their rights under the Ordinance.
19. The representative of HKACE expressed the view that if Clause E(iii)(d)(5) were simply made inapplicable to for-profit educational establishments, the effect of such exclusion would be uncertain. These establishments might interpret the exclusion as allowing them to treat "textbooks" (which had more stringent conditions) the same as other books. This would go against the publishers' interests.
20. The representative of ACTPO reiterated that his view was that for-profit educational establishments should not be allowed to enjoy the preferential treatment under the guidelines.
21. The second representative of HKRRLS said while the publishers association in the U.K. did not support multiple copying, they acknowledged the special circumstances in Hong Kong and agreed that special treatment could be provided to not-for-profit educational establishments. However as the U.S. Classroom Guidelines were only applicable to not-for-profit educational establishments, he believed justification would be necessary before extending the Hong Kong guidelines to for-profit educational establishments. Further he expressed concern that if the guidelines were extended to cover for-profit education establishments, not only textbooks but other printed works would also be affected. He suggested that the guidelines should specify what for-profit educational establishments were entitled to enjoy.
22. The representative of JULAC queried whether the government had considered amending Schedule 1 in the Ordinance.
23. Ms TSOI replied in the negative.
24. Mr SELBY said under the Ordinance no distinction was made between the different types of educational establishments. He believed the suggestion of ED (i.e. to see whether an educational establishment was "charitable") might be a more practical solution.
25. The representative of HKACE queried whether universities were charitable organisations.
26. The representative of HUCOM confirmed that they were charitable organisations.

27. Mr SELBY queried if preferential treatment was available to for-profit educational establishments, whether such treatment would only cover textbooks or it would cover other printed works as well.
28. The representative of ACTPO expressed concern that the international publishing community would wonder why for-profit educational establishments were being specifically looked after.
29. Ms TSOI said that it would be undesirable to leave a certain type of educational establishment out of the guidelines. 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. Even if for-profit educational establishments were excluded from the guidelines, they could still make use of the permitted act in section 45. The publishers could take legal action against such establishments, but in her view such course of action might not be beneficial to the publishers. She also believed it was undesirable to have no guidelines, covering for-profit educational establishments.
30. The representative of ACTPO agreed that it was a difficult issue and said further discussions with other members of the publishing industry might be necessary.
31. Mr SELBY considered there to be 3 alternatives for the Members' consideration:
 - (a) The guidelines applied to all educational establishments;
 - (b) A separate set of guidelines for for-profit educational establishments; or
 - (c) Allow for-profit educational establishments a different percentage of copying under the same set of guidelines.
32. The representative of ACTPO suggested that a further alternative was to amend Schedule 1 of the Ordinance by removing for-profit educational establishments from the Schedule.
33. Ms TSOI said before considering any proposed amendment to the Ordinance, CITB would need to solicit the views of all interested parties. In her view, even for-profit educational establishments were still providing educational services to students. They were still promoting education even though their funding was sourced from school fees.
34. The representative of HKEPA believed some private tuition schools were making substantial profits. He did not consider such schools to be promoting education.

He further clarified that he was not speaking against all schools which were not funded by the government, for instance international schools or private schools.

35. Mr H. W CHAN confirmed that private tuition schools had to be registered with ED.
36. The representative of HKSSSC believed there were different categories of school registrations. He suggested that these categories could be used in the guidelines.
37. Mr H. W. CHAN explained that schools could be classified by curriculum or finance type. The former classification included grammar schools, international schools and prevocational schools. Under this classification, a large number of schools were in the "Not Applicable" and "Other Courses" categories. Private tuition schools fall within these. The finance type classification included Aided, CAPUT, DSS, ESF, Government, "Other" and Private schools. He noted that private schools could also be non-profit-making schools. Overall his view was that the above classifications could not achieve the purpose of distinguishing for-profit educational establishments from non-profit-making ones.
38. The representative of HKAPA expressed the view that even if the private tuition schools were covered by the guidelines, the limited percentage allowed under the guidelines was unlikely to be sufficient for their use in practice. Therefore they would still need to obtain licences from the licensing bodies. In particular, she believed these tutorial schools often produced course packs for distribution to students, which would not be covered by the guidelines.
39. The representative of HKSSSC believed it was possible for tuition schools to distribute notes at every class rather than distributing course packs and therefore still within the scope of the guidelines.
40. The representative of HKCLA noted that the time frame under the guidelines, i.e. one academic year, would be difficult to apply to tutorial schools as most of the classes were course-based.
41. The representative of JULAC expressed the view that if tutorial schools were excluded from the guidelines, there would not be any guidance to these schools on their copying activities.
42. The representative of ACTPO acknowledged that the publishing industry was facing a dilemma. If they excluded for-profit educational establishments from the guidelines, then it would be entirely up to the courts to decide whether their copying activities were within the exception. On the other hand the publishing

industry could not accept the endorsement of for-profit educational establishments copying textbooks free of charge. He said the whole issue could be resolved by adding a "not-for-profit" or "charitable" requirement in Section 45 of the Ordinance.

43. Mr SELBY suggested that the Members gave further thoughts to the issue. But at this stage he noted there was a consensus on the following:
- (a) If for-profit and not-for-profit educational establishments were to be distinguished in the guidelines, the distinction would apply to all works covered by the guidelines, not just to textbooks.
 - (b) The most practical solution to classifying different types of educational establishments would be to check the "charitable" status of individual schools under the Inland Revenue Ordinance.

He expressed the further view that there would be a lot of uncertainty if no guidelines were available to for-profit educational establishments.

44. The representative of HKSSSC thought it would be better to look at whether a particular educational establishment was "for-profit" when it was established. He said it was possible for charities to operate profit-making organisations. He suggested that a separate set of conditions for for-profit educational establishments should be included in Clause E(iii)(d)(5).
45. The second representative of HKRRLS objected to this proposal as he believed the for-profit educational establishments would still be entitled to make multiple copies of a lot of other printed works.
46. The representative of ACTPO suggested amendment of the Ordinance.
47. Mr SELBY said the Government was not in a position to give a commitment without first conducting a full consultation.
48. Mr SELBY suggested that further discussion on this issue be held at the next meeting. He then proceeded to go through Paragraph A and invited views from the Members.
49. The representative of HKSSSC suggested the wording in footnote 1 should be amended, e.g. "Aided schools" and "Direct Subsidies Scheme".
50. Mr SELBY noted that the wording in footnote 2 would depend on the progress of the legislative amendment.

Paragraph B

51. The Members did not make any comments on this Paragraph.

Paragraph C

52. The representative of HKSSSC suggested that the square brackets in Clause C(i) should be removed. He also found the word "etc" misleading.

53. Mr SELBY suggested the following wording:

"Literary, dramatic, musical and artistic works in printed form including such items as newspapers, periodicals, books (including textbooks and reference books), sheet music and printed music items."

54. Mr SELBY further suggested that the exclusion of "course pack" be included in a new clause C(iii). He asked whether any Member had come across a definition for the term "course pack".

55. The representative of HUCOM said that the term "course pack" was defined by Copyright Licensing Agency (U.K.) as basically a compilation of 4 or more photocopied extracts of licensed material from one or more sources and which compilation exceeded 25 pages. He noted that this definition was in the process of being amended.

56. Mr SELBY suggested the first part could be adopted, but it was not necessary to specify the number of pages. He said any suggestions on this issue could be sent to IPD and a proposed definition would be prepared for further discussion at the next meeting.

57. The representative of HKSSSC noted that textbooks often included some exercises. He queried whether the content of such textbooks could be copied under Clause C(ii).

58. Mr SELBY suggested Clause C(ii) should only cover books which were "principally" or "substantially" consumable. There was no objection to this suggestion, and he said the wording would be amended for further discussion at the next meeting.

Paragraph D

59. Clauses D(i) and (ii) were agreed to by the Members.
60. On Clause D(iii), the representative of HKPTU noted that often several teachers would discuss the course materials as a group. In this case the term "individual teacher" might be too restrictive.
61. The representative of HKSSSC agreed that this restriction appeared to go against what ED had been promoting, i.e. teachers were encouraged to prepare for classes as a group.
62. Mr SELBY suggested that there were two reasons for the restriction to "individual teacher":
 - (a) the spontaneity requirement; and
 - (b) the responsibility of copying should lie with the individual teacher who took the decision to make the copies.
63. The representative of HKPTU believed while teachers preparing for classes might not be "spontaneous", the choice of teaching materials could be "spontaneous". He also believed a group of teachers could be collectively responsible for the copying.
64. The representative of HKACE suggested that the clause be amended to read "Copying should be done on the initiative of the teachers".
65. This proposal was agreed to by the Members.
66. Ms TSOI noted that the term "course pack" appeared in Clause D(ii), and she queried whether it was necessary to add the new Clause C(iii) for the same term.
67. Mr SELBY noted that "create" and "replace/substitute" were two different issues. He thought the effect of Clause D(ii) was not entirely clear, and suggested the word "create" be changed.
68. The representative of HUCOM noted the phrase originated from the U.S. Classroom Guidelines. He believed it was necessary to define "course pack" in Clause C(iii).
69. Mr SELBY suggested that the wording of Clause D(ii) be amended for further discussion at the next meeting.

70. The Members proceeded to examine Clause D(iv).
71. The representative of HKCLA said she had spoken to various publishers and they preferred the AAP proposal.
72. The representative of JULAC considered 2 days too short to be practical.
73. The representative of HKSSSC said the ACTPO proposal was not practical and he preferred a fixed number of days. He believed 3 working days were more reasonable.
74. The second representative of HKRRLS said AAP thought it would be desirable to have a fixed time period in the clause. The teacher should be required to make an effort to seek permission during the time period, but it did not mean that permission had to be obtained within 3 working days.
75. The representative of JULAC noted that there was no definition for the term "unreasonable" in the U.S. Classroom Guidelines. She also considered the fixed time period would place a significant burden on teachers.
76. The representative of HKACE was concerned that if a teacher found certain material which he or she would like to use in class 4 days later, under the proposed definition the teacher would not be able to use it.
77. The representative of HUCOM queried whether the teacher could make copies of the material if the permission was not forthcoming from the publisher or the licensing body.
78. The second representative of HKRRLS said if the teacher had one week, then that would indicate planning was involved. If it was more than 3 days, permission was required.
79. The representative of HKLA asked what if there was no reply from the licensing body or the publisher within the time period.
80. The second representative of HKRRLS expressed the view that the issue was whether an effort was made to obtain permission.
81. Mr SELBY suggested the following wording:

"...the teacher has made his or her best efforts over 3 working days to obtain permission."

82. The representative of HUCOM queried how the Government was planning to incorporate the fair use approach into Hong Kong Law.
83. Mr SELBY noted that the U.S. Copyright Law had its origin in the U.S. Constitutional principle of 'promoting the useful arts', while the U.K. fair dealing provisions had their own historical background, stressing protecting the rewards of the creator. He said CITB had indicated that they would consider the issue carefully.
84. The representative of JULAC raised the issue of making transparencies for use in class under Section 45.
85. The representative of HUCOM suggested that a clause allowing the making of transparencies/slides for purpose of instruction. He noted that other restrictions regarding percentage of work would still apply.
86. The representative of HKSSSC agreed with this proposal.
87. The representative of HKCLA said they had talked to their members on the issue and proposed 2 days. For other alternatives, she said she would need to talk to their members.
88. Mr SELBY said Clause D(iv) would be amended for further consideration at the next meeting.
89. The Members agreed that one academic year was acceptable in Clause D(v).

Agenda Item IV

90. Mr SELBY introduced Miss Joey HUNG to the Members. He informed the Members that Miss HUNG would be taking over the secretarial work of the Working Group as Mr LAU had been assigned other duties within IPD.

Date of Next Meeting:

91. The next meeting would be held on 16 August 2002 at 3:00 p.m. at IPD.
92. Mr SELBY would be on leave and the Deputy Director of Intellectual Property, Mr Peter CHEUNG would attend the next meeting. The Members would be consulted on who should take up the role of Convenor for the next meeting.

The meeting closed at 5:15 p.m.