

**Submission to the Bills Committee on
Copyright (Amendment) Bill 2001 and
Copyright (Amendment) Bill 2003**

**Inter-Institutional Task Force on Reprographic Rights Licensing
Heads of Universities Committee**

17 June 2003

Copyright (Amendment) Bill 2003

Making Permanent the Suspension Arrangements

1. **We strongly support the proposal to make permanent the suspension arrangements under the Copyright (Suspension of Amendments) Ordinance 2001.** The permanent suspension ensures teachers that, among other things, the possession and the use of copyright materials in a printed form for educational purposes will never be the subject of a criminal prosecution. This gives teachers their much-needed assurance that they may never become criminally liable for using printed articles and reference materials in their course of teaching.
2. If the suspension is not made permanent, teachers in order to avoid criminal liabilities may refrain totally from including copyright works in their teaching materials. This would clearly affect the students adversely by circumscribing their exposure to valuable articles and useful materials not found in textbooks. Alternatively, a teacher may choose to supply only a list of references to his students and ask them to find the materials themselves. This will be impracticable for large classes where there are only limited copies of the materials in the library.
3. We strongly believe that the copyright law must strike a balance between the interests of copyright owners and the interests of the public in using copyright works for educational and other purposes beneficial to society. While the rights of the copyright owner must be protected, such protection must not inhibit learning or obstruct the free dissemination of knowledge. **Hence as we welcome the permanent suspension, we also urge the legislature to give assurance that as end-users teachers in Hong Kong will not have to face criminal prosecution for possessing or using copyright materials in a printed form for bona fide educational purposes.**

Parallel Importation

4. **We strongly support the proposal to remove civil and criminal liability in relation to parallel importation of copies of copyright works and the possession, exhibition in public and distribution of such parallel-imported copies unless the act is done for profit or financial gain.** In the absence of a motive for profit or financial gain, these acts do not conflict with a normal exploitation of the copyright works by the copyright owners and do not unreasonably prejudice the legitimate interests of the copyright owners.
5. Parallel-imported copies of copyright works are lawfully made in their countries of origin and lawfully purchased in those countries. As the copyright owners have already made a profit upon the first sale of such copies, the acts referred to in Paragraph 4 above which are not done for profit or financial gain do not prejudice the copyright owners and thus should not be regarded as illegal under the law. This is particularly so where the acts are done for the purposes of teaching, learning, research, use in libraries and classrooms, and all other bona fide educational use. Such acts should be free from all legal restrictions.
6. Besides those considerations such as free trade and increasing the availability of products in the market, we are in favour of a system that is conducive to promoting the widest dissemination of knowledge and encouraging the broadest circulation of educational and research materials in a manner most cost effective and most beneficial to teachers, students and the general public. **The proposal allows schools to lawfully acquire such educational and research materials anywhere in the world where a lower and more affordable price is offered. We welcome this enthusiastically, particularly in view of the current economic situation in Hong Kong and the urgent need for better, and wiser, use of resources for education.**

Other Pressing Issues: Newspapers and Fair Dealing

7. Following an earlier consultation exercise on the review of certain provisions of the Copyright Ordinance, the Government issued in September 2002 the “Guidelines for Photocopying of Printed Works by Not-for-profit Educational Establishments” (“**Classroom Guidelines**”), which have set out the extent of permissible photocopying of printed works by schools under section 45 of the Copyright Ordinance. **We welcome the Classroom Guidelines and greatly appreciate the Government’s effort in bringing the copyright owners and end-users together to formulate such guidelines.**

8. However, the Classroom Guidelines unfortunately do not apply to the copying of newspaper articles and reports. Thus teachers in courses involving discussions of current news and teachers who wish to engage students in such discussions are still left with no guidelines on how much they can copy for classroom use without violating the law.
9. Although the Hong Kong Copyright Licensing Association (HKCLA), which represents 12 newspapers published in Hong Kong, has recently offered various licensing schemes for copying of newspaper articles and reports, these licensing schemes are fundamentally different from the Classroom Guidelines in three important aspects:
 - (a) The schemes are aimed at profit making. Their main concern is not about promoting free use of newspaper articles and reports for educational purposes.
 - (b) The schemes are not the result of any negotiation or agreement between HKCLA and the end-users, and are announced unilaterally by HKCLA.
 - (c) In the same way that they are unilaterally announced, the schemes can be unilaterally varied or withdrawn by HKCLA without having to consult and to obtain the consent of the end-users.
10. As such, these licensing schemes mainly serve the interests of the copyright owners represented by HKCLA and do not adequately address the needs of the educational sector. Being unilaterally announced by HKCLA and not having to obtain the consent of the end-users, these schemes by their nature cannot be relied on to strike the right balance between the interests of the copyright owners on the one hand, and end-users (particularly teachers and students) on the other. These licensing schemes cannot be a substitute for guidelines issued by the Government after consultation with both the copyright owners and end-users.
11. We echo the Government's observation in Chapter 2 of the consultation document "Review of Certain Provisions of Copyright Ordinance" published in October 2001 that the issue of photocopying for classroom use should be resolved either by some "detailed, non-statutory guidelines" (Paragraphs 2.7) or by legislating "in more definitive terms the extent of free, permissible copying" (Paragraphs 2.8). **We therefore strongly urge the Government to either revise the Classroom Guidelines extending its scope to include newspapers or legislate in more definitive terms the extent of free, permissible copying in relation to newspapers.**

12. Another pressing issue that requires prompt action relates to the “fair dealing” exemptions under section 38 of the Copyright Ordinance. In our “Submission to the Commerce and Industry Bureau Regarding Permitted Acts for Educational Purposes” filed in December 2001 (“**Earlier Submission**”), we already pointed out the problems of fair dealing under the existing law in the context of education:
 - (a) Fair dealing is given a restrictive definition in the Copyright Ordinance. To qualify for fair dealing, the dealing must be for one of the prescribed purposes, namely, research, private study, criticism, review and news reporting. Fair dealing does not extend to other purposes, including teaching.
 - (b) There are no guidelines in the Copyright Ordinance as to what would be considered as “fair” in the context of fair dealing. This places teachers and students who make copies of copyright materials in a precarious position, even when the copying is made for the prescribed purposes.
13. The fair dealing provisions of the Copyright Ordinance are based on the restrictive UK model, which is by no means the only model in this regard. In contrast, the US adopts an open-ended system of “fair use”, which does not confine “fair use” to specific purposes but rather defines it to include, among other things, copying for the purposes of teaching, including multiple copying for classroom use. **In the Earlier Submission, we recommended the expansion of fair dealing to an open-ended model akin to that of the US fair use. We still stand by this position and are of the view that this can be accomplished by expanding the current exclusive list of purposes (research, private study, criticism, review and news reporting) to a non-exclusive list that encompasses teaching and other educational purposes. In addition, we also strongly recommend that there be clear guidelines as to what would constitute “fair dealing”, whether or not the term is to be expanded as aforesaid.**
14. In the absence of any guidelines issued by the Government on fair dealing, the Hong Kong Reprographic Rights Licensing Society Limited (HKRRLS), which represents certain copyright owners, has recently issued its own “Guidelines for Photocopying of Printed Works by Individuals for the Purposes of Research and Private Study” (“**HKRRLS Guidelines**”). However, these guidelines cannot be relied on to strike the right balance between the interests of the copyright owners and the end-users because of two fundamental reasons:

- (a) The HKRRLS Guidelines are not the result of any negotiation or agreement between HKRRLS and the end-users, and are imposed unilaterally by HKRRLS on the end-users.
 - (b) In the same way that they are unilaterally imposed, the HKRRLS Guidelines can be unilaterally varied or withdrawn by HKRRLS without having to consult and to obtain the consent of the end-users.
15. Recently, HKRRLS has also offered various licensing schemes. Similar to the HKCLA licensing schemes mentioned in Paragraph 9 above, the HKRRLS licensing schemes are also unilaterally announced by HKRRLS and their main concern is profit making instead of promoting free use of copyright works for educational purposes. These unilateral licensing schemes all share the same inherent deficiencies as described in Paragraph 9 above, which make them intrinsically unable to strike the right balance between the interests of the copyright owners and end-users.
16. **By reasons stated above, the HKRRLS Guidelines and licensing schemes cannot in any way resolve the delicate issue relating to fair dealing. They cannot be a substitute for guidelines on fair dealing issued by the Government after consultation with both the copyright owners and end-users. We urge the Government to formulate such guidelines as soon as possible to give more certainty to this area of the law. Alternatively, the Government should consider legislating in more definitive terms as to what would constitute fair dealing.**

Copyright (Amendment) Bill 2001

17. **We support the proposal to remove civil and criminal liability related to parallel importation of and subsequent dealings in computer software as set out in the Copyright (Amendment) Bill 2001.** However, we also observe that as far as computer software is concerned, the Copyright (Amendment) Bill 2001 seems to overlap substantially with the Copyright (Amendment) Bill 2003. This overlap should be dealt with if both Bills are to be incorporated into the law.

About the HUCOM Inter-Institutional Task Force on Reprographic Rights Licensing

The Inter-Institutional Task Force on Reprographic Rights Licensing is established by the Heads of Universities Committee (HUCOM) to look into reprographic rights licensing in UGC-funded institutions and, whenever necessary, to negotiate collectively with licensing bodies with regard to the acquisition of the relevant licences.

HUCOM is a body formed by the Presidents and Vice-Chancellors of the following UGC-funded institutions:

City University of Hong Kong;
Hong Kong Baptist University;
Hong Kong Institute of Education;
Lingnan University;
The Chinese University of Hong Kong;
The Hong Kong Polytechnic University;
The Hong Kong University of Science and Technology; and
The University of Hong Kong.

The Task Force was formed in June 2000 and comprises one representative from each of the above institutions. It is advised by a legal consultant who specializes in intellectual property.

Current members of the Task Force are:

Mr Patrick KWONG (<i>Convener</i>)	Director, City University of Hong Kong Press, City University of Hong Kong
Mr Ping Kwan CHIU	Director of General Administration Hong Kong Baptist University
Mr Tommy K. Y. YEUNG	Associate Librarian, Lingnan University
Ms Connie WONG	Manager, Resources and Administrative Services, Hong Kong Institute of Education
Mr Barry BURTON	University Librarian, The Hong Kong Polytechnic University
Mr Jacob LEUNG	University Secretary, The Chinese University of Hong Kong
Mr Donald WASSINK	Associate University Librarian, The Hong Kong University of Science and Technology
Dr Kevin K H PUN	Associate Professor, Department of Computer Science and Department of Law, The University of Hong Kong
Dr Colin STOREY (co-opted member from the Joint University Librarians Advisory Committee)	Librarian, The Chinese University of Hong Kong