

Submission to LegCo Panel on Commerce and Industry

"Permitted Acts for Educational Purposes" (Chapter 2 of Consultation Document Entitled "Review of Certain Provisions of Copyright Ordinance")

*Task Force on Reprographic Rights Licensing
Heads of Universities Committee*

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(Revised)

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Aim

1. This paper aims to serve two purposes:
 - (a) to respond to the questions relating to "permitted acts for educational purposes" posed by the Commerce and Industry Bureau in its consultation document issued in October 2001 and entitled "Review of Certain Provisions of Copyright Ordinance"; and
 - (b) to make recommendations with regard to fair dealing under the Copyright Ordinance (Cap 528).

Fair dealing and permitted acts for educational purposes: present status

2. In Hong Kong, a teacher or student can reproduce copyright works without licence if the reproduction falls within the ambit of "fair dealing" or "permitted acts for educational purposes". At present, fair dealing and permitted acts for educational purposes are governed by separate provisions in the Copyright Ordinance. Broadly speaking, those provisions are designed to cater for three different scenarios.
 - (a) Where a teacher or student copies a work for the purposes of research or private study, he may be protected under the fair dealing provision of section 38.
 - (b) Where a teacher or student copies a work in the course of instruction or preparation for instruction without using a reprographic process, he may be protected under section 41.
 - (c) Where a teacher makes reprographic copies of a work for the purposes of instruction, he may be protected under section 45.
3. Sections 38, 41 and 45 do not overlap. Relatively speaking, the protection afforded by section 41 is the narrowest as it is confined to copying in the course of instruction or preparation for instruction. Moreover, the copying must not be by means of a reprographic process i.e., not "involving the use of an appliance for making multiple copies".¹ Thus if a teacher uses photocopies of copyright materials when preparing his lecture, he will not be protected by section 41.

¹ See definition of "reprographic process" in section 198.

4. Similarly, the fair dealing protection under section 38 is also narrow. Section 38 reads:

- (1) Fair dealing with a work of any description for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.
- (2) Copying by a person other than the researcher or student himself is not fair dealing if –
 - (a) ...; or
 - (b) ... the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.
- (3) ...

Because of subsection (2), section 38 only applies to the making of a *single* copy of a copyright work for the teacher's or student's own research or private study. The protection is not open to teachers who make *multiple* copies of copyright works as course materials for their students.

5. Section 45 is the only provision that allows reprographic copying of published works for the purposes of instruction. Section 45 reads:

- (1) Reprographic copies of artistic works or of passages from published literary, dramatic or musical works may, to a reasonable extent, be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work, or in the typographical arrangement.
- (2) Copying is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the copying in question and the person making the copies knew or ought to have been aware of that fact.
- (3) ...

While section 45 allows a teacher to provide photocopies of copyright materials to his students, it is subject to two important restrictions:

- (a) the copying can only be "to a reasonable extent"; and
 - (b) there must be no licensing scheme covering the copying in question.
6. Other provisions in the Copyright Ordinance relating to fair dealing and permitted acts for educational purposes include the following:
- section 39 (fair dealing for the purposes of criticism, review and news reporting);
 - section 42 (anthologies for education use);
 - section 43 (performance, playing or showing work in the course of activities of educational establishments);
 - section 44 (recording by educational establishments of broadcasts and cable programmes).

Section 39, another provision on fair dealing, is similar in scope to section 38 discussed above. Section 42 is of little use in practice as the permitted anthologies must consist "mainly of material in which no copyright subsists".² Section 43 is not concerned with copying but performance, playing or showing of copyright works at educational establishments. Section 44 permits the recording of broadcasts and cable programmes for educational purposes but the permission only applies where there is no licensing scheme covering the recording in question.

Current problems with fair dealing and permitted acts for educational purposes

7. The problems with fair dealing and permitted acts for educational purposes under the existing law are obvious.
- (a) Fair dealing is given a restrictive definition. 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.

² See, section 42(1)(b).

- (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.
 - (c) Although section 45 allows reprographic copying for the purposes of instruction, the copying can only be "to a reasonable extent". The Copyright Ordinance provides no guidelines for assessing reasonableness in this context. This again places teachers who prepare course materials for their students in a precarious position.
 - (d) Reprographic copying for the purposes of instruction is allowed under section 45 only on condition that there is no licensing scheme available. The same restriction is found in section 44, which authorises recording of broadcasts or cable programmes for educational purposes. Hence the mere existence of a licensing scheme covering the copying or recording in question will immediately preclude the statutory permission, forcing schools to buy licences from the licensing body, whether or not the licensing scheme is reasonable.
 - (e) Having separate provisions for fair dealing and reprographic copying makes the law in this regard unnecessarily complex and confusing. It is not easy for teachers and students to understand and comply with the law. This plainly defeats the purpose of legislation.
8. The genesis of the restrictive approach of fair dealing in the Copyright Ordinance can be traced to the UK Copyright Act 1956 and the UK Copyright, Designs and Patents Act 1988. Indeed, all UK-derived legislation — including Australian, Canadian, New Zealand and Singaporean legislation — has adopted the same approach.³ This contrasts sharply with the United States approach of "fair use", which is based on an open-ended model.

Restrictive UK system of "fair dealing": a severe handicap for education

9. The restrictive fair dealing provisions of the Copyright Ordinance are hindering the ability of teachers and students to use copyright works for teaching and learning. The following are just some of the more obvious examples:

³ For more details of the fair dealing provisions of the UK and UK-derived legislation, see Appendix 1.

- (a) With no clear guidelines on "fair dealing", teachers and students can never be sure whether or not they are infringing copyright when they make copies of copyright materials for their own research or private study. Unless they choose not to make such copies, they will constantly run the risk of incurring legal liabilities for infringing copyright.
- (b) With no clear guidelines on what is "a reasonable extent" for reprographic copying, a teacher who takes the trouble of making and distributing copies of course materials containing copyright works to his students risks infringing copyright. Such infringement would incur not only civil but also criminal liabilities, if the suspended criminal provisions of the Copyright Ordinance (sections 118 and 120) were to resume operation after 31 July 2002.
- (c) Teachers concerned about their potential liabilities — particularly criminal liabilities — can only feel safe by refraining totally from including copyright works in their teaching materials. This clearly will adversely affect the students by circumscribing their exposure to valuable articles and useful materials not found in textbooks and effectively deprive teachers and students of their right of fair dealing with copyright works stipulated in the Copyright Ordinance. **For this reason, we strongly oppose applying criminal sanction to the possession of an infringing copy of a copyright work in business activities of a non-profit-making nature, such as education.**
- (d) Alternatively, a teacher concerned about his potential liabilities may choose to supply only a list of references to his students and ask them to find the materials themselves. This, however, will be impracticable for large classes where there are only limited copies of the materials in the library.

These problems constitute a severe handicap to our education, and are an impediment to Hong Kong's bid to become a knowledge-based society.

10. Furthermore, as will be seen below when we consider the situation in the US, the existing Copyright Ordinance offers teachers and students in Hong Kong much less freedom in using copyright materials as compared to their counterparts in the US. This competitive disadvantage cannot be over-stated. Such a disadvantage will have serious long-term repercussions for Hong Kong as the world moves further towards globalisation and Hong Kong faces competition world-wide.

11. We strongly believe that the copyright law must strike a balance between the interests of copyright owners and the interests of public good 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 and obstructs dissemination of knowledge.

Open-ended US system of "fair use"

12. In contrast to the UK, the US adopts an open-ended system for "fair use". The relevant provision is section 107 of the US Copyright Act 1976, which reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright...⁴

13. From the US provision one immediately observes two main differences between the US "fair use" and Hong Kong's "fair dealing".
 - (a) The US fair use is open-ended and is not confined to specific purposes as Hong Kong's fair dealing.
 - (b) The US fair use expressly extends to copying for the purposes of teaching, including multiple copying for classroom use, which is not the case for Hong Kong's fair dealing.
14. Because it is not confined to certain specific purposes, the US fair use allows the public much greater freedom in using copyright works while offering adequate protection to the copyright owners. Since the US Copyright Act was enacted in 1976, the fair use provision has proved invaluable in striking the right balance between the interests of the copyright owners and the interests of the American public. In particular, in the fields of science and technology, the fair use provision has contributed significantly to the US success in maintaining a leading position world-wide by ensuring that innovations are allowed to be built on rapidly developing knowledge rather than being stifled.

⁴ For more details of the US fair use provision, see Appendix 2.

15. To provide certainty on the scope of fair use in relation to classroom copying, the US Congress has endorsed an "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions With Respect to Books and Periodicals" ("US Guidelines") reached between publishers and users in 1976. The purpose of the US Guidelines is to state the *minimum* standards for educational fair use. Such minimum standards include, among other things, the following:
- in respect of single copying for teachers: a chapter from a book; an article from a periodical or newspaper; a short story, short essay or short poem; a chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;
 - in respect of multiple copies for classroom use: the copying has to meet the tests of "brevity", "spontaneity" and "cumulative effect" which set out the conditions and limits for such copying (see Appendix 3).

Trend towards US system of "fair use"

16. The open-ended US system is much simpler and more flexible than the restrictive UK system of fair dealing. Coupled with the US Guidelines, the US system has proved extremely robust and effective in resolving the conflicting interests between the copyright owners and the public. In recent years, the US system has begun to gain favour outside the US, even among countries that derive their legislation from the UK.
17. In a report published in June 1999 by the Australian Copyright Law Review Committee (CLRC),⁵ a recommendation was made to the Australian government to expand its existing UK-derived system of fair dealing to a system akin to that of the US fair use:

"The Committee recommends the expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes — such as research or study (ss.40 and 103C), criticism or review (ss.41 and 103A), reporting news (ss.42 and 103B) and professional advice (s.43(2)) — but is not confined to those purposes."
[Paragraph 6.35]

⁵ See, law.gov.au/clrc/gen_info/clrc/rep_index.html.

"The recommended model is not limited to an exclusive set of purposes such as are regarded as currently falling within fair dealing. In the Committee's view the removal of such a limitation will provide greater flexibility by allowing courts to determine the existence of additional purposes that are regarded as falling within fair dealing. The Committee considers that this approach will enable fair dealing to be adapted by the courts to changing technology and will move the application of fair dealing into the digital environment. The recommended approach would therefore answer the criticism that the current fair dealing provisions are inflexibly linked to specific purposes and are difficult to apply to new technologies." [Paragraph 6.33]

CLRC's analysis of fair dealing in Australia was insightful and its recommendation was made with a full awareness of the digital technology. We concur with its view and consider its recommendation of expanding fair dealing into an open-ended model as equally applicable to Hong Kong. Such a recommendation can be implemented in Hong Kong by expanding the current exclusive list of purposes for fair dealing under the Copyright Ordinance to a non-exclusive list that encompasses teaching and other educational purposes.

Licensing schemes

18. The Copyright Ordinance contains provisions for establishing licensing schemes to authorise the reproduction of copyright works.⁶ Pursuant to sections 44 and 45, where there are such licensing schemes available, schools will not be allowed to record broadcasts or cable programmes, or to make reprographic copies of published works, without obtaining a licence. **This in effect compels schools to take out licences from the licensing bodies, irrespective of the extent of copying and irrespective of whether the licensing terms are reasonable.**
19. Sections 44 and 45 thus place schools in an extremely weak position vis-à-vis the licensing bodies. Because of the grave consequences of copyright infringement, particularly the potential criminal liabilities, schools are left with virtually no choice but to accept the terms laid down by the licensing bodies. Although the Copyright Ordinance does allow licensees to apply to the Copyright Tribunal for varying the terms of a licensing scheme,⁷ few schools, being government-funded and not for profit, can in practice afford the time and costs for making such applications.

⁶ See, Part II, Division VIII of the Copyright Ordinance.

⁷ Copyright Ordinance, sections 155 and 156.

20. Apart from the above, it is also easy to see the deficiencies of licensing schemes.
- (a) Not all copyright owners wish to be represented by licensing bodies. Many unpublished works such as correspondence, speeches and lectures are also not covered by licensing schemes. Although licensing bodies are required to provide information on the scope of their representation, it is in practice very difficult for licensees to know the precise coverage of the licences which they are buying. Thus licensees still run the risk of infringing the copyrights of owners not represented by the licensing bodies.
 - (b) Because of practical considerations and business efficacy, licensing schemes invariably take the form of a "blanket licence", i.e., requiring users to pay a licence fee in the form of a lump sum in return for a right to copy works covered by the scheme. Such schemes do not exclude copying that requires no license, such as copying which is insubstantial or which falls within the ambit of fair dealing. This means that the licence fee is often more than what the licensee actually needs to pay.
21. The pressure to buy licences and the heavy financial burden such licences could inflict upon universities was clearly revealed in a dispute in the UK in July 2000 between the Committee of Vice-Chancellors and Principals of the Universities of the UK ("CVCP") and the Copyright Licensing Agency ("CLA").⁸ In its Statement of Case, CVCP described its grievance against CLA's licensing scheme as follows.
- (a) CVCP was "never happy" with the terms of the licence because the tariff was "unreasonable both as to the amount payable (royalty rate) and as to the basis of calculation of that amount". Despite this, CVCP felt it "had no choice but to reach some agreement". [Paragraph 4]
 - (b) The royalty rate charged by CLA to universities was unreasonably high. The rate in 2000-2001 was £3.25 per full-time student per annum, calculated on the basis of 5p per page copied. (This did not include royalties for course packs, which in 1998-1999 alone amounted to over £500,000.) [Paragraphs 7, 15]
 - (c) Much of the photocopying was not required to be licensed, either because it did not constitute a substantial part of the copyright work, or because it fell within the terms of fair dealing for the purposes of research and private study. [Paragraph 11(i)]

⁸ Case No. CT 71/00, UK Copyright Tribunal.

- (d) Libraries in universities already paid an increased subscription rate for journals and periodicals to reflect multiple use, which on occasions was as much as 5 times the individual subscription rate. [Paragraph 11(iv)]
 - (e) The royalty rate and the basis of calculation did not have any regard to the cuts in government funding. By contrast, the royalties received by CLA from universities had increased by 27% between 1998 and 1999. [Paragraph 12]
22. While each of these contentions was contested by CLA, the real issue in the dispute was what should be a fair licence fee for the following year (2001-2002). CVCP maintained that the licence fee should not exceed £0.6 per full-time student, including course packs and incidental artistic works accompanying the works copied. This contrasted sharply with CLA's proposal of £13.36 per full-time student, which figure excluded course packs but included all artistic works, whether incidental or separate. Although CLA's proposed scheme was broader than the existing scheme by covering all artistic works, its proposed figure represented an increase of more than 300% from the existing rate (£3.25) and was more than 22 times the CVCP's figure.
23. This dispute, although it occurred in the UK, clearly illustrates the sort of difficulties that universities in Hong Kong will have to face. Regardless of how they may feel about the licensing terms, universities are forced to buy licences from the licensing bodies, the charge for which will inevitably be passed on to the students. Unless the charge is nominal, universities must constantly fight for a low licence fee to ensure that it does not become another financial burden for the students. Alternatively, universities will have to ask their teachers to refrain from using copyright materials in the classroom, which only means that the ultimate victims are our students and the quality of their education.
24. The deficiencies of licensing schemes, and the problems they create, have also been the experience of other countries. In Canada, the deficiencies of licensing schemes were the basis of a position paper submitted in August 1994 by the Association of Universities and Colleges of Canada to the Canadian government advocating clear guidelines on the Canadian fair dealing.⁹
25. Because of their deficiencies, licensing schemes are not a panacea for resolving conflicting interests. They can only supplement, but not preempt, fair dealing or other legitimate uses of copyright works. Indeed, it is difficult

⁹ Entitled "Submission to the Hon. Michael Dupuy, Minister of Canadian Heritage, and the Hon. John Manley, Minister of Industry, regarding Phase II Copyright Reform", 23 August 1994.

to understand why licensing bodies are accorded such a supreme status under the Copyright Ordinance, to whom every school must pay for using copyright materials covered by their licensing schemes, even when the amount of materials used is insubstantial and the use is purely for the benefit of students and for the purposes of instruction.

26. **We are strongly of the view that the use (including reprographic copying), to a reasonable extent, of copyright materials for the purposes of instruction should be part of fair dealing and requires no licence.** At the same time, we also hold the view that to protect the interests of copyright owners, copying beyond fair dealing, even for the purposes of instruction, requires a licence from the copyright owners or licensing bodies acting on their behalf. This should apply to course packs used in teaching.

Fair dealing and permitted acts for educational purposes in the digital environment

27. With the increasing use of information technology in education, fair dealing and permitted acts for educational purposes must take into account electronic materials, particularly those on the Internet. As copyright is only concerned with the content of a work and not the medium in which the work resides, the principles of copyright should be the same for copyright works in any format, whether they are in print form published on paper, or digital form stored in a CD-ROM, hard disk or web site.
28. **Accordingly, the act of copying should include not only the making of print copies but also the making of electronic copies, whether the original work is in print form or digital form. This will cover, among other things, the conversion of printed materials into digital files by scanning, and vice versa. By the same reasoning, fair dealing and any other permitted acts for educational purposes should apply equally to all types of copying, whether it is print copying or electronic copying.**
29. However, the new digital environment does give rise to new copyright issues. For teachers and students, the most pressing issue that needs to be addressed is the lawfulness of certain common activities in the course of teaching and learning. Such activities include, among other things, the following:
- (a) extracting, downloading or printing materials from the Internet or other electronic databases;

- (b) uploading materials extracted from books, journals or magazines to the Internet;
 - (c) compiling educational multimedia works from copyright materials and posting them on the Internet.
30. These and other Internet-related activities have been the subject of much discussion in countries that seek to reform their copyright laws to cope with the digital technology.
- In the UK, such activities were discussed in a document published in 1998 by the Joint Information Systems Committee and the Publishers Association¹⁰ in the context of fair dealing.
 - In the US, similar activities were considered in the final report on the Conference on Fair Use published in 1998¹¹ in relation to digital images, distance learning, educational multimedia and electronic reserve systems.
 - In Canada, in a document published in June 2001 by the Copyright Forum comprising 13 national associations,¹² similar activities were discussed with a view to adapting existing Canadian copyright law to the digital environment.

All of these documents have proposed certain guidelines on the permitted use of electronic materials on the Internet. However, it is still too early to discern any international trend emerging from those guidelines, as they were all formulated with reference to their own local contexts and domestic concerns.

31. While the Internet does expose copyright owners to a much greater risk than conventional media, the risk is considerably reduced if one is confined to a school Intranet accessible only to the students concerned. We hold the view that the uploading of materials to a school Intranet accessible only to students enrolled in the relevant course is generally of the same effect as making reprographic copies of the materials for the students. Accordingly, such acts of uploading should be treated similarly as reprographic copying and should be allowed within the scope of fair dealing (cf. Paragraph 26).
32. Following the pioneering efforts in the UK, the US and Canada, we recommend the Government to set up a Working Group with broad

¹⁰ Entitled "Guidelines for Fair Dealing in an Electronic Environment": see, www.ukoln.ac.uk/services/elib/papers/pa/fair/intro.html.

¹¹ See, www.uspto.gov/web/offices/dcom/olia/confu/index.html.

¹² Entitled "Discussion Paper on Digital Copyright Issues": see, www.aucc.ca/en/publicindex.html.

representation to consider copyright issues arising from the Internet and their implications for Hong Kong. As the Government has invested hundreds of millions of dollars in projects designed to develop Internet skills among students, the Working Group should promote the widest use of the Internet for educational purposes, while ensuring that such use will not unreasonably prejudice the legitimate interests of copyright owners. In the short term, the Working Group should give priority to formulating guidelines relating to educational use of the Internet. In the long term, the Working Group should monitor the ever changing digital environment and the new information technologies, with a view to advising the Government on matters relating to copyright law, fair dealing and collective licensing.

Our recommendations

33. Based on the considerations and discussions set out above, our recommendations with regard to fair dealing and permitted acts for educational purposes are as follows.
 - (a) The existing restrictive UK model of fair dealing should be replaced with the open-ended US model of fair use. 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.
 - (b) The new fair dealing provisions as recommended in sub-paragraph (a) above should explicitly state that fair dealing includes the recording of broadcasts and cable programmes for educational purposes. Such recording should be permitted whether or not there are licensing schemes available. Accordingly, section 44 of the Copyright Ordinance could be subsumed within the new fair dealing provisions thereby simplifying the law.
 - (c) The new fair dealing provisions should explicitly state that, subject to the guidelines referred to in sub-paragraph (e) below, fair dealing for teaching purposes includes reprographic copying for classroom use. Such copying should be permitted whether or not there are licensing schemes available. Accordingly, section 45 of the Copyright Ordinance could be subsumed within the new fair dealing provisions thereby simplifying the law.
 - (d) The new fair dealing provisions should explicitly state that, subject to the guidelines referred to in sub-paragraph (e) below, fair dealing

applies not only to the making of print copies, but also to the following acts:

- the making of electronic copies by any means;
- the conversion of printed materials into digital files, and vice versa;
- the uploading of materials for teaching purposes to a school Intranet accessible only to students enrolled in the relevant course.

(e) To give certainty to the law, there should be clear guidelines as to what would constitute "fair dealing". Such guidelines should, **at a minimum**, allow the following:

- in respect of single copying, the copying of
 - (i) a chapter from a book;
 - (ii) an article from a periodical or newspaper;
 - (iii) a judgment from a law report;
 - (iv) a short story, short essay or short poem;
 - (v) a chart, graph, diagram, drawing, cartoon or picture from a book, periodical or newspaper.
- in respect of multiple copying for the purposes of instruction:
 - (i) the copying does not exceed more than one copy per student enrolled in the course;
 - (ii) the copying meets the tests of brevity, spontaneity and cumulative effect as described in Appendix 3; and
 - (iii) each copy includes a notice of copyright.

(f) Although the guidelines can in theory be implemented by way of agreement between copyright owners and general users, this is unlikely to be fruitful in view of the lack of representation for general users in Hong Kong. We therefore recommend that the guidelines be implemented by legislation. Furthermore, as the guidelines are likely to be detailed, we recommend that the legislation be by way of regulations issued under the Copyright Ordinance i.e., secondary legislation.

- (g) We recommend that a Working Group with broad representation be formed with a short-term goal of formulating guidelines relating to educational use of the Internet. In the long term, the Working Group should monitor the ever changing digital environment and the new information technologies, with a view to advising the Government on matters relating to copyright law, fair dealing and collective licensing.

Appendix 1

UK and UK-derived "Fair Dealing"

The right granted to users to reproduce part of a copyright work without having to obtain permission from the copyright owner is known as "fair dealing" in the UK and other jurisdictions deriving their copyright laws from the UK. These jurisdictions include Australia, Canada, New Zealand, Singapore and Hong Kong. In the US, the right is referred to as "fair use".

The UK system of "fair dealing" is a restrictive one, which operates only when the reproduction in question is made for certain specific purposes, namely, research, private study, criticism, review and news reporting. If the reproduction is not made for any of these purposes, fair dealing does not apply.

"Fair Dealing" in the UK

In the UK, "fair dealing" has always been a subject of dispute because the law does not define the extent of copying permitted under the rule. In 1965, when the UK Copyright Act 1956 was still in force, the UK Society of Authors and the Publishers Association jointly laid down guidelines on the scope of fair dealing. They agreed that they would not normally regard it as "unfair" if, for the purposes of research or private study, a single copy was made of:

- (a) a single extract not exceeding 4,000 words; or
- (b) a series of extracts each not exceeding 3,000 words, to a total of 8,000 words;

provided that in no case the total amount copied exceeded 10% of the whole work. Poems, essays and other short literary works were regarded as whole works in themselves and not as parts of the volumes in which they appeared.

The guidelines had often been misunderstood as setting limits on fair dealing, both in the UK and in Hong Kong, rather than indicating the level below which authors and publishers would rather not be troubled with requests for permission to copy. The guidelines were, however, withdrawn in March 1984.

The 1956 Act was replaced in 1988 by the current UK copyright legislation, Copyright, Designs and Patents Act 1988. Like its predecessor, the 1988 Act continues the restrictive system of fair dealing and provides no statutory guidelines on the scope of fair dealing. The fair dealing provisions of the 1988 Act are sections 29 and 30, which are incorporated in the current Copyright Ordinance of Hong Kong.

"Fair Dealing" in Australia

The situation in Australia is similar to that in the UK. The fair dealing provisions of the current Australian Copyright Act 1968, sections 40 to 42, also allow users to reproduce part of a copyright work for certain specific purposes. Such purposes are the same as those under the UK fair dealing, except that instead of "private study", the legitimate purpose under the Australian law is simply "study".

Unlike the UK law, the Australian Copyright Act 1968 contains statutory guidelines on fair dealing. Section 40(3) provides that the act of reproducing a literary, dramatic or musical work for the purposes of research or study is fair dealing if the part reproduced is:

- (a) an article in a periodical publication; or
- (b) in any other case, of not more than a "reasonable portion" of the work.

The term "reasonable portion" is defined in sections 10(2) and 10(2A) as follows:

- (a) for published editions of a work — not exceeding 10% of the number of pages in the edition, or a single chapter of the work;
- (b) for works in electronic form — not exceeding 10% of the number of words in the work, or a single chapter of the work.

"Fair Dealing" in Singapore

The fair dealing provisions of the current Singaporean Copyright Act, sections 35 to 37, resemble much of the Australian provisions. As in the case of the Australia law, the Singaporean legislation also contains statutory guidelines on fair dealing. Section 35 provides that the act of copying a literary, dramatic or musical work for the purposes of research or study is fair dealing if the part copied is:

- (a) an article in a periodical publication; or
- (b) in any other case, of not more than a "reasonable portion" of the work.

The term "reasonable portion" is defined in sections 7(2) and 7(2A) as follows:

- (a) for published editions of a work — not exceeding 10% of the number of pages in the edition, or a single chapter of the work;
- (b) for published editions of a work, being editions stored on any medium by electronic means — not exceeding 10% of the total number of bytes in the edition, or a single chapter of the work.

Appendix 2

US "Fair Use"

The United States adopts an open-ended system for "fair use". Section 107 of the US Copyright Act 1976 sets out the fair use principle and a non-exclusive list of factors for determining fair use.

Section 107 reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for, or value of, the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

It is worth noting that the four factors for determining fair use as set out in section 107 are not exhaustive, though they are by far the most important factors as considered by the US courts. The assessment of fair use involves balancing all of the four factors and other factors deemed relevant. Each factor is weighed differently depending on the facts of the case in question.

General remarks on the four factors

1. Purpose of use

Non-profit educational use (including multiple copying for classroom use) weighs more in favour of fair dealing than commercial use. If the use is a "transformative use" of the original material, i.e, the resulting work is different from the original material, then the use would weigh higher on the fair use scale. Including a passage in one's own article as a basis for advancing one's own argument is an example of such transformative use.

2. Nature of the copyright work

Use of scientific and non-fictional works is generally considered more favourably than use of artistic and fictional works. Similarly, use of non-commercial works is more likely to be regarded as fair use than use of commercial works. Use of unpublished materials usually leans against fair use. Use of consumables, such as workbooks and worksheets, also weighs against fair use.

3. Amount of portion used

Amount is assessed both quantitatively and qualitatively. In general, copying of an entire work weighs heavily against fair use, whereas including only a small portion of a work weighs in favour of fair use. However, if the portion copied, though quantitatively small, is qualitatively a central or a significant part of the work being copied, then the use would lean against fair use. Images and pictures pose special problems because such works are seldom copied in part.

Section 107 expressly states that fair use includes the making of multiple copies for classroom use. To provide certainty for all parties concerned, copyright owners and users in the US have arrived at an "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions With Respect to Books and Periodicals" (cf. Appendix 3). Published in 1976, the Guidelines have been endorsed by the US Congress as part of the legislative history of the 1976 Copyright Act. The Guidelines have been in use in the US since.

4. Effect on the potential market for or value of the copyright work

The question here is whether the use of a copyright work has adversely affected the potential market for, or the value of the work. The question is often considered in terms of loss of sales, loss of royalties, or loss of opportunity of expanding into a new market on the part of the copyright owner.

Appendix 3

US Guidelines for Classroom Copying

The following is an excerpt from the legislative history of the US Copyright Act 1976 establishing congressionally endorsed guidelines relating to classroom copying for educational use: "Agreement On Guidelines For Classroom Copying in Not-For-Profit Educational Institutions With Respect To Books and Periodicals".

The purpose of the following guidelines is to state the minimum standards for educational fair use under Section 107 of HR 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

- A. The copying meets the tests of *brevity* and *spontaneity* as defined below; and,
- B. Meets the *cumulative effect* test as defined below; and,
- C. Each copy includes a notice of copyright.

Definitions

Brevity

- i. Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.
- ii. Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

(Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.)

- iii. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
- iv. "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

- i. The copying is at the instance and inspiration of the individual teacher, and
- ii. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

- i. The copying of the material is for only one course in the school in which the copies are made.
- ii. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- iii. There shall not be more than nine instances of such multiple copying for one course during one class term.

(The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.)

Prohibitions

Notwithstanding any of the above, the following shall be prohibited:

- A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts there from are accumulated or reproduced and used separately.
- B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable materials.
- C. Copying shall not:
 - i. substitute for the purchase of books, publishers' reprints or periodicals;
 - ii. be directed by higher authority;
 - iii. be repeated with respect to the same item by the same teacher from term to term.
- D. No charge shall be made to the student beyond the actual cost of the photocopying.

About the HUCOM Task Force on Reprographic Rights Licensing

The 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 acquisition of the relevant licences.

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

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 specialises in intellectual property.

Current members of the Task Force are:

| | |
|---|---|
| Mr Patrick KWONG (Convenor) | Director, University Publications Office, City University of Hong Kong |
| Mr Ping-kwan CHIU | Director, General Administration Office, Hong Kong Baptist University |
| Ms Connie WONG | Manager, Resources and Administrative Services, Hong Kong Institute of Education |
| Mr Tommy K Y YEUNG | Associate Librarian, Lingnan University |
| Mr Jacob LEUNG | University Secretary, The Chinese University of Hong Kong |
| Mr Barry BURTON | University Librarian, The Hong Kong Polytechnic University |
| Mr Donald B 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 Libraries Advisory Committee) | Librarian, The Chinese University of Hong Kong |