

JOINT UNIVERSITY LIBRARIES ADVISORY COMMITTEE (JULAC)

*RESPONSE TO THE REVIEW OF CERTAIN PROVISIONS OF COPYRIGHT
ORDINANCE: CONSULTATION DOCUMENT*
(December 12, 2001)

A. PREAMBLE

The JULAC Librarians of the eight UGC-funded tertiary institutions welcome this opportunity to communicate again with the Hong Kong Government concerning the Hong Kong Copyright Ordinance. On September 18, 2001, JULAC submitted a *Focus Paper on Copyright for the Intellectual Property Department* (Appendix 1).

To promote a prosperous and democratic Hong Kong, with a vibrant and exemplary educational system, it is important to create a balanced copyright law that encourages the exchange of information and ideas, free of unreasonable copyright restrictions. The not-for-profit educational sector should not be handicapped and placed at a disadvantage when compared to other countries with more favourable copyright laws, such as the United States or Australia.

B. FAIR DEALING AND FAIR USE

The UK concept of Fair Dealing, which has heretofore been adopted in Hong Kong, is limiting and restrictive. Without a clear definition of what is permitted for educational and research uses, it trends towards ever tightening restrictions, as educators fear potential lawsuits, or even criminal prosecution. In contrast, the US concept of Fair Use is open-ended, not restricted to specific purposes, and flexible in the application of establishing "reasonable extent". Thus, the US concept of Fair Use is preferable for conducting research and for educators in preparing their classroom presentations.

C. ELECTRONIC/DIGITAL COPYING

The Hong Kong copyright law needs to address the issue of electronic or digital copying, by applying the same concepts of Fair Use to the digital environment. Copying that is permissible in a paper format should be permissible in the digital world as well. The negative position states that digital copies are too easy to make, and too easy to propagate; and thus all copying should be banned. This is backward thinking. This ease of copying should not be feared. It should be embraced. The increased potential for spreading and sharing knowledge, will make the electronic information all the more valuable and necessary for a knowledge-base society; and increase sales and marketing exposure for digital information.

A specific case of a library application of Fair Use in an electronic environment is the potential for “Electronic Reserve”. All university libraries have a “Reserve Section” to hold books and journal articles that faculty members have assigned for class reading. This is extra reading, in addition to class textbooks, and covers material that students cannot be expected to purchase. Due to the high demand of limited resources, students are able to borrow this material for only a short period of time, and usually will make personal photocopies of the assigned journal article or chapter within a book. In the digital environment, it is far more efficient to create an Electronic Reserve database, containing the scanned images of the copyrighted material, for the students to access and print out if needed. Electronic Reserve would allow multiple user access, unlike the single user access in the print environment. Access to this database would be limited to the campus Intranet only, to prevent abuse. There is no loss of revenue for the copyright holder, since students cannot be expected to subscribe to journals on the odd chance that an article may prove useful to a class, nor can they be expected to purchase hundreds of books to assist their studies. But the learning environment is improved ten-fold by creating a fast and easy access to information.

D. CHAPTER 2: PERMITTED ACTS FOR EDUCATIONAL PURPOSES

2.13(a) It is preferable that the law, or regulations arising from the Ordinance, gives an indication of what is acceptable copying, with clear examples to give the public direction, without being restrictive or limited. Draw a symbolic line, below which it is clearly legal to make copies, and above which the other factors such as the copyright holders “reasonable expectation for exploitation” need to be considered. One of the most frequently questions on copyright asked in UGC institution libraries recently is "what percentage of a copyrighted work can be copied legally?" It is unfair to the public for the law to be purposefully vague, placing the public in danger of infringement by misinterpretation and allowing a licensing body to then set overly strict guidelines that unfairly limit public Fair Use copying.

2.13(c) A licensing scheme should not be empowered to charge for copying that is permitted under Fair Use. This effectively takes away all right of the public to information, and only those who are able to pay the cost will be able to avail themselves of information. Licensing schemes should be used so that copyright holders receive fair recompense of copying in excess of Fair Use guidelines. The rights of the copyright holder should be placed in proper balance with the information access rights of, and benefits to, the public. A licensing agency should not be able to overturn those public rights, and effectively write their own law.

2.13(d) Educational institutions should be encouraged to use modern technologies for the exchange and flow of information. Artificial roadblocks should not be created because the law has yet to figure out how to cope. Placing digital copies on a school's Intranet, with proper access controls to assure authorized use, should be encouraged. Fax and email copies should also be permitted within the Fair Use guidelines. Digital copying is not different from photocopying. Libraries and educational institutions should be granted the same exemptions to make digital copies as they have for making photocopies. Such a practice is in the public interest and in line with fair practice for education and research.

E. CHAPTER 5: PARALLEL IMPORTATION OF COPYRIGHT WORKS OTHER THAN COMPUTER SOFTWARE

All bans on the parallel importation of books, movies, and all other material should be lifted. This will lower prices for the consumer by making the market more competitive, and help prevent the loss of sales within Hong Kong to the overseas Internet retailer. The specific benefits for the education sector are:

1. In most cases, a movie VCD/DVD will be produced and released in overseas markets much faster than the local market. This title may be required urgently for teaching and studying purposes.
2. The local agents do not import those titles which only serve a minority interest, and selection is restricted in this sense.
3. Occasionally, the original movie (especially for Japanese titles) will be voiced-over in Cantonese in the VCD. This negates the educational value of language learning and cultural studies.

F. CHAPTER 7: LICENSING BODIES

7.13(a) It is proper that a Copyright Tribunal be established to settle disputes on copyright issues. The Tribunal needs to have a fair and equal representation, but it is not clear under existing law how that representation is determined. This representation is of concern to the educational sector, as it is generally perceived that the business interests of the copyright holders are of more import to Government than the legitimate public right to a free exchange of information.

7.13(b) Licensing bodies need to be registered and regulated by Government. Since copyright violation is both a criminal and civil offense, licensing agencies have an overpowering bargaining position when dealing with individuals or educational institutions. This can only be justified if Government plays an active role in regulating the agencies. The agencies must make full disclosure of their financial records. This includes showing how the charges for licenses are determined, and how the fees they collect are passed along to the rights holders they represent. At present, licensing bodies can in effect write their own law, by determining

arbitrarily the scope and scale of copying allowed under their license. By making no allowance for copying that is permitted under Fair Dealing, the rights of the public are unduly prejudiced.

We are also concerned with the number of licensing bodies emerging. An educational organization may be approached by any number of licensing bodies, each representing a certain group within the publishing industry, and each with its own charging scheme. We therefore believe that there should not only be regulation of licensing bodies, but also coordination *among* these licensing agencies, otherwise the aggregated costs to an educational organization may become enormous.

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APPENDIX 1

JOINT UNIVERSITY LIBRARIES ADVISORY COMMITTEE (JULAC)

FOCUS PAPER ON COPYRIGHT FOR INTELLECTUAL PROPERTY DEPARTMENT (18 September 2001)

A balanced copyright law will promote the advancement of society as a whole by giving reasonable access to knowledge and information, in order to encourage creativity, innovation, research, education and learning; as well as provide for the strong and effective protection of the interests of rights-holders. The necessity for a free exchange of ideas in society and the responsibility of libraries for information dissemination must be balanced against the rights of authors, publishers and copyright owners. The knowledge society and the knowledge economy are inter-dependent. Too much of a slant on the economic rights of the author or publisher can seriously damage society's right for information access, which is a very important nutrient for an information society.

The Hong Kong law needs to have a stronger sense of "fair use" as opposed to "fair dealing". "Use" puts the emphasis on the user and "dealing" leaves a great deal of interpretation in the hands of other parties. Although Hong Kong's legal heritage can be traced back to UK's legal system, we should not hold so tightly to that framework as to limit ourselves from the best and most thoughtful practices of other developed countries, such as Australia, Canada and the U.S. An overly restrictive copyright law stifles innovation and limits creativity. Overprotection of copyright could impact on social justice principles by unreasonably restricting access to information and knowledge.

The use of information for non-profit purposes by faculty, students, and staff at educational institutions should be recognized. If every time a faculty, student or staff uses information, they must first consider what are the economic impacts on the rights-holders, then this "dollar-sign" consideration will impact and detract from every research and teaching activity. Clearly recognized and defined rights will help the faculty, students and staff carry out their daily activity within the scope of the legal constraints.

Libraries collect, preserve and disseminate information. Traditionally, society has placed the responsibility for preserving information and culture on them. Copyright law should not prevent libraries from relying on new technologies to improve preservation techniques and speed dissemination. Legislation should give libraries and archives permission to convert copyright protected materials

into digital format for preservation and conservation related purposes, as well as to make temporary electronic copies for Fair Use dissemination of information.

APPLICATIONS OF COPYRIGHT LAW

AUDIO-VISUAL MATERIALS

Copyright law should provide for the circulation and public viewing of AV materials for educational purposes. Restrictions placed at the front of videos by the publisher, seeking to limit the usage rights, should be secondary to Hong Kong law. For preservation and storage purposes, libraries should be permitted to store the content on campus servers and to convert present format into digital format.

ELECTRONIC or DIGITAL FORMATS

Digital copying is not different from photocopying. Libraries and educational institutions should be granted the same exemptions to make digital copies as they have for making photocopies. Such a practice is in the public interest and in line with fair practice for education and research. Without such an exemption, there is a danger that only those who can afford to pay will be able to take advantage of the benefits of the Information Society.

Transient or temporary copies which are incidental to the use of copyright material should be excluded from the scope of the reproduction right.

LIBRARY RESERVE

At the request of a faculty member, a library may photocopy and place on reserve excerpts of copyrighted works in its collection in accordance with the concept of Fair Use. The library may scan and create electronic copies of this material so long as the material is used for instructional purposes and access is limited to the institution's students.

Instructors may place examination papers on Library Reserve, even though they may contain excerpts from copyrighted material, such as formulas, maps, pictures, etc.

INTER-LIBRARY LOAN

Where the law permits libraries to provide copies of articles to individuals or to other libraries, they should be permitted to fax or provide electronic copies in lieu of photocopies. Where the law requires the requester of an ILL to sign a declaration, a valid login and password or other form of electronic signature should be sufficient.

USE OF THE INTERNET

Academics use the Internet to speed the exchange and flow of information. Hong Kong law should not restrict this flow by requiring or implying that material on the Internet may only be linked to (hyperlinked) after gaining the copyright holders permission. If the copyright holder does not want people linking to their site, then they have an easy remedy by simply restricting access by IP address or password controls. The law should not seek to restrict access and it should clearly recognize, that while it is illegal to make an unauthorized copy of material from another's site, it is certainly legitimate to link to the site for viewing, and to encourage others to view, the material.

PHOTOCOPYING FOR CLASSROOM USE

The document *Copyright in Education in Hong Kong* distributed by the Intellectual Property Department, calls for a "create your own materials" approach as the preferred method to illustrate real-life material, such as art works or newspaper articles, for use in classroom teaching. It is unrealistic to suggest, as this booklet does, that teachers should attempt to draw their own 'cubist' picture, rather than copy a picture from an art book; or that teachers should write their own newspaper articles, rather than use the example of a polished professional news reporter. Fair Use provisions should clearly cover such copying, so that teachers may use the appropriate material for instruction, and are not called upon to create their own 'Mona Lisa' at the learning expense of the students.