

**A Submission to
LegCo Panel on Commerce and Industry
in response to
Government Preliminary Proposals on
Various Copyright-related Issues**

by

The Task Force on Copyright in Education

(Formerly, the Inter-Institutional Task Force on Reprographic Rights
Licensing)

**Established under the
Heads of Universities Committee (HUCOM)**

July 2005

This submission is made by The HUCOM Task Force on Copyright in Education and represents the collective views of the eight UGC-funded tertiary institutions in Hong Kong regarding the current review of certain provisions of the Copyright Ordinance (Appendix 1).

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Foreword

- (1) In December 2004, the Government released the consultation document *Review of Certain Provisions of Copyright Ordinance*. In response to that document, the Task Force (under its former guise of the Inter-Institutional Task Force on Reprographic Rights Licensing) made a submission to the Commerce, Industry and Technology Bureau (CITB) in January 2005.
- (2) With regard to the current Government proposals in the LegCo paper, the Task Force is of the view that in general the Government has taken into account the concerns expressed by the tertiary education sector about the impending legislative amendments to the Copyright Ordinance. **The Task Force fully supports the majority of the proposals** in the paper and believes that if fully implemented, the staff and student communities in the tertiary education sector will have a clearer idea of their responsibilities in the area of intellectual property. They will thus be better able to understand the parameters within which copyright materials can continue to be adopted in teaching, learning and research with due regard to the rights of the copyright owners.
- (3) The Task Force earnestly wishes that proposals which have a positive impact on the quality of university teaching, learning and research are stated in as clear and unequivocal a manner as possible in the Ordinance, and that previous points raised with Government by the Task Force are fully adopted.
- (4) In addition, the Task Force wishes to respond to some of the points raised in the LegCo paper that require further clarification/discussion. The Task Force's views are set out in the paper below. Note that the paragraph numbers in this paper refer to those from the document sent to the Task Force Convenor from the Commerce and Industry Branch (covering letter ref: CIB CR 07/09/16) "For Discussion on 21 June 2005...*Proposals on Various Copyright-Related Issues*".

Business End-user Criminal Liability

New criminal liability for copying/distribution...

- (5) **Para 12.** Noting the need of teachers, the Government proposes to exempt educational establishments subvented by the Government from the proposed criminal provision to facilitate teaching. While the Task Force **opposes** in principle the introduction of criminal liability on the use of copyright works as it would impose an adverse psychological effect on copyright users in making use of copyright works even within the boundary of the law, the Task Force **fully supports** the recognition of the serious consequences any criminal provision would have on teachers, and thus, exemption is given to the education sector.
- (6) **Para 14.** The Task Force **notes** the concerns expressed by copyright owners, particularly the publishers, about the alleged copying of textbooks and materials marketed primarily for instructional users on a “significant scale” by the education sector. The Task Force **wishes to make it absolutely clear** that it does not support such acts and that such acts are not to be tolerated in the tertiary education sector. The Task Force also notes that the criminal liability now imposed on copy-shop owners should further restrict copying by students.

Employees’ ...defence against criminal liability

- (7) **Para 17.** The Task Force **notes** that professors and lecturers with limited management responsibility and students who are student organization officials or teaching assistants should not be considered as being in a position to influence or decide.

Proof of infringing copies of computer programs in end-user liability cases

- (8) **Para 19.** The Task Force is **in complete agreement** with the Government proposal to defer consideration of the requirement on the part of the end-users to keep records of licensed computer programs for a certain period as proof of compliance.

Copyright Exemption Regime

Fair Dealing for Education and Public Administration

- (9) **Paras 21/22.** The Task Force **notes** the Government proposal for retaining all existing copyright permitted act provisions, and not introducing a general non-exhaustive ‘fair use’ regime along US lines. While an non-exhaustive fair use model would be regarded as the ideal, the Task Force **warmly welcomes** a non-exhaustive fair dealing approach and believes this to be a very positive step in the right direction, especially since teaching, as well as research and private study, is now covered by the proposals.

- (10) **Paras 23/27.** The Task Force **agrees** with the introduction of a fourth factor in fair dealing: “(d) the effect of the dealing upon the potential market or value of the work”. The Task Force **assumes** that if *all* of the four conditions are met are in favour of the copyright owner, *only then* will the copyright user be found liable.
- (11) **Para 24.** The Task Force **notes** the reluctance of the Government to introduce a quantitative test. While the lack of such a test will make it more difficult to explain the fair dealing regime to academic and student communities, nevertheless, the Task Force **considers** that the fourth factor introduced in Para. 23 should offer the tertiary sector more protection.
- (12) **Para 25.** The Task Force **supports** the non-inclusion of technological measures in the Ordinance at this juncture. However, the Task Force **wonders** why professors and students can make reprographic copies lawfully under prescribed conditions while the same cannot be done in the digital environment. The Task Force therefore **recommends** that the relevant sections of the Ordinance be amended to make the fair dealing approach technologically neutral, i.e. that there be no distinction in using copyright works reprographically or digitally. This provision would particularly benefit Faculty members and librarians in posting reference materials on the intranet for dissemination to their student communities.

Permitted acts for education

- (13) **Para 26.** The Task Force **applauds** the proposals to improve the permitted act provisions for the education sector to cover not only the acts done by teachers but also those by students receiving instruction, and audience members in not-for-profit university performances.

Prescribed acts for libraries

- (14) **Para 28.** The Task Force **welcomes** the proposal that libraries should be allowed to make replacement copies involving medium shifting. Nevertheless, the Task Force is of the opinion that the libraries’ need to circumvent copy protection in DVDs or CD-ROMs to make a copy for preservation or archiving purposes has not been fully met. First, it is the librarians’ experience that authorization, if granted, may not be secured within the required time-period. Second, there are certain conditions wherein librarians need to make such copies, such as: (a) to use the copy in day-to-day business and leave the first generation original untouched for as long as possible; and, (b) to copy an item from another source when the home copy has been lost and cannot now be replaced in the marketplace, or when it is irretrievably damaged.

Proposed Permitted Acts...

- (15) **Para 31.** Re reprographic copying of passages from published works by educational establishments, the Task Force **agrees** that "...the statutory exemption should not be subject to the requirement that no licensing scheme is available".

Circumvention of Technological Measures for Copyright Protection

Circumvention of technological measures

- (16) **Para 34.** The Task Force **welcomes** the exemption proposed but would ask that the exemption not be so narrowly defined as to cover only research into cryptography. Other areas of research should be incorporated here – for example computer security. In addition, since the life-blood of any university lies in research *and the publishing and dissemination of that research*, the Task Force **strongly feels** that the provisions as they stand will militate against the essence of what tertiary institutions are all about. **It is therefore proposed** that, similar to the proposed conditions for what constitute "fair dealing", only research papers which set out *intentionally* to create an adverse impact on the interest of a copyright work will be subject to civil liability. Simply, if no commercial profit is involved, there should be no penalization.
- (17) The Task Force also **restates** its earlier request that tertiary institutions be allowed to circumvent technological access controls so that digital works legally purchased abroad can be used locally.

Parallel Importation of Copyright Works

- (18) **Para 38.** The Task Force **welcomes** the Government proposal to give educational establishments and libraries criminal and civil liability exemption for importation and possession for use of parallel imports of copyright works. Such a provision will not only facilitate the import of copyright works that are considered to be of low or no commercial value and therefore not distributed by local suppliers, but will also allow educational establishments lawfully to acquire educational and research materials worldwide where such materials are more readily available and at affordable price.

Rental Rights for Films and Comic Books

- (19)**Para 41.** The Task Force **is concerned** that the definition of “rent” should be fully defined in the Ordinance. Non-profit making university libraries often loan out films and sound recordings strictly for educational purposes to faculty and student communities. No commercial advantage is involved, and no fees are charged. The Task Force **proposes** that university libraries be exempted from the stated civil liability if no rental fee is levied and no commercial advantage is gained.

Issues Relating to the...(WIPO) Copyright Treaty...

- (20)**Para 42.** The Task Force **regrets** that no guidelines have yet been issued on the use of digital materials and the Internet in the education sector. The Task Force **recommends** that, in spite of the divergence of the views between the copyright owners and the copyright users, in the next round of consultation the Government will identify guidelines which would not deprive tertiary education of the full exploitation of the Internet for teaching, learning and research.

Conclusion

- (21)The Task Force would like to **express its thanks** to Government for having attended to the needs of the education sector with regard to the use of copyright works in teaching, learning and research. The Task Force **restates its long-held view** that, while the commercial and intellectual property interests of the copyright owners obviously need to be protected, striking a balance between the interests of the copyright users and the larger interests of the educational community in its pursuit of knowledge and in training the Hong Kong leaders of the future, is of the utmost importance.

(July 8, 2005).

Appendix 1

**About The Heads of Universities Committee (HUCOM)
Task Force on Copyright in Education**

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LU	Mr YEUNG Kai-yin, Tommy	Associate Librarian	2616 8566	2838 6231	tyeung@ln.edu.hk
CUHK	Dr Colin STOREY (Conv.)	University Librarian	2609 7318	2603 6952	storey@cuhk.edu.hk
	Mrs. Shirley LEUNG (Sec.)	Head of Public Services, Library	2609 7328	2603 6952	shirleyleung@cuhk.edu.hk
HKIED	Ms Connie WONG	Resources and Administrative Services Manager	2948 6215	2948 6306	ctmwong@ied.edu.hk
PolyU	Mr Barry BURTON	University Librarian	2766 6856	2765 8274	lbbarry@inet.polyu.edu.hk
HKUST	Ms Victoria CAPLAN (w.e.f .July 1, 2005)	Access Services Manager, Library	2358 6786	2358 1462	lbcaplan@ust.hk
HKU	Dr Kevin K H PUN	Associate Professor, Dept of Computer Science & Dept. of Law	2859 2186	2859 2816	pun@cs.hku.hk

The HUCOM Task Force on Copyright in Education

This Task Force (formerly 'The HUCOM Inter-Institutional Task Force on Reprographic Rights Licensing') is established by the Heads of Universities Committee (HUCOM) with the following Terms of Reference:

- a) The Task Force will consist of one representative from each of the UGC institutions, one of which will be elected as Convenor upon endorsement from HUCOM;
- b) The Task Force will monitor developments in Reprographic Rights Licensing and Government proposed amendments to the *Copyright Ordinance*, with particular attention paid to their impact on the tertiary sector, including but not limited to issues concerning copying printed materials and using electronic/digital copyright materials for teaching and research purposes;
- c) The Task Force will represent the UGC institutions in liaison and negotiations with all interested parties, including local and international licensing bodies, concerned groups in the copyright arena, Hong Kong Government departments and LegCo, on issues raised in (b) above in order that the views of the UGC institutions are fully understood and taken into account;
- d) The Task Force will give reports to HUCOM on the progress of any such discussions and negotiations as and when necessary.

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

City University of Hong Kong;
The Hong Kong Baptist University;
Lingnan University;
The Chinese University of Hong Kong;
The Hong Kong Institute of Education;
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:

Dr Colin STOREY (<i>Convenor</i>)	University Librarian The Chinese University of Hong Kong
Mrs Shirley LEUNG (Secretary)	Head of Public Services The Chinese University of Hong Kong Library
Prof Steve CHING	University Librarian, 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
Mr Barry BURTON	University Librarian, The Hong Kong Polytechnic University
Ms Connie WONG	Manager, Resources and Administrative Services, The Hong Kong Institute of Education
Ms Victoria CAPLAN	Access Services Manager, Library, 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