

UNIVERSITY OF HONG KONG

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Optional Assignment

**The Role of Creative Commons within Copyright Regulation
in Hong Kong:
Potentials for Secondary Education**

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Introduction

The present framework of copyright law is seen by many, especially users of copyright works, as being too protective of copyright, too technical, and sometimes too expensive, to be followed. Creative Commons (CC) seeks to address this imbalance and encourage sharing and creativity by offering a range of permissive licences, the adoption of which by author(s) would allow others to use their licensed work(s) for the various purposes permitted and defined by the terms of the licences.

The secondary education sector is one of the groups particularly affected by copyright laws. With the upcoming launching of CC in Hong Kong in October 2008, this article seeks to introduce to the secondary education sector what is CC, its usages and relation with the existing copyright law, and the potentials CC may offer for education.

CC: Revolution from within the Copyright Regulation

✧ *Explaining the Present Copyright Law*

Copyright gives its holder a broad range of rights, which prohibits others from copying substantial parts of copyright works, issuing copies to the public, distributing copies on the Internet and making adaptation without the permission of the copyright holder.¹ However, in seeking to balance of the interests between copyright holders (i.e. their efforts in the production of copyright works) and users of those works, the Copyright Ordinance provides for various “fair dealing” exceptions against allegations of copyright infringement if the copyright works are used for research, private study,² criticism, review or news reporting.³

This approach has certain disadvantages, the most notable being that uses of copyright works for purposes other than those specified above, even if fair, would still constitute copyright infringement and entail civil liability. “Fair dealing” is also a concept elusive to the general public, and whether certain uses could qualify as “fair dealing” depends on the weighing of a number of factors.⁴ This is not an easy exercise, and the result of which may differ to different people.

¹ The range of rights given to copyright holders is provided for in section 22 of the Copyright Ordinance, Cap. 528, Laws of Hong Kong (abbreviated as “CO”), which are further elaborated under sections 23-31. The provisions in CO could be found at <http://www.legislation.gov.hk/>.

² Section 38, CO.

³ Section 39, CO.

⁴ These are listed under section 38(3), CO.

✧ *Origin of CC*

In recent years, copyright holders have resorted to technological measures, both in terms of hardware and software, to protect electronic copyright materials from being copied by users for any purposes, including those which would constitute “fair dealing”.⁵ Copyright laws in various jurisdictions (including Hong Kong) have been amended to criminalise removal of these “technical measures for copyright protection”, and thus have implicitly endorsed this trend.⁶ This further tilts the current copyright law in favour of copyright protection, to the extent that some criticise this as being excessive.

Professor Lessig of Stanford University, the founder of CC, is one such critic. He argues that the rights given to copyright holders are too extensive, and this limits our ability to create and develop our culture based on existing materials. In other words, the expansion of public domain is restricted.⁷ CC was thus established to facilitate and encourage sharing of digital materials on the Internet by removing a number of legal and practical concerns.⁸

✧ *Legal Aspect of CC: Relation with Copyrights*

Under the current practice, in order to use copyright works legally, one has to obtain the consent of the copyright owners for any dealing with those works outside the scope of “fair dealing”. However, obtaining consent could be difficult and inefficient as each user has to obtain the relevant consent from the copyright owner,⁹ unless some organisations comprising of copyright owners with certain common interests exist to facilitate the granting of such licences.

⁵ Naomi Korn and Charles Oppenheim, “Creative Commons Licences in Higher and Further Education: Do We Care?” *Ariadne*, Issue 49, October 2006 (available at <http://www.ariadne.ac.uk/issue49/korn-oppenheim/>, visited 27 March 2008).

⁶ As above. See also sections 273A-273C, CO, inserted by virtue of Copyright (Amendment) Ordinance 2007.

⁷ See website of Lawrence Lessig at <http://www.lessig.org/>; Lawrence Lessig, “The Creative Commons” 55 *Florida Law Review* 763 (2003).

⁸ website

⁹ Naomi Korn, “Study into Creative Commons Licences in HE/FE” (PowerPoint presentation, available at http://www.jisc.ac.uk/media/documents/events/2007/06/naomi_korn.pdf, visited 6 April 2008).

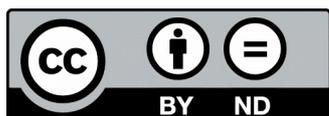
CC does not seek to replace the copyright legal framework,¹⁰ but practically reverses the present mode of operation of the law by providing people with the possibility to adopt licences that only “reserves some rights”¹¹ provided to copyright holders under the law. Consent is given voluntarily, not upon requests.¹² Thus, re-use of the works for creative purposes would be easier – provided that those uses are within the terms of the licences; otherwise consent of the copyright owner is still necessary to avoid copyright infringement, if those uses would not constitute “fair dealing” under the Copyright Ordinance.

As CC licences are intended to be enforceable in courts¹³ (and are held to be enforceable in Dutch and Spanish courts),¹⁴ they have to be suitably adopted (“ported” from a master version of the licence) to ensure its compatibility to Hong Kong copyright law.¹⁵ However, enforcement of copyright would remain the responsibility of the copyright owner, but not CC.¹⁶ The 3.0 version of the Hong Kong licence has been released for public consultation.¹⁷

The Hong Kong CC licence would operate in the same way as those offered in other jurisdictions. Six types of licences (as represented in the following diagrams) are offered:



(i) “Attribution” licence



(ii) “Attribution – No Derivative Works” licence

¹⁰ Creative Commons Hong Kong, “Some Rights Reserved: Frequently Asked Questions Regarding Hong Kong Creative Commons”, section entitled “What problem does the Creative Commons (CC) Licences intend to solve?”, distributed at the seminar entitled “Comparative Perspectives on Digital Copyright Reform: Lessons from Abroad and Beyond”, organised by the Faculty of Law, University of Hong Kong on 19 March 2008 (on file with author). This document would later be referred to as “CCHK”.

¹¹ See the home page of the website of Creative Commons International (CC Int’l) at <http://creativecommons.org/>.

¹² As above.

¹³ See CC Int’l website, FAQ Section para. 1.21 (available at <http://wiki.creativecommons.org/FAQ>, visited 29 February 2008).

¹⁴ Korn and Oppenheim (n 5 above), citing news item at <http://www.edri.org/edrigram/number4.6/ccdecisions>.

¹⁵ CCHK (n 10 above).

¹⁶ See CC Int’l website, FAQ Section para. 1.21 (n 13 above).

¹⁷ See the website of Creative Commons Hong Kong at <http://cchk.webpaint.com/>.



(iii) “Attribution – Share Alike” licence



(iv) “Attribution – No Commercial” licence



(v) “Attribution – No Commercial – No Derivative Works” licence



(vi) “Attribution – No Commercial – Share Alike” licence

The four elements in these licences mean:

1. “Attribution”: One can do anything with the work, from copying, distributing to making derivative works – provided that the author of the work is named.
2. “Non-commercial”: Again, one can do anything with the work – provided that the works are not used for commercial purposes.
3. “No derivative work”: This does not allow derivative works to be made.
4. “Share alike”: One could distribute works derived from the work in question only under the same conditions as the original work.¹⁸

For the sake of clarity, after choosing and adopting any type of licences from the CC website according to one’s needs, one should display these pictures on one’s webpage. A link would also be provided by CC to its website for the relevant Common Deed, which would explain in simple words the meaning of the licences and pictures as discussed above.¹⁹ Works licensed under CC could also be searched by virtue of metadata attached to the works.²⁰

Indeed, CC licences could also be applied to offline works by marking the applicable CC licence on the work.²¹ Microsoft Office has even provided a downloadable plug-in which would help to licence works under Office applications.²²

¹⁸ See CCHK (n 10 above); CC Int’l, FAQ para 2.3 (n 13 above).

¹⁹ CC Int’l, FAQ para 1.16 (n 13 above).

²⁰ CC Int’l, FAQ para 1.1 (n 13 above).

²¹ CC Int’l, FAQ para 1.2 (n 13 above).

²²

Available at <http://www.microsoft.com/downloads/details.aspx?FamilyId=113B53DD-1CC0-4FBE-9E1D-B91D07C76504&displaylang=en/>, visited 5 April 2008.

✧ *Usages of CC*

CC has become one of the most successful and widely used websites providing these types of licences that promote sharing. Flickr is an online business that provides photo-sharing services to its users.²³ Music may also be shared under CC licences, whether for profit (e.g. Jamendo²⁴ and Magnatune²⁵) or not. Indeed, for many budding singers and artists, they may wish to use CC licences in ensuring that while others could freely circulate their works online as widely as possible, they are named and receive the credit for the work. The more prominent example in Hong Kong involves KellyJackie who released her first song online for sharing. The song became so popular that she is now famous.²⁶

Relevance of CC to Education

✧ *Potentials for the Educational Sector*

To many secondary school teachers and students, on the face, CC may not have much to offer as fees still have to be paid for photocopying of copyright materials which are not under CC licences.²⁷ Indeed, publishers may not have the commercial incentive to allow their publications to be made available under CC licences. Besides, under the current Copyright Ordinance, teachers and students are already allowed to copy copyright work to a reasonable extent for giving and receiving instructions.²⁸ Making available of copies online is also allowed provided that the circulation of those copies is limited to those giving and receiving instructions for such purposes.²⁹

However, experience from various jurisdictions with the use of CC suggests great benefit to the education sector. As the Internet is a useful tool for research by students in doing their assignments, and by teachers in the preparation of course materials, teachers and students could easily identify the extent to which they could handle online materials, which have adopted CC licences, for educational purposes without having to worry about copyright infringement. This would probably become more important, especially under the new education curriculum which encourages liberal studies.

²³ See <http://www.flickr.com/>.

²⁴ See <http://www.jamendo.com/>.

²⁵ See <http://magnatune.com/>.

²⁶ See <http://en.wikipedia.org/wiki/Kellyjackie>, visited 6 April 2008.

²⁷ See section 45(2), CO.

²⁸ Section 41, CO.

²⁹ Section 41A, CO.

For instance, the US Massachusetts Institute of Technology (MIT) publishes courseware under CC licences as part of the MIT OpenCourseware project.³⁰ At the University of Hong Kong's Journalism and Media Studies Centre, New Media course materials and student work are also released online under CC licences.³¹ These would be ideal research websites. Through the use of CC licences, students would also be more aware of the importance to respect other's copyright on the Internet. The growing use of CC licences would also offer students more materials which they could re-mix to create their own work.³²

Other more innovative uses to which CC could be made include:

- The Department of Education in South Africa complained that there were not enough incentives on publishers to translate books in foreign languages into local languages. It was suggested that through various projects undertaken by CC, translations of various texts could be freely available, just as the multi-lingual Wikipedia.³³
- The South African Students Congress representatives made a more radical proposal addressing the concern of rising prices for the latest editions of textbooks. Authors may wish to adopt CC licences to distribute updated materials online quickly and cheaply.³⁴ However, publishers may have commercial concerns. Students group may wish to form groups to compile their own notes, and post them online under CC "Share Alike" licences so that other students may update those notes in the future.

For more general and conventional uses of CC licences, the Taiwan Ministry of Education is actively involved in the setting up of an online education databases under its auspice³⁵ and several others,³⁶ which adopt CC licences. These websites serve as platforms for teachers and students to exchange education materials, which could be

³⁰ See <http://ocw.mit.edu/OcwWeb/web/home/home/index.htm>.

³¹ CCHK (n 10 above).

³² Andy Carvin, "Encouraging Student Creativity with Creative Commons" (article dated August 1, 2006, available at http://www.pbs.org/teachers/learning_now/2006/08/encouraging_student_creativity.html, visited 6 April 2008).

³³ "Access to Learning Materials in Southern Africa" (unknown author, article dated 26 January 2005, available at <http://za.creativecommons.org/blog/archives/2005/01/26/access-to-learning-materials-in-southern-africa/>), visited 6 April 2008.

³⁴ As above.

³⁵ See <http://study.heart.net.tw/special.shtml>.

³⁶ See e.g. <http://etweb.tp.edu.tw/>.

re-used and re-mixed by others. This sharing of materials may also stimulate new ideas for devising new education materials.

✧ *Points to Note for the Educational Sector*

In Hong Kong, Education City is one of the main online educational platforms.³⁷ As the platform set up by the Education Department, the Department may wish to consider adopting CC licences regarding works uploaded there so as to facilitate sharing and simplify the copyright policy. It would also be a good chance to promote CC licences in Hong Kong³⁸ so that other educational platforms may choose to follow. With the legal position regarding the copyright of materials shared online being clarified and sharing made easier by CC licences, there may be greater incentive to share education materials through these platforms, which would benefit the educational sector.

However, it is not immediately clear whether the same benefit could be realised in Hong Kong as in Taiwan. At present, only a small number of schools participate in sharing of education materials through Education City. Other commercial companies also exist in providing services for managing intra-school networks for teachers' and students' communication. While CC licences may also be adopted in these school intranets, benefits from sharing would clearly be less.

There are also other concerns. CC licences are irrevocable and applicable worldwide, making it difficult to trace the uses of the education materials available online³⁹ (although the need for a username to access the Education City database may restrict the distribution of those shared materials). Unlike universities (e.g. MIT) which could promote greater public interests in enrolling with them through publishing their course materials online under CC licences, secondary schools are not in the same position to do so.

It should also be noted that unless there are contrary agreements between teachers and the schools (i.e. their employer), the copyright in education materials would vest with the schools.⁴⁰ Therefore, decision ultimately would rest with the

³⁷ See <http://www.hkedcity.net/>.

³⁸ CCHK, Discussion Board at <http://cchk.wetpaint.com/page/Ideas> (an idea raised by Haggen, visited 5 April 2008).

³⁹ Korn and Oppenheim (n 5 above).

⁴⁰ Section 16, CO.

school management as to whether and what materials may be put online under CC licences.⁴¹

Conclusion

Although CC licences are based on the present law of copyrights, they fundamentally affect the way in which we view the operation of the copyright system. While sharing of educational experience and students' creativity are facilitated, the introduction of CC into Hong Kong is not a solution to all copyright problems faced by the secondary education sector, for existing copyright in education materials continue to exist. However, this may help to cultivate deeper awareness of copyright issues in our next generation.

⁴¹ Korn and Oppenheim (n 5 above).