

[II] Copyright

1. What does the Law of Copyright Protect?

Copyright protects the expression of ideas. It does not protect the underlying ideas themselves. What does that mean? Well, your recipe for a Chinese dish is an 'idea'. You can write it down, or record a sound or video tape explaining the recipe or draw a set of diagrams or take some photographs explaining how to prepare the dish. When you have done that, copyright law protects your written explanation, or sound or video recording, or your drawings or photographs: no-one is allowed to copy, publish or broadcast them unless you give permission. But people who follow your instructions, learn the ideas behind them, teach them to other people or even open a restaurant specialising in serving your special dish, would not be infringing your copyright.

The written expression of an idea is called a 'work' in copyright law. Here are examples of 'works' which can be protected in Hong Kong:

- literary works
- drama
- music (the composer's rights)
- artistic graphics and sculpture
- photographs
- computer software
- sound recordings (a person who makes a sound recording has separate rights from the composer and performer)
- films
- broadcasts (a broadcaster can have separate rights from the author, performer or recording studio)
- cable programmes
- typographical layouts of published editions of works

Furthermore, performers of live performances have a separate right to prevent unauthorised exploitation of their performances.

Copyright protects works which are original but regardless of the 'quality'. A Form One student's dreary essay on how he spent his summer holidays gets the same degree of copyright protection as a work which has won the Nobel Prize for Literature. A kindergarten pupil's finger-painting of her dog gets the same protection as a painting by a renowned painter.

As you can see from the list of 'works' which can be protected in Hong Kong, people who assemble works (say a cinema film) from, for example, a script/screenplay (literary work), actors' performances, musical soundtrack (musical score/lyrics), sound recordings and video recordings can claim a separate right from those of the contributing talents. So 'multimedia' is nothing new to copyright law.

When a film is included in a broadcast and broadcasts are subsequently reorganised for cablecasting, new rights arise at each stage.

This leads to a very important point: rights in what on the surface seems a single 'work' can in fact amount to a very complex network of rights originating from a number of countries around the world at different times.

2. What Exclusive Rights do Copyright Owners Enjoy?

Now we come to the exclusive rights that copyright law gives to the creator of the works listed in the previous paragraphs. These are known in copyright law as 'restricted acts'. They include:

- copying,
- issuing copies to the public (publishing),
- renting computer programmes or sound recordings to the public,
- making copies of works available on the Internet,
- performing works in public,
- broadcasting works by wireless or cable; and
- adapting (e.g. translating a work or adapting a two-dimensional plan to a three-dimensional object.)

If a work is used in one of the ways described above without the creator's permission, it is an 'infringing' copy, performance or broadcast. There are also some things you are not allowed to do with an infringing copy of a work: you may not knowingly:

- import to Hong Kong
- export from Hong Kong
- possess for trade or business purposes
- sell
- distribute

an infringing copy or recording of a work. Acts like these are known as 'secondary infringement'. Some of these acts can result in criminal prosecution.

3. How long does Copyright Protection Last?

The monopoly that copyright law gives to the creator does not last forever: the 'golden number' for copyright protection is fifty years. But that fifty years operates differently depending on the nature of the work.

- In the case of literary, dramatic, musical or artistic works and broadly speaking, for films as well, copyright protection lasts for fifty years from the end of the calendar year in which the author died. For example, if a child genius composes a piano sonata at the age of ten and dies at aged 90, the total period of copyright protection could be 80 years plus 50, equals 130 years. After the death of the creator, the copyright passes to his heirs. So don't imagine that because Picasso is dead, his works are no longer protected.

- A sound recording is protected for 50 years from the time it is made, or if during that period it is released, 50 years from its release.
- A performer's performance is protected for 50 years from the time the performance takes place or, if during that 50 year period, a recording of the performance is released, the protection lasts for 50 years from its release.

Note another important point here: ***Copyright need not be registered. It arises naturally from the moment a 'work' is first reduced to a permanent form.*** Use of the © mark is not a sign of registration: it is to remind people to respect the copyright owner's rights.

What about works of creators from outside Hong Kong? Although you could argue about the legal detail, the simplest approach is to assume that ***the outline in the previous paragraphs applies to works originating outside Hong Kong just as much as to works from within Hong Kong.*** The reason is (a) that Hong Kong is bound by a group of international treaties to respect copyright in works of creators from other places, and most of the world is covered by these treaties; and (b) Hong Kong's copyright law recognises and protects copyright in works from all parts of China (including Taiwan) and all around the world anyway.

4. Computers and Software

When you purchase software, you do not own the copyright of it, you are only purchasing the right to use the software under certain terms and conditions imposed by the software supplier. These terms and conditions are clearly described in the documentation accompanying the software – the licence. Generally speaking, you have the right to install the software onto a single computer. If you copy, distribute or install the software onto other computers without authorisation, you violate the copyright law.

Apart from legal consequences, using copied or counterfeit software also means:

- Greater exposure to software viruses, corrupt disks, or otherwise defective software;
- Inadequate or no documentation. No warranties;
- Lack of technical product support available to properly licenced users;
- Ineligibility for software upgrades offered to properly licenced users.

Schools are not allowed to use any unlicensed software in their computers. Students should not bring their own computer software to school and install it in the school's computers, whether with or without the teachers' knowledge. On the other hand, the schools should not lend their software to their teachers and students for use at home.

The Internet

Works on the Internet can be protected by copyright. Normally, copyright works may not be copied without permission (even into computer RAM memory). However, if a transient and incidental copy is made and such copying is technically required for the viewing of the work in an Internet browser, it would not be an infringement. Internet browsing does not contravene Hong Kong's copyright law.

If someone places any materials from other web sites onto his/her own web pages (including text, graphics, photographs or sounds) without the permission of the copyright owner, he/she is infringing copyright.

In certain circumstances it may be a copyright infringement to place a hypertext link to another web site (i.e. someone else's copyright work) without permission. In the circumstances, we recommend that you seek permission from the webmaster of that site before making a hypertext link to it.

Do not limit your concern for intellectual property rights to Hong Kong law: the Internet does not recognise geographical boundaries. You may be found liable for infringement under foreign law in any country in which your material is available through the Internet.

5. Sound and Video Recordings

Making sound and video recordings of broadcast or cable programmes

Normally (that is, outside the school context) you can make a recording of a cable or broadcast radio or TV programme for your domestic viewing at a later time ('time-shifting'). Making a recording or copy for other purposes needs licences from the broadcaster.

In the meantime, educational establishments are allowed to make recordings to show to students at the school for teaching purposes (not entertainment). But this sort of recording is only allowed provided you do not clip off the credits at the beginning or end of the programme.

Playing sound and video recordings of radio, TV and cable programmes

You may show or play a sound or video recording of a broadcast or cable programme (even if there is a licensing scheme in existence) without infringing copyright provided that all three of the following conditions are satisfied:

- the playing is in an educational establishment (an exhaustive list of 'educational establishments' is given in Chapter 528 - Schedule I of the Copyright Ordinance.)
- the playing is to an audience consisting wholly or mainly of teachers, pupils and their parents or guardians
- the playing is for the purpose of giving or receiving instruction

You can see from this that you cannot play video or sound recordings of Radio, TV and Cable Programmes for purposes such as -

- school fairs to raise funds for parent-teacher associations or charities,
- functions to which the public can be admitted,
- entertainment purposes,

without getting appropriate licences in advance. You should contact the broadcaster or cable programme service provider and other copyright owners of the works involved. The following organisations are some of the licensing bodies which may be able to provide such licences or assistance:

- Composers and Authors Society of Hong Kong (Web site : <http://www.cash.org.hk>)
- Hong Kong Copyright Licensing Association (Web site : www.hkcla.org.hk)
- Hong Kong Recording Industry Alliance Limited (Web site : <http://www.hkria.com>)
- Hong Kong Reprographic Rights Licensing Society (Web site : www.hkrrls.org)
- Phonographic Performance (South East Asia) Limited
(Web site : <http://www.ppseal.com>)

Note that you often need different categories of licences for the playing of recordings of broadcast or cable programmes: one in respect of the underlying musical, literary or dramatic work, one in respect of the recording or performance, and another in respect of the broadcast or cable programme itself.

Playing Sound and Video Recordings (other than Recordings of Radio, TV and Cable Programmes)

You may play a sound or video recording (e.g. a video or audio CD/DVD) or a broadcast or cable programme (even if there are licensing schemes available):

- the playing is in an educational establishment (an exhaustive list of 'educational establishments' is given in Chapter 528 - Schedule I of the Copyright Ordinance.)
- the playing is to an audience consisting wholly or mainly of teachers, pupils and their parents or guardians
- the playing is for the purpose of giving or receiving instruction

without infringing copyright. You should be aware that rented video recordings are normally rented for domestic viewing, not use in schools. To show rented CD/DVD etc in school (even where the criteria listed above are met) may be a breach of the conditions of hire of the video.

But you cannot play video or sound recordings for purposes such as -

- school fairs to raise funds for parent-teacher associations or charities,
- functions to which the public can be admitted,
- entertainment purposes,

unless you have obtained appropriate licences in advance.

Note that you often need two categories of licences for the playing of audio-visual works: one in respect of the underlying musical, literary or dramatic work, and another in respect of the recording or performance of it.

To sum up:

Students are allowed to use short clips of audio-visual works for learning purposes under limited circumstances provided it constitutes "fair dealing",

- When recording, don't cut the credits or alternatively, include relevant acknowledgements,
- Only use them in the school, and
- Restrict them for showing mainly to teachers, pupils and their parents, guardians.

Live School Performances

Dramatic performances, poetry recitals and concerts are a normal part of school life. Copyright law supports these activities in schools.

Anyone (whether in school or not) is allowed to recite a reasonable extract from a published literary or dramatic work in public and to make a recording of such a recitation, provided that they properly acknowledge the title and authorship of the extract. This exception only applies, however, to a solo recital (i.e. not to choral poetry recital or a dramatic performance), and does not allow people to recite the whole of a work. It operates, for example, to allow people to include recognisable literary or dramatic quotations in public speeches without the need for copyright clearance.

For live performances of musical, literary or dramatic works, you do not need to obtain a licence, regardless of whether the performer is a pupil, teacher or anyone else, under the following circumstances:

- The performance is in an educational establishment (an exhaustive list of 'educational establishments' is given in Chapter 528 - Schedule I of the Copyright Ordinance.)
- The performance is made before an audience consisting wholly or mainly of teachers, pupils and their parents or guardians
- The performance is made for the purpose of giving or receiving instruction.

But performances without a licence are not permitted for purposes such as -

- school fairs to raise funds for parent-teacher associations or charities that are open generally to the school staff, the students, parents and other guests invited by them,
- functions to which the public can be admitted,
- performances conducted by guests invited by the school for entertainment purposes,

unless you have obtained a licence in advance. You should normally only require one licence in respect of the musical, literary or dramatic work itself. The following organisations are some of the licensing bodies which may be able to provide such licences or assistance:

- Composers and Authors Society of Hong Kong (Web site : <http://www.cash.org.hk>)
- Hong Kong Copyright Licensing Association (Web site : www.hkcla.org.hk)
- Hong Kong Recording Industry Alliance Limited (Web site : <http://www.hkria.com>)
- Hong Kong Reprographic Rights Licensing Society (Web site : www.hkrrls.org)
- Phonographic Performance (South East Asia) Limited
(Web site : <http://www.ppseal.com>)

6. Copyright and Other Acts for Private Research and Study

Fair dealing

Copyright and other acts for private research and study are what a student or researcher does for him- or herself: it does not involve any other person. The process of copying for private research and study is what you do to help yourself learn or arrange data obtained in the process of research.

Hong Kong's Copyright Ordinance allows fair dealing in any type of copyright work for the purpose of private research and study. 'Fair dealing' can include copying or any other of the restricted acts in copyright (e.g. performance, recording, adapting). If you translate a reasonable passage of text as an exercise in developing language skills, that would be considered 'fair dealing'. To decide whether an act is 'fair dealing' the law requires you to consider:

- the purpose and nature of the dealing,
- the nature of the work, and
- the amount and substantiality of the portion dealt with in relation to the work as a whole.

These considerations must also be set in the context of the primary consideration that 'the act' (here we are talking of fair dealing) does not conflict with a normal exploitation of the work by the copyright owner and does not unreasonably prejudice the legitimate interests of the copyright owner.

The first conclusion you should draw is that fair dealing for the purpose of private research and study has nothing to do with allowing students to save money. Rather, it is an acknowledgment that reasonable note and record taking is an essential part of the process of private study and research which should not be stifled by copyright considerations.

With respect to published printed books and periodicals, the student's first recourse should be to borrowing them from a library, or to buying them if he or she will need to refer to them regularly. If you copy a book or part of a book to save the expense of buying it or the bother of borrowing it, you have already infringed the copyright of others.

There is a popular urban myth that the 'fair dealing' provisions in Hong Kong's copyright law can be related to a definitive percentage of a work that can be copied. Some places outside Hong Kong do specify such percentages. Some publishers and collecting societies also state sometimes that they don't require a license for copying below a certain percentage of a work. However, if this is the case, you must ascertain that from the copyright owner or collecting society: there is no general rule of percentages in Hong Kong.

The following examples would NOT be considered "fair":

- A student copying the whole or a large portion of a textbook because he believes the textbook is too expensive (this is not fair dealing because the amount is too great and the market for the book was adversely affected).
- A teacher playing a DVD of a currently shown movie in class for students' entertainment after examination is over (this is not fair dealing because it is a currently shown movie and it is not used for an educational purpose).

7. Copyright in Works Created by Students

Students' works

Students are not employed in schools, so the copyright in their works belongs to them. Schools can't publish their students' works or distribute them on the Internet without the student's permission. Of course, this permission can be given in a very informal way, and in many circumstances, students may produce works with the implicit understanding that they will be copied or published (because, for example, the school has a well-established tradition of publishing outstanding essays of students or entering them for competitions.)

There is no 'minimum age' below which children cannot control their copyright. But if it is intended that works be exploited commercially, schools should consult the parents or guardians of children too young to enter into contracts, or handicapped students who may not have the capacity to enter into contracts.

Be aware also that where schools negotiate contracts with students, the two parties may have inequality of bargaining power. This could affect the validity of a contract at a later stage. It is advisable, therefore, always to involve parents in discussion if there is a possibility of a high return from a commercial creative venture involving school children with the risk of dispute at a later stage.

It is common for universities to make and publish rules about the ownership of copyright in works and research done by university students and researchers. These rules may become part of the terms under which the students or researchers gain admission and will be binding on all the parties unless they are varied by mutual agreement.

8. Create Your Own Work

This is always the best option. 'Creating your own work' does not always have to mean literally making the work yourself: you can ask a classmate or a friend to write or draw something for you and give you permission to make copies. Do you really need to copy a picture from a book for your Visual Arts homework? Try to create your own work!

9. Circumvention of Technological Measures

Copyright owners have an option of using technological measures to protect copyright works that are distributed in electronic form. A person who bypasses, disables or removes the protection measure is said to have circumvented the copy control measure.

The mere act of purchasing a modified game machine does not involve any circumvention activity and would not attract any liability. However, the playing of a pirated computer game on a modified game machine often involves circumvention of the copy control/access control measures in the computer game and the making of an unauthorised copy of the game. You could therefore be subject to civil liability for unlawful circumvention of technological measures and for copyright infringement.

Making, importing, exporting or dealing in circumvention devices (such as modified chips), or installing them into game consoles so they can play pirated games, are prohibited under the anti-circumvention provisions of the Copyright Ordinance. People who break the law face civil or criminal action.