

in the Digital Era

many school teachers have expressed their concerns about the rigidity and technicality of the copyright law and its exemptions, and would rather compile their own teaching material than copy existing works, no matter how useful or relevant such works may be. Such a cautious approach might work in the past, but now, with the promotion of liberal and general education, classroom teaching and learning tend to rely more on “open” resources and the Internet, and less on standard textbooks. It would certainly help if teachers and students (or indeed everyone) can decide for themselves what they may copy legally. As said above, the law only prohibits copying or other dealing that is done without the copyright holder’s licence. Thus, licence or permission may be said to be the key to legal copying.

In the case of established authors and composers, the licensing in relation to their copyright works is usually taken care of by licensing organisations. How about the fifteen-year-old amateur composer? It is in cases like this that Creative Commons may have a role to play.

Creative Commons

Founded by a team of US intellectual property experts, Creative Commons is a not-for-profit organization that facilitates legal sharing of copyright works by providing a simple, user-friendly, and universally applicable template from which authors and composers may choose the terms they would like to include in their respective licences.

As the ones most likely to use the template are amateurs, their right to be acknowledged as the creators of the works is considered to be the

most fundamental and most-wanted element of any licence they grant. This is a kind of moral right under copyright law, and is called “Attribution” in the Creative Commons licence template. Other available licence elements include: “Non-commercial use” (that is, the sharing must be for non-commercial purposes);

“No derivative works” (that is, no alteration or adaptation of the work is allowed);

“Share alike” (that is, any subsequent sharing of the work must be subject to the same licence terms)

These are terms most likely to be desired by those who would like to share their works in this digital era, and are made available in the template designed by the US Creative Commons team. This template also makes it clear that the exemptions already available under copyright law are not affected by the licence thereby granted.

Naturally, all this was originally written in US legal terminology (e.g. “fair use” was used instead of “fair dealing”) as the whole idea was originated in the United States. Any other jurisdiction that would like to adopt the template is welcome to do so (Creative Commons’ mission is to facilitate legal sharing) but would have to make necessary changes (e.g. by substituting local legal terminology) so that the local community, in particular, the legal community, can correctly interpret and apply the licence terms. Usually, such changes are made by local intellectual property experts (“Legal Leads”) who see the need to bring the Creative Commons model to their own jurisdiction.

As Creative Commons is a non-for-profit project and all those

involved are volunteers, the local affiliate is invariably a local university or educational institution. In Hong Kong, the local affiliate is the Journalism and Media Studies Centre of the University of Hong Kong with two professors from the Law Faculty of the same university as the Legal Leads. We have just celebrated the completion of the “localization” process and the launch of Creative Commons Hong Kong with Professor Lawrence Lessig of Stanford University, founder of Creative Commons, and Mr Joichi Ito, the Chief Executive Officer of Creative Commons.

Now, anyone who would like to share their works with the Hong Kong community may choose “Hong Kong” from the “Jurisdiction” list on the Creative Commons website <http://creativecommons.org> and can select the licence elements they desire from the webpage “Licence Your Work”. With Creative Commons, legal sharing can be as simple as this:



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Legal Sharing

Copyright law has been evolving all over the world. In Hong Kong, the government has issued a consultation document entitled “Copyright Protection in the Digital Environment” (available at <http://www.ipd.gov.hk/eng/copyright.htm>). Why does the digital environment warrant special attention? How does it impact on the copyright regime?

Rigidity of Copyright Law

When it first emerged, copyright law was primarily concerned with the protection of the interests of those who invested in the publishing of books – books in the form of printed pages fastened together along one side and bound in covers (no e-books at that time!) – because it costs a great deal to do the printing, binding and distribution. Now, it costs virtually nothing to copy and disseminate – or to share, as the digital jargon has it – a piece of work, be it writing or music.

The advancement in technology has made life easier. It has also made “sharing” easier. In the past, when we lent out (or “shared”) our books, we simply passed the books on to those with whom we would like to share them. Now, when we want to share something we have come across on the Internet, all we need is just a few

clicks. However, not many realize that in so doing they are actually “making copies” of the original work and “distributing” those copies. These acts, if done without the copyright holder’s licence or permission, are prohibited under the copyright law.

So the law is clear on this point: sharing by handing over the original work is not against the law, but sharing by copying is. And the latter can take different forms, ranging from the simple “copy and paste” to the more sophisticated peer-to-peer sharing (such as what is enabled by BitTorrent). That is why the government, in the consultation document mentioned above, raised the issue of whether and how peer-to-peer sharing should be regulated or even criminalised. Criminalised? Yes! But who are the ones sharing the most?

There are different kinds of sharing, and not every kind should be labeled “illegal”. If a fifteen-year-old secondary school student has composed a song and posts it on his blog, all he wants may be recognition for his work. He does not mind, or even welcomes, copying and sharing of his song but may not have made it explicit (probably because he does not even know what rights he has as an author under copyright law), so the viewers of his blog may hesitate to share what he wants them to. There may be a local band that would like to mix this song with other songs, but they are not sure if such mixing is permissible. Or there may be music teachers who would like to play the song in class, or students who would like to use the song as background music for a performance ... Of course, there are a number of exemptions available to teachers and students under

copyright law, but it is not always easy to tell whether the exemptions are indeed applicable.

For instance, there is a fair dealing exemption under Hong Kong copyright law which is modeled on the UK law, but in deciding whether a dealing is “fair”, all the circumstances of each individual case have to be taken into account, including but not limited to the following:

- (1) the purpose and nature of the dealing;
- (2) the nature of the work in question;
- (3) the amount and substantiality of the portion dealt with in relation to the work as a whole; and
- (4) the effect of the dealing on the potential market for or value of the work.

These questions are not easy at all, and it is doubtful how many in Hong Kong are actually aware of the existence, let alone operation, of these provisions of the law! What is even more frustrating is that this fair dealing exemption, unlike the much broader notion of “fair use” under US law, is subject to the requirement that the dealing must be for one of the specified purposes, namely, private study, research, criticism, review, news reporting, receiving or giving instruction (the last one being recently added as a result of an earlier consultation exercise). These are expressions which dictate the applicability of the exemption and yet none of them are defined in the statute! How can one be sure that a particular dealing is exempted and thus lawful?

Those who are copyright-conscious but are not fully aware of the legal requirements and implications may indeed choose to err on the side of caution. In fact,



Sharing takes different forms in the digital era.