



<b>Title</b>	<b>Unlocking the potential of creative commons for Hong Kong's education and creative sectors</b>
<b>Author(s)</b>	<b>Kwok, KHF</b>
<b>Citation</b>	<b>Hong Kong Law Journal, 2010, v. 40 PART 2, p. 381-415</b>
<b>Issued Date</b>	<b>2010</b>
<b>URL</b>	<b><a href="http://hdl.handle.net/10722/161261">http://hdl.handle.net/10722/161261</a></b>
<b>Rights</b>	<b>Creative Commons: Attribution 3.0 Hong Kong License</b>



# UNLOCKING THE POTENTIAL OF CREATIVE COMMONS FOR HONG KONG'S EDUCATION AND CREATIVE SECTORS



Kelvin Hiu Fai Kwok\*

*Creative Commons is a non-profit organisation founded by Professor Lawrence Lessig in the United States. The organisation seeks to replace the default rule of "All Rights Reserved" under copyright law with a flexible "Some Rights Reserved" approach in order to promote the wider dissemination of knowledge and innovation in society. It achieves its aims by offering user-friendly copyright licences which authors and creators can attach to their works so as to encourage free use and remix by others within the prescribed limits. Creative Commons licences have been adapted to Hong Kong copyright law since 2008. This article contends that the current copyright system fails to promote the education and creativity of the young generation and examines how Creative Commons could assume a pivotal role in advancing the education and creative sectors in Hong Kong. Case studies are drawn from the local community and overseas where appropriate.*

## Introduction

The Creative Commons movement builds on the culture of online sharing and remixing which has been growing rapidly in the recent decade. This article seeks to explore the potential role played by Creative Commons in Hong Kong's education and creative sectors. It argues that the existing copyright system fails to promote the development of both sectors and that Creative Commons could assume a pivotal role in advancing education and creative media in Hong Kong. The article starts by explaining the idea of Creative Commons and how its licensing system works, before proceeding to explore the relationship between Creative Commons and copyright, and how they interact with each other in the context of Hong Kong's education and creative sectors.

\* BBA (Law), LLB, University of Hong Kong; LLM candidate, University of Chicago. This paper was originally written for an Intellectual Property course taught by Professor Haochen Sun at the University of Hong Kong. The author wishes to thank Professor Sun for his helpful comments on the paper, and Professor Alice Lee, who first introduced the author to the concept of Creative Commons. Any errors are the author's.



## What is Creative Commons?

Creative Commons<sup>1</sup> (CC) is a non-profit organisation founded by Professor Lawrence Lessig in the United States. The organisation is devoted to expanding the range of creative works (including books, music, videos and webpages) available for people to legitimately build upon and share with others through a variety of licensing schemes.<sup>2</sup>

Underlying CC is the idea of “free culture”, the title of one of Lessig’s books. As he argues while the copyright system is intended to reward creativity and provide incentives for others to build on previous ideas, large corporations – interested only in accumulation of profits but not free exchange of ideas – have been abusing the system to stifle innovation.<sup>3</sup> As copyright law continually adapts to provide greater protection to these companies, it places an increasing burden on creators who wish to share their works with the public.<sup>4</sup> CC was founded with a view to reducing this burden.

## The CC Licences

CC achieves its aims by developing licences that creators can attach to their works as simple tags. Each tag is tied to: (i) a human-readable description explaining the terms of use (the Commons Deed); (ii) a comprehensive version of the licence which ensures that it is legally enforceable (the Legal Code); and (iii) a machine-readable translation of the licence that enables search engines to identify the work (the Digital Code).<sup>5</sup> The three together constitute a CC licence.

Creators can choose a set of conditions they wish to apply to their works from the following options:

- Ⓘ Attribution: the user must attribute the creator in the manner required.
- Ⓒ Noncommercial: the user may not use the work for commercial purposes.

<sup>1</sup> <http://creativecommons.org>.

<sup>2</sup> “Creative Commons”, *Wikipedia*, available at: [http://en.wikipedia.org/wiki/Creative\\_commons](http://en.wikipedia.org/wiki/Creative_commons) (visited 19 May 2010).

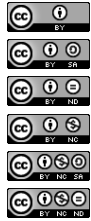
<sup>3</sup> “Open Access and creative common sense”, *Open Access now*, available at: <http://www.biomedcentral.com/openaccess/archive/?page=features&issue=16> (visited 19 May 2010).

<sup>4</sup> *Ibid.*

<sup>5</sup> Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004), pp 282–283.

- ⊖ No Derivative Works: the user may only make verbatim copies of the work, but not adapt or change it.
- ⊕ Share Alike: the user may only make derivative works if he licenses them under the same licence terms.

The four conditions can be chosen in six possible combinations:



- (i) Attribution
- (ii) Attribution – Share Alike
- (iii) Attribution – No Derivatives
- (iv) Attribution – Noncommercial
- (v) Attribution – Noncommercial – Share Alike
- (vi) Attribution – Noncommercial – No Derivatives

To date, CC licences have been applied to millions of websites consisting of text,<sup>6</sup> images,<sup>7</sup> audio-visual materials<sup>8</sup> and education works.<sup>9</sup> Popular websites such as Wikipedia<sup>10</sup> and YouTube<sup>11</sup> have recently begun to adopt CC licences.

## Localising CC Licences in Hong Kong

In Hong Kong, OpenRadioHK,<sup>12</sup> Daayu,<sup>13</sup> DotAsia<sup>14</sup> and an unknown number of bloggers had been using the generic international version of CC licences for many years. However, in order for the CC licences to be legally enforceable in Hong Kong, they must be “ported” or adapted to the local copyright law.

The CC Hong Kong project began in 2007 to localise and promote the use of CC licences in Hong Kong. The project has been hosted by the HKU Journalism and Media Studies Centre (JMSC), with Professor Yuen-

<sup>6</sup> Apart from Lessig’s books *Code*, *The Future of Ideas*, *Free Culture*, *Code version 2.0*, and *Remix*, one example is Corry Doctorow, who has released his scientific novel *Down and Out in the Magic Kingdom* online for free under a CC Attribution-Noncommercial-Share-Alike licence.

<sup>7</sup> *Flickr.com*, for example, hosts more than two billion images for free sharing primarily through the CC Attribution licence.

<sup>8</sup> Notable examples are Jamendo (<http://www.jamendo.com>), Magnatune (<http://www.magnatune.com>), blip.tv and Sony eyeVio (<http://eyevio.jp>).

<sup>9</sup> Famous examples include the MIT Open Courseware (<http://ocw.mit.edu>) and Rice University’s Connexions (<http://cnx.org>), which will be discussed below.

<sup>10</sup> <http://www.wikipedia.org>.

<sup>11</sup> <http://www.youtube.com>.

<sup>12</sup> The Hong Kong-based online radio and podcast: <http://www.openradiohk.com>.

<sup>13</sup> An online platform for free sharing of photos and videos: <http://www.daayu.com>.

<sup>14</sup> The Hong Kong based Internet domain registry: <http://www.dotasia.org>.

Ying Chan and Mr Pindar Wong serving as the current Public Leads. The CC Hong Kong legal team, led by Professors Alice Lee and Yahong Li, conducted the porting process in collaboration with legal experts and CC International.<sup>15</sup> The Hong Kong licences were formally launched on 25 October 2008, with details available on the CC Hong Kong website.<sup>16</sup> An Education Kit<sup>17</sup> was also created for distribution to schools, universities and other groups who are in great need of legal content-sharing options.

### Relationship between CC and Copyright Law

Before the advent of CC, copyright debates had been framed at the extremes. Believers of maximal copyright strived to maintain the *status quo* of “All Rights Reserved” by default, while abolitionists supported a “No Rights Respected” approach – an anarchy in which creators have no control over the use of their works – albeit with limited success.<sup>18</sup> The mistake was to overlook the middle ground: a “Some Rights Reserved” copyright. While some authors choose to retain all rights to their works, many others prefer to release their works under a more permissive licence to allow free sharing and remixing among the public.<sup>19</sup>

Under the Hong Kong Copyright Ordinance (HKCO) (Cap 528), an original work is protected by copyright once it is created and recorded in permanent form.<sup>20</sup> No registration is required. The creator of the work is normally the first owner of copyright,<sup>21</sup> though he may assign or license it to others for use within a specific scope and period.<sup>22</sup> “Copyright” is more than the right to prevent copying.<sup>23</sup> It also covers infringing acts such

<sup>15</sup> CC International is a division devoted to porting the core Creative Commons licences to different copyright systems around the world. To date, there are 52 jurisdiction-specific licences, with 9 other jurisdictions in drafting process: see <http://creativecommons.org/international>.

<sup>16</sup> <http://hk.creativecommons.org>.

<sup>17</sup> The CC Education Kit, available at: <http://hk.creativecommons.org/resources/education-kit> (visited 19 May 2010).

<sup>18</sup> See n 5 above, p 276.

<sup>19</sup> “FAQ”, CC Hong Kong, available at: <http://hk.creativecommons.org/faq> (visited 19 May 2010).

<sup>20</sup> See s 4(2), HKCO. Currently, nine categories of work are protected by copyright: literary, dramatic, musical, artistic, sound recordings, films, broadcasts, cable programmes, typographical arrangements: s 2(1), HKCO. The first four categories must also satisfy the requirement of originality.

<sup>21</sup> See s 11, HKCO. This rule is subject to exceptions in ss 12 (works of joint authorship), 14 (employee works) and 15 (commissioned works). The duration of copyright is normally the author’s life plus 50 years: s 17(2), HKCO.

<sup>22</sup> See ss 101 and 103 of the HKCO for the legal requirements of assignment and licensing of copyright.

<sup>23</sup> Infringement by copying is prohibited under s 23, HKCO. Only reproduction of the whole or a substantial part of a copyrighted work constitutes an infringement: s 22(3)(a), HKCO.

as issuing or making available copies to the public,<sup>24</sup> public performance or broadcasting,<sup>25</sup> making an adaptation<sup>26</sup> and commercial dealing with infringing copies.<sup>27</sup> An infringing act attracts civil liability<sup>28</sup> and possibly criminal liability.<sup>29</sup> The HKCO provides for several defences/exceptions to infringement, which include fair dealing for specific purposes,<sup>30</sup> education exceptions,<sup>31</sup> libraries and archives exceptions,<sup>32</sup> public administration exceptions,<sup>33</sup> incidental inclusion<sup>34</sup> and time shifting.<sup>35</sup>

Since the inception of copyright law in Anglo-Commonwealth jurisdictions including Hong Kong, copyright protection has been continually expanding in scope to benefit right owners. Back in 2005, Chan Nai Ming became the world's first-ever BitTorrent user to be sentenced to imprisonment for distributing three copyrighted films using the BitTorrent software.<sup>36</sup> The 2007 amendments to the HKCO expanded the scope of civil liability for circumventing technological measures for copyright protection and introduced criminal liability for commercial dealing in circumvention devices.<sup>37</sup> In the digital copyright reform proposals recently submitted by the local government, limited exceptions for media shifting and temporary reproduction by online service providers (OSPs) came with the *quid pro quo* of introducing a broad right of communication with criminal sanctions, a liability regime for OSPs and additional copyright damages.<sup>38</sup> In fact, during the first consultation exercise, the information technology industry specifically requested for

<sup>24</sup> Sections 24 and 26, HKCO.

<sup>25</sup> Sections 27 and 28, HKCO.

<sup>26</sup> Section 29, HKCO. This section covers, *inter alia*, translating a book into a foreign language or creating a play based on a novel.

<sup>27</sup> Section 31, HKCO. For other acts of secondary infringement, see ss 30 (importing or exporting infringing copies), 32 (providing means for making infringing copies), 33 (permitting use of premises for infringing performance) and 34 (providing apparatus for infringing performance etc).

<sup>28</sup> Section 107, HKCO. The copyright owner may seek for compensatory damages and an injunction to prevent further infringement.

<sup>29</sup> Sections 118, 119 and 119A, HKCO. A criminal offence is punishable by fine and imprisonment.

<sup>30</sup> The recognised purposes are research and private study (s 38), criticism, review and news reporting (s 39) and giving or receiving instruction in an education establishment (s 41A).

<sup>31</sup> See ss 41 to 45, HKCO.

<sup>32</sup> See ss 46 to 53, HKCO.

<sup>33</sup> See ss 54 to 59, HKCO.

<sup>34</sup> Section 40, HKCO.

<sup>35</sup> Section 79, HKCO.

<sup>36</sup> *HKSAR v Chan Nai Ming* [2005] 4 HKLRD 12 (Magistrate Court). Chan's verdict and sentence was upheld on appeal to the CFA: see *Chan Nai Ming v HKSAR* [2007] 2 HKLRD 489.

<sup>37</sup> See ss 273 to 273H, HKCO.

<sup>38</sup> See "Proposals for Strengthening Copyright Protection in the Digital Environment" dated Nov 2009, *HKSAR Commerce and Economic Development Bureau*, available at: <http://www.legco.gov.hk/yr09-10/english/panels/ci/papers/ci1117cb1-341-8-e.pdf>.

the introduction of an open-ended US-style fair use exception<sup>39</sup> in Hong Kong, but the government decided against the proposal and responded with a narrow media shifting exception.<sup>40</sup>

The existing copyright system remains unsatisfactory for several other reasons. First, the stringent rule of “all rights reserved” automatically applies to all works by default. Consent from the owner is necessary before anyone can use the work outside the scope of the recognised exceptions. Unless collective licensing schemes exist for the type of work in question, it may take a long time for consent to be obtained, let alone situations where it may be practically impossible to reach the owner. Paradoxically, the creator may be willing to share his work provided that credit is given, only that he does not know who is interested in using his work. Even if he manages to get in touch with interested parties, it will be inconvenient for him to give permission upon every request. More importantly, the restrictive language of copyright law fails to assist a creator who wishes to encourage free sharing and remixing of his work. For example, s 23 of the HKCO provides that “[t]he copying of the work is an act restricted by copyright in every description of copyright work”. This should be contrasted to the permissive tone of CC licences which encourage use within certain limits. For example, the Commons Deed of the CC Attribution licence reads: “You are free to share – to copy, distribute, display and perform the work – [and] to remix – to make derivative works ... [provided that] you must attribute the work in the manner specified by the author or licensor”.<sup>41</sup> Finally, existing exceptions under copyright law are too restrictive in both scope and extent. This point will

<sup>39</sup> See §107 of the US Copyright Act. Whether copying falls under the fair use exception requires a case-by-case analysis with particular emphasis on four factors: (i) the purpose and character of the use; (ii) nature of the copyrighted work; (iii) substantiality of the part taken; and (iv) market effect. These four factors have been transplanted into the fair dealing exceptions under ss 38 and 41A, HKCO. The primary difference between fair use under US law and fair dealing under HK and UK law is that fair dealing is confined to specific purposes of use, such as: research and private study (s 38); criticism, review and news reporting (s 39); giving or receiving instruction in an education establishment (s 41A). In contrast, the US fair use exception is not subject to an exhaustive list of purposes, thus allowing the courts to play an active role in adapting copyright law to changes in technology. One famous example is *Sony Corp of America v Universal City Studios* 464 U.S. 417 (1984) (also known as the “Betamax case”), where the Supreme Court declared that time shifting of televisions shows to VHS cassettes constitutes fair use under §107 of the US Copyright Act.

<sup>40</sup> Peter Yu, “Digital Copyright Reform and Legal Transplants in Hong Kong” (2010) 48 *University of Louisville Law Review* (forthcoming), at 38. An electronic copy of this article is available at: [http://papers.ssm.com/5013/papers.cfm?abstract\\_id=1538638](http://papers.ssm.com/5013/papers.cfm?abstract_id=1538638). Under the proposed media shifting exception, “the owner of a non-infringing copy of a sound recording may make one copy of that recording in each device he lawfully owns for his personal and domestic use”. The exception is subject to the following conditions: “(a) no circumvention of technological measures ... to restrict copying or control access; and (b) any copy made must not be sold or given away to other persons”. See n 38 above, p 7. The problem of technological measures (digital rights management) prevailing over the media shifting exception will be discussed below.

<sup>41</sup> See <http://creativecommons.org/licenses/by/3.0/hk>.

be explained against the backdrop of education and creative media in the below sections.

CC aims to fill the gap by building a layer of reasonable copyright on top of the current extremes.<sup>42</sup> CC licences are user-friendly. The creator simply selects the licence that suits his preferences and applies the html code in his work. The code automatically enables the work to be searched via ccSearch and other CC-enabled search engines like Google and Yahoo. Once a CC tag is attached to a work, it acts as an “automatic” grant of a worldwide, royalty-free, non-exclusive and irrevocable licence to users for the exercise of certain rights permitted by the creator.<sup>43</sup> The default rule becomes “some rights reserved”: any person may use the work without asking for permission provided that it falls within the licence terms. The creator can also convey the message that he encourages further sharing of the work, or even modifications from which new creativity springs. CC licences are flexible. They can be applied to all types of copyright work, whether online or offline.<sup>44</sup> Under the flexible options of CC licences, the creator can choose to allow sharing of the entire work, commercial use of his work or even the making of derivative works. Since all CC licences are non-exclusive, they enable the creator to enter into separate non-exclusive licences with others, even for profit.<sup>45</sup> Meanwhile, CC licences are legally binding and enforceable in local courts once they are “ported” to Hong Kong law. The first CC court case took place in the Netherlands, where Adam Curry successfully enforced his CC Attribution-Noncommercial licence and enjoined a Dutch tabloid from publishing photos from his Flickr page.<sup>46</sup>

The remainder of this article will focus on two particular sectors – education and creative media – which are of prime importance to the future development of Hong Kong. It will explain why the current copyright law fails to promote the education and creativity of the young generation, and how CC licences could play a pivotal role in advancing the education and creative sectors in Hong Kong.

<sup>42</sup> See n 5 above, p 282.

<sup>43</sup> Section 3, Legal Code, CC Attribution 3.0 Hong Kong licence, available at <http://creativecommons.org/licenses/by/3.0/hk/legalcode> (visited 19 May 2010).

<sup>44</sup> CC licences can be applied to offline works: see “Frequently Asked Questions”, CC Wiki, available at: [http://wiki.creativecommons.org/Frequently\\_Asked\\_Questions](http://wiki.creativecommons.org/Frequently_Asked_Questions) (visited 19 May 2010). Microsoft has created an add-in for users to embed CC licences directly into Microsoft Office Word, Powerpoint and Excel documents. The add-in can be downloaded at: <http://www.microsoft.com/downloads/details.aspx?FamilyID=113b53dd-1cc0-4fbe-9e1d-b91d07c76504&displaylang=en> (visited 19 May 2010).

<sup>45</sup> See n 44 above.

<sup>46</sup> “Creative Commons Licences Upheld by Dutch Court”, *Groklaw*, available at: <http://www.groklaw.net/article.php?story=20060316052623594> (visited 19 May 2010).



## Unlocking the Potential of CC in Hong Kong's Education Sector

### *Problems under the Existing Copyright System*

The right for everyone to receive education is recognised under both Article 26 of the Universal Declaration of Human Rights and Article 13 of the International Covenant on Economic, Social and Cultural Rights.<sup>47</sup> The Articles provide that “education shall be directed to the full development of the human personality” and “shall promote understanding, tolerance and friendship among all nations, racial or religious groups”. Since copyright is premised upon a tradeoff between incentives to innovate on the one hand, and access to knowledge on the other, it is important for policymakers to strike an appropriate balance between copyright and the right to education, or more specifically, to internalise education policies within the copyright system.

Regrettably, the right to education is not adequately protected under the existing copyright law. This is despite the fact that several exceptions have been created under the HKCO to cater for the reproduction of education materials. The most relevant exceptions are s 38 (research and private study), s 41 (things done for purposes of instruction or examination), s 45 (reprographic copying made by educational establishments or pupils) and the newly enacted s 41A (fair dealing for purposes of giving or receiving instruction). The first three exceptions are unduly narrow and applicable only in restricted circumstances. Section 41 permits copying to a reasonable extent by a person giving or receiving instruction but *not* by means of a reprographic process (meaning the teacher or student must copy *by hand*) and waives copyright protection for the setting and answering of examination questions only. Section 38 permits fair dealing with a work for purposes of research or private study, but it cannot be relied on for making multiple copies “provided to more than one person at substantially the same time and for substantially the same purpose”. Section 45 allows reprographic copying (ie photocopying) to a reasonable extent by or on behalf of educational establishments for instruction purposes. However, not-for-profit education institutions relying on this section must comply with the stringent standards set out in the *Guidelines for*

<sup>47</sup> A more limited education right is provided under Art 137 of the Basic Law, which guarantees enjoyment of academic freedom by education institutions and freedom of choice of study by students in Hong Kong.

*Photocopying of Printed Works*.<sup>48</sup> In any event, s 45 does not apply where there is a licensing scheme authorising the photocopying in question. This explains why the University of Hong Kong (HKU), along with most tertiary institutions, has a licensing arrangement with the Hong Kong Reprographic Right Licensing Society<sup>49</sup> (HKRRLS) that governs the production of student course packs, and hence does not seek reliance on s 45.

The most liberal exception is perhaps s 41A, a medium-neutral fair dealing exception introduced in 2007 for the purposes of giving or receiving instruction in an educational establishment. Section 41A can be seen as a hybrid of s 38 (fair dealing for research or private study purposes) and s 45 (reprographic copying to a reasonable extent by an educational establishment). The traditional four factors transplanted from the US fair use analysis are considered in determining whether a dealing is fair or not, namely: (a) the purpose and nature of the dealing; (b) the nature of the work in question; (c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and (d) the effect of the dealing on the potential market for or value of the work.<sup>50</sup>

Still, there are several problems with the new s 41A exception. First, unlike the broader, open-ended concept of “fair use” under US law, the dealing in question must be for the specific purpose of “giving or receiving instruction”, which, along with other fair dealing purposes of “research”, “private study”, “criticism”, “review” and “news reporting”, is nowhere defined in the HKCO.<sup>51</sup> This leads to the second problem – uncertainty and fear on the part of users. While it remains doubtful how many students and teachers are actually aware of the existence of s 41A, those who do know of this section may not be able to tell whether or

<sup>48</sup> This document was issued by the HKSAR Intellectual Property Department in 2002. The updated version (effective from 10 Mar 2004) is available at: [http://www.ipd.gov.hk/eng/intellectual\\_property/copyright/workshop/clarifying/Eng%20guidelines%202-Aug-04.pdf](http://www.ipd.gov.hk/eng/intellectual_property/copyright/workshop/clarifying/Eng%20guidelines%202-Aug-04.pdf). It prescribes for strict conditions for determining the extent of permissible copying under s 45, HKCO in relation to articles in newspapers or periodicals (a complete article), poems (not more than 250 words), stories or essays (not more than 2500 words) and textbooks (not more than 2% of a book per month, and not more than 5% in an academic year). In addition, for periodical articles, poems, stories or essays, not more than three works may be copied from the same author for one course in every academic year.

<sup>49</sup> The HKRRLS is a member of the International Reproduction Rights Organizations and represents over 1.7 million publications published in Hong Kong and overseas in establishing licensing schemes with Hong Kong education institutions. The HKRRLS licenses the reproduction of limited portions of works, collects a fee for such reproduction and distributes royalties to copyright owners of the works being reproduced. For details, see “About HKRRLS”, HKRRLS, available at: <http://www.hkrrls.org/index.cfm?pageid=1> (visited 19 May 2010). Details of the licence agreement between HKU and HKRRLS can be found at: <http://lib.hku.hk/coursepack> (visited 19 May 2010).

<sup>50</sup> Section 41A(2), HKCO.

<sup>51</sup> Alice Lee, “Legal Sharing in the Digital Era”, *RTHK Media Digest*, available at: [http://www.rthk.org.hk/mediadigest/20081113\\_76\\_122052.html](http://www.rthk.org.hk/mediadigest/20081113_76_122052.html) (visited 19 May 2010).

not a particular use falls within the specified purpose, let alone whether the four factors aforementioned will be analysed in their favour. This explains why tertiary institutions in Hong Kong still choose to maintain their licensing arrangements with the HKRRLS despite that the new s 41A applies irrespective of any existing licensing scheme.<sup>52</sup> As Professors Fisher and McGeveran aptly described:

“... indeterminacy often leads institutions to seek licenses much more frequently than legally necessary. Even an individual or institution that takes a risk-adverse approach to education uses of content may sometimes find it impossible to evaluate risks and benefits in an informed fashion”.<sup>53</sup>

Indeterminacy and fear on the part of students and teachers mark the beginning of a vicious cycle. Fisher and McGeveran continued to explain:

“The more extensively educators seek licenses to use content, and the easier rightholders make it to procure such licenses, the more pressure it puts on the fair use analysis whenever licenses are not sought. Courts have been more likely to reject fair use defenses when there is a demonstrated market for the content being used. While educators certainly should seek licenses when they are truly necessary, doing so out of excessive caution, when fair use would otherwise apply, is harmful”.<sup>54</sup>

The fact that there is no reported case on fair dealing in Hong Kong suggests that this issue is seldom litigated in Hong Kong. The likely reason is not that copyright owners rarely take issue with unauthorised uses of their works (otherwise they would not have established the HKRRLS and collective licensing schemes in the first place), but that educators (along with other users of copyright work) are generally risk adverse and will seek for permission instead of rely on a copyright exception such as s 41A.

<sup>52</sup> Since the existence of a relevant licensing scheme does not preclude the application of s 41A, licensing schemes with the HKRRLS are no longer compulsory; and s 45(2), which disapplies the existing exception for reprographic copying by education establishments, is rendered obsolete. However, s 45(2) has not been repealed since copyright owners are concerned that there will be reduced incentives for seeking *voluntary* licensing from collective licensing societies. See “Report of the Bills Committee on Copyright (Amendment) Bill 2006” 25 June 2007, *Legislative Council*, available at: <http://www.legco.gov.hk/yr05-06/english/bc/bc01/reports/bc010627cb1-1980-e.pdf>.

<sup>53</sup> William Fisher and William McGeveran, “The Digital Learning Challenge: Obstacles to Education Uses of Copyrighted Material in the Digital Age”, Berkman Center Research Publication No. 2006-09, *Harvard University*, available at: <http://cyber.law.harvard.edu/media/files/copyrightandeducation.html> (visited 19 May 2010), quoting from s 5.1.

<sup>54</sup> *Ibid.*

Finally, although s 41A is a medium-neutral exception that expressly provides for making available of education materials online, it restrictively requires schools to limit the scope and duration of their access. In terms of scope, the school is required to adopt technological measures to ensure that materials are only accessible by students enrolled in a specified course of study,<sup>55</sup> meaning that the general public is denied access to the education content. In terms of duration, the materials cannot be stored in the network for a period longer than necessary (and not longer than one year in any case),<sup>56</sup> meaning that future students cannot benefit from the construction of an online archive of education resources accumulated over the years.

On the other hand, copyright may impede organisational efforts to digitise traditional educational works such as books and academic journals for the benefit of global learners with Internet access. The best example is the Google Book Search Library Project launched by Google in 2004.<sup>57</sup> The Internet search giant started to scan millions of books into digital form and display the text in small “snippets” in response to online search enquiries. In 2005, the Authors Guild of America and Association of American Publishers brought actions against Google for copyright infringement. Google counter-argued that displaying only small sections of a book constituted fair use under US copyright law. Indeed, the reporting of search results itself was likely fair use since the quotations displayed were too fragmented to amount to substantial reproduction of a book. However, the focus of the plaintiffs’ argument was on the acts of scanning millions of copyrighted books in full and saving them onto Google’s databases. These acts undeniably constituted “copying” under the US law, and pleading fair use would be difficult for Google. The US courts have traditionally given more weight to the first factor (purpose and character of the use) and the fourth factor (market harm) under s 107 of the Copyright Act: since Google’s use was both commercial and non-transformative (verbatim copies of books being made), the company would bear the burden of proving the absence of market harm.<sup>58</sup> The burden would be difficult to discharge given the court might consider that the digital library amounted to a viable potential

<sup>55</sup> Section 41A(5)(a)(i), HKCO.

<sup>56</sup> Section 41A(5)(a)(ii), HKCO.

<sup>57</sup> The following discussion is based on: Mathew Sag, “The Google Book Settlement and the Fair Use Counterfactual” (2010) *New York Law School Review* (forthcoming), pp 11–26, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1437812](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437812) (visited 19 May 2010); “Digital books: A new chapter”, *The Economist*, 30 October 2008; “Google Books”, *Wikipedia*, available at: [http://en.wikipedia.org/wiki/Google\\_Books](http://en.wikipedia.org/wiki/Google_Books) (visited 19 May 2010).

<sup>58</sup> See *Princeton University Press v Michigan Document* 99 F.3d 1381, 1385–1386 (6th Circ. 1996).

market for the publishers' works. The risk of losing the litigation perhaps prompted Google to reach a settlement with the publishers' representatives in October 2008. The settlement required Google to pay US\$125 million to compensate the copyright holders and to establish a "Books Rights Registry", which would serve as a collecting society for digital access to the publishers' works. Users wishing to gain access beyond the prescribed limits are now forced to either purchase the entire book or pay on a per-page basis. No longer is there free access to full education works on Google Book Search, except for books out of copyright. As Professor James Boyle criticised:

"... [B]ad policy may lock up our cultural heritage unnecessarily, leave it to molder in libraries, forbid citizens to digitize it, even though the vast majority of it will never be available publicly and no copyright owner can be found. Would you not prefer the world in which your children could look at the Library of Congress online catalogue and click to get the book or film or song that otherwise languished as an 'orphan work'?"<sup>59</sup>

### ***Role of CC in Hong Kong's Education Sector***

CC helps to implement the right to education by ensuring equal access to education tools and hence the opportunity to learn and flourish. The open courseware movement is a prime example. In 2002, the Massachusetts Institute of Technology (MIT) launched the MIT OpenCourseware (OCW),<sup>60</sup> an online platform which makes available university course materials (including course syllabuses, lecture notes, assignments, past exams and even lecture recordings) to students and self-learners around the world. All materials are distributed for free under the CC Attribution-Noncommercial-Share-Alike licence. As of June 2009, over 1900 MIT undergraduate and graduate courses were available online, including 27 courses with complete lecture videos which may be streamed online or downloaded for viewing at a later time.<sup>61</sup> The MIT initiative was followed by Connexions<sup>62</sup> of Rice University in 2004. Connexions is essentially a freely accessible repository of education materials organised in small

<sup>59</sup> James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven & London: Yale University Press, 2009), p 246.

<sup>60</sup> <http://ocw.mit.edu>

<sup>61</sup> "MIT OpenCourseWare", *Wikipedia*, available at: [http://en.wikipedia.org/wiki/MIT\\_OpenCourseWare](http://en.wikipedia.org/wiki/MIT_OpenCourseWare) (visited 19 May 2010).

<sup>62</sup> <http://cnx.org>.

modules which may be used as building blocks for a course of study at the secondary or tertiary level. The Connexions approach is premised upon the conviction that learning should be “modular and non-linear”: it aims to “let students to see the relationships both within and between topics and helps demonstrate that knowledge is naturally interconnected”.<sup>63</sup> More than 4500 modules are currently hosted under the CC Attribution licence and the modules have been developed into courses ranging from engineering to musicology.<sup>64</sup> Not only does open courseware enable education materials to be shared freely and legally among teachers and students, but also learners who are struggling to overcome education barriers of poverty and geographical isolation.<sup>65</sup> It also helps people to become socially included and hence productive members of society by providing them with access to global knowledge.<sup>66</sup> Open courseware such as Connexions also facilitates collaboration between educators through a review system under which modules are rated according to feedback provided by users.<sup>67</sup>

To make education truly accessible on a global scale, the open courseware movement has to undergo a further process of “glocalisation”, meaning the adaptation of education materials to suit local needs.<sup>68</sup> MyOOPS<sup>69</sup> was therefore established in 2004 by a group of Taiwanese volunteers with a view to translating all MIT OCW materials into Chinese so that they can be widely used by teachers and students in Greater China.<sup>70</sup> Meanwhile, more than 200 universities around the world (including 15 from Mainland China and Taiwan) participated in the joint establishment of the OpenCourseWare Consortium<sup>71</sup> to encourage the adoption and adaptation of open education materials around the world. Although none of the Hong Kong universities has yet become a member of the Consortium, the HKU JMSC has taken the lead by

<sup>63</sup> “Connexions – Philosophy”, *Connexions*, available at: <http://cnx.org/aboutus> (visited 19 May 2010).

<sup>64</sup> “Connexions – History”, *Connexions*, available at: [http://en.wikipedia.org/wiki/MIT\\_Open\\_CourseWare](http://en.wikipedia.org/wiki/MIT_Open_CourseWare) (visited 19 May 2010).

<sup>65</sup> Henk Huijser et al, “OpenCourseWare, Global Access and the Right to Education: Real access or marketing ploy?” (2008) 9(1) *International Review of Research in Open and Distance Learning* 1, 2, available at: <http://www.irrodl.org/index.php/irrodl/article/view/446/1008> (visited 19 May 2010).

<sup>66</sup> See n 65 above, p 10.

<sup>67</sup> Michael Carroll, “Creative Commons as Conversational Copyright”, in Peter Yu (ed), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (Westport: Praeger Publishers, 2007), p 453.

<sup>68</sup> See n 65 above, pp 2–6.

<sup>69</sup> <http://www.myoops.org>

<sup>70</sup> “周日話題: 集體智慧 創意共生 CC點點的分享” (in Chinese), *Mingpao*, 2 Nov 2008, available at: <http://hk.news.yahoo.com/article/081101/4/90yx.html> (visited 19 May 2010).

<sup>71</sup> <http://www.ocwconsortium.org>.

publishing course materials – such as the New Media Workshop course webpage<sup>72</sup> and the derivative Hong Kong Stories website<sup>73</sup> hosting students' coursework – under a CC Attribution licence. The HKU Philosophy Department has also made available the Critical Thinking Web,<sup>74</sup> which contains over 100 free online tutorials on critical thinking and logic, under an Attribution-Noncommercial-Share-Alike licence. The HKU Law Faculty is currently planning to open up assignments and student research papers for free public access in the near future.<sup>75</sup> On the other hand, the Self Learning College forum<sup>76</sup> has been established by a group of Hong Kong educators to help with the translation work of OOPS and also to supplement OCW materials with useful education resources ranging from weblinks to vocabulary lists.

The open courseware movement has been gradually expanding from the tertiary education sector to secondary school education. An important aspect of the recent education reform in Hong Kong is that Liberal Studies will become a compulsory subject for every secondary school student sitting for the Hong Kong Diploma of Secondary Education. The new subject adopts a cross-disciplinary approach and emphasises particularly critical thinking, moral values and civic education in the Hong Kong context.<sup>77</sup> It also takes a student-oriented approach and requires students to critically evaluate media resources on contemporary issues so as to distinguish between facts and opinions, and sense objectivity versus bias. The curriculum consists of three areas of study, namely “Self and Personal Development”, “Society and Culture” and “Science, Technology and the Environment”, which can be further divided into six modules. Apart from taking a public examination, each student will carry out an Independent Enquiry Study on a specific issue (such as the feasibility of imposing sales tax in Hong Kong and the impact of pornography on social values) and present findings and reflections in a report. Given the dynamic and fast-moving nature of the subject, teaching and learning are expected to go beyond standard textbooks and rely more on open resources on the Internet.

In response to the new education curriculum, CC Hong Kong and the HKU JMSC jointly launched the Liberal Studies Creative Archive<sup>78</sup> on 9 September 2009. The Archive addresses the paucity of teaching

<sup>72</sup> <http://jmsc.hku.hk/blogs/newmedia>.

<sup>73</sup> <http://jmsc.hku.hk/hkstories>.

<sup>74</sup> <http://philosophy.hku.hk/think>.

<sup>75</sup> See n 70 above.

<sup>76</sup> <http://www.self-learning-college.org/forum>

<sup>77</sup> “Liberal Studies: Curriculum and Assessment Guide (Secondary 4 – 6)”, *HKSAR Education Bureau*, available at [http://www.edb.gov.hk/FileManager/EN/Content\\_5999/ls\\_final\\_e\\_070508.pdf](http://www.edb.gov.hk/FileManager/EN/Content_5999/ls_final_e_070508.pdf) (visited 19 May 2010). The following discussion is based on the same document.

<sup>78</sup> <http://hk.creativecommons.org/archive>.

materials on Liberal Studies by pooling together text and audio-visual resources and making them available online under CC licences. Teachers and students may now freely build their Liberal Studies materials and share them for education and non-commercial use without fear of infringing copyright. Users have a choice of sorting the materials by modules or by media when browsing the Achieve online. Thus far, RTHK, Yazhou Zhoukan, Reader's Digest, the Independent Commission Against Corruption and various external websites have contributed learning resources to the Archive. The launch was shortly followed by the creation of the RTHK Creative Archive website<sup>79</sup> on 30 September 2009. This represented the first initiative by the RTHK, a public broadcaster in Hong Kong, to offer video footages, audio clips and photos covering the developments and landscape of Hong Kong under a CC Attribution-Noncommercial-No-Derivative-Works licence. Other efforts to promote Liberal Studies education are also worth mentioning. The Hong Kong Institute of Education has launched the Liberal Studies Resources Sharing Platform<sup>80</sup> to enable teachers to share their teaching materials on contemporary issues ranging from teenage drug abuse to the commercialisation of sports. The Three Teachers Blog<sup>81</sup> has been created by three Liberal Studies teachers who wish to share their views on the latest social events by uploading podcasts to the Blog every week. Both works are offered under a CC Attribution-Noncommercial licence.

At present, the Hong Kong Education City,<sup>82</sup> despite being the largest online database of primary and secondary school teaching materials established by the Education Bureau, has not adopted CC licences as part of its intellectual property policy.<sup>83</sup> The Education Bureau should follow the example of the Taiwan Ministry of Education in setting up education resources databases licensed under CC.<sup>84</sup> Teachers are likely to be willing to share their materials knowing that they will be given credit and that copyright can be enforced against commercial exploitation. However, the Bureau must tackle certain obstacles before promoting more widely sharing of education materials under CC. First, unless there is agreement to the contrary, copyright in works created by a teacher (as an employee) in the course of his employment belongs to the school (as the

<sup>79</sup> <http://www.rthk.org.hk/creativearchive/index.html>.

<sup>80</sup> <http://edblog.hkedcity.net/elshkied>.

<sup>81</sup> <http://hk3teachers.mysinablog.com>.

<sup>82</sup> <http://www.hkedcity.net>.

<sup>83</sup> Details can be found in "Copyright and Intellectual Property Rights", Hong Kong Education City, available at: [http://www.hkedcity.net/notices/tc\\_english.php#s2](http://www.hkedcity.net/notices/tc_english.php#s2) (visited 19 May 2010).

<sup>84</sup> Examples include the Taiwan Education Resources Net (<http://study.heart.net.tw>) and the Easy Teaching Web (<http://etweb.tp.edu.tw>).



employer).<sup>85</sup> A teacher must therefore seek permission from the school management before proceeding to upload his teaching materials onto a CC sharing platform. The school may well be reluctant to allow such sharing if the materials have incorporated text or audio-visual work for which permission to use has not been sought from the relevant copyright owners.<sup>86</sup> This illustrates that the CC movement can only be successful if it is promoted on a global scale so that educators will be happy to share their resources to anyone around the world.

In the 2008-09 Policy Address, Hong Kong's Chief Executive, Donald Tsang, promised to promote the use of e-books as a means to reduce the heavy financial burden placed on parents by expensive and frequently-revised textbooks.<sup>87</sup> In fact, the cost of textbooks is not entirely borne by parents: around HK\$466 million is paid out of taxpayers' money each year on textbooks.<sup>88</sup> Advocating more extensive use of e-books/textbooks has other obvious advantages. While it is impossible to reprint textbooks every day, e-books can be easily updated to reflect new knowledge and disseminate information in a fast-changing society.<sup>89</sup> Using e-books also helps to save tons of paper used in printing hardcopies which in turn alleviates environmental concerns and even health problems – since students are spared from carrying heavy schoolbags to school everyday. Not only should the Government encourage more extensive use of e-books published under CC licences, but also stimulate teachers to follow the idea of Connexions by creating customised course texts which incorporate the latest research and pedagogy tailored to match their teaching goals. The open textbook movement also helps local students to gain wider exposure to educational resources from Europe and America, which are particularly beneficial to English Medium of Instruction secondary schools in Hong Kong.<sup>90</sup>

CC has given first priority to developing open education, as evidenced by its recent establishment of ccLearn,<sup>91</sup> an education division

<sup>85</sup> Section 14(1), HKCO.

<sup>86</sup> Naomi Korn and Charles Oppenheim, "Creative Commons Licences in Higher and Further Education: Do We Care?" (2006) 49 *Ariadne*, available at: <http://www.ariadne.ac.uk/issue49/korn-oppenheim> (visited 19 May 2010).

<sup>87</sup> See "2008-09 Policy Address: Embracing New Challenges", *HKSAR Government*, available at: <http://www.policyaddress.gov.hk/08-09/eng/policy.html>, at para 51.

<sup>88</sup> Pindar Wong, "Simply copyright for the sake of Hong Kong's students", *South China Morning Post*, 15 November 2008.

<sup>89</sup> Interview with Pindar Wong (Chairman of CC Hong Kong) dated 22 October 2008, RTHK Radio 3, Morning Brew, available at: [http://www.rthk.org.hk/rthk/radio3/morning\\_brew/clips/radio3\\_2505\\_82306\\_2220.aspx](http://www.rthk.org.hk/rthk/radio3/morning_brew/clips/radio3_2505_82306_2220.aspx) (visited 19 May 2010).

<sup>90</sup> Martin Oei, "教育界無理由反對電子課本" (in Chinese), *Hong Kong Economic Journal*, 11 November 2008.

<sup>91</sup> <http://learn.creativecommons.org>.

devoted to facilitating collaboration and synergy between open education projects worldwide. The division aims to encourage wider use of open education resources by reducing legal barriers (through advocating for interoperable user terms based on CC licences) as well as technical and cultural barriers (through enhancing accessibility and adaptability of education materials to different localities).<sup>92</sup> Even before ccLearn, the Science Commons project was launched in 2005 with a view to accelerating the research cycle from the generation of research to its reuse to produce new scientific discoveries.<sup>93</sup> This is achieved through initiatives such as encouraging laboratories to make their research “re-useful”, integrating fragmented information sources and streamlining the materials-transfer process so that scientists can easily verify and extend existing research.<sup>94</sup> It is encouraging to see the CC movement expanding beyond classroom teaching to cutting-edge scholarly research, which forms the basis of new knowledge and hence education in tomorrow’s world.

## Unlocking the Potential of CC in Hong Kong’s Creative Sectors

### *Problems under the Existing Copyright System*

In the 2008-09 Policy Address, the Chief Executive announced that a creative industry office would be established under the Commerce and Economic Development Bureau to promote the development of creative industries in Hong Kong.<sup>95</sup> Accordingly, CreateHK<sup>96</sup> was officially launched in June 2009, shortly followed by the CreativeSmart Initiative which provides financial support of up to HK\$300 million to creative industry projects until 2012.<sup>97</sup>

In light of these developments, an issue of growing importance to Hong Kong is the relationship between copyright protection and stimulation of creativity and innovation. Indeed, an increasing number of intellectual property theorists such as Neil Netanel have argued that copyright should be framed in a way that fosters a creative culture in

<sup>92</sup> “Mission Statement for ccLearn – Summer 2008”, *Creative Commons*, available at: <http://learn.creativecommons.org/wp-content/uploads/2008/06/public-cclearn-mission-statement-summer-2008.pdf> (visited 19 May 2010).

<sup>93</sup> “About Science Commons”, *Science Commons*, available at: <http://sciencecommons.org/about> (visited 19 May 2010).

<sup>94</sup> *Ibid.*

<sup>95</sup> See n 87 above, at para 44.

<sup>96</sup> The website of CreateHK: <http://www.createhk.gov.hk> (visited 19 May 2010).

<sup>97</sup> Details can be found at: [http://www.createhk.gov.hk/en/service\\_createsmart.htm](http://www.createhk.gov.hk/en/service_createsmart.htm)

“a robust, participatory and pluralistic civil society”.<sup>98</sup> For Netanel, copyright law can help to foster creativity in two ways:

“The first is a production function. Copyright provides an incentive for creative expression on a wide array of political, social, and aesthetic issues, thus bolstering the discursive foundations of democratic culture and civic association. The second function is structural. Copyright supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy”.<sup>99</sup>

Professor James Boyle also puts cultural creativity at the centre of copyright policy:

“Copyright law is supposed to give us a self-regulating cultural policy in which the right to exclude others from one’s original expression fuels a vibrant public sphere indirectly driven by popular demand. At its best, it is supposed to allow a decentralized and iconoclastic cultural ferment in which independent artists, musicians, and writers can take their unique visions, histories, poems, or songs to the world – and making a living doing so if their works finds favor”.<sup>100</sup>

Disappointingly, however, copyright has not lived up to society’s expectations in promoting a creative culture. Lessig attributed this failure to two primary reasons. First, copyright law supports professional culture but not amateur culture.<sup>101</sup> To be certain, there is no surprise in that copyright protection focuses on commercial creativity. Copyright, in economic terms, is a property system that seeks to resolve the problem of free riding (ie when someone benefits from a work without compensating the creator), which is particularly serious for intellectual property due to its non-excludable and non-rivalrous nature.<sup>102</sup> Professional creators, ie those who create works to be sold for profit, are therefore given exclusive rights to commercially exploit their works for a limited duration so as to preserve their incentives to innovate. On the other hand, amateur culture – engaged by “people who produce not for money, but for the love

<sup>98</sup> Neil Netanel, “Copyright and a Democratic Civil Society” (1996) 106 *Yale Law Journal* 283, at 343.

<sup>99</sup> See n 98 above, p 288.

<sup>100</sup> See n 59 above, p 7.

<sup>101</sup> See n 5 above, pp 7–8.

<sup>102</sup> Lawrence Lessig, *Remix* (New York: Penguin Press, 2008), p 289.

of what they do”<sup>103</sup> – was traditionally left untouched by copyright law. As Lessig observed in *Free Culture*:

“When old men sat around parks or on street corners telling stories that kids and other consumed, that was noncommercial culture. ... [F]or just about the whole of our tradition, noncommercial culture was essential unregulated. Of course, if your stories were lewd, or if your song disturbed the peace, then the law might intervene. But the law was never directly concerned with the creation or spread of this form of culture, and it left this culture ‘free’. The ordinary ways in which ordinary individuals shared and transformed their culture – telling stories, reenacting scenes from plays or TV, participating in fan clubs, sharing music, making tapes – were left alone by the law”.<sup>104</sup>

However, amateur culture is no longer “free” as copyright law has continually expanded in scope over the last three centuries. Hong Kong copyright law originates from English copyright law.<sup>105</sup> The Statute of Anne 1709, the first modern copyright statute in English law, only gave the author of a published book “the sole and exclusive liberty of *printing* such book” for a period of 14 years (renewable for another 14 years). It was subsequently clarified by the House of Lords in *Donaldson v Beckett*<sup>106</sup> that unpublished works still enjoyed a perpetual right of first publication at common law (though this was abolished by the Copyright Act 1911), while copyright for published works was solely governed by statute and was later extended to encompass “the sole and exclusive liberty of *printing or otherwise multiplying copies* of [books]” by the Copyright Act 1842. The focus of copyright law has since then changed from regulating printing and publishing to the making of copies. The law also expanded to regulate the making of adaptations (not merely copies) when the Copyright Act 1911 was enacted to confer both a translation right and a dramatisation right to every author, in an effort to implement the Berne Convention.<sup>107</sup> At this stage, given the economics of reproduction at the

<sup>103</sup> Lawrence Lessig, *Code: version 2.0* (New York: Basic Books, 2006), p 393.

<sup>104</sup> See n 5 above, at 8.

<sup>105</sup> Hong Kong for the first time acquired a purely local copyright law with the enactment of the HKCO (Cap 528) in June 1997. The HKCO was in part inspired by the United Kingdom Copyright, Designs & Patents Act 1988. Prior to June 1997, the United Kingdom Copyright Act 1956 was the governing law in Hong Kong. The 1956 Act had been extended to Hong Kong by the Copyright (Hong Kong) Orders from 1972 to 1990. Schedules 6 and 7 of the 1956 Act also preserved the operation of some parts of the Copyright Act 1911 for works created before 12 Dec 1972. For details, see Michael Pendleton and Alice Lee, *Intellectual Property in Hong Kong* (Hong Kong: Lexis Nexis, 2008), pp 119–120.

<sup>106</sup> (1744) 2 Brown’s Parl. Cases 129.

<sup>107</sup> Kevin Garnett et al, *Copinger and Skone James on Copyright* (London: Sweet & Maxwell, 2005), pp 40–11.

prevailing time, non-commercial copying and transformation remained free from copyright regulation. Then came a swift wave of technologies which enabled individuals to make private copies easily: the Xerox photocopier in the late 1960s, the Sony Betamax recorder in the mid-1970s, and devices for copying cassette tapes in the 1980s.<sup>108</sup> With the advent of digital technologies and the Internet in the late 1990s, amateur transformation and remixing also became popular. Not only has modern technology expanded the scope of amateur culture, but it has also extended the reach of copyright law to regulate both private copying and transformation.<sup>109</sup> It should be noted that the copyright system was originally designed to strike a balance between incentives and access: while the WIPO Copyright Treaty “emphasiz[ed] the outstanding significance of copyright protection as an incentive for literary and artistic creation”, the Treaty also “recogniz[ed] the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”.<sup>110</sup> However, the balance has been tipped towards the incentives side in light of technological innovation. Ironically, incentives for amateur creativity are not derived from copyright protection nor commercial exploitation, but simply passion for whatever the individual is engaged in.

Secondly, copyright law supports a “read-only” culture but not a “rewrite” culture (Lessig used “RO” and “RW” to denote the two).<sup>111</sup> RO, fuelled by professionals, refers to the simple consumption of copyrighted material purchased by an individual, such as a couch potato watching a DVD film. In contrast, RW is engaged by both professionals and amateurs who “add to the culture they read by creating and re-creating the culture around them”.<sup>112</sup> Music remixing and video mash-ups are prime examples of RW cultures. Digital technologies have enhanced the technical capacity of individuals to remix creativity and fostered a RW culture through easy sharing of works over the Internet. However, every use in the digital context produces a copy and hence triggers copyright regulation.<sup>113</sup> When someone plays a CD on computer, the recording must be reproduced into the computer memory before the music can reach his ears through headphones or speakers, and hence the necessity of end

<sup>108</sup> See n 102 above, pp 101–102.

<sup>109</sup> See n 5 above, p 171.

<sup>110</sup> Preamble, WIPO Copyright Treaty (1996).

<sup>111</sup> See n 102 above, pp 97–105.

<sup>112</sup> See n 102 above, p 28.

<sup>113</sup> See n 5 above, p 143.

user licences.<sup>114</sup> If the person proceeds to remix songs from a number of CDs without permission, he will likely violate ss 23 or 29 of the HKCO by copying or making an adaptation of a substantial part of a copyright work.<sup>115</sup> When the law is out of sync with technology, there is a need to change either the law or technology. Indeed, both copyright law and technologies have changed over the years, only to favour a RO culture at the expense of RW culture.<sup>116</sup> In terms of technology, digital rights management (DRM) is increasingly employed by copyright owners to restrict copying or control access of their works. For example, DRM may require a purchaser of a CD to use specific playback devices, control the frequency and duration of playing the CD or prevent him from shifting the contents into a different format (eg MP3) or medium (eg portable media player) for listening on-the-go. Meanwhile, copyright law supplements these restrictive measures by rendering illegal the circumvention of DRM or dealing in circumvention devices.<sup>117</sup> Bound by such restrictions, an individual has no choice but to seek for permission or rely on existing copyright defences. However, high transaction costs are likely to deter him from seeking a licence from the copyright owner. As for defences, fair dealing under the HKCO is confined to specific purposes<sup>118</sup> and in any event, the courts will unlikely consider the circumvention of DRM as “fair”. DRM also trumps the media shifting exception (under the recent copyright reform proposals), which is conditioned upon “no circumvention of technological measures applied by the copyright owner to protect the sound recording”.<sup>119</sup> As Lessig bluntly pointed out:

“This is how code becomes law. The controls built into the technology of copy and access protection becomes rules, the violation of which is also a violation of the law. In this way, the code extends the law – increasing its regulation, even if the subject it regulates (activities that would otherwise plainly constitute fair use) is beyond the reach of the law. Code becomes law; code extends the law; code thus extends the control that copyright owners effect ...”<sup>120</sup>

<sup>114</sup> See n 104 above, p 99.

<sup>115</sup> “Adaptation” under s 29, HKCO means, in relation to a music work, an arrangement or transcription of the work. For an act of copying or making an adaptation to constitute copyright infringement, it must be done in relation to a substantial part of the work: s 22(3)(a), HKCO.

<sup>116</sup> See n 102 above, p 98.

<sup>117</sup> See ss 273 to 273H of the HKCO introduced as part of the 2007 amendment.

<sup>118</sup> See n 30 above.

<sup>119</sup> See n 38 above, p 7, fn 14.

<sup>120</sup> See n 5 above, p 160.

The bias of copyright law against amateur creativity and RW culture has created unhappy incidents in different creative sectors worldwide. In 2003, DJ Danger Mouse created a ground-breaking mashup album, the *Grey Album*, by mixing a cappella versions of Jay-Z's *The Black Album* with instrumentals crafted from samples of The Beatles' *The White Album*.<sup>121</sup> Considerable controversy was caused when EMI, the copyright owner of *The White Album*, sent cease and desist letters to DJ Manger Mouse and online retailers, demanding them to cease distribution of *The Grey Album* and destroy all existing copies. On 24 February 2004, known as "The Grey Tuesday", 170 websites posted copies of *The Grey Album* for free downloading in an act of protest and civil disobedience, resulting in over 100,000 copies being downloaded and more warning letters sent by the EMI. Similar threats were faced by GirlTalk, a young American musician who created the famous *Night Ripper* album by remixing more than 200 samples from 167 artists ranging from Elton John to Destiny's Child – none of which he obtained permission to use.<sup>122</sup> While *The New York Times* described GirlTalk's music as "a lawsuit waiting to happen",<sup>123</sup> GirlTalk believed that music re-mixing had already become a practice of this generation:

"People are going to be forced – lawyers and ... older politicians – to face this reality: that everyone is making this music and that most music is derived from previous ideas. And that all pop music is made from other people's source material. And that it's not a bad thing. It doesn't mean you can't make original content".<sup>124</sup>

Meanwhile, director Jonathan Caouette stunned the world when his film *Tarnation*, initially made with a budget of only US\$218 using the iMovie software on his computer, won the Best Documentary in the 2004 Los Angeles Independent Film Festival.<sup>125</sup> However, US\$400,000 more was eventually spent to clear copyrights in sound, print, score and music in order to bring the film to the theatres.<sup>126</sup>

<sup>121</sup> The following discussion regarding DJ Danger Mouse is based on: Matthew Rimmer, *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Cheltenham: Edward Elgar, 2007), pp 132–134.

<sup>122</sup> See n 102 above, p 11.

<sup>123</sup> Rob Walker, "Mash-up Model", *The New York Times*, 30 July 2008, available at: <http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html> (visited 19 May 2010).

<sup>124</sup> See n 102 above, p 15.

<sup>125</sup> Ian Youngs, "Micro-budget Film Wow Cannes", *BBC News*, 18 May 2004, available at: <http://news.bbc.co.uk/2/hi/entertainment/3720455.stm> (visited 19 May 2010).

<sup>126</sup> *Ibid.*

Ironically, copyright owners have even discouraged fan creativity which would only have helped to promote their commercial products. For example, Wind-Up Records, a well-known record label, ordered a website hosting Anime Music Videos (ie Japanese cartoons remixed with music tracks) to take down the videos despite the many hours of “volunteer work” offered by children who uploaded them.<sup>127</sup> In another incident, Sony Corporation sent a cease and desist letter to a fan of the Sony AIBO robotic dog who created a website, aibopet.com, teaching other fans how to circumvent DRM to teach their dogs to dance jazz.<sup>128</sup> As these examples illustrate, copyright enforcement is no longer a commercial strategy, but simply a religion of copyright owners, who make every effort to curb the creative culture induced by their own products. Despite the courts’ increasingly willingness to protect transformative unauthorised uses, when fans are threatened with astronomical civil damages, their likely response is to shut down their activities rather than stand their ground against copyright owners.<sup>129</sup>

### *Role of CC in Hong Kong’s Creative Sectors*

When CC Hong Kong was officially launched in October 2008, interviews were conducted with representatives from different creative industries who shared their views on how CC could assist their creative endeavours. Ian Parkinson was the representative from the music industry.<sup>130</sup> Red Door,<sup>131</sup> his music and sound design company, frequently interacted with different industry players such as composers, record companies, directors and other music remixers. However, communication barriers existed between the players: they could only co-operate with each other through lawyers who would handle complicated licensing issues. As Parkinson described, seeking a licence to remix music was a daunting process. A licensee had to sign through a twenty-page licence agreement and distribute multiple copies to all interested parties. The picture would be even more complicated if instead of a licence between an artist

<sup>127</sup> See n 103 above, p 195.

<sup>128</sup> Lawrence Lessig, “The Creative Commons” (2003) 55(3) *Florida Law Review* 763, 765–766.

<sup>129</sup> Rebecca Tushnet, “Payment in Credit: Copyright Law and Subcultural Creativity”, in James Boyle and Lawrence Lessig (ed), *Cultural Environmentalism @ 10*, 70 *Law and Contemporary Problems* 135 (Spring 2007), pp 141–142. An electronic copy of the article is available at: <http://www.law.duke.edu/journals/lcp/lcptoc70spring2007>.

<sup>130</sup> Unless otherwise indicated, the following discussion is based on the interview with Ian Parkinson dated 25 October 2008, available at: <http://hk.creativecommons.org/resources/launchfestival> (visited 19 May 2010).

<sup>131</sup> <http://www.reddoorhk.com>.



and a remixer, the agreement concerned cross-licensing between record companies wishing to put together a compilation album. One may ask: why could not a musician rely on an implied permission to remix instead of asking for an express licence? Indeed, the UK and US courts used to allow small amounts of music sampling based on the legal maxim of “*de minimis non curat lex*” (ie “the law cares not for trifles”).<sup>132</sup> The turning point was *Bridgeport Music v Dimension Film*,<sup>133</sup> where the US Sixth Circuit Court of Appeals rejected a *de minimis* inquiry and insisted that every digital sampling required a licence:

“[A] sound recording owner has the exclusive right to ‘sample’ his own recording. We find much to recommend this interpretation. To begin with, there is ease of enforcement. ... It must be remembered that if an artist wants to incorporate a ‘riff’ from another work in his or her recording, he is free to duplicate the sound of that ‘riff’ in the studio”.<sup>134</sup>

Meanwhile, the fair dealing defence is limited to situations where a song is sampled for criticism and review purposes.<sup>135</sup> The default rule remains that a remixer needs to obtain permission from the copyright owner for every use of a sample. Lessig therefore argued that copyright law should be reformed to expand the scope of the fair use defence for making derivative works and to introduce compulsory licensing for digital sampling.<sup>136</sup>

In the absence of legal reform, CC licences designed for digital sampling and mash-ups can help to fill the gap. In 2003, CC Sampling

<sup>132</sup> In the United Kingdom, prior to the decision in *Produce Records v BMG Entertainment* (1999, unrep.), the courts generally recognised a “three second rule”, ie no action would succeed against a music sampler who used three seconds or less of the original work. This rule was rejected by Parker J along with the strike-out application by the defendant in the above case. According to Parker J, the issue of substantial reproduction was a question of fact to be assessed by the court with the assistance of expert evidence provided by musicologists. In the US case *Newton v Diamond* 349 F.3d 591 (9th Circ. 2003), the majority held that unauthorised use of a music sample, being a six-second, three-note sequence of the plaintiff’s composition, by the defendant music band was *de minimis* and therefore not actionable. However, *Newton* is somewhat a confusing precedent as the defendant group obtained a licence from ECM Records to sample the *sound recording*; at issue in the case was instead the sampling of the musical work owned by the plaintiff composer. Both cases were discussed in Ben Challis, “The Song Remained the Same: A Review of the Legalities of Music Sampling”, *WIPO Magazine*, Nov 2009, available at: [http://www.wipo.int/wipo\\_magazine/en/2009/06/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2009/06/article_0006.html) (visited 19 May 2010).

<sup>133</sup> 410 F.3d 792 (6th Circ. 2005).

<sup>134</sup> See n 133 above, p 801.

<sup>135</sup> See s 39, HKCO. Note that unlike Australian copyright law, the HKCO does not provide a specific exception for parody and satire.

<sup>136</sup> See n 5 above, pp 294–295; Lawrence Lessig, “The Black and White Waged By Grey Tuesday”, *Lessig Blog*, available at: [http://lessig.org/blog/2004/02/the\\_black\\_and\\_white\\_about\\_grey.html](http://lessig.org/blog/2004/02/the_black_and_white_about_grey.html) (visited 19 May 2010).

Licences were introduced for musicians who wished to encourage sampling and reworking of their music. Since then, their use has extended beyond music sampling to remixing of other audio-visual materials, such as incorporating a clip into a video creation, or putting a photograph into a new collage.<sup>137</sup> Licensors can choose between the CC Sampling Plus licence (which permits transformation for all purposes other than advertising plus non-commercial sharing of the work)<sup>138</sup> and CC Noncommercial Sampling Plus licence (which allows non-commercial transformation and sharing of the work only).<sup>139</sup> On the other hand, ccMixer.org<sup>140</sup> was established in 2004 to promote a remix culture by inviting musicians to upload tracks and samples to the site for others to download and incorporate into their own remixes.<sup>141</sup> Parkinson applauded the idea of ccMixer:

“I can write a piece of music, put it up on ccMixer for everyone to download and use. Another composer can pick it and say – hey that’s fantastic – I’d like to put some strings on that, develop it, and advance it a bit more. Another comes along and says – I want to put a flat beat behind this – and so he does. A director hearing all this may then want to put it all together and make it a project for everyone to see. ... CC is great because a lot of people freely share their music, so you can get out there much faster than any other means. Whereas with the record companies, you have to do exactly what they say. With CC, you can do things your way”.<sup>142</sup>

Meanwhile, the *Wired Magazine* included in its November 2004 issue a copy of *The Wired CD*, a collection of 16 songs produced under CC Sampling Licences, encouraging readers to “[r]ip, mix, burn [and] swap till your drop”.<sup>143</sup> Since 2004, ccMixer has been the host of the *Wired CD* remix contest and several other competitions which offered recording contracts as prizes.<sup>144</sup> Indeed, music remixing has developed into a

<sup>137</sup> See <http://creativecommons.org/license/sampling>.

<sup>138</sup> See the Commons Deed of the CC Sampling Plus 1.0 licence, available at: <http://creativecommons.org/licenses/sampling+/1.0> (visited 19 May 2010). This is a generic licence and has not been ported into Hong Kong law to date.

<sup>139</sup> See the Commons Deed of the CC Noncommercial Sampling Plus 1.0 licence, available at: <http://creativecommons.org/licenses/nc-sampling+/1.0> (visited 19 May 2010). Same as the CC Sampling Plus licence, this licence has not been ported into Hong Kong law yet.

<sup>140</sup> <http://ccmixter.org>

<sup>141</sup> See “ccMixer”, *Wikipedia*, available at <http://en.wikipedia.org/wiki/CcMixer> (visited 19 May 2010).

<sup>142</sup> A direct quote from Ian Parkinson’s interview mentioned in n 137 above.

<sup>143</sup> Thomas Goetz, “Sampling the Future”, *Wired Magazine*, November 2004, available at: <http://www.wired.com/wired/archive/12.11/sample.html> (visited 19 May 2010).

<sup>144</sup> See n 141 above.

global exchange between musicians under the common language of CC. In 2003, Colin Mutchler, an American musician, composed a guitar track called “My Life” and uploaded it to Opsound (a sound resource with all content made available under CC licences).<sup>145</sup> His work inspired Cora Beth, a young violinist who added a violin track to the guitar track and named the remix as “My Life Changed”. This in turn inspired Francois Burdon (in France) to create a ballad which Lawrence Cosh-Ishii and Takahiro Miyao (in Japan) video-recorded and named as “My Life Changed Completely”. Finally, Tryad, a virtual band with members from Ohio, Washington and Japan, added a vocal track to the song and called it “Our Lives Changed”. It is amazing to see how musicians from different parts of the world can collaborate with each other through the network of CC.

V-artist, a local media advocacy group which produces video documentaries on social issues, spoke for the film-making industry in the interviews.<sup>146</sup> They started with an example of making a documentary on Hong Kong heritage stories. For the documentary to sound historical and realistic, directors need to gather myriads of audio-visual resources ranging from video footages to background music tracks. Amateur or start-up film makers are frequently forced to forgo the best quality video clips and sound tracks since they cannot afford their licensing fees. To avoid copyright infringement, they have to compose their own music or use open audio-visual resources made available by foreign film producers. However, cultural differences may result in a lack of empathy when foreign sound tracks are transposed onto a local documentary describing the history of Hong Kong. The process of clearing rights is also unduly complicated and expensive. To create a film based on a novel, the director needs the author’s permission before he can create an adaptation of the book. To use a song in a film, the director needs to clear rights with the composer of the melody (a musical work), the author of the lyrics (a literary work), the copyright owner of the sound recording<sup>147</sup> and the artist performing the song (who owns performance rights).<sup>148</sup> Further complication is caused by “orphan works”: what should a director do if he discovers photographs of Hong Kong during the Japanese Occupa-

<sup>145</sup> The following case study has been reported in Joyce Kam, “An uncommon alliance”, *The Standard*, 5 November 2008, available at: [http://www.thestandard.com.hk/news\\_detail.asp?we\\_cat=16&art\\_id=73835&sid=21311485&con\\_type=1&d\\_str=&fc=4](http://www.thestandard.com.hk/news_detail.asp?we_cat=16&art_id=73835&sid=21311485&con_type=1&d_str=&fc=4) (visited 19 May 2010).

<sup>146</sup> Unless otherwise indicated, the following discussion is based on the interview with V-artist, available at: [http://hk.creativecommons.org/wp-content/uploads/2009/04/waiyi\\_interview.ogg](http://hk.creativecommons.org/wp-content/uploads/2009/04/waiyi_interview.ogg) (visited 19 May 2010), and the summary provided in the CC Education Kit (n 17 above), p 6.

<sup>147</sup> This is normally the producer of the sound recording: see ss 11(2)(a) and 13 of the HKCO.

<sup>148</sup> See ss 201 to 207 of the HKCO.

tion period but whose copyright owners can never be traced? And what about incidental copyright works such as pieces of artwork or furniture appearing in the film for only several seconds?<sup>149</sup> Although such uses arguably fall under the exceptions for fair dealing or incidental inclusion under the HKCO, carriers of errors and omissions insurance take a dim view of copyright exceptions, and film makers will unlikely risk spending millions defending a legal claim in the aftermath.<sup>150</sup> The rights clearing process is even more onerous for the increasingly popular practice of “film sampling”, which mashes-up existing films to allow audiences to appreciate old movies in a new light.<sup>151</sup> One could imagine the complication involved in identifying every actor in a film, contacting them individually, agreeing on the compensation for what might be a few seconds of appearance and repeating the whole process for all other films in the remix.<sup>152</sup> Besides, educators of film-making who circumvent DRM systems in DVDs to produce compilations of movie excerpts for students may face civil liability under s 273A of the HKCO.

Anson Mak, a local film artist who won several Hong Kong Independent Short Film and Video Awards, shared her views on how CC could facilitate amateur film-making during an interview.<sup>153</sup> She specifically mentioned the Public Records Office (PRO) established by the local government.<sup>154</sup> The PRO maintains a rich archive of historical documents, photographs, movies and other records tracing the governance and evolution of Hong Kong. However, these heritage resources are only accessible on-site at the Hong Kong Public Records Building located in Kowloon. Anson Mak therefore suggested that the PRO digitise and make available these resources under CC licences so that film makers could download and incorporate them into their projects. More specifically, the PRO can create an online sharing platform for their audio-visual materials, following overseas examples of Internet Archive and the Flickr Commons. Internet Archive<sup>155</sup> is the world's largest non-profit digital library based in San Francisco which hosts media collections attested by the uploader to be in the public domain

<sup>149</sup> This issue was raised in Lawrence Lessig, *The Future of Ideas* (New York: Random House, 2001), p 3.

<sup>150</sup> See n 5 above, p 98.

<sup>151</sup> See n 5 above, p 107.

<sup>152</sup> A case study was provided by Lessig (n 5 above), pp 100–105, to illustrate the complicated process of clearing rights for film sampling.

<sup>153</sup> Unless otherwise indicated, the following discussion is based on the interview with Anson Mak, available at: [http://hk.creativecommons.org/wp-content/uploads/2009/04/anson\\_interview.ogg](http://hk.creativecommons.org/wp-content/uploads/2009/04/anson_interview.ogg) (visited 19 May 2010), and the summary provided in the CC Education Kit (n 17 above), pp 6–7.

<sup>154</sup> The website of the PRO: <http://www.grs.gov.hk/ws/index.htm> (visited 19 May 2010).

<sup>155</sup> <http://www.archive.org>.

or available for redistribution under a CC licence. Flickr Commons,<sup>156</sup> meanwhile, is a joint venture between Flickr.com and Australia's Powerhouse Museum, which became the world's first museum to release publicly-held historical photographs for free online access under a CC Attribution-Noncommercial-No Derivative-Works licence.<sup>157</sup> Anson Mak has set a good example by licensing her Kwun Tong Culture and Histories website<sup>158</sup> under CC to encourage the use and remix of multimedia works capturing changes in Kwun Tong's landscape in the course of urban renewal. On the other hand, overseas news agencies such as CNN<sup>159</sup> have begun releasing video interviews with politicians under CC licences to encourage film makers to incorporate them into their productions. InMediaHK,<sup>160</sup> a local citizen media website, followed CNN's idea by licensing all video-recorded interviews with 2008 Legislative Council Election candidates under CC for easy sharing and remixing. The Government's support in the development of digital film resources archives is vital since private organisations do not have the network capacity necessary to support large-scale uploading and downloading of audio-visual materials.

The recent decade saw the proliferation of new media channels such as weblogs and Internet radio stations. Despite issues of adverse selection have arisen from the explosion of unregulated Internet content, commentators such as Lessig and Yochai Benkler have argued that an increasing number of websites are outperforming traditional media in delivering quality and truth.<sup>161</sup> Lessig also noted the problem of increasing concentration of traditional media ownership in both Europe and the United States, resulting in a homogenous, mainstream media market which is loyal to sponsors (advertisers and the government) rather than public interest.<sup>162</sup> Although such ownership concentration is not prominent in Hong Kong, there has been an increasing trend of "non-organisational concentration" of the local media since the 1997 handover through the acquisition of newspapers and television stations by pro-China businessmen.<sup>163</sup> Such media concentration may stifle content

<sup>156</sup> [http://www.flickr.com/commons?GXHC\\_gx\\_session\\_id\\_=6afecb2055a3c52c](http://www.flickr.com/commons?GXHC_gx_session_id_=6afecb2055a3c52c).

<sup>157</sup> "Powerhouse Museum, Sydney", CC Wiki, *Creative Commons*, available at: [http://wiki.creativecommons.org/Case\\_Studies/Powerhouse\\_Museum,\\_Sydney](http://wiki.creativecommons.org/Case_Studies/Powerhouse_Museum,_Sydney) (visited 19 May 2010).

<sup>158</sup> <http://www.kwuntongculture.hk>.

<sup>159</sup> <http://www.cnn.com>.

<sup>160</sup> <http://www.inmediahk.net>.

<sup>161</sup> See n 102 above, p 62; and Yochai Benkler, *The Wealth of Networks* (New Haven: Yale University Press, 2006), pp 225–233.

<sup>162</sup> Lawrence Lessig, "The Creative Commons" (2004) 65 *Montana Law Review* 1, 8–9.

<sup>163</sup> Anthony Fung, "Political Economy of Hong Kong Media: Producing a Hegemonic Voice" (2007) 17(2) *Asian Journal of Communication* 159, 163.

creativity in Hong Kong and encourage traditional media channels to creep towards a pro-China stance.<sup>164</sup> Fortunately, the growing adoption of CC licences by local bloggers and Internet radio stations may help new media channels to increase publicity and enter into healthy competition with the traditional media sector. InMediaHK, the citizen journalism website aforementioned, has been running as a participatory media by republishing articles written by Hong Kong bloggers on current affairs and social issues under CC licences.<sup>165</sup> InMediaHK also hosts a number of socially-concerned weblogs and supports media activism in both idea and practice.<sup>166</sup> Oiwan Lam, a frequent contributor of InMediaHK articles, is also the Northeast Asia Regional Editor of Global Voices Online,<sup>167</sup> a wider project which publishes under the CC Attribution licence writings from an international team of bloggers who monitor online conversations in their regions. For instance, in Oiwan Lam's entry witnessing the 10th-year anniversary of Hong Kong's reunification with China, she gathered views expressed by prominent local bloggers on issues ranging from freedom of speech to cyber-activism.<sup>168</sup> On the other hand, MySinaBlog,<sup>169</sup> a major blog service provider in Hong Kong, has rolled out a new feature in October 2008 that encourages users to license their blog entries under one of six CC licences.<sup>170</sup> Leila Chan,<sup>171</sup> Sidekick<sup>172</sup> and Syaoran<sup>173</sup> are among the famous citizen journalists who license their weblogs under CC. Apart from blogging, Internet radio broadcasting is also increasingly popular within the Hong Kong community. In 2005, Open Radio Hong Kong<sup>174</sup> (ORHK) was founded with a view to providing a wide variety of entertainment, culture and technology programmes for online streaming. ORHK also maintains an archive of past programmes which can be downloaded as podcasts under a CC Attribution-Noncommercial-No Derivative-Works licence.<sup>175</sup> Another

<sup>164</sup> See n 163 above, p 165.

<sup>165</sup> "InMediaHK", CC Wiki, Creative Commons, available at: [http://wiki.creativecommons.org/Case\\_Studies/InMediaHK](http://wiki.creativecommons.org/Case_Studies/InMediaHK) (visited 19 May 2010).

<sup>166</sup> *Ibid.*

<sup>167</sup> <http://globalvoicesonline.org>.

<sup>168</sup> See Oiwan Lam (ed), "Hong Kong: Top News in 2007 Blogosphere", *Global Voices Online*, available at: <http://globalvoicesonline.org/2007/12/31/hong-kong-top-ten-in-blogosphere-2007> (visited 19 May 2010).

<sup>169</sup> <http://mysinablog.com>.

<sup>170</sup> See the notice on: <http://admin.mysinablog.com/index.php?op=ViewArticle&articleId=1402052> (visited 19 May 2010).

<sup>171</sup> <http://leila1301.mysinablog.com>.

<sup>172</sup> <http://sidekick.myblog.hk>.

<sup>173</sup> <http://www.cuhkacs.org/~syaoran/blog>.

<sup>174</sup> <http://www.openradiohk.com>.

<sup>175</sup> <http://www.openradiohk.com/podcast.php>.

example is PSMSAR,<sup>176</sup> an online music podcast programme established by Felix Wong, a white collar worker in Hong Kong, to fulfill his childhood dream of becoming a disc jockey. The podcast station selects music of podsafe<sup>177</sup> artists around the world and all content is made available under a CC Attribution-Noncommercial-Share-Alike licence. Finally, a growing number of content hosts, including YouTube,<sup>178</sup> DotAsia,<sup>179</sup> eyeVio<sup>180</sup> and blip.tv,<sup>181</sup> have adopted CC licences to encourage more permissive sharing of user-generated content.

On the other hand, CC may assist amateur artists to turn professional by ensuring wide publicity of their works over the Internet. As John Barlow said, “nothing makes you famous faster than an audience willing to distribute your work for free”.<sup>182</sup> An often-cited example in Hong Kong is Kellyjackie. In 2004, the teenage Internet singer uploaded her debut song, “A Date At Disneyland”, to online forums for free sharing. The romantic song soon became the talk of the town. Within two months of the uploading, she conducted more than thirty interviews with television, radio, newspaper and magazine journalists, before eventually signing a five-year contract with Warner Music Hong Kong.<sup>183</sup> As Professor Alice Lee explained:

“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. ... 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 [CC] may have a role to play”.<sup>184</sup>

<sup>176</sup> <http://psmsar.com>

<sup>177</sup> “Podsafe” is a term used in the podcasting community. A work is “podsafe” if through licensing or otherwise, the work can be used in podcasting without infringing copyright. Works in the public domain or licensed under CC are inherently podsafe and do not require commercial licences to permit use in podcasting. For details, see: “Podsafe”, *Wikipedia*, available at: <http://en.wikipedia.org/wiki/Podsafe> (visited 19 May 2010).

<sup>178</sup> See n 11 above.

<sup>179</sup> See n 14 above.

<sup>180</sup> See n 8 above.

<sup>181</sup> *Ibid.*

<sup>182</sup> John Barlow, “The Next Economy of Ideas”, Oct 2000, available at: <http://www.wired.com/wired/archive/8.10/download.html> (visited 19 May 2010).

<sup>183</sup> Alex Hung, “將科技融入創意 拓展創意新領域” (in Chinese), *RTHK Media Digest*, available at: [http://www.rthk.org.hk/mediadigest/20090415\\_76\\_122222.html](http://www.rthk.org.hk/mediadigest/20090415_76_122222.html) (visited 19 May 2010).

<sup>184</sup> See n 51 above.

What happens after an artist has gained sufficient publicity and decides to embark on a professional career? Since CC licences are non-exclusive, the artist may choose to license the same work for profit at a later stage (though licences previously granted are irrevocable), and has the entire discretion to license future works exclusively under commercial terms without CC licences attached. MoShang,<sup>185</sup> a Taiwanese music remixer who has licensed his four albums under a CC Attribution-Noncommercial-No Derivative-Works licence, praised this flexibility of CC:

“[Artists] stood to gain much more from the exposure than we did from making it available commercially. Choosing a CC Music Sharing licence gave the listening public a clear mandate to download and share the album [while] allow[ing] us to retain the right to possibly license the music for commercial use at a later stage. Furthermore, since I’d made use of CC licensed material in the past, it seemed like the perfect opportunity to give something back to the CC community”.<sup>186</sup>

Perhaps surprisingly, some creators may choose to re-release their works under more permissive terms to allow greater re-use after gaining familiarity with CC licences. Such was the case of Cory Doctorow, author of the scientific fiction *Down and Out in the Magic Kingdom*, who switched from a CC Attribution-Noncommercial-No Derivative-Works licence to a CC Attribution-Noncommercial-Share-Alike licence one year after the book’s initial publication.<sup>187</sup> One may wonder why his publisher would agree to this. Lessig gave a logical answer:

“There are two groups of people out there: (1) those who will buy Cory’s book whether or not it’s on the Internet, and (2) those who may never hear of Cory’s book, if it isn’t made available for free on the Internet. Some part of (1) will download Cory’s book instead of buying it. Call them bad-(1)s. Some part of (2) will download Cory’s book, like it, and then decide to buy it. Call them (2)-goods. If there are more (2)-goods than bad-(1)s, the strategy of releasing Cory’s book free on-line will probably increase sales of Cory’s book”.<sup>188</sup>

<sup>185</sup> [http://moshang.net/soundjeweler\\_blog](http://moshang.net/soundjeweler_blog)

<sup>186</sup> “Asia and the Commons – Case Studies 2008”, Creative Commons, available at: <http://hk.creativecommons.org/resources/english-promotion> (visited 19 May 2010), pp 36–37.

<sup>187</sup> Jessica Coates, “Creative Commons – The Next Generation: Creative Commons licence use five years on” (2007) 4(1) *SCRIPT-ed* 72, 78.

<sup>188</sup> See n 5 above, p 284.



In Hong Kong, Snoblind,<sup>189</sup> a two-person electronic music band formed by Regina Chang and Vincent Wong, has been licensing all of its digital EPs under CC since the local launch in 2008. Although Snoblind has no immediate plans to go commercial, the band does not wish people to profit from their creativity without permission while their music is being shared freely among their supporters who agree to attribute and share alike.<sup>190</sup> The band therefore adopted the CC Attribution-Noncommercial-Share-Alike (Hong Kong) licence. Recently, Snoblind has collaborated with artists from Taiwan (including Moshang), Japan, Korea, Philippines, Malaysia, South Africa and the United States to form the CC Asia Band, with their first album, *Cabaca*, released to the public under the CC Attribution-Noncommercial-Share-Alike (Taiwan) licence.<sup>191</sup> Snoblind described their excitement about this creative joint venture:

“We had heard of some CC artists in Taiwan before. We are glad to have a chance to make songs with them and other Asian artists, though we have not met before. It is an exciting experience to collaborate with artists in the internet realm”.<sup>192</sup>

Meanwhile, Ella Koon, Hong Kong model and singer, has licensed her online image gallery<sup>193</sup> (hosted by DotAsia) containing her photographs, desktop wallpapers and mobile phone wallpapers under a CC Attribution-Noncommercial-No-Derivative-Works licence.

To promote CC in a commercial city like Hong Kong, a crucial success factor is that entrepreneurs funding the creative industries are convinced that CC is a boon rather than a bane to their business. In *Remix*, Lessig argued that online businesses and sharing networks complement rather than substitute each other:

“Commercial economies build value with money at their core. Sharing economies build value, ignoring money. ... But between these two economies, there is an increasingly important third economy: one that builds upon both the sharing and commercial economies, one that adds value to each. This third type – the hybrid – will dominate the architecture for commerce on

<sup>189</sup> <http://www.snoblind.com>.

<sup>190</sup> “Snoblind”, CC Wiki, *Creative Commons*, available at: [http://wiki.creativecommons.org/Case\\_Studies/Snoblind](http://wiki.creativecommons.org/Case_Studies/Snoblind) (visited 19 May 2010).

<sup>191</sup> The album can be accessed for free at: <http://www.indievox.com/disc/881> (visited 19 May 2010).

<sup>192</sup> See n 145 above.

<sup>193</sup> <http://www.ella.asia/gallery.html>.

the Web. ... The hybrid is either a commercial entity that aims to leverage value from a sharing economy, or it is a sharing economy that builds a commercial entity to better support its sharing aims. Either way, the hybrid links two simpler, or purer, economies, and produces something from the link".<sup>194</sup>

One example of a "hybrid economy" is Flickr,<sup>195</sup> an online community allowing users to easily share their photographs and obtain feedback from friends and other photographers. The website turned out to be a huge success and was acquired in 2005 by Yahoo, which now profits from the community out of premium memberships and partnerships with photograph printers.<sup>196</sup> Flickr has supported the CC movement by incorporating its licences as an option for its users to signal their willingness to share their photos, though Flickr's business model is not reliant on CC licensing as such.<sup>197</sup> Some websites such as Magnatune<sup>198</sup> has taken one step further by integrating CC licences into their business strategy. Magnatune describes itself as "a pioneer in the fair trade music movement" by promoting equal treatment of its musicians and customers. The website makes available MP3 previews under a CC Attribution-Noncommercial-Share-Alike licence for free downloading, sharing and remixing by customers. A customer may choose to pay US\$5 to US\$18 to purchase a higher-quality copy of the entire album, and proceeds will be divided fifty-fifty between Magnatune and the musician. CC licences attached to music samples are therefore deployed as a promotional tool to support Magnatune's traditional sales and licensing model, but they are by no means indispensable to the business model. Revver,<sup>199</sup> a free video sharing site analogous to Youtube, has pursued a more aggressive strategy by tying its revenue model directly to CC licensing. Unlike Youtube which displays advertisements next to the video being streamed, Revver incorporates advertising into every video uploaded by users. A tracking tag is also attached to each video which reports back to the host server every time a video is played or an embedded advertisement is clicked on. The advertiser is charged according to the number of views and clicks and the advertising revenue is split fifty-fifty between Revver and the

<sup>194</sup> See n 102 above, p 177.

<sup>195</sup> See n 7 above.

<sup>196</sup> See n 104 above, pp 193–4.

<sup>197</sup> See n 187 above, p 91.

<sup>198</sup> <http://magnatune.com>. The following discussion on Magnatune is based on Coates (n 187 above), p 92; "Magnatune", *Wikipedia*, available at: <http://en.wikipedia.org/wiki/Magnatune> (visited 19 May 2010).

<sup>199</sup> <http://www.revver.com>. The following discussion on Revver is based on Coates (n 187 above), p 93; "Revver", *Wikipedia*, available at: <http://en.wikipedia.org/wiki/Revver> (visited 19 May 2010).

video creator. As the tags can be tracked anywhere across the Internet, users are encouraged to share the videos as widely as possible under a CC Attribution-Noncommercial-No-Derivative-Works licence. Since CC licences guarantee more widespread distribution of the videos, which in turn translates into higher advertising revenue, they are not only ancillary to, but part and parcel of Revver's business model. In future, entrepreneurs in Hong Kong's creative industries can learn from these foreign business models and make use of CC to take their businesses to new horizons. Foncept,<sup>200</sup> a Hong Kong-based design sharing community site, is one local example of a "hybrid economy". Designers are encouraged to publish their T-shirt designs on Foncept under CC licences for non-commercial reuse and remix of design elements by other designers. Foncept also organises a design contest every fortnight and winning designs will be printed on T-shirts for sale, with proceeds shared between Foncept and the winning designers. Foncept is yet another example of a commercial enterprise (the business being founded by a group of software developers based in the Hong Kong Science Park) which seeks to leverage value from a sharing economy of creators.

In 2007, the CC Plus (CC+) protocol was introduced to provide businesses with a simple way of moving between sharing economies and commercial economies.<sup>201</sup> In simple terms, CC+ is a combination of a CC licence and a commercial licence with more permissive rights. Take the example of a song which is licensed under a CC Attribution-Noncommercial-No-Derivatives licence under the CC+ infrastructure. A user who seeks for rights beyond those granted under the CC licence can click on the "permissions beyond" icon on the Commons Deed. The user is then directed to a third party brokerage site through which he can obtain additional permissions such as commercial distribution, use without attribution or remixing into a new work. Yahoo, Blip.tv, Magnatune and Jamendo are among the 16 websites which have adopted the CC+ protocol to date.

<sup>200</sup> <http://www.foncept.com/hk>. The following discussion on Foncept is based on "Foncept", CC Wiki, Creative Commons, available at: [http://wiki.creativecommons.org/Case\\_Studies/Foncept](http://wiki.creativecommons.org/Case_Studies/Foncept) (visited 19 May 2010).

<sup>201</sup> The following discussion is based on "CCPlus", CC Wiki, Creative Commons, available at: <http://wiki.creativecommons.org/CCPlus> (visited 19 May 2010); "CC and CC+ Overview – for the World Wide Web", *Creative Commons*, available at: [http://wiki.creativecommons.org/images/3/37/Creativecommons-ccplus-overview-for-the-world-wide-web\\_eng.pdf](http://wiki.creativecommons.org/images/3/37/Creativecommons-ccplus-overview-for-the-world-wide-web_eng.pdf) (visited 19 May 2010).

## Conclusion

As Benjamin Franklin wrote: “Knowledge is not the personal property of its discoverer, but the common property of all. As we enjoy great advantages from the inventions of others, we should be glad of an opportunity to serve others by any inventions of ours; and this we should do freely and generously”.<sup>202</sup> When the existing copyright law fails to promote a culture of free sharing of knowledge and creativity, CC has an important part to play in the future development of Hong Kong’s education and creative sectors. In relation to education, the localisation of CC licences can help to develop online archives of teaching and learning materials, electronic books/textbooks and freely-accessible databases of scholarly research which are customised to suit the unique needs of local educators and students, both at the secondary and tertiary level. In terms of creative media, the use of CC licences spans across innovative activities such as music re-mixing, film making and sampling, blogging and online radio broadcasting, and helps to expand the scope of multimedia resources on which artists can build their creative endeavours. CC also accelerates the distribution of creative works over the Internet, and can thus be of great assistance to amateur artists who aspire to becoming professionals, and online businesses that wish to build “hybrid economies” in collaboration with Internet users and creators. It is the author’s wish that CC licences be used extensively within the Hong Kong community to help society fulfill its goals of disseminating knowledge and stimulating innovation as widely and effectively as possible.

<sup>202</sup> Benjamin Franklin, “The Autobiography of Benjamin Franklin”, *The Electric Franklin*, available at: <http://www.ushistory.org/franklin/autobiography/index.htm> (visited 19 May 2010), p 55.