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The Quest for a User-Friendly Copyright Regime in Hong Kong

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THE QUEST FOR A USER-FRIENDLY COPYRIGHT REGIME IN HONG KONG

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I. INTRODUCTION

The quest for a user-friendly copyright regime began a decade ago when the Hong Kong government launched a public consultation on "Copyright Protection in the Digital Environment" in December 2006.[1] Although this consultation initially sought to address Internet-related challenges, such as those caused by peer-to-peer file-sharing technology, the reform effort quickly evolved into a more comprehensive digital upgrade of the Hong Kong copyright regime.

A decade later, however, Hong Kong still has not yet amended its Copyright Ordinance.[2] Thus far, three consultation exercises have been launched in December 2006, April 2008, and July 2013.[3] Two

1. *See* COMMERCE, INDUS. & TECH. BUREAU (H.K.), COPYRIGHT PROTECTION IN THE DIGITAL ENVIRONMENT (2006), http://www.info.gov.hk/archive/consult/2007/digital_copyright_e.pdf [hereinafter FIRST CONSULTATION PAPER] (launching the first consultation exercise).

2. Hong Kong Copyright Ordinance, (1997) Cap. 528 (H.K.).

3. *See* FIRST CONSULTATION PAPER, *supra* note 1; COMMERCE & ECON. DEV. BUREAU (H.K.) [CEDB], PRELIMINARY PROPOSALS FOR STRENGTHENING COPYRIGHT PROTECTION IN THE DIGITAL ENVIRONMENT (2008), http://www.ipd.gov.hk/eng/intellectual_property/copyright/Consultation_Document_Prelim_Proposals_Eng(full).pdf [hereinafter SECOND CONSULTATION PAPER]

bills have also been introduced in June 2011 and June 2014.[4] Because the latest bill lapsed at the end of the fifth term of the Legislative Council ("LegCo"), which expired in July 2016,[5] the Hong Kong government will have to submit a new bill to the LegCo after the September 2016 elections to restart the upgrading effort.[6]

In the run-up to this third (and hopefully successful) bill, it will be timely to retrospectively examine the developments surrounding the Copyright (Amendment) Bill 2014 ("2014 Bill"),[7] including some of the committee stage amendments ("CSAs") moved by legislators. Because I served as a pro bono advisor to Internet user groups (namely, the Copyrights and Derivative Works Alliance ("CDWA") and Keyboard Frontline)—and, by extension, some pan-Democrat legislators—that experience has inevitably colored my views on the Bill and the copyright reform process. Nevertheless, my experience as an advisor has also enabled me to explain in greater depth why I crafted or defended the proposals in a certain way and why I still believe these proposals would benefit Hong Kong. Because policymakers, legislators, and Internet user groups seeking to introduce user-friendly copyright legislation in other countries have faced, and will continue to face, similar questions or challenges that I encountered, the analysis in this Article may provide useful insights beyond the rather limited jurisdiction of Hong Kong.

Part II recounts the origin and evolution of the 2014 Bill. Parts III to V examine three proposals that I either developed or was heavily involved in defending. Specifically, Part III focuses on my proposal

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(launching the second consultation exercise); CEDB, TREATMENT OF PARODY UNDER THE COPYRIGHT REGIME: CONSULTATION PAPER (2013), http://www.cedb.gov.hk/citb/doc/en/Consultation_Paper_English.pdf [hereinafter THIRD CONSULTATION PAPER] (launching the third consultation exercise).

4. The Copyright (Amendment) Bill 2011 (H.K.), http://www.legco.gov.hk/yr10-11/english/bills/b201106033.pdf [hereinafter 2011 Bill]; The Copyright (Amendment) Bill 2014 (H.K.), http://www.gld.gov.hk/egazette/pdf/20141824/es32014182421.pdf [hereinafter 2014 Bill].

5. *See Prorogation of the Fifth Legislative Council*, LEGISLATIVE COUNCIL (H.K.), http://www.legco.gov.hk/english/education/prorogation.html (last visited Sept. 26, 2016) ("The Chief Executive has appointed 16 July 2016 as the date from which the Fifth Legislative Council shall stand prorogued.").

6. *See* Gary Cheung et al., *Record Turnout for Bitterly Fought Poll*, S. CHINA MORNING POST, Sept. 5, 2016, at 1 (reporting the Legislative Council elections on September 4, 2016).

7. 2014 Bill, *supra* note 4.

for an exception for predominantly noncommercial user-generated content ("PNCUGC"). Part IV discusses the proposed addition of an open-ended, catch-all fair use provision to the new and existing fair dealing provisions—a proposal supported by many stakeholders, including online service providers ("OSPs"), Internet user groups, and myself. Part V examines my proposal for a moratorium on lawsuits against individual Internet users based on noncommercial copyright infringement.

It is worth noting at the outset that these three proposals were advanced at different times during the copyright reform process in Hong Kong. Owing to its different strengths and objectives, each proposal can serve as either an alternative or a complement to the others, with some modification perhaps. This Article does not call for policymakers and legislators in Hong Kong to simultaneously accept all three proposals without modification. Nor does the Article's limited length allow for further exploration of how these proposals can be best combined to serve the needs and interests of Internet users.

II. 2014 BILL

The initial public consultation on digital copyright reform was launched in Hong Kong in December 2006.[8] This reform sought to update the Hong Kong copyright regime in light of the many changes in the digital environment, including challenges posed by online file-sharing activities. The consultation focused on six distinct areas: (1) legal liability for unauthorized uploading and downloading of copyrighted works; (2) protection of copyrighted works transmitted to the public via all forms of communication technology; (3) the role of OSPs in combating Internet piracy; (4) facilitation of civil actions against online copyright infringement; (5) statutory damages for copyright infringement; and (6) copyright exemption for temporary reproduction of copyrighted works.

Of particular concern to Internet user groups was the proposed amendment to Section 118 of the Hong Kong Copyright Ordinance, which sought to introduce a new, technology-neutral right of

8. *See* Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 699-700 (2010) [hereinafter Yu, *Digital Copyright Reform*] (discussing the government's first public consultation).

communication to the public.[9] Covering all modes of electronic transmission and featuring both criminal sanctions and civil remedies, this amendment focused on two specific types of activities: (1) infringements in the business context and (2) upstream infringements. The first type concerned the communication to the public of a copyrighted work "for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward."[10] The second type concerned the communication to the public of a copyrighted work "to such an extent as to affect prejudicially the copyright owner" other than for the purpose of, or in the course of, any trade or business.[11]

To seek guidance on developing this new right, the Hong Kong government drew on the legislative experiences of Australia, Canada, New Zealand, the United Kingdom, and the United States.[12] This referential approach is both common and understandable. Before China resumed sovereignty in July 1997, Hong Kong has been a British colony for more than 150 years.[13] Despite the handover, this special administrative region has retained its common law legal tradition, similar to what is found in Commonwealth jurisdictions.[14] Moreover, as the government noted in its first consultation paper, "[t]he advantage of [formulating a solution based on an existing overseas model] is that [the] courts could make reference to the case

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9. *See* THIRD CONSULTATION PAPER, *supra* note 3, at 6 n.18 (providing the proposed amendment).

10. 2014 Bill, *supra* note 4, § 118(8B)(a).

11. *Id.* § 118(8B)(b).

12. *See* THIRD CONSULTATION PAPER, *supra* note 3, at 7-10 (discussing the legislative experiences of Australia, Canada, New Zealand, the United Kingdom, and the United States).

13. *See* Peter K. Yu, *Succession by Estoppel: Hong Kong's Succession to the ICCPR*, 27 PEPP. L. REV. 53, 53 (1999) ("On July 1, 1997, China resumed sovereignty over Hong Kong under the 'one country, two systems' framework. Under this unprecedented framework, Hong Kong retains for fifty years its economic, social, political, and legal systems, which are distinctively different from those practiced in other parts of China.").

14. *See* Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China art. 8, Apr. 4, 1990, 29 I.L.M. 1511 (1990) [hereinafter Hong Kong Basic Law] ("The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.").

law of that particular jurisdiction when deciding cases before them. This would result in more certainty and predictability in our law."[15]

After two public consultations—one launched in December 2006 and the other in April 2008—the government submitted to the LegCo the Copyright (Amendment) Bill 2011, which introduced into Hong Kong digital copyright standards from other common law jurisdictions.[16] During the bill's deliberation, questions arose over the treatment of parodies, satires, and other so-called "secondary creations."[17] For example, policymakers, civil liberties groups, the Internet user community, and the public at large were concerned that the proposed legislation would cast the criminal net wider than was needed to protect the interests of copyright holders. They also feared that the legislation would adversely impact on the protection of free speech, free press, privacy, and other civil liberties.

Nicknamed "Internet Article 23" or "network Article 23," the 2011 Bill was analogized to the highly draconian and subsequently abandoned public security legislation that sought to implement Article 23 of the Hong Kong Basic Law. Article 23 specifically requires the region to

> enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.[18]

Owing to other pressing legislative matters toward the end of the LegCo term, the second reading of the copyright amendment bill did not resume before the term expired in July 2012. As a result, the government had to introduce a new bill to the LegCo in the ensuing term. In preparation for this bill, the government launched a third public consultation in July 2013 on the treatment of parody under the

15. FIRST CONSULTATION PAPER, *supra* note 1, at v.

16. *See* 2011 Bill, *supra* note 4.

17. *See* LEGISLATIVE COUNCIL, PAPER FOR THE HOUSE COMMITTEE MEETING ON 20 APRIL 2012, at 5-6 (2012) (LC Paper No. CB(1)1610/11-12), http://www.legco.gov.hk/yr11-12/english/hc/papers/hc0420cb1-1610-e.pdf (noting the public concerns about the lack of copyright exemption for parody or other similar works).

18. Hong Kong Basic Law, *supra* note 14, art. 23.

copyright regime. This consultation was initially held for three months, but the deadline was eventually extended to mid-November. At the conclusion of the consultation, the government collected close to 2,500 submissions from individuals and other parties—about forty times the number of submissions from the previous consultation exercise.[19]

Included in the new consultation were three specific legislative options. The first clarified the threshold for criminal copyright infringement under Section 118 of the Hong Kong Copyright Ordinance.[20] The second option introduced a criminal exemption for parody, satire, caricature, pastiche, or other similar works.[21] The final option introduced a fair dealing exception for these works.[22] Although each of these options served an important purpose and had varied strengths, none of them would fully accommodate the needs and interests of Internet users, in particular their need to develop user-generated content ("UGC").[23]

Consider, for instance, the uploading of a home video showing a teenager's performance of a Canto-pop or Mando-pop song—similar to what Justin Bieber did before he became a pop superstar. Under the government's proposals, such uploading would open that performer to both civil and criminal liability for copyright infringement. To be certain, the teenager performed the song himself

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19. *Compare* CEDB, PUBLIC CONSULTATION ON TREATMENT OF PARODY UNDER THE COPYRIGHT REGIME 1 (2013), http://www.cedb.gov.hk/citb/doc/en/consultation/Discussion_Paper_Eng1012.pdf [hereinafter THIRD CONSULTATION REPORT] (stating that the government "received altogether 2 455 written submissions through the post, email, fax, Home Affairs Bureau's Public Affairs Forum (www.forum.gov.hk) and LegCo"), *with* CEDB, PROPOSALS FOR STRENGTHENING COPYRIGHT PROTECTION IN THE DIGITAL ENVIRONMENT 1 (2009), http://www.cedb.gov.hk/citb/doc/en/consultation/Panel_Paper_Digital_Eng_Full.pdf (stating that the government "held two public forums in July 2008 and received over 60 submissions at the end of the public consultation period in August 2008").

20. *See* THIRD CONSULTATION PAPER, *supra* note 3, at 12 (discussing the first option).

21. *See id.* at 13 (discussing the second option).

22. *See id.* at 14-15 (discussing the third option).

23. *See* PETER K. YU, DIGITAL COPYRIGHT AND THE PARODY EXCEPTION IN HONG KONG: ACCOMMODATING THE NEEDS AND INTERESTS OF INTERNET USERS 2-33 (2013), http://ssrn.com/abstract=2349007 [hereinafter THIRD POSITION PAPER] (discussing how the government's proposals can be improved to better accommodate the needs and interests of Internet users).

or herself, and no sound recording was used. However, the underlying song was protected by copyright. Since this performance was not intended to be a parody or a satire, the dissemination of the home video via the Internet could infringe on the proposed right of communication to the public regardless of whether an exception for parody or satire existed. Whether infringement would occur would depend largely on whether the Internet or social media platform had received the proper copyright licenses—arrangements over which the teenaged performer had no control whatsoever.

Given the inadequate protection the government's proposals provided to Internet users, a large volume of the consultation submissions called for the adoption of a copyright exception for UGC, an option that the government's consultation paper did not identify. For example, in a position paper I submitted on behalf of the Journalism and Media Studies Centre at the University of Hong Kong, I advocated the introduction of a PNCUGC exception,[24] which Part III will discuss in considerable depth. In another submission, the CDWA, formed out of the Concern Group of Rights of Derivative Works and Keyboard Frontline, argued for the establishment of an exception for "non–profit making user-generated contents or user-generated contents not in the course of business [or trade]."[25] In addition, both Amnesty International Hong Kong and the Hong Kong Civil Liberties Union supported the creation of a copyright exception for noncommercial or non-profit-making UGC.[26]

In December 2013, the government released its report on the consultation exercise.[27] Eighty-four pages in length, this comprehensive report covered both the strengths and weaknesses of the various legislative options, including those not identified by the government. It also stated the government's intention to further "engage stakeholders to exchange thoughts on how best to

24. *See id.* at 21-33.

25. COPYRIGHT AND DERIVATIVE WORKS ALLIANCE, SUBMISSIONS ON THE TREATMENT OF PARODY UNDER THE COPYRIGHT REGIME 4-6 (2013), http://www.cedb.gov.hk/citb/doc/en/consultation/parody_submission/0789.pdf [hereinafter CDWA SUBMISSION] (providing the text of the proposal).

26. *See* THIRD CONSULTATION REPORT, *supra* note 19, app. II, at 37 (noting the positions of Amnesty International Hong Kong and the Hong Kong Civil Liberties Union).

27. *Id.*

consolidate and reconcile ideas" before introducing a new copyright amendment bill.[28]

On June 18, 2014, the government introduced the 2014 Bill.[29] The bill included not only the exceptions for parody, satire, caricature, and pastiche[30]—the third option outlined in the government's consultation paper—but also two new exceptions—one for quotation and one for commenting on current events.[31] The latter is interesting because such an exception cannot be found in the Copyright, Designs and Patents Act 1988 in the United Kingdom (which many Hong Kong policymakers and legislators considered a model for emulation). Nevertheless, the government, along with the Hong Kong Bar Association, took the view that commenting on current events "is analogous to reporting on current events which is a permitted act under the [Copyright Ordinance] and should have similar treatment to further safeguard freedom of expression and public interest."[32]

Two days later, the Bills Committee was established to closely scrutinize the Bill.[33] Since its establishment, the Committee held twenty-four meetings,[34] including a meeting in October 2014 that was devoted completely to collecting views from copyright holders, trade associations, Internet user groups, and other relevant parties.[35] This whole committee process took about a year and a half. When

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28. *Id.* at 21.

29. *See* BILLS COMMITTEE ON COPYRIGHT (AMENDMENT) BILL 2014 [BILLS COMMITTEE], PAPER FOR THE HOUSE COMMITTEE MEETING ON 13 NOVEMBER 2015: REPORT OF THE BILLS COMMITTEE ON COPYRIGHT (AMENDMENT) BILL 2014, at 3 (2015) (LC Paper No. CB(4)199/15-16), http://www.legco.gov.hk/yr15-16/english/hc/papers/hc20151113cb4-199-e.pdf [hereinafter BILLS COMMITTEE'S REPORT].

30. *See* 2014 Bill, *supra* note 4, § 39A.

31. *See id.* § 39.

32. BILLS COMMITTEE'S REPORT, *supra* note 29, at 16.

33. *See* HOUSE COMM. OF THE LEGISLATIVE COUNCIL, MINUTES OF THE 29TH MEETING HELD IN CONFERENCE ROOM 1 OF THE LEGISLATIVE COUNCIL COMPLEX AT 2:30 PM ON FRIDAY, 20 JUNE 2014 (2014) (LC Paper No. CB(2)1891/13-14), http://www.legco.gov.hk/yr13-14/english/hc/minutes/hc20140620.pdf.

34. *See* BILLS COMMITTEE'S REPORT, *supra* note 29, at 4.

35. *See* BILLS COMMITTEE, MINUTES OF THE THIRD MEETING HELD ON SATURDAY, 25 OCTOBER 2014, AT 9:00 AM IN CONFERENCE ROOM 1 OF THE LEGISLATIVE COUNCIL COMPLEX (2014) (LC Paper No. CB(4)871/14-15), http://www.legco.gov.hk/yr13-14/english/bc/bc106/minutes/bc10620141025.pdf [hereinafter OCTOBER 25 MEETING MINUTES].

the second reading debate resumed in December 2015, the government's amendments offered only very limited changes to the Bill.[36]

Three months after the Bills Committee started its deliberation, the highly depressing Occupy Central campaign was launched. On September 28, 2014, the first day of this largely pro-democracy movement, the police fired an unprecedented eighty-seven canisters of tear gas at protesters while also using pepper spray and batons.[37] Referred sometimes to as the "umbrella movement"—based on the resourceful use of umbrellas to respond to police brutality on this rainy day as well as the subsequent use of a yellow umbrella to symbolize resistance and defiance—the events shocked not only local citizens but also members of the international community. For those who have lived or studied in Hong Kong or have visited this beautiful city, the images they saw on television or via the Internet did not give them the same impression of a place that was widely known for its food, luxury life, and shopping opportunities.

In retrospect, this movement and its aftermath probably have contributed significantly to the derailing of the 2014 Bill and the copyright reform process. Although the government repeatedly claimed that the Bill was not intended to clamp down on Internet freedom and that the government would not abuse the power granted by the new bill—such as engaging in political, selective, or excessive prosecutions—these arguments rang hollow after the umbrella movement and the subsequent prosecutions of the movement's peaceful protesters. Because many of the Bill's provisions, including those concerning criminal enforcement, could be interpreted very differently in a politically charged climate depending on one's trust in the government, the movement has undoubtedly made the copyright reform process much more difficult.[38]

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36. *See* LEGISLATIVE COUNCIL, AMENDMENTS TO BE MOVED BY THE SECRETARY FOR COMMERCE AND ECONOMIC DEVELOPMENT (2015) (LC Paper No. CB(3) 153/15-16), http://www.legco.gov.hk/yr15-16/english/counmtg/papers/cm20151209cb3-153-e.pdf [hereinafter GOVERNMENT'S CSAs].

37. *See Tear Gas Fired as Thousands Join Occupy*, S. CHINA MORNING POST, Sept. 29, 2014, at 1; *Riot Police Pull Out but Protesters Are Unmoved*, S. CHINA MORNING POST, Sept. 30, 2014, at 1.

38. *See, e.g.*, Vivienne Chow, *Hong Kong People Barking Up the Wrong Tree on Copyright Bill, Insists Association Policy Chief*, S. CHINA MORNING POST (Jan. 31, 2016), http://www.scmp.com/news/hong-kong/politics/article/1907615/hong-

Indeed, before the second reading debate resumed, it was unclear that the movement would have such a significant impact. After all, copyright legislation is highly technical. Other than those Internet user groups that had paid close attention to the developments surrounding the Bill and had become quite knowledgeable about digital copyright issues, most Hong Kong citizens were not interested in this type of highly technical issue. Even after the LegCo debates prematurely adjourned several times, many local citizens remained baffled by the controversy the Bill had caused.[39]

On November 2, 2015, the Bills Committee held its final meeting. Before the committee concluded its work, Pan-Democrat legislators managed to introduce four sets of CSAs. The first set was introduced by Dennis Kwok of the Civic Party, who represented the legal functional constituency.[40] Moved by the Bills Committee's chairman

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kong-people-barking-wrong-tree-copyright-bill-insists ("[John] Medeiros [the Chief Policy Officer of the Cable & Satellite Broadcasting Association of Asia] said the fundamental problem lay in suspicions about the government. He said people believed that what the government had proposed would reduce civil rights in the city."); Violet Law, *Hong Kong Netizens Worry Copyright Bill Will Limit Freedom of Expression*, L.A. TIMES (Dec. 17, 2015), http://www.latimes.com/world/asia/la-fg-hong-kong-internet-law-20151217-story.html ("Protesters [of the 2014 Bill] said they fear the legislation could be wielded as a tool of political prosecution against those who use memes to mock politicians, and even expose them to criminal charges."); Richard Scotford, *Hong Kong's Controversial Copyright Law Opens the Door for Mainland-Style "Lawfare,"* H.K. FREE PRESS (Dec. 17, 2015), https://www.hongkongfp.com/2015/12/17/hong-kongs-controversial-copyright-law-opens-the-door-for-mainland-style-lawfare/ (expressing concerns about "the potential for future laws to be bundled together [with copyright law] . . . to quell political opposition"); Peter K. Yu, *Hong Kong Copyright Battle Tests U.S. Candidates' Commitments to Free Speech*, CONVERSATION (Jan. 8, 2016), https://theconversation.com/hong-kong-copyright-battle-tests-u-s-candidates-commitments-to-free-speech-52566 ("Considering the strong distrust many Hong Kong people have of their government, it is not difficult to see why they fear that the new law will become just another secret weapon to silence dissent. Their fears are also understandable following the government's active—and, in their view, selective—prosecution of peaceful protesters of the 'Occupy Movement.'").

39. *See* Peter K. Yu, *How to Handle Hong Kong's Copyright Amendment Bill*, H.K. IN-MEDIA (Dec. 11, 2015), http://www.inmediahk.net/node/1039443 (discussing the public's challenge to understanding the 2014 Bill).

40. *See* BILLS COMMITTEE, COMMITTEE STAGE AMENDMENTS TO BE MOVED BY THE HONOURABLE DENNIS KWOK (2015) (LC Paper No. CB(4)1249/14-15(01) (Revised)), http://www.legco.gov.hk/yr13-14/chinese/bc/bc106/papers/bc1060706cb4-1249-1-ec.pdf.

on behalf of its members, these amendments sought to prevent copyright holders from contracting out of the fair dealing exceptions provided by the Bill or the existing Copyright Ordinance.[41] The amendments called for the addition of the following provision to Section 38(3) and the proposed Sections 39(6) and 39A(2) of the Ordinance: "A term of contract is unenforceable to the extent that it purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright."[42]

This provision was modeled after similar legislation in the U.K. Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.[43] Although this provision was highly important to Internet users and other parties that have limited bargaining power and negotiating capabilities, it could undermine freedom of contract in Hong Kong.[44] The sanctity of contract issue is particularly

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41. *See* LEGISLATIVE COUNCIL, AMENDMENTS TO BE MOVED BY THE HONOURABLE CHAN KAM-LAM, SBS, JP 2-3 (2015) (LC Paper No. CB(3) 219/15-16), http://www.legco.gov.hk/yr15-16/english/counmtg/papers/cm20151209cb3-219-e.pdf [hereinafter BILLS COMMITTEE'S AMENDMENTS] (providing the text of the proposed amendment). As the Australian Law Reform Commission defined:

> "Contracting out" refers to an agreement between owners and users of copyright material that some or all of the statutory exceptions to copyright are not to apply—so that, for example, the user will remunerate the copyright owner for uses that would otherwise be covered by an unremunerated exception; or the user agrees not to use copyright material in ways that would constitute fair use or fair dealing.

AUSTL. LAW REFORM COMM'N, COPYRIGHT AND THE DIGITAL ECONOMY: FINAL REPORT 449 (2013) [hereinafter ALRC FINAL REPORT].

42. BILLS COMMITTEE'S AMENDMENTS, *supra* note 41, at 2-3.

43. Copyright and Rights in Performances (Quotation and Parody) Regulations, 2014, S.I. 2014/2356 (U.K.).

44. As the Bills Committee's report stated:

> [T]he Administration has advised that freedom of contract plays a vital role in Hong Kong's free-market economy and it remains a cornerstone in the law of contract. Allowing copyright owners and individual users to enter into contractual arrangements on terms mutually agreed to both parties in respect of the use of copyright works not only provides flexibility and legal certainty, but also facilitates the efficient and competitive exploitation of copyright works to the benefits of both owners and users of copyright works.

BILLS COMMITTEE'S REPORT, *supra* note 29, at 21; *see also* ALRC FINAL REPORT, *supra* note 41, at 449 ("Copyright owners generally oppose limitations on contracting out because this challenges freedom of contract, with possible unintended consequences."); Letter from Sam Ho, Honorary Secretary, Hong Kong Copyright Alliance, to Chan Kam-Lam, Chairman, Bills Committee on Copyright (Amendment) Bill 2014 (Feb. 18, 2015) (LC Paper No. CB(4)551/14-15(01)),

sensitive to the local business community, which takes great pride in Hong Kong's *laissez-faire* approach and the region's position as the world's leader in economic freedom, as is reflected in the Index of Economic Freedom released annually by *The Wall Street Journal* and The Heritage Foundation.[45] Introducing provisions to limit contractual restrictions may also be unnecessary in situations in which protection is already available under the general principles of contract law, the public policy exception in the Copyright Ordinance,[46] and the Unconscionable Contracts Ordinance.[47]

Because of my very limited involvement in this proposal, this Article will not further discuss the need for a "contract override" in copyright law.[48] Nevertheless, it is worth noting my support for using this proposal or other legal means to invalidate contractual provisions that purport to render copyright limitations and exceptions inoperative in two types of situations. The first type arises when Internet users have a weak bargaining position vis-à-vis copyright holders.[49] The negotiation between a multinational conglomerate and an Internet user is just very different from the negotiation between two multinational conglomerates. The second type involves

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http://www.legco.gov.hk/yr13-14/english/bc/bc106/papers/bc1060224cb4-551-1-e.pdf ("This type of provision [for limiting contractual restrictions on the operation of statutory exceptions] may affect freedom of contact and ha[s] a deep and extensive impact on operations of businesses whose structures and relationships depend on copyright law for their foundation."); Press Release, Hong Kong Copyright Alliance, Copyright Alliance Urges Legislators to Attend to Bill Proceedings (Dec. 20, 2015), https://www.facebook.com/hongkongcopyright alliance/photos/pcb.781304395330231/781304345330236 [hereinafter HKCA Press Release] ("There is no practical need for a contract override provision, which stabs at the very heart of an individual's right of freedom to contract.").

45. *See 2016 Index of Economic Freedom*, HERITAGE FOUND., http://www.heritage.org/index/ (last visited May 15, 2016).

46. *See* Hong Kong Copyright Ordinance, *supra* note 2, § 192(3) ("Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.").

47. *See* Hong Kong Unconscionable Contracts Ordinance, (1997) Cap. 458 (H.K.).

48. BILLS COMMITTEE'S REPORT, *supra* note 29, at 20-23 (discussing the pros and cons of providing for a contract override).

49. *See* ALRC FINAL REPORT, *supra* note 41, at 450 ("Where copyright owners are in a strong bargaining position, they may overreach and circumvent the provisions of the Act, so that 'private ordering' leads to a different balancing of parties' rights than is contemplated in the many complex and carefully structured statutory provisions of the *Copyright Act*.").

contractual restrictions in the fine print of a contract, such as a browse-wrap or click-wrap license.

The second set of CSAs, which was introduced by LegCo Councilor Cyd Ho of the Labour Party[50] and moved by the Bills Committee's chairman, concerned the PNCUGC exception.[51] Although different drafting language had been proposed in the consultation exercise and in the run-up to the resumption of the second reading debate,[52] the CSA eventually embraced the "predominantly non-commercial" language proposed in the position paper I submitted to the government as part of the 2013 consultation exercise.[53] Part III will discuss this proposal at greater length.

The third set of CSAs, which was introduced by LegCo Councilor Raymond Chan[54] and moved by the Bills Committee's chairman, concerned an open-ended, catch-all fair use provision.[55] Although this amendment sought to introduce fair use into Hong Kong, it did not call for either the repeal of the existing fair dealing provisions or the replacement of those new ones proposed in the 2014 Bill. Instead, it supplemented all of these provisions by adding an open-ended, catch-all provision—something different from Section 107 of the U.S. Copyright Act.[56] Part IV will discuss this proposal at greater length.

The final set of CSAs, which was moved by independent LegCo Councilor Wong Yuk-Man, covered a wide variety of drafting

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50. *See* BILLS COMMITTEE, COMMITTEE STAGE AMENDMENTS TO BE MOVED BY THE HONOURABLE CYD HO SAU-LAN (2015) (LC Paper No. CB(4)1289/14-15(02)), http://www.legco.gov.hk/yr13-14/chinese/bc/bc106/papers/bc1060706cb4-1289-2-ec.pdf.

51. *See* THIRD POSITION PAPER, *supra* note 23, at 21-33 (discussing the PNCUGC exception).

52. *See* CDWA SUBMISSION, *supra* note 25; THIRD CONSULTATION REPORT, *supra* note 19, app. II, at 37.

53. *See* BILLS COMMITTEE'S AMENDMENTS, *supra* note 41, at 5-6 (providing the text of the CSA).

54. *See* BILLS COMMITTEE, COMMITTEE STAGE AMENDMENTS TO BE MOVED BY THE HONOURABLE CHAN CHI-CHUEN (2015) (LC Paper No. CB(4)48/15-16(03)), http://www.legco.gov.hk/yr13-14/chinese/bc/bc106/papers/bc1061019cb4-48-3-ec.pdf (providing the text of the proposal).

55. *See* BILLS COMMITTEE'S AMENDMENTS, *supra* note 41, at 4 (providing the text of the proposal).

56. *Compare id. with* 17 U.S.C. § 107 (2012).

issues.[57] Although he proposed close to 903 amendments,[58] the LegCo President only allowed the inclusion of forty-two of these amendments in the LegCo debate.[59] Because this set of amendments focused on clarifying or limiting the scope of the Bill's coverage, this Article will not discuss the amendments.

On December 9, 2015, the LegCo sought to resume the second reading debate on the 2014 Bill. On that day, however, the Council's meeting prematurely adjourned following several quorum calls.[60] The debate did not resume until December 17.[61] Since then, the Council's meetings were aborted four more times in 2016—on January 7,[62] January 22,[63] February 4,[64] and finally February 24.[65] Due to these premature adjournments—along with incessant quorum calls, continuous filibustering, and various debate motions—the

57. *See* LEGISLATIVE COUNCIL, AMENDMENT TO BE MOVED BY THE HONOURABLE WONG YUK-MAN (2015) (LC Paper No. CB(3) 220/15-16), http://www.legco.gov.hk/yr15-16/english/counmtg/papers/cm20151209cb3-220-e.pdf [hereinafter WONG'S AMENDMENTS].

58. *See* BILLS COMMITTEE, AMENDMENTS TO BE MOVED BY THE HONOURABLE WONG YUK-MAN (2015) (LC Paper No. CB(4)48/15-16(02)), http://www.legco.gov.hk/yr13-14/chinese/bc/bc106/papers/bc1061019cb4-48-2-ec.pdf (in Chinese).

59. *See* Kris Cheng, *More Lawmakers Set to Vote Down New Copyright Bill as Filibuster Amendments Are Cut*, H.K. FREE PRESS (Dec. 7, 2015), https://www.hongkongfp.com/2015/12/07/more-lawmakers-set-to-vote-down-new-copyright-bill-as-filibuster-amendments-are-cut/ (reporting the LegCo President's allowance of only a limited number of Councilor Wong's amendments).

60. *See* Kris Cheng, *"Internet Article 23" Debate Delayed After Lawmakers Fail to Show Up*, H.K. FREE PRESS (Dec. 9, 2015), https://www.hongkongfp.com/2015/12/09/breaking-internet-article-23-debate-delayed-after-lawmakers-fail-to-show-up/.

61. *See* Hong Kong *Hansard* 17 Dec. 2015 Col 3132 (H.K.), http://www.legco.gov.hk/yr15-16/english/counmtg/hansard/cm20151217-translate-e.pdf.

62. *See* Kris Cheng, *LegCo Meeting on Copyright Bill Adjourned Due to Lack of Quorum*, H.K. FREE PRESS (Jan. 7, 2016), https://www.hongkongfp.com/2016/01/07/legco-meeting-on-copyright-bill-adjourned-due-to-lack-of-quorum/.

63. *See* Kris Cheng, *LegCo's Copyright Bill Debate Unexpectedly Adjourned Again*, H.K. FREE PRESS (Jan. 22, 2016), https://www.hongkongfp.com/2016/01/22/legcos-copyright-bill-debate-unexpectedly-adjourned-again/.

64. *See* Kris Cheng, *Lawmakers Bicker over LegCo Elevator Shenanigans as Copyright Bill Debate Abandoned Again*, H.K. FREE PRESS (Feb. 4, 2016), https://www.hongkongfp.com/2016/02/04/lawmakers-bicker-over-legco-elevator-shenanigans-as-copyright-bill-debate-abandoned-again/.

65. *See* Tony Cheung, *Copyright Debate Hit by Count Blunder*, S. CHINA MORNING POST, Feb. 25, 2016, at 1.

deliberation of the 2014 Bill progressed very slowly. Such a lack of progress underscored the considerable controversy surrounding the bill and its accompanying CSAs.

Although the second reading debate eventually concluded on January 21, 2016, and the Committee of the Whole Council quickly began deliberating the CSAs,[66] legislators were debating only the first set of amendments when the LegCo recessed for the Chinese New Year in early February. Following this debate was the debate on three more sets of CSAs from Pan-Democrat legislators as well as the government's own set of amendments.[67]

Because the debate on digital copyright reform had blocked other important legislative matters, including the passage of the government's annual budget and about twenty other outstanding bills, the government and lawmakers made a last-ditch effort to convene a four-party meeting to search for compromises.[68] Held on February 17, this meeting brought together legislators, government officials, copyright holders, and Internet user groups.[69] Because the copyright industries adamantly refused to make any concession, the meeting ended with one Internet user group walking out in the middle of the meeting.[70] A similar meeting had not been held again.

Shortly after the February 17 meeting, LegCo Councilors Dennis

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66. *See* Kris Cheng, *Controversial Copyright Bill Unexpectedly Completes Second Reading, but Longer Debate Awaits*, H.K. FREE PRESS (Jan. 21, 2016), https://www.hongkongfp.com/2016/01/21/controversial-copyright-bill-unexpectedly-completes-second-reading-but-longer-debate-awaits/ [hereinafter Cheng, *Controversial Copyright Bill*].

67. *See* BILLS COMMITTEE'S AMENDMENTS, *supra* note 41; GOVERNMENT'S CSAS, *supra* note 36; WONG'S AMENDMENTS, *supra* note 57. LegCo President Jasper Tsang announced the order of the debates on the CSAs as follows: "The first and second debates are on Mr CHAN Kam-lam's amendments, the third debate is on the amendments proposed by the Secretary for Commerce and Economic Development, the fourth debate is on Mr WONG Yuk-man's amendments, and the fifth debate is on clauses with no amendment." Hong Kong *Hansard* 28 Jan. 2016 Col 4364 (H.K.), http://www.legco.gov.hk/yr15-16/english/counmtg/hansard/cm20160128-translate-e.pdf.

68. *See* Stuart Lau, *Four-Way Copyright Talks End in Failure*, S. CHINA MORNING POST, Feb. 18, 2016, at 1.

69. *See id.*

70. *See* Eric Cheung, *Copyright Owners, Netizens Fail to Reach Consensus in Copyright Bill Talks*, H.K. FREE PRESS (Feb. 18, 2016), https://www.hongkongfp.com/2016/02/18/four-sides-fail-to-reach-consensus-on-copyright-bill/.

Kwok of the Civic Party and Kenneth Leung and Charles Mok of the Professional Commons submitted to the Bills Committee a proposal for introducing a more confined fair use regime into Hong Kong, seeking bi-partisan support from both the Bill's proponents and opponents.[71] Drawing on Section 35 of the Singapore Copyright Act[72] and focusing on the noncommercial use of copyrighted works, this proposal sought to move the 2014 Bill forward at the eleventh hour. The government, however, declined to consider this proposal due to industry opposition, even though the government had crafted a similar compromise proposal earlier[73] and the current proposal had received growing support from both lawmakers[74] and Internet user groups.[75]

On February 25, the Secretary for Commerce and Economic Development surprisingly announced the government's intention to shelve the bill if the LegCo did not approve it by the end of the following week.[76] Considering that the debate on the first set of

71. *See* Letter from Hon. Dennis Kwok, Kenneth Leung, and Charles Mok to Chan Kam-Lam, Chairman, Bills Committee on Copyright (Amendment) Bill 2014 (Mar. 8, 2016) (LC Paper No. CB(4)703/15-16(01)), http://www.legco.gov.hk/yr13-14/english/bc/bc106/papers/bc106cb4-703-1-e.pdf.

72. Copyright Act § 35 (Sing.).

73. *See* Hong Kong *Hansard* 3 Mar. 2016 Col 6415 (H.K.), http://www.legco.gov.hk/yr15-16/english/counmtg/hansard/cm20160303-translate-e.pdf (the remarks of the Secretary for Commerce and Economic Development); Hong Kong *Hansard* 4 Mar. 2016 Col 6434 (H.K.), http://www.legco.gov.hk/yr15-16/english/counmtg/hansard/cm20160304-translate-e.pdf (the remarks of Hon. Charles Mok, LegCo Councilor); *id.* Col 6437-38 (the remarks of Hon. Cyd Ho, LegCo Councilor); *id.* Col 6648 (the remarks of Hon. Emily Lau, LegCo Councilor).

74. *See* Hermina Wong, *"Remember These People": Commerce Sec Puts Full Blame on Pan-Dems for Copyright Bill Failure*, H.K. FREE PRESS (Mar. 4, 2016), https://www.hongkongfp.com/2016/03/04/remember-these-people-commerce-chief-puts-full-blame-on-pan-democrats-for-failure-of-copyright-bill/.

75. *See* Tony Cheung et al., *Government in Ultimatum on Copyright Bill*, S. CHINA MORNING POST, Feb. 26, 2016, at 1 ("Pan-democrat lawmaker Cyd Ho Sau-lan said the ultimatum came a day after she told [the Secretary for Commerce and Economic Development] internet users had agreed to a concession on the 'fair use' exemption in response to business worries expressed by copyright owners.").

76. *See* Karen Cheung, *Copyright Amendment Bill to Be Withdrawn If Not Passed Next Week, Says Commerce Minister*, H.K. FREE PRESS (Feb. 25, 2016), https://www.hongkongfp.com/2016/02/25/copyright-amendment-bill-to-be-withdrawn-if-not-passed-next-week-says-commerce-minister/; *see also* Karen Cheung, *Mixed Reactions as Gov't Says It Will Withdraw Controversial Copyright Bill If Not Passed Next Week*, H.K. FREE PRESS (Feb. 27, 2016),

CSAs had not even finished and there were still four more sets of amendments, the writings of another round of failed copyright reform were already on the wall. After lawmakers missed the government-imposed March 4 deadline, the government reshuffled the legislative agenda, moving the 2014 Bill to the end of the queue.[77] On April 14, the Bill was finally withdrawn on a voice vote after the passage of LegCo Councilor Raymond Chan's adjournment motion.[78]

By the time the term of the LegCo expired in July 2016, the 2014 Bill had not returned to the legislative agenda. This bill therefore suffered the same fate as the 2011 Bill, its equally controversial predecessor. If the government wants to renew its effort to introduce a digital upgrade to the Hong Kong copyright regime, it will have to submit a new bill to the LegCo in the new term, which began on October 1, 2016.[79] It remains to be seen whether a fourth public consultation will precede this bill—and if so, what legislative items will be consulted on and what proposals the government will advance.[80]

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https://www.hongkongfp.com/2016/02/27/mixed-reactions-as-govt-says-it-will-withdraw-controversial-copyright-bill-if-not-passed-next-week/ (reporting reactions to the government's announcement to shelf the 2014 Bill).

77. *See* Stuart Lau & Vivienne Chow, *Copyright Bill Dies, but Legco Blame Game Carries on*, S. CHINA MORNING POST, Mar. 5, 2016, at 1.

78. *See* Kris Cheng, *Copyright Bill Officially Withdrawn After Months of Filibustering*, H.K. FREE PRESS (Apr. 15, 2016), https://www.hongkongfp.com/2016/04/15/copyright-bill-officially-withdrawn-after-months-of-filibustering/.

79. *See Beginning of a New Term of the Legislative Council*, LEGISLATIVE COUNCIL (H.K.), http://www.legco.gov.hk/english/education/files/newterm/newterm_e.pdf (last visited Sept. 26, 2016) ("The commencement date of the Sixth Legislative Council as specified by the Chief Executive in Council is 1 October 2016.").

80. Among the copyright industries' concerns not fully addressed in the Bill, but noted during the Bills Committee's deliberation were the aggregation and dissemination of hyperlinks, unauthorized content distribution through set top boxes, and the blocking of infringing websites from abroad. *See* BILLS COMMITTEE'S REPORT, *supra* note 29, at 43 ("[T]he Administration will launch in earnest a new round of copyright review to address pressing concerns of different stakeholders on outstanding and new copyright issues. These include online piracy facilitated by set top boxes and link aggregate websites and remedial ideas such as judicial site blocking, longer copyright terms, updates to the Copyright (Libraries) Regulations (Chapter 528B), UGC, contract override, and orphan works."); *see also id.* at 5-8 (discussing hyperlinks and set top boxes).

III. PNCUGC EXCEPTION

The first of my proposals in the latest round of digital copyright reform concerns the introduction of a PNCUGC exception, which was inspired by Section 29.21 of the Canadian Copyright Modernization Act.[81] I first advanced this proposal during a presentation organized in August 2013 by the Journalism and Media Studies Centre ("JMSC") at the University of Hong Kong, shortly after the release of the government's third consultation paper.[82] The presentation was immediately followed by a meeting with the representatives of Internet user groups to discuss both the proposal and the various issues in the consultation paper. JMSC and its Media Law Project—under the leadership of Ying Chan and Doreen Weisenhaus, respectively—have been my longtime collaborators since the launch of the government's first consultation exercise. JMSC was also instrumental in launching the localized Creative Commons license in October 2008, making Hong Kong the fiftieth jurisdiction to adapt the license to the local legal environment.[83]

Since the presentation at the University of Hong Kong, this proposal and its variants have been warmly embraced by Internet user groups, in particular the Concern Group of Rights of Derivative Works, Keyboard Frontline, and the CDWA formed out of these two groups.[84] Variants of this proposal have also received support from Amnesty International Hong Kong and the Hong Kong Civil Liberties Union.[85] Because of its wide acceptance and strong public

81. Copyright Modernisation Act, R.S.C., ch. C-20, § 29.21 (2012) (Can.).

82. *See* THIRD CONSULTATION REPORT, *supra* note 19, at 14 n.20 ("We understand that the idea actually originates from a proposal by Professor Peter K Yu, who also made a submission on behalf of the Journalism of Media Studies Centre, University of Hong Kong, which contains drafting suggestions along similar lines, among other things."); *see also JMSC HKU—How Should Hong Kong Copyright Law Handle Parodies and Secondary Creations?*, YOUTUBE (Sept. 2, 2013), https://www.youtube.com/watch?v=aAvNFMtel9c (providing the video of this presentation).

83. *See Hong Kong Promotes Education, Creativity with Creative Commons' 50th Launch Event*, CREATIVE COMMONS (Oct. 23, 2008), https://blog.creativecommons.org/2008/10/23/hong-kong-promotes-education-creativity-with-creative-commons-50th-launch-event-2/.

84. *See* CDWA SUBMISSION, *supra* note 25, at 4-6 (advocating a variant of this proposal).

85. *See* THIRD CONSULTATION REPORT, *supra* note 19, app. II, at 37 (noting the position of Amnesty International Hong Kong and the Hong Kong Civil

support, the proposal was referred to as the "civil society's fourth option" (owing to the fact that this option originated from nongovernmental organizations and was not among the three options the government listed in its consultation paper). As with any legislative proposal that has been generated from below, the considerable traction that this proposal received is attributable to the active on-the-ground efforts by Internet user groups as well as the courage and support of sympathetic legislators.

Before the Bills Committee concluded its work in November 2015, LegCo Councilor Cyd Ho managed to introduce a CSA that incorporated this proposal. The amendment read as follows:

> 39C. User-generated content
>
> (1) It is not an infringement of copyright for an individual to use an existing work or copy of one, which has been published or otherwise made available to the public, in the creation of a new work in which copyright subsists and for the individual (or, with the individual's authorization, a member of their household) to use the new work or to authorize an intermediary to disseminate it, if—
>
> (a) the use of, or the authorization to disseminate, the new work is done predominantly for non-commercial purposes;
>
> (b) the source (and, if given in the source, the name of the author, performer, maker or broadcaster) of the existing work or copy of it are mentioned, if it is reasonable in the circumstances to do so;
>
> (c) the individual had reasonable grounds to believe that the existing work or copy of it as the case may be, was not infringing copyright; and
>
> (d) the use of, or the authorization to disseminate, the new work does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or copy of it or on an existing or potential market for it, including that the new work is not a substitute for the existing one.
>
> (2) For the purposes of subsection (1) —
>
> *intermediary* . . . means a person or entity who regularly provides space or means for works to be enjoyed by the public;
>
> *use* . . . means to do anything that by this Ordinance the owner of the copyright has the sole right to do, other than the right to authorize anything.[86]

Liberties Union).

86. BILLS COMMITTEE'S AMENDMENTS, *supra* note 41, at 5-6.

A. JUSTIFICATIONS

Many reasons exist to introduce into Hong Kong a copyright exception for UGC. To begin with, the development of UGC is particularly important in an environment where there is insufficient debate on current events and public affairs. Because Hong Kong was a British colony, the region has not developed a vibrant, critical political culture until recent years. If the people of Hong Kong are to successfully govern the region, as promised through the Sino-British Joint Declaration[87] and the Hong Kong Basic Law,[88] it is very important for the region to harness its copyright regime to promote the development of a critical political culture.

The development of UGC is also important because the Internet has unleashed the unprecedented potential for Hong Kong citizens to express themselves. As the third consultation paper rightly noted:

> With advances in technology, it has become easier for members of the public to express their views and commentary on current events by altering existing copyright works and to disseminate them through the Internet. In Hong Kong, popular forms of this genre in recent years include (a) combining existing news photos or movie posters with pictures of political figures; (b) providing new lyrics to popular songs; and (c) editing a short clip from a television drama or movie to relate to a current event (sometimes with new subtitles or dialogues).[89]

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87. *See* Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong ¶ 3(2), Sept. 26, 1984, U.K.-P.R.C., 23 I.L.M. 1366 ("The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.").

88. *See* Hong Kong Basic Law, *supra* note 14, art. 2 ("The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.").

89. THIRD CONSULTATION PAPER, *supra* note 3, at 2; *see also* IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 50 (2011) ("Video parody is today becoming part and parcel of the interactions of private citizens, often via social networking sites, and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy."); U.K. INTELLECTUAL PROPERTY OFFICE, CONSULTATION ON COPYRIGHT 83 (2011) ("Parodies have become part and parcel of online social interaction, with parody works adorning Facebook walls and

Thanks to the high speed and low costs of reproduction and distribution as well as its pseudonymous architecture and many-to-many communication capabilities, the Internet has become a particularly effective means of communication. As a U.S. district court judge recognized in the early days of the World Wide Web, the Internet is "the most participatory form of mass speech yet developed," and its content "is as diverse as human thought."[90] Thus, the amended Ordinance should allow Hong Kong to harness the copyright regime to enable the Internet to realize its immense potential for political, social, economic, and cultural developments.

In all fairness, copyright holders could question why the law should be amended to allow Internet users to use their works to create UGC, as opposed to creating new works themselves. However, a deeper understanding of how meanings are created in culture is needed to properly answer this question. As Lawrence Lessig explained:

> [The meaning of remixes] comes not from the content of what they say; it comes from the reference, which is expressible only if it is the original that gets used. Images or sounds collected from real-world examples become "paint on a palette." And it is this "cultural reference," as coder and remix artist Victor Stone explained, that "has emotional meaning to people. . . . When you hear four notes of the Beatles' 'Revolution,' it means something." When you "mix these symbolic things together" with something new, you create . . . "something new that didn't exist before."[91]

To a large extent, a society that allows Internet users to generate derivative creations will ensure that "[e]veryone—not just political, economic, or cultural elites—has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and subcommunities to which they belong."[92] As Jack Balkin reminded

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trending on Twitter. The modern public's response to an event is as likely to be expressed through Photoshop competitions and Downfall parodies as through traditional comment, argument, and debate.").

90. *Reno v. ACLU*, 929 F. Supp. 824, 883, 842 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

91. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 74-75 (2008) [hereinafter LESSIG, REMIX].

92. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 45 (2004).

us, freedom of speech is the ability to "participate in culture through building on what [people] find in culture and innovating with it, modifying it, and turning it to their purposes."[93]

Since China's resumption of sovereignty over Hong Kong in July 1997, the protection of free speech, free press, and other civil liberties in Hong Kong has always been the subject of heightened scrutiny by Western media.[94] Greater freedom in developing UGC would not only protect Hong Kong's much-needed reputation for free speech and free press, but would also enhance Hong Kong's reputation as a city that respects and protects individual freedom. The protection of such freedom is especially urgent following the shocking developments surrounding the umbrella movement and the increasing discontent among local citizens.

Even better, the proposed PNCUGC exception would help ensure the appropriate balance between the adequate protection of copyright interests and the region's need to protect individual human rights. Article 27 of the Hong Kong Basic Law specifically states: "Hong Kong residents shall have freedom of speech, of the press and of publication."[95] Article 16(2) of the Hong Kong Bill of Rights further provides: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his [or her] choice."[96]

Finally, the development of UGC is important to fostering the development of the creative and cultural sectors in Hong Kong. As Lawrence Lessig, Henry Jenkins, and many other commentators have aptly pointed out, digital literacy now goes beyond texts to include other forms of creative media.[97] Materials that can be used for re-

93. *Id.* at 4.

94. *See, e.g.*, Law, *supra* note 38; Heather Timmons & Grynn Guilford, *Hong Kong's Protests Are Over, but the Fight over Free Speech Has Just Begun*, QUARTZ (Dec. 15, 2014), http://qz.com/311287/hong-kongs-protests-are-over-but-the-fight-over-free-speech-has-just-begun/.

95. Hong Kong Basic Law, *supra* note 14, art. 27.

96. Hong Kong Bill of Rights Ordinance, (1997) Cap. 383, § 8, art. 16(2) (H.K.).

97. *See, e.g.*, KRIS ERICKSON, MARTIN KRETSCHMER & DINUSHA MENDIS, COPYRIGHT AND THE ECONOMIC EFFECTS OF PARODY: AN EMPIRICAL STUDY OF MUSIC VIDEOS ON THE YOUTUBE PLATFORM AND AN ASSESSMENT OF THE

creation therefore need to cover not only texts, but also images, audio files, and video clips—including even portions of preexisting copyrighted works. As Professor Lessig eloquently declared:

> Text is today's Latin. It is through text that we elites communicate . . . . For the masses, however, most information is gathered through other forms of media: TV, film, music, and music video. These forms of "writing" are the vernacular of today. They are the kinds of "writing" that matters most to most.[98]

Likewise, in his *Creative Industries Strategy*, the Australian Minister for the Arts reminded us that "a creative nation is a more productive nation."[99] This key insight cannot be lost on Hong Kong, a place that takes great pride in its high productivity.

In view of the myriad benefits provided by greater UGC development, Hong Kong needs a more flexible copyright regime. Thus, in the first two position papers I submitted to the Hong Kong government as part of the 2006 and 2008 consultation exercises,[100] I called for the introduction of fair use into the region, a position also taken by local OSPs and Internet user groups. Nevertheless, the government declined to introduce a fair use regime in the 2011 Bill, except to offer a very narrow media shifting exception that could be trumped by technological protection measures.[101]

When the third public consultation was launched in July 2013, I opted for a different approach. Given the government's demonstrated and continued reluctance to introduce fair use into Hong Kong, my

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REGULATORY OPTIONS 32 (2013); HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 186 (2006); LESSIG, REMIX, *supra* note 91, at 68-76.

98. LESSIG, REMIX, *supra* note 91, at 68.

99. MINISTRY FOR THE ARTS (Austl.), CREATIVE INDUSTRIES: A STRATEGY FOR 21ST CENTURY AUSTRALIA 2 (2011).

100. *See* PETER K. YU, DIGITAL COPYRIGHT REFORM IN HONG KONG: PROMOTING CREATIVITY WITHOUT SACRIFICING FREE SPEECH 13 (2007), http://www.peteryu.com/jmsc.pdf [hereinafter FIRST POSITION PAPER] (calling for the introduction of a broad fair use privilege similar to Section 35 of the Singapore Copyright Act); PETER K. YU, COPYRIGHT PROTECTION IN THE DIGITAL ENVIRONMENT: CREATING A BETTER DIGITAL FUTURE FOR HONG KONG 13-14 (2008), http://www.peteryu.com/jmsc2.pdf [hereinafter SECOND POSITION PAPER] (reiterating the importance of this proposal).

101. *See* 2011 Bill, *supra* note 4, § 76A (providing an exception for copying sound recordings for private and domestic use).

position paper offered the PNCUGC exception as a middle-of-the-road proposal.[102] Although this exception, like fair use, sought to address the needs and concerns of Internet users, its scope of coverage was more limited. Sadly, and somewhat surprisingly, when the second reading debate resumed at the LegCo, the proposal ended up receiving even more industry opposition than the proposal for an open-ended, catch-all fair use provision, due largely to the considerable benefits the proposal would offer to OSPs, social media platforms, and other third parties.

In that position paper, I further suggested that a fair dealing for PNCUGC could be introduced as an alternative option.[103] This back-up proposal, however, was never formally considered by the government or the legislators—notwithstanding the support of Internet user groups toward the end of the Bills Committee's deliberative process.[104]

B. MODELING AND ADAPTATION

As noted earlier, the proposal for a PNCUGC exception was inspired by Section 29.21 of the Canadian Copyright Modernization Act. Its support, however, did not come from Canadian law alone. The proposed exception also mirrored the transformative use doctrine in the United States.[105] Fueling innovation in the information

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102. *See* THIRD POSITION PAPER, *supra* note 23, at 21-33 (advancing the proposal for a PNCUGC exception).

103. *See id.* at 31 ("If law- and policymakers remain concerned about this test and decline to introduce the proposed PNCUGC exception, they can introduce a special exception for the fair dealing of a copyright work for the purposes of creating PNCUGC, making a transformative use of a copyright work, or both.").

104. *See* CDWA, FURTHER SUBMISSIONS ON COPYRIGHT AMENDMENT BILL 2014, at 2 (2015) (LC Paper No. CB(4)1257/14-15(03)), http://www.legco.gov.hk/yr13-14/english/bc/bc106/papers/bc1060706cb4-1257-3-e.pdf ("We are also prepared to accept Professor Yu's proposal of a fair dealing for UGC so that the application of the UGC exemption would be confined to certain special cases within a limited scope.").

105. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-85 (1994) (advancing the U.S. transformative use doctrine). Before *Campbell*, distinguished appellate Judge Pierre Leval outlined this doctrine in a highly influential article:

> I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely

technology sector, which ranges from search engines to mass digitization projects, this doctrine remains one of the more attractive and valuable features in U.S. copyright law. Indeed, the Canadian and U.S. models are so closely related that policymakers and commentators, including those in the Australian Law Reform Commission ("ALRC"), have considered the Canadian UGC exception a form of the transformative use exception.[106] The U.S. exception has further inspired the Irish Copyright Review Committee to propose the creation of a new copyright exception for innovation, thereby fostering greater transformative or innovative use of copyrighted works in Ireland.[107]

Across the Atlantic, the proposed PNCUGC exception is also consistent with the highly influential *Gowers Review of Intellectual Property* ("*Gowers Review*") commissioned by the U.K. government.[108] Recommendation 11 specifically proposed that the EU Information Society Directive "be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three Step Test."[109] Given the longstanding ties between Hong Kong and U.K. legal traditions, this recommendation deserves considerable policy attention.

The ability to locate parallels in other countries is important, because Hong Kong is a small jurisdiction, has been the subject of intense media scrutiny, and has attracted constant pressure from

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"supersede the objects" of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.

Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

106. *See* AUSTL. LAW REFORM COMM'N, COPYRIGHT AND THE DIGITAL ECONOMY: DISCUSSION PAPER 202-03 (2013) [hereinafter ALRC DISCUSSION PAPER].

107. *See* IRISH COPYRIGHT REVIEW COMMITTEE, MODERNISING COPYRIGHT 72-75 (2013), https://www.djei.ie/en/Publications/Publication-files/CRC-Report.pdf.

108. ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY (2006).

109. *Id.* at 68.

foreign copyright holders and their supportive governments. This constant pressure is due in large part to the widespread piracy and counterfeiting problems in China as well as Hong Kong's strategic location as a gateway to the Chinese mainland. To ensure that the model would stand up to international scrutiny, the proposed PNCUGC exception drew heavily on both Canadian and U.S. copyright laws as well as Recommendation 11 of the *Gowers Review*. Such modeling prevented Hong Kong from being isolated in the international copyright community. After all, any question concerning the appropriateness of the proposed exception will inevitably implicate the laws of these other major economies.

At the moment, it is hard to imagine any country willing to challenge the U.S. fair use provision, including the transformative use doctrine, before the Dispute Settlement Body of the World Trade Organization ("WTO"). Nor is a WTO panel likely to strike down this provision. It is worth recalling that "[t]he compatibility of the fair use doctrine with the United States' obligations under the Berne Convention [for the Protection of Literary and Artistic Works ("Berne Convention")] was not formally questioned or disputed" when the country acceded to the Convention.[110] The United States also supported the inclusion of the three-step test in the two Internet treaties of the World Intellectual Property Organization ("WIPO")—WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.[111] The country made clear that "it was essential that the Treaties permit the application of the evolving doctrine of 'fair use.'"[112]

In the future, challenges will become even less likely as more countries embrace the fair use regime—by switching over from a close-ended, purpose-based fair dealing regime, perhaps. Thus, even though some commentators, especially those in the European Union,

110. Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 114 (2000) [hereinafter Okediji, *International Fair Use*].

111. WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) [hereinafter WCT]; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 18 (1997).

112. Christophe Geiger, Daniel Gervais & Martin Senftleben, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT'L L. REV. 581, 615 (2014) (quoting the U.S. delegation at the 1996 WIPO Diplomatic Conference).

still question whether the U.S. fair use provision complies[113] with the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights[114] ("TRIPS Agreement"), the Berne compliance question has become increasingly academic.

Although the proposed PNCUGC exception was modeled as close to Section 29.21 of the Canadian Copyright Modernization Act as possible, it included a key substantive change. In the qualifying condition concerning noncommercial purposes, the word "solely" was replaced with the word "predominantly."[115] This change broadened the exception to cover a wider array of UGC works. It was particularly important in light of the increasing opportunities in "a digital environment that monetises social relations, friendships and social interactions."[116] By changing a single word, this proposal for a PNCUGC exception would clarify the law in situations where the UGC in question might not be considered "solely for non-commercial purposes"—for instance, when the UGC developer receives inconsequential advertising revenue from an Internet or social media platform.

This change is important because it is much more difficult to determine what constitutes a noncommercial activity than what the language in Section 29.21 suggests. As shown in a study conducted by Creative Commons, the Internet user community has wide disagreement over what constitutes "non-commercial use."[117] If members of this community could not even achieve consensus among themselves, one can imagine how much harder this task would be when the copyright holders' views and interests were also

113. *See* Okediji, *International Fair Use*, *supra* note 110, at 115. *But see* ALRC FINAL REPORT, *supra* note 41, at 120-22 (noting the lack of challenges to fair use in international fora).

114. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement].

115. *See* THIRD POSITION PAPER, *supra* note 23, at 24 (explaining the replacement of the word "solely" in the Canadian statute with the word "predominantly").

116. COPYRIGHT COUNCIL EXPERT GRP. (AUSTL.), DIRECTIONS IN COPYRIGHT REFORM IN AUSTRALIA 2 (2011).

117. *See* CREATIVE COMMONS, DEFINING "NONCOMMERCIAL": A STUDY OF HOW THE ONLINE POPULATION UNDERSTANDS "NONCOMMERCIAL USE" (2009) (studying how Internet users define the term "noncommercial").

taken into consideration. To avoid difficult situations, the word "predominantly" was therefore used instead. In doing so, this change sought to clarify a grey area without greatly expanding the scope of the proposed exception. It also took into consideration the large gap between legal and social norms.[118]

C. CRITICISMS AND RESPONSES

As the support for the PNCUGC proposal and its variants grew, industry representatives began actively arguing why the proposal would not suit Hong Kong. Indeed, many of these arguments arrived so early in the third consultation exercise that I managed to respond to them one-by-one in the position paper I submitted to the government.[119] These criticisms included the following: First, because the UGC concept is vague, difficult to define, and remains highly contested,[120] it is not ideal for incorporation into the Copyright Ordinance.[121] Second, the proposed exception does not meet the oft-cited three-step test[122] laid out in the Berne Convention,[123] the TRIPS

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118. *See* JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES (2008) (describing generational differences in the use of digital technology and the Internet); *see also* Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 756-63 (2005) (discussing massive online copyright infringement in relation to Generation Y).

119. *See* THIRD POSITION PAPER, *supra* note 23, at 26-33.

120. *See* BILLS COMMITTEE'S REPORT, *supra* note 29, at 24-25 ("The Administration has indicated that it has reservation in adopting a generic concept of UGC as a subject matter for copyright exception in this round of update as the concept of UGC is vague and undefined. There is no widely accepted definition of UGC at the international level. The concept appears to be evolving alongside technological developments.").

121. *See id.* at 24 ("The Administration has indicated that it has reservation in adopting a generic concept of UGC as a subject matter for copyright exception in this round of update as the concept of UGC is vague and undefined. There is no widely accepted definition of UGC at the international level."). That the government repeatedly relied on this argument is interesting. After all, the term UGC was never used in the text of the proposed exception. It was only included in the exception's sub-heading, which of course could be altered if such a sub-heading would pose legal problems. It simply makes little sense to reject a workable provision based on the stakeholders' criticism of a sub-heading.

122. *See id.* at 25 ("The Administration . . . has reservation about whether the UGC exception, in particular the one proposed by the netizens, notably the Copyright and Derivative Works Alliance, would comply with the three-step test under the Berne Convention and the TRIPS Agreement.").

123. *See* Berne Convention for the Protection of Literary and Artistic Works art. 9(2), Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (revised at Paris July 24,

Agreement,[124] and the WIPO Copyright Treaty.[125] Third, the proposed exception is not compliant with Article 61 of the TRIPS Agreement, which requires WTO members to "provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale."[126] Fourth, by replacing the word "solely" with "predominantly"—or, in regard to CDWA's proposal, by replacing the phrase "solely noncommercial" with "non-profit making"—the proposed exception is broader and more controversial than Section 29.21 of the Canadian Copyright Modernization Act.[127] Fifth, the Canadian statute remains the world's only exception for noncommercial UGC and has yet to be widely accepted by the

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1971) ("It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.").

124. *See* TRIPS Agreement art. 13 ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.").

125. *See* WCT, *supra* note 111, art. 10(1) ("Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."); *id.* art. 10(2) ("Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.").

126. TRIPS Agreement art. 61. For the Author's discussion of Article 61 of the TRIPS Agreement, see generally Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT'L L. REV. 727, 731-34 (2011); Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1056-69 (2011).

127. As the Asian Regional Office of the International Federation of the Phonographic Industry (IFPI) noted in its supplementary comments submitted to the Hong Kong government:

> It is a view shared by many commentators, IFPI included, that the Canadian exception breaches the Three-Step Test laid down under the TRIPS Agreement and to which Hong Kong is bound. Since the proposed UGC exception would be much broader in scope than the Canadian law, it appears inevitable that it will also breach the Three Step Test.

IFPI ASIAN REGIONAL OFFICE, IFPI SUPPLEMENTARY COMMENTS ON THE TREATMENT OF PARODY UNDER THE COPYRIGHT REGIME CONSULTATION IN HONG KONG 4 (2013), http://www.cedb.gov.hk/citb/doc/en/consultation/parody_submission/1079.pdf [hereinafter IFPI SUPPLEMENTARY COMMENTS].

international community.[128] Sixth, owing to its relative recent origin and the lack of parallels in other parts of the world, this untested model has not generated enough case law to provide public guidance.[129] Finally, the proposed exception will create confusions and complications in the Hong Kong copyright regime, because UGC development involves many different layers of rights and, by extension, many different copyright holders and perhaps also many types of rights holders.[130]

Because I already offered detailed responses to these criticisms in the position paper I submitted to the government as well as in several

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128. As the Bills Committee's report stated:

> As far as the Administration is aware, only Canada has introduced the UGC exception in her copyright legislation. The subject of UGC remains unsettled in the international community and there are conflicting views as to whether the UGC exception would fail the three-step test among academics (such as Dr Mihaly Ficsor, the former Assistant Director General of WIPO and Professor Peter Yu).

BILLS COMMITTEE'S REPORT, *supra* note 29, at 25.

129. As the IFPI's Asian Regional Office noted in its supplementary comments submitted to the Hong Kong government:

> [T]he Canadian exception has only been in place for one year, and its scope of application and other details as to how it works have yet to be determined. Furthermore, we are not aware of any cases concerning the exception have been taken in the domestic Canadian courts. . . . In the circumstances, it is much too early to evaluate the real-world effect of the Canadian exception.

IFPI SUPPLEMENTARY COMMENTS, *supra* note 127, at 4; *see also* MOTION PICTURE ASSOCIATION, MPA SUBMISSION ON THE "TREATMENT OF PARODY UNDER THE COPYRIGHT REGIME CONSULTATION PAPER" 3 (2013), http://www.cedb.gov.hk/citb/doc/en/consultation/parody_submission/0952.pdf [hereinafter MPA SUBMISSION] ("Because the Act only came into law in June 2012 it will be unclear exactly what the scope of 'non-commercial purposes' (s. 29.21(1)(a)) or 'a substantial adverse effect, financial or otherwise' (s. 29.21(1)(d)) might be for some time to come."); HKCA Press Release, *supra* note 44 ("Only one country—Canada—has [the UGC] exception testifying to the fact that such an exception is highly controversial, and totally unnecessary as the quantity of UGCs continue to grow exponentially globally.").

130. As the IFPI's Asian Regional Office noted in its supplementary comments submitted to the Hong Kong government:

> [I]t is unclear whether the right holder of the first work will be an owner or co-owner of the copyright (if any) in the new UGC work as no agreement will be in place to delineate such rights. A further complication will arise if a third party copies, adapts or otherwise exploits the new work, as both the original right holder and the creator of the new work may claim to be entitled to licence fees, and both may sue for infringement. The proposed UGC exception fails to take into account such complicated issues and will therefore lead to much uncertainty.

IFPI SUPPLEMENTARY COMMENTS, *supra* note 127, at 5.

subsequent articles,[131] I do not intend to rehash my earlier arguments. Instead, this Section will respond to two distinct groups of criticisms.

1. Lack of Consultation

The first group includes criticisms made by government officials, the copyright industries, and their supportive legislators. It lamented how the public have not been consulted about the proposed PNCUGC exception.[132] As a result, the critics argued, the LegCo should reject this late-arriving proposal—or at least delay its consideration until the next round of copyright consultation.[133]

The claim that the proposed exception has not been publicly consulted or was introduced in the eleventh hour is clearly not based on facts. That the copyright holders' criticisms arrived so early in the consultation process that I managed to include my replies in the government submission is revealing. Such inclusion suggests that the

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131. For some of these responses, see THIRD POSITION PAPER, *supra* note 23, at 26-33; Peter K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?*, 26 INTELL. PROP. J. 175, 190-96 (2014) [hereinafter Yu, *Canadian UGC Exception*]; Peter K. Yu, *The Confuzzling Rhetoric Against New Copyright Exceptions*, *in* 1 KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY 278 (Peter Drahos et al. eds., 2015); Peter K. Yu, *Still Need to Work Harder on Copyright Reform*, MING PAO DAILY NEWS (Hong Kong) (Oct. 17, 2014), http://news.mingpao.com/pns/余家明: 版權條例須努力web_tc/article/20141017/s00012/1413483482648 [hereinafter Yu, *Still Need to Work Harder*] (in Chinese).

132. Interestingly, the copyright industries have made the same argument against the exceptions for quotation and commenting on current events that the government introduced into the 2014 Bill. IFPI ASIAN REGIONAL OFFICE, IFPI SUBMISSIONS ON THE HONG KONG COPYRIGHT (AMENDMENT) BILL 2014, at 2-3 (2014) (LC Paper No. CB(4)67/14-15(108)), http://www.legco.gov.hk/yr13-14/english/bc/bc106/papers/bc1061025cb4-67-108-e.pdf. Apparently, the industries' views on what constitutes public consultation were very different from those held by both the government and Internet user groups.

133. As LegCo Councilor Starry Lee, the chair of the Democratic Alliance for the Betterment and Progress of Hong Kong, lamented:

> Given that the general public might not quite understand the legislative timetable, some netizens or dissenters gave their views only at a later stage. This I understand. But, as Members of this Council and lawmakers, we should understand that if we seek to have our views incorporated in the Bill, we should adopt a more proactive and more responsible approach, which is to express our views during the consultation period or at an early stage of the meetings of the Bills Committee, so as to stimulate discussion in society.

Hong Kong *Hansard* 21 Jan. 2016 Col 3938 (H.K.), http://www.legco.gov.hk/yr15-16/english/counmtg/hansard/cm20160121-translate-e.pdf.

public debate on issues surrounding the proposed PNCUGC exception was ongoing even before the conclusion of the government's consultation exercise.

Moreover, a quick glance at the record of this consultation exercise as well as the government's consultation report shows that this proposal was the legislative choice overwhelmingly supported by Internet users and their supportive groups. These constituencies accounted for more than ninety-seven per cent of the close to 2,500 total consultation submissions received by the government.[134] Out of the total 2,455 submissions, "a total of 2 387 submissions [came] from users and netizen groups such as the Copyright and Derivative Works Alliance and a couple of other Facebook groups."[135]

Even if the copyright industries and their supportive legislators were to discount the submissions by ordinary citizens that were generated by online templates, they would still be estopped from claiming that this proposal was not publicly consulted considering that their own consultation submissions included detailed explanations on why they did not support this proposal. Examples of these submissions were those from the Asia-Pacific Office of the Motion Picture Association,[136] the Asian Regional Office of the International Federation of the Phonographic Industry,[137] and the Hong Kong film industry.[138] Just because these trade groups objected to the proposal during the public consultation does not mean that the proposal was not publicly consulted.

Likewise, government officials were estopped from claiming that the proposed exception had not been publicly consulted. When the government released its consultation report in December 2013, that report already offered a preliminary analysis of the proposal on the introduction of a UGC exception into Hong Kong copyright law.[139] In its first meeting, the Bills Committee also discussed "the operation

134. *See* THIRD CONSULTATION REPORT, *supra* note 19, app. II, at 1.

135. *Id.*

136. *See* MPA SUBMISSION, *supra* note 129, at 3.

137. *See* IFPI SUPPLEMENTARY COMMENTS, *supra* note 127.

138. *See* H.K. FILM & VIDEO LTD ET AL., OUR VIEWS & SUGGESTIONS ON THE TREATMENT OF PARODY UNDER THE COPYRIGHT REGIME CONSULTATION IN HONG KONG 6-8 (2013), http://www.cedb.gov.hk/citb/doc/en/consultation/parody_submission/2123.pdf.

139. *See* THIRD CONSULTATION REPORT, *supra* note 19, app. III.

of the safe harbour mechanism and the concept of 'User Generated Content.'"[140] Since then, the Committee discussed the proposal for a UGC exception continuously in its next four meetings.[141] Although the government has repeatedly expressed its reservation about this proposal—in particular how it may not meet international standards, such as the three-step test under the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty—it cannot deny that the proposal was analyzed during the consultation exercise. The government's consultation report speaks for itself.

2. UGC v. PNCUGC

The second group of criticisms consists of those against a blanket UGC exception. For instance, the critics—relying on Mihály Ficsor, a leading copyright commentator who has been both a WTO panelist and a former assistant WIPO director general—claimed that such an exception would not pass muster under the three-step test in the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty.[142] These critics also claimed that such a blanket exception

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140. BILLS COMMITTEE, MINUTES OF THE FIRST MEETING HELD ON THURSDAY, 17 JULY 2014, AT 4:30 PM IN CONFERENCE ROOM 2 OF THE LEGISLATIVE COUNCIL COMPLEX app., at 1 (2014) (LC Paper No. CB(4)1028/13-14), http://www.legco.gov.hk/yr13-14/english/bc/bc106/minutes/bc10620140717.pdf.

141. *See* BILLS COMMITTEE, MINUTES OF THE SECOND MEETING HELD ON TUESDAY, 14 OCTOBER 2014, AT 10:45 AM IN CONFERENCE ROOM 1 OF THE LEGISLATIVE COUNCIL COMPLEX (2014) (LC Paper No. CB(4)156/14-15), http://www.legco.gov.hk/yr13-14/english/bc/bc106/minutes/bc10620141014.pdf; OCTOBER 25 MEETING MINUTES, *supra* note 35; BILLS COMMITTEE, MINUTES OF THE FOURTH MEETING HELD ON TUESDAY, 4 NOVEMBER 2014, AT 4:30 PM IN CONFERENCE ROOM 1 OF THE LEGISLATIVE COUNCIL COMPLEX (2014) (LC Paper No. CB(4)228/14-15), http://www.legco.gov.hk/yr13-14/english/bc/bc106/minutes/bc10620141104.pdf; BILLS COMMITTEE, MINUTES OF THE FIFTH MEETING HELD ON TUESDAY, 18 NOVEMBER 2014, AT 10:45 AM IN CONFERENCE ROOM 1 OF THE LEGISLATIVE COUNCIL COMPLEX (2014) (LC Paper No. CB(4)251/14-15), http://www.legco.gov.hk/yr13-14/english/bc/bc106/minutes/bc10620141118.pdf.

142. As Mihály Ficsor observed in regard to Hong Kong:

> [T]he concept of UGC is too broad and vague. As a result, a general exception for UGC may hardly meet the first condition . . . of the above-mentioned three-step test, namely, that an exception may only be provided in a special (eg, limited and duly determined) case, but, in fact, it would not be in accordance with the test's other two conditions either. This would also be true if the concept were somewhat narrowed to adaptations of existing works by users.

Mihály Ficsor, *Why the Hong Kong Bill on Copyright Amendments Is Right on the Issue of UGC*, H.K. LAW. (Aug. 2014), http://www.hk-lawyer.org/content/why-

would prevent copyright holders and the government from taking legal action against commercial infringers, thereby promoting piracy in the digital environment.[143]

While I find the concern about increased digital piracy highly exaggerated—considering that piracy is already rampant in the digital environment and such a narrow exception is unlikely to have any major impact in this area—I do question the relevance of this type of criticism to the discussion of the proposed PNCUGC exception. Just because a broad, blanket exception is problematic does not mean that a narrower exception that is specifically tailored to noncommercial individual online activities will be equally problematic.

Indeed, many of the conditions added to the PNCUGC exception were intended to narrow and concretize its scope so that the proposed exception does not pose the same problems as a blanket exception. Specifically, the PNCUGC exception includes five required conditions: (1) an individual Internet user, not just any user; (2) a predominantly noncommercial activity, not a commercial activity; (3) the acknowledgement of source, where reasonable; (4) the use of noninfringing pre-existing work, not pirated work; and (5) no substantial adverse effect, such as market substitution. If an individual user engages in commercial infringement or if the UGC created supplants the original market, the PNCUGC exception will

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hong-kong-bill-copyright-amendments-right-issue-ugc; *see also* Mihály Ficsor, *Comments on the UGC Provisions in the Canadian Bill C-32: Potential Dangers for Unintended Consequences in the Light of the International Norms on Copyright and Related Rights*, COPYRIGHT SEE-SAW (Oct. 23, 2010), http://www.copyrightseesaw.net/archive/?sw_10_item=31 (discussing the flaws of Section 29.21 of the Canadian Copyright Modernization Act). *But see* Yu, *Still Need to Work Harder*, *supra* note 131 (responding to Dr. Ficsor's reservations about the introduction of a PNCUGC exception into Hong Kong).

143. As John Medeiros, the Chief Policy Officer of the Cable & Satellite Broadcasting Association of Asia, declared:

> A blanket exception for UGC is unwarranted because the hard work of the employees in the creative sector is easily stolen and spread online under the fictitious guise of being "user-generated". A blanket exception would allow anyone to say, "Oh, I have copied this video of Game of Thrones and provided my commentary at the end, so it is covered by the exception." It should be obvious that not all content uploaded online is legitimate, and not all should be covered by a blanket exception.

John Medeiros, *Real Purpose of the Copyright (Amendment) Bill Being Overlooked*, CHINA DAILY ASIA (Dec. 18, 2015), http://www.chinadailyasia.com/opinion/2015-12/18/content_15360395.html.

be unavailable to this individual. In such a scenario, the individual will be unable to meet the second or fifth condition, or both the second and fifth conditions.

To be certain, the critics of this proposal could take the position that no viable distinction exists between UGC in general and predominantly noncommercial UGC. After all, the boundaries between commercial and noncommercial are both subjective and unclear, as the Creative Commons study has shown.[144] There are also other valid industry concerns, such as those concerning licenses for UGC platforms.[145]

Nevertheless, the critics' position would create two major problems within the copyright regime. First, a categorical rejection of the commercial-noncommercial distinction would require the rewriting of the copyright laws in many jurisdictions. In the Hong Kong Copyright Ordinance, for example, the word "commercial" has been used in over two dozen provisions.[146] In determining the scope of fair dealing under Sections 38, 41A, and 54A of the Hong Kong

144. *See* CREATIVE COMMONS, *supra* note 117; *see also* ALRC DISCUSSION PAPER, *supra* note 106, at 205-07 (noting the difficulties in distinguishing between commercial and noncommercial uses of copyrighted works).

145. As the IFPI's Asian Regional Office noted in its supplementary comments:

> Thousands of works are currently subject to platforms such as YouTube, who pay royalties to the rightholders of the copyright works in question, in order to allow them to make these works, including UGC, available to the public. These platforms would not need to obtain a licence or pay royalties for the use of those works in Hong Kong (but not so outside Hong Kong) if the proposed UGC exception is enacted here. Furthermore, even if the commercial platforms do not benefit from the UGC exception, the ability of the user-creators to disseminate their "creations" to the public online, for instance through their own websites, undercuts the value to platforms (such as YouTube) of licences since members of the public may go to the websites created by users—or even to non-commercial websites created by users in order to aggregate UGC—rather than to the licensed platforms. There is therefore no question at all that UGC disseminated on platforms (commercial or otherwise) has the potential to adversely affect the market for the work.

IFPI SUPPLEMENTARY COMMENTS, *supra* note 127, at 4; *see also id.* at 2 ("Proponents who claim UGC does no harm where it is 'non-commercial' ignore the practical reality that this material is, in the vast majority of cases, posted to commercial platforms which then derive revenue from it in some way. Further, even non-commercial dissemination to the public can cause harm to the market of the original work.").

146. *See* Hong Kong Copyright Ordinance, *supra* note 2, §§ 25, 38, 40A, 40B, 40C, 41A, 54A, 56, 89, 92, 117, 118, 119B, 182, 196, 207A, 208, 242A, 246A, 273B, 273C, 273E, 273F.

Copyright Ordinance, the court has to specifically consider whether "the dealing is of a commercial nature."[147]

Second, if the copyright industries have no interest in exploring proposals that distinguish between different types of UGC—such as between commercial and noncommercial UGC—they are unlikely to develop new, innovative solutions that address the future challenges in the copyright regime. Such short-sighted views are particularly troublesome, considering that the current developments in the digital environment have already shown that UGC development will become more pervasive in the near future, not less.

IV. FAIR USE

The second proposal concerns the introduction of an open-ended, catch-all fair use provision in Hong Kong. The introduction of fair use into Hong Kong has received longstanding support from both OSPs and Internet user groups. Even in the first two consultation exercises—launched in December 2006 and April 2008—various stakeholders, myself included,[148] have called for the introduction of fair use. Coincidentally, before assuming office at the LegCo in October 2012, Councilor Charles Mok was involved in these consultations in his capacity as the founding chairman of Internet Society Hong Kong.[149]

Although the government declined to include fair use in both the 2011 and 2014 Bills, LegCo Councilor Raymond Chan moved a CSA to introduce an open-ended, catch-all fair use provision. The

147. *Id.* §§ 38(3)(a), 41A(2)(a), 54A(2)(a).

148. *See* FIRST POSITION PAPER, *supra* note 100, at 13 (calling for the introduction of a broad fair use privilege similar to Section 35 of the Singapore Copyright Act); SECOND POSITION PAPER, *supra* note 100, at 13-14 (reiterating the importance of this proposal).

149. As he declared on the floor:

> I have to point out that this UGC we have been talking about has been discussed for a long time, more than two years during the consultation, whereas fair use was already proposed for consultation almost a decade ago. I would say that the Government has all along remained unconvinced, or over the years it has been the Government's position not to accept them. But I think it is not accurate to say that no consultation has been conducted.

Hong Kong *Hansard* 17 Dec. 2015 Col 3167 (H.K.), http://www.legco.gov.hk/yr15-16/english/counmtg/hansard/cm20151217-translate-e.pdf.

amendment read as follows:

> 39B. Fair use
>
> Notwithstanding the provisions of sections 22, 89, 92 and 96, the fair use of a copyright work, including such use by reproduction or distribution in copies or communication by any other means, for purposes such as criticism, review, quotation, reporting and commenting on current events, parody, satire, caricature, pastiche, education (including multiple copies for educational establishment use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered must include—
>
> (a) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit-making purposes;
>
> (b) the nature of the copyright work;
>
> (c) the amount and substantiality of the portion used in relation to the copyright work as a whole; and
>
> (d) the effect of the use upon the potential market for or value of the copyright work.
>
> The fact that a work is unpublished must not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[150]

To preempt this proposal, the government, industry representatives, and their supportive legislators actively explained why fair use should not be introduced into Hong Kong. Although these critics advanced many reasons against such inclusion, a key argument concerned the fact that fair use is based on the American model and that Hong Kong has a longstanding fair dealing tradition, similar to the one found in the United Kingdom and other Commonwealth jurisdictions.[151] As the critics described to the local mass media in layperson's terms, Hong Kong should not suddenly shift to driving on the right when it has been driving on the left for such a long time.[152]

This Part begins by exploring the difference between fair dealing and fair use. It then discusses how the open-ended, catch-all fair use

150. BILLS COMMITTEE'S AMENDMENTS, *supra* note 41, at 4.

151. *See* discussion *infra* Part IV.D.1.

152. *See* Peter K. Yu, *Is the Fair Use Doctrine Feasible in Hong Kong? (Part I)*, H.K. IN-MEDIA (Dec. 21, 2015), http://www.inmediahk.net/node/1039616 (in Chinese).

proposal before the LegCo did not call for Hong Kong to suddenly abandon the fair dealing model to embrace the fair use model. It concludes by scrutinizing six major arguments that the critics have advanced against this proposal.

A. FAIR DEALING VS. FAIR USE

The easiest, and somewhat oversimplified, way to distinguish between fair dealing and fair use is that the former specifies the permissible conduct while the latter does not specify any permissible conduct. Instead, fair use relies on a case-by-case balancing of multiple fairness factors to determine whether the conduct in question is permissible. In short, fair dealing is best described as a rule, while fair use is best described a standard.[153]

For illustrative purposes, consider Section 39 of the Hong Kong Copyright Ordinance. Section 39(1) states:

> Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, if it is accompanied by a sufficient acknowledgement, does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.[154]

Section 39(2) further provides: "Fair dealing with a work for the purpose of reporting current events, if . . . it is accompanied by a sufficient acknowledgement, does not infringe any copyright in the work."[155] Because both provisions specify the permissible conducts and neither provision requires any balancing of factors, Section 39 is best described as a rule, not a standard.

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153. As the ALRC declared in its final report:

> The flexibility of fair use largely comes from the fact that it is a standard, rather than a rule. This distinction between rules and standards is commonly drawn in legal theory. Rules are more specific and prescribed. Standards are more flexible and allow decisions to be made at the time of application, and with respect to a concrete set of facts. Further, "standards are often based on concepts that are readily accessible to non-experts".
>
> Rules and standards are, however, points on a spectrum. Rules are "not infinitely precise, and standards not infinitely vague". The legal philosopher H L A Hart wrote that rules have "a core of certainty and a penumbra of doubt". The distinction is nevertheless useful.

ALRC FINAL REPORT, *supra* note 41, at 99; *see also id.* at 98-100 (discussing rules and standards in the fair use context).

154. Hong Kong Copyright Ordinance, *supra* note 2, § 39(1).

155. *Id.* § 39(2).

For comparison, now consider Section 107 of the U.S. Copyright Act, which provides as follows:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[156]

Because this provision requires the court to balance four enumerated factors, it is best described as a standard, not a rule.

While this rule-standard distinction is easy for the public to comprehend and has been widely used by legal commentators,[157] including those in the intellectual property field,[158] such a distinction does not work very well in regard to the fair dealing/fair use debate. Consider again Section 39 of the Hong Kong Copyright Ordinance. Because this provision includes the phrase "fair dealing," it

156. 17 U.S.C. § 107 (2012).

157. For discussions of this distinction, see, for example, H.L.A. HART, THE CONCEPT OF LAW 124-35 (2d ed. 1994); John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 AUSTL. J. LEGAL PHIL. 47 (2002); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

158. *See, e.g.*, ALRC FINAL REPORT, *supra* note 41, at 99-100 (discussing rules and standards in the fair use context); Chiang Tun-Jen, *The Rules and Standards of Patentable Subject Matter*, 2010 WIS. L. REV. 1353 (2010) (breaking § 101 of the U.S. Patent Act down into rules and standards, and providing utilitarian justifications for each type of subject-matter restriction covered by the provision); Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1332-33 (2002) (discussing rules and standards in the cyberlaw context); Thomas B. Nachbar, *Rules and Standards in Copyright*, 52 HOUS. L. REV. 583 (2014) (discussing the implications of shifting copyright law in the direction of either rules or standards).

inevitably will require anyone reading the statute to determine what dealing is fair. It does not matter whether the reader is a judge, a law enforcement officer, a copyright holder, or an individual Internet user.

To make things worse, because of the common law tradition in those Commonwealth jurisdictions embracing the fair dealing model, the use of fairness factors often emerge through case law even when those factors have not been written into the statutory provisions.[159] For instance, in determining what constitutes fair dealing for the purposes of reporting on current events in *Ashdown v. Telegraph Group Ltd.*, a case before the Court of Appeal of England and Wales, Lord Phillips quoted with approval the late Justice Hugh Laddie's noted treatise:

> It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most

159. As Lord Denning declared in the classic case of *Hubbard v. Vosper*:

> It is impossible to define what is "fair dealing". It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide. In the present case, there is material on which the tribunal of fact could find this to be fair dealing.

Hubbard v. Vosper, [1972] 2 Q.B. 84 (Eng.); *see also* Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309, 342-43 (2008) (extracting from English copyright law the following fairness factors: nature of the work, how the work was obtained, amount taken, uses made, commercial benefit, motives for the dealing, consequences of the dealing, and purpose achieved by different means).

> important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of "leaked" information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing.[160]

Although this excerpt focused on Section 30 of the U.K. Copyright, Designs and Patents Act 1988, the factors mentioned strongly resemble the fair use factors found in Section 107 of the U.S. Copyright Act. While the former factors are used in a fair dealing regime, the latter are used in a fair use regime.

Moreover, as a historical matter, there was apparently no distinction between fair dealing and fair use before the codification of the fair dealing doctrine in U.K. copyright law in 1911. As Ariel Katz noted:

> [T]he common terminology in English copyright law prior to 1911 was often "fair use", just like the American terminology, but it was also common to use the term "fair" as an adjective to describe specific activities, such as "fair quotation", "fair criticism", "fair refutation", and, in the earlier cases, "fair abridgement". Sometimes courts would not use the term "fair" but its synonyms, such as "bona fide imitations, translations and abridgements." The switch to "fair dealing" in Commonwealth jurisdictions seems to simply follow a terminology adopted when the doctrine was codified in 1911, but . . . there is no evidence that the switch from "use" to "dealing" was intended to reflect any change in the law or its direction.[161]

Indeed, fair use originated from the British concept of fair

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160. *Ashdown v. Telegraph Group Ltd.*, [2002] EWCA (Civ) 1142 (Eng.) (quoting HUGH LADDIE, PETER PRESCOTT & MARY VITORIA, THE MODERN LAW OF COPYRIGHT AND DESIGNS § 20.16 (3d ed. 2000)).

161. Ariel Katz, *Fair Use 2.0: The Rebirth of Fair Dealing in Canada*, *in* THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 93, 101-02 (Michael Geist ed., 2013) [hereinafter COPYRIGHT PENTALOGY].

abridgement.[162] In the United States, the fair use doctrine was derived from *Folsom v. Marsh*, which concerned the unauthorized reproduction of President George Washington's writings, official documents, and private letters that were extracted from a twelve-volume book set.[163] Before laying down the now-codified fair use doctrine, Justice Joseph Story considered the British concept "the real hinge of the whole controversy."[164] Given the historical linkage between fair use and fair abridgement, it is no surprise that some commentators have traced fair use back to the British copyright regime.[165]

As if these complications had not made the distinctions between fair dealing and fair use murky enough, the U.S. fair use factors have been written into three of the four fair dealing provisions in Hong Kong—namely, Sections 38, 41A, and 54A of the Hong Kong Copyright Ordinance.[166] These factors are also used in all the new fair dealing provisions in the 2014 Bill.[167] If the American fair use provision were as unappealing as the critics had claimed, owing to its need for case-by-case balancing of multiple factors, how would these critics explain the operation of the U.S. fair use factors in these three Sections of the Ordinance? Can judges or law enforcement officers really determine fair dealing without balancing the U.S. fair use factors?

Put differently, are the provisions in Hong Kong based on the

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162. For discussions of the traditional English doctrine of fair abridgement, see Joseph J. Beard, *Everything Old Is New Again: Dickens to Digital*, 38 LOY. L.A. L. REV. 19, 24-26 (2004); Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1379-93 (2011).

163. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

164. *Id.* at 347.

165. As Matthew Sag noted:

> [H]istorical discussion of the fair use doctrine in the United States tends to proceed from the wrong baseline. Specifically, it falls short by over 100 years—treating the first American fair use case, *Folsom v. Marsh* (1841), as the beginning of the American fair use doctrine. . . . [T]he fair use doctrine is better understood as the continuation of a long line of English fair abridgment cases, dating back to the beginning of statutory copyright law in 1710.

Sag, *supra* note 162, at 1372-73; *see also* ALRC FINAL REPORT, *supra* note 41, at 93 ("The principles encapsulated in fair use and fair dealing exceptions also have a long common law history, traced back to eighteenth century England.").

166. Hong Kong Copyright Ordinance, *supra* note 2, §§ 38, 41A, 54A.

167. *See* 2014 Bill, *supra* note 4, §§ 39 (amended), 39A.

British fair dealing model or the American fair use model? The answer is of course both. Hong Kong has a hybrid model due to its colonial history and unfortunate position in the U.S.-China intellectual property policy. As a former British colony, Hong Kong unsurprisingly embraced the British fair dealing model. In fact, most of the provisions in the Hong Kong Copyright Ordinance are legacy provisions introduced by the colonial government before Hong Kong's return to China in July 1997.[168] Nevertheless, because of active external pressure from the United States—through the American Chamber of Commerce,[169] the International Intellectual Property Alliance,[170] and the Office of the United States Trade Representative[171]—the region has actively transplanted American

168. The present Copyright Ordinance came into effect just a few days before China resumed sovereignty over the region on July 1, 1997. *See* MICHAEL D. PENDLETON & ALICE LEE, INTELLECTUAL PROPERTY IN HONG KONG 119 (2008).

169. *See* Letter from Peter Levesque, Chairman, and Richard Vuylsteke, President, The American Chamber of Commerce in Hong Kong to Clerk, Bills Committee on Copyright (Amendment) Bill 2014 (Oct. 17, 2014) (LC Paper No. CB(4)67/14-15(106)), http://www.legco.gov.hk/yr13-14/english/bc/bc106/papers/bc1061025cb4-67-106-e.pdf ("Recognizing Hong Kong's broader political realities, we strongly urge the Administration to pass the Bill in this current Legislative Council year. Time is of the essence."); *see also* Cheung et al., *supra* note 75 ("The American Chamber of Commerce said it was disappointed that the government was 'forced to take this position', and 'the blame lies squarely with those legislators who have participated in filibustering tactics and have perpetuated misinformation about the bill'.").

170. As the International Intellectual Property Alliance declared:

> [T]he overriding concern is that Hong Kong has simply been unable, over the past decade, to bring its laws into sync with realities of the digital networked age. Thus, the overriding priority must be to enact the Copyright (Amendment) Bill 2014 without any further changes. Only then should Hong Kong turn to a full-scale review of whether its copyright law needs further updates to ensure that the territory can properly protect copyright in the online space, and does not fall even further behind the rapid pace of technological and market change.

INT'L INTELLECTUAL PROP. ALLIANCE, 2016 SPECIAL 301 REPORT OF COPYRIGHT PROTECTION AND ENFORCEMENT 89 (2016), http://www.iipawebsite.com/rbc/2016/2016SPEC301HONGKONG.PDF. In 2016, the Alliance recommended that the U.S. Trade Representative place Hong Kong back on the Section 301 Watch List—for the first time since the late 1990s. *See id.* annex B, at 1 (providing a chart of the United States Trade Representative's Special 301 placements and the International Intellectual Property Alliance's Special 301 recommendations from 1989 to 2016).

171. *See* OFFICE OF THE U.S. TRADE REP., 2016 SPECIAL 301 REPORT 20 (2016) ("[T]he United States urges Hong Kong to address rampant online piracy at the earliest opportunity. Hong Kong's failure to address this major problem represents a growing concern in what is otherwise generally a positive environment for IPR

laws. Notable examples are the incorporation of U.S. fair use factors into Hong Kong's fair dealing provisions and the effort to transplant the Digital Millennium Copyright Act of 1998[172] through the 2011 and 2014 Bills.

Because Hong Kong now has a hybrid model, it is disingenuous for the critics of the open-ended, catch-all fair use proposal to argue that the American fair use model is alien to the longstanding fair dealing tradition in Hong Kong. That argument is simply unsupported by the actual text of the Copyright Ordinance. The existence of a hybrid model in Hong Kong also requires us to engage in a more complex comparative analysis. A simple comparison between fair dealing and fair use is unlikely to provide sufficient insight.

B. STAND-ALONE V. CATCH-ALL

Given the difficulties identified in the previous Section, a better way to distinguish between fair dealing and fair use is to describe the former as a closed-ended, purpose-based regime and the latter as an open-ended, flexible regime. Because limitations and exceptions are exhaustively listed in a closed-ended regime but not so in an open-ended regime, one could easily debate which of the two models would work better for Hong Kong.

In its final report, the ALRC explored the strengths and weaknesses of the two regimes.[173] Among the strengths the report identified are:

- Fair use is flexible and technology-neutral.
- Fair use promotes public interest and transformative uses.
- Fair use assists innovation.
- Fair use better aligns with reasonable consumer expectations.
- Fair use helps protect rights holders' markets.
- Fair use is sufficiently certain and predictable.

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protection and enforcement.").

172. Digital Millennium Copyright Act, Pub. L. No. 105-204, 112 Stat. 2860 (1998).

173. *See* ALRC FINAL REPORT, *supra* note 41, at 87-122.

- Fair use is compatible with moral rights and international law.[174]

While this report is representative of comparative studies on the distinctions between fair dealing and fair use, the analysis in this report (as well as in other similar reports) does not fully capture the potential complexities concerning the introduction of an open-ended, catch-all fair use provision into the Hong Kong copyright regime.

Despite the claims made by the proposal's critics—and the many red herrings they introduced[175]—this proposal did not call for "a fundamental revamp of [the Hong Kong] copyright regime"[176] by switching from its existing hybrid fair dealing model to the American fair use model. Instead, the proposal merely called for the addition of an open-ended, catch-all provision. Under this proposal, all four existing fair dealing provisions in Sections 38, 39, 41A, and 54A of the Hong Kong Copyright Ordinance will be retained.[177] All the proposed fair dealing provisions in the 2014 Bill (on quotation, commenting on current events, parody, satire, caricature, and pastiche) will also remain untouched.[178]

Although the proposal's wording undeniably draws on Section 107 of the U.S. Copyright Act, inevitably reminding us of the American fair use model, a more accurate description of this proposal is an open-ended, catch-all provision that has more or less the same legal effect as a fair dealing provision for "all other purposes." While such a provision will indeed change the limitations and exceptions in Hong Kong copyright law from a closed-ended regime to an open-ended one—admittedly a major concern of the copyright industries—the provision will retain the hybrid model that Hong Kong has adopted by virtue of its colonial history and unfortunate position in the U.S.-China intellectual property policy.

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174. *Id.* at 21.

175. *See* Peter K. Yu, *Friends of Opposition to Copyright Bill Amendments, Netizens Are Not Talking About This*, H.K. IN-MEDIA (Feb. 1, 2016), http://www.inmediahk.net/node/1040375 (in Chinese) (discussing the straw man and red herring arguments advanced in the Bill's defense).

176. *Cf.* BILLS COMMITTEE'S REPORT, *supra* note 29, at 14 ("A shift to fair use would represent a fundamental revamp of our copyright regime and must be carefully considered in the light of a proper consultation exercise, and is beyond the scope of the current round of legislative update.").

177. Hong Kong Copyright Ordinance, *supra* note 2, §§ 38, 39, 41A, 54A.

178. *See* 2014 Bill, *supra* note 4, §§ 39 (amended), 39A.

The hybrid model advanced by this proposal is similar to the model embraced by Singapore when it switched from a closed-ended regime to an open-ended one.[179] It is also the same approach taken in the latest draft of the Third Amendment to the Chinese Copyright Law.[180] In the proposed Article 43, "other circumstances" have been added as a catch-all category for those circumstances in which a copyrighted work may be used without authorization or remuneration.[181]

Moreover, the proposal's hybrid model is similar to the model the ALRC advocated in its final report. Apart from the introduction of an open-ended fair use exception, this report called for the creation of a non-exhaustive list of illustrative purposes.[182] Most recently, the ALRC's proposal was strongly supported by the Australian

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179. *See* Copyright Act § 35 (Sing.).

180. *See* Copyright Law of People's Republic of China (Third Revised Draft) art. 43 (2014), http://www.chinalaw.gov.cn/article/cazjgg/201406/20140600396188.shtml (in Chinese).

181. *See id.* art. 43(13).

182. *See* ALRC FINAL REPORT, *supra* note 41, at 150-51. The Commission's Recommendation 5-3 provides the following non-exhaustive list of illustrative purposes:

(a) research or study;
(b) criticism or review;
(c) parody or satire;
(d) reporting news;
(e) professional advice;
(f) quotation;
(g) non-commercial private use;
(h) incidental or technical use;
(i) library or archive use;
(j) education; and
(k) access for people with disability.

Id. The Commission explained the benefits of this approach as follows:

> Professor Kathy Bowrey considered that the fairness factors and illustrative purposes would be mutually supportive: "The former primarily serve to better elucidate motivational factors related to the creation of the defendant's work and allow for critical reflection on the significance of that evidence, in view of current cultural and economic practices. The non-exhaustive list of illustrative purposes document established cultural practices that might generally be indicative of fair use, where the fairness factors are also met."
>
> In her view, the advantage of this approach is that, by separating out the fairness factors from the illustrative purposes, it is "easier for the public to identify the normative factors they need to consider to determine the legitimacy of their use, regardless of any idiosyncrasies associated with their individual practice".

Id. at 124.

Productivity Commission's draft report entitled *Intellectual Property Arrangements*.[183]

Likewise, in its final report, the Irish Copyright Review Committee proposed a hybrid model, seeking to supplement the existing fair dealing provisions with an open-ended fair use regime.[184] Unlike the fair use provision in the United States or the one the ALRC recommended, the proposed Section 49A of the Irish Copyright Act includes unique drafting language:

> (1) The fair use of a work is not an infringement of the rights conferred by this Part.
>
> (2) The other acts permitted by this Part shall be regarded as examples of fair use, and, in any particular case, the court shall not consider whether a use constitutes a fair use without first considering whether that use amounts to another act permitted by this Part.[185]

C. CRITICISMS AND RESPONSES

The hybrid model advanced by the open-ended, catch-all fair use proposal is important because it calls into question the relevance and usefulness of the existing comparative studies on the distinctions between fair dealing and fair use. As discussed above, most of the analysis in these studies, including the ALRC's excellent report, focuses on the comparison between two distinct models. Such analysis, however, does not account for the fact that countries may seek to achieve the best of both worlds by adopting a hybrid model that includes some features of fair dealing and some features of fair use. If these comparative studies are to guide legislative reforms, adjustment will be needed considering that these studies were not designed to explore the distinction between the fair dealing model and a hybrid fair dealing/fair use model.

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183. *See* PRODUCTIVITY COMM'N (AUSTL.), INTELLECTUAL PROPERTY ARRANGEMENTS: DRAFT REPORT 2 (2016), http://www.pc.gov.au/inquiries/current/intellectual-property/draft ("Australia's copyright system has progressively expanded and protects works longer than necessary to encourage creative endeavour, with consumers bearing the cost. A new system of user rights, including the introduction of a broad, principles-based fair use exception, is needed to help address this imbalance.").

184. *See* IRISH COPYRIGHT REVIEW COMMITTEE, *supra* note 107, at 93-94.

185. *Id.* at 93.

1. Lack of Precision and Clarity

For illustration, consider the two oft-cited criticisms of the fair use model. The first concerns a lack of precision and clarity.[186] As this criticism goes, fair dealing specifies the different permissible conducts. In the case of Hong Kong, the Copyright Ordinance states that fair dealing is available for research and private study (Section 38); criticism, review and news reporting (Section 39); giving or receiving instruction (Section 41A); and public administration (Section 54A).[187] The new fair dealing provisions in the 2014 Bill also allows for fair dealing for the purposes of quotation and commenting on current events (amended Section 39) as well as for parody, satire, caricature, and pastiche (proposed Section 39A).[188] Because the provisions explicitly identify the permissible conducts, they provide precision and clarity.

By contrast, Section 107 of the U.S. Copyright Act does not provide the same degree of precision and clarity. Because the provision only includes four fair use factors, users will have to determine for themselves whether their preferred conducts are permissible. Until courts have made their final determination, users will have no ability to know with certainty whether their conducts are permissible. The uncertainty brought by the fair use model will increase transaction and litigation costs.[189] In jurisdictions where people are not litigious, the lack of copyright lawsuits will also make it difficult for the enumerated factors to be fully interpreted. The contours of the fair use provision are therefore unclear and arguably

186. *See Copyright (Amendment) Bill 2014: Facts and Truth (2)*, INTELLECTUAL PROPERTY DEP'T (H.K.) (Dec. 2015), http://www.ipd.gov.hk/chi/intellectual_property/copyright/Q_A_FAT_2014.htm [hereinafter *Facts and Truth*] (in Chinese) (stating that, because fair use legislation will not clearly indicate which conduct is exempted from copyright protection, it lacks precision and will lead to unnecessary litigation); Medeiros, *supra* note 143 ("There would be no clear rules [in a fair use regime]; especially at the beginning, every case would have to be adjudicated by a court to see if the use is fair."); *see also* ALRC DISCUSSION PAPER, *supra* note 106, at 74 ("Many of those opposed to fair use were concerned that a lack of clear and precise rules would result in uncertainty about what the law is, and possibly misunderstanding and misapplication as well.").

187. *See* Hong Kong Copyright Ordinance, *supra* note 2, §§ 38, 39, 41A, 54A.

188. *See* 2014 Bill, *supra* note 4, §§ 39 (amended), 39A.

189. *See* ALRC DISCUSSION PAPER, *supra* note 106, at 74-76 (discussing the criticism that "fair use would create uncertainty and expense").

unpredictable.[190]

To begin with, the argument that fair use does not provide sufficient public guidance due to its lack of precision and clarity is unconvincing. It is one thing to point out that Section 107 requires case-by-case balancing of multiple factors, but quite another thing to say that the provision does not offer guidance to copyright holders and users. If the latter were true, how would one explain the phrase "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research"?[191] That phrase has certainly provided some guidance to copyright holders and users.

Indeed, it is difficult to argue that Section 107 provides less public guidance than a provision that allows for fair dealing for the purposes of "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." Such an argument is particularly difficult considering that the latter provision also requires the balancing of fairness factors—whether identified through case law or listed in the statutory provision (such as in Sections 38, 41A, and 54A of the Hong Kong Copyright Ordinance). Because of the identical factors used, both Section 107 and the fair dealing provision concerned cover the same set of permissible conduct. Both provisions also require the same type of case-by-case analysis and multi-factor balancing.

More importantly for our discussion, if fair use is added to the fair dealing provisions as an open-ended, catch-all provision, having a

190. As the ALRC observed:

> The opponents of fair use have pointed to research indicating that the outcome of fair use cases is unpredictable. The outcome of litigation is never completely predictable—if it were, the parties would not have commenced litigation, or would likely have settled. This is also true of recent litigation over the fair dealing exceptions and specific exceptions.

ALRC FINAL REPORT, *supra* note 41, at 115; *see also* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2542 & n.28 (2009) ("If one analyzes putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair. The only clusters of fair use cases in which it is quite difficult to predict whether uses are likely to be fair is in the educational and research use clusters where judges have tended to take starkly different perspectives on fair use defenses in these settings. . . .").

191. 17 U.S.C. § 107 (2012).

similar effect of a fair dealing provision for "all other purposes," the comparative analysis in regard to precision and clarity should be somewhat different. To the extent that the existing fair dealing provisions and those proposed in the 2014 Bill already provide precision and clarity, the retention of all of these provisions should allow the Copyright Ordinance to maintain more or less the same degree of precision and clarity. There is simply no reason to believe that the addition of a new catch-all provision under the fair use proposal would suddenly make the existing and new provisions imprecise and unclear.

Finally, the critics of this proposal have claimed that a fair dealing regime will provide more certainty because it will clearly indicate to users what they cannot do.[192] Some critics have also expressed concern that the introduction of fair use will tempt users to test the boundaries of copyright law, thus reducing the protection they currently receive.[193] The critics' claim about certainty is undeniably valid, especially when viewed from the copyright holders' standpoint. After all, the law is the clearest and most certain when users have to ask for permission for every single use.[194] Nevertheless, precision and clarity are not the only goals of the copyright regime. Nor should the proposal be analyzed from only the copyright

192. Nevertheless, the ALRC reminded us, "Standards are generally less certain in scope than detailed rules. However, a clear principled standard is more certain than an unclear complex rule." ALRC FINAL REPORT, *supra* note 41, at 112. Likewise, John Braithwaite wrote:

> 1. When the type of action to be regulated is simple, stable and does not involve huge economic interests, rules tend to regulate with greater certainty than principles.
>
> 2. When the type of action to be regulated is complex, changing and involves large economic interests:
>
> (a) principles tend to regulate with greater certainty than rules;
>
> (b) binding principles backing non-binding rules tend to regulate with greater certainty than principles alone;
>
> (c) binding principles backing non-binding rules are more certain still if they are embedded in institutions of regulatory conversation that foster shared sensibilities.

Braithwaite, *supra* note 157, at 75.

193. *See* ALRC FINAL REPORT, *supra* note 41, at 110 ("Some stakeholders raised concerns that introducing fair use would serve to normalise and increase infringing conduct. Like the claim that fair use would improve respect for copyright law, these matters are difficult to measure or test.").

194. *Cf. id.* at 164 (quoting a submission from Robert Burrell, Michael Handler, Emily Hudson, and Kimberlee Weatherall) ("Australia's current system of exceptions only provides 'certainty' in the sense that we can be confident that a whole raft of socially desirable re-uses of copyright material are prohibited.").

holders' perspective. At some point, precision and clarity will have to give way to fairness and balance. As the Australian Productivity Commission recently reminded us in its draft report:

> [L]egal uncertainty is not a compelling reason to eschew a fair use exception in Australia, nor is legal certainty desirable in and of itself. Courts interpret the application of legislative principles to new cases all the time, updating case law when the circumstances warrant it. To say otherwise would be to argue that all laws should be prescriptive—a doctrine that is inconsistent with many laws across all social and economic arenas, and completely inimical to the common law.[195]

2. Increase in Litigation

The second oft-cited criticism is that the fair use model will open a floodgate of copyright litigation, as it will require copyright holders and users to go to courts more often to determine the law's boundaries.[196] After all, until the parties appear before a court, it is difficult to know for certain whether the conduct at issue is permissible. With limited case law, it may also be hard to predict the outcome of the case. This lack of predictability, in turn, will generate even more litigation, burdening copyright holders and users further.

Like the previous criticism, this criticism is equally unconvincing. To begin with, even if we assumed the fair use model would generate more litigation than the fair dealing model—an assumption I reject—whether people go to courts often depends on the litigiousness of the

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195. PRODUCTIVITY COMM'N (AUSTL.), *supra* note 183, at 147.

196. *See Facts and Truth*, note 186 (stating that the lack of precision in the fair use provision will lead to more litigation); HKCA Press Release, *supra* note 44 ("The scope of the fair use exemption, implemented in only 5 jurisdictions globally, is vague and ill-defined, leaving both right holders and users at risk. This will result in a massive increase in litigation . . . ."). Similarly, in the Australian context, the ALRC collected the following views from copyright stakeholders:

> There was a view that there would be no precedents, at least for a time after fair use was introduced; and that it would take many years to develop case law—especially given that Australia is not as populous or litigious a society as the US; and that all of the existing jurisprudence in respect to fair dealing would be open to reinterpretation.
>
> A number of stakeholders were concerned that the 'uncertainty' of fair use would be likely to cause higher transaction costs. There was a view that it would make things harder for both users and rights holders of copyright material as a result of an increased need for legal advice and litigation. There were concerns that rightsholders would face increased costs in litigation—including recourse to appeal courts—in order to attain certainty about the scope of the exception and to enforce their rights.

ALRC DISCUSSION PAPER, *supra* note 106, at 74-75.

society involved and the structure of the judicial process (for instance, who pays the litigation costs?). In a litigious society, users may go to courts more often even when the fair dealing model is adopted. By contrast, in a non-litigious society, users may go to courts less often even when the fair use model is adopted. There are simply too many factors at play in these scenarios to make the distinction between fair dealing and fair use outcome-determinative.

In addition, the critique seems to assume that, if the fair use model is adopted, there can be only one fair use provision, identical or similar to Section 107 of the U.S. Copyright Act. If many of the problems of the U.S. fair use model are caused by the difficulty in packing many different unrelated purposes into a short standalone provision, the addition of other provisions, similar to the open-ended, catch-all fair use proposal before the LegCo, may help avoid these problems. While trade-offs between brevity and clarity are inevitable when there is only a single provision, the fair use model can be implemented in ways that do not require similar trade-offs. Indeed, the model gives countries considerable flexibility to determine for themselves how the model is to be implemented.[197]

In any event, the problems attributable to a single fair use provision is irrelevant to the debate on the open-ended, catch-all fair use proposal. Under this proposal, all the existing fair dealing provisions in Sections 38, 39, 41A, and 54A of the Hong Kong Copyright Ordinance as well as all the proposed fair dealing provisions in the 2014 Bill will be retained.[198] Thus, copyright holders and users can rely on these provisions before moving on to the final catch-all provision. If those other provisions already cover the conduct at issue, there is simply no need to go to the new catch-all provision introduced by the proposal.

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197. *Compare* 17 U.S.C. § 107 (2012), *with* Copyright Act § 35 (Sing.) (requiring the court to balance five different factors, including "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price"); ALRC FINAL REPORT, *supra* note 41, at 150-51 (calling for the addition of a non-exhaustive list of illustrative purposes to accompany the proposed fair use provision); IRISH COPYRIGHT REVIEW COMMITTEE, *supra* note 107, at 93-94 (proposing to supplement existing fair dealing provisions with a fair use regime that requires the balancing of eight factors).

198. *See* Hong Kong Copyright Ordinance, *supra* note 2, §§ 38, 39, 41A, 54A; 2014 Bill, *supra* note 4, §§ 39, 39A.

Moreover, the same logic from the previous Section can be applied here. To the extent that the existing fair dealing provisions and those proposed in the 2014 Bill have already limited the amount of litigation, the retention of all of these fair dealing provisions should allow Hong Kong to continue to do so. There is simply no reason to believe that the addition of a new catch-all provision would suddenly open the floodgate of litigation, given the existing litigation culture in Hong Kong and the fact that the existing and new fair dealing provisions are already equipped to resolve many copyright disputes.

If the government or the LegCo remains concerned about the potential confusion over the interrelationship between the catch-all provision and the other fair dealing provisions, it could clarify the relationship by including the following language, as proposed by the Irish Copyright Review Committee:

> The other acts permitted by this Part shall be regarded as examples of fair use, and, in any particular case, the court shall not consider whether a use constitutes a fair use without first considering whether that use amounts to another act permitted by this Part.[199]

Finally, if the new catch-all provision has to be used to address many new copyright disputes due to their first impression nature—and the fact that the conducts in question do not fall neatly within the scope of the existing and new fair dealing exceptions—this provision is doing exactly the job it is supposed to do—that is, it covers situations that the government or the LegCo has not anticipated or cannot anticipate. It also validates the concern of Internet user groups and their supporters that the 2014 Bill did not cover most of the Internet users' day-to-day activities.[200]

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199. IRISH COPYRIGHT REVIEW COMMITTEE, *supra* note 107, at 93.

200. As the Bills Committee's report stated:

> The Bills Committee notes the view of some deputations that the proposed copyright exceptions under the 2014 Bill would not provide adequate protection for users of copyright works who are engaged in online dissemination of user-generated content . . . such as altered pictures/videos, mash-up works, video clips of cover versions of songs or songs with rewritten lyrics, fan-made videos and streaming of video game playing, etc.

BILLS COMMITTEE'S REPORT, *supra* note 29, at 23. *But see id.* at 25 ("[T]he Administration has advised that the new copyright exceptions proposed in the 2014 Bill and the existing ones will cover many daily activities on the Internet.").

As the ALRC rightly observed, a major shortcoming of the fair dealing model is that it requires the government or the legislature "to identify and define *ex ante* all of the precise circumstances in which an exception should be available."[201] In a rapidly evolving digital environment, anticipating all of these circumstances is simply impossible. Even if the government or the legislature is eager to quickly rectify the situation, the lengthy time needed to adopt new fair dealing provisions will precipitate a highly undesirable catch-and-mouse chase between these provisions and new digital technology.[202] The resulting frustration illustrates why an open-ended, adaptive, and flexible fair use regime is particularly appealing in a rapidly evolving digital environment.[203]

D. OTHER ARGUMENTS AND RESPONSES

In addition to these two criticisms, this Section will briefly discuss four arguments advanced by the critics of the open-ended, catch-all

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201. ALRC FINAL REPORT, *supra* note 41, at 97 (quoting a submission from Robert Burrell, Michael Handler, Emily Hudson, and Kimberlee Weatherall); *see* also IRISH COPYRIGHT REVIEW COMMITTEE, *supra* note 107, at 93 ("[I]t is simply not possible to predict the direction in which cloud computing and 3D printing are going to go, and it is therefore impossible to craft appropriate ex ante legal responses.").

202. *See* ALRC FINAL REPORT, *supra* note 41, at 96 ("A copyright exception permitting time shifting was not enacted in Australia until 22 years after time shifting had been found to be fair use in the US. The exception for parody and satire came 12 years later, and for reverse engineering of computer programs, seven years."); *cf.* Peter K. Yu, *Trade Agreement Cats and the Digital Technology Mouse*, *in* SCIENCE AND TECHNOLOGY IN INTERNATIONAL ECONOMIC LAW: BALANCING COMPETING INTERESTS 185 (Bryan Mercurio & Ni Kuei-Jung eds., 2014) (discussing the cat-and-mouse chase between trade agreements and new digital technology).

203. *See* ALRC FINAL REPORT, *supra* note 41, at 87 ("Law that incorporates principles or standards is generally more flexible and adaptive than prescriptive rules. Fair use can therefore be applied to new technologies and new uses, without having to wait for consideration by the legislature."); Samuelson, *supra* note 190, at 2540 ("A well-recognized strength of the fair use doctrine is the considerable flexibility it provides in balancing the interests of copyright owners in controlling exploitations of their works and the interests of subsequent authors in drawing from earlier works when expressing themselves, as well as the interests of the public in having access to new works and making reasonable uses of them."); *see also* Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797 (2010) (proposing a framework to tailor the U.S. fair use doctrine to technological change). For a brief discussion of why fair use is more adaptive and flexible than fair dealing, see ALRC FINAL REPORT, *supra* note 41, at 95-98.

fair use proposal. A better understanding of the responses to these arguments is important, as these arguments can be easily used in other jurisdictions, especially in light of the copyright industries' growing efforts in coordinating government lobbying at the regional and international levels. Such an understanding will not only help anticipate future criticisms of similar proposals, but will also ensure the development of quicker and stronger responses.

1. An Alien Model

The first argument is that very few countries have adopted fair use. As an alien transplant of foreign laws, fair use will contradict the local legal tradition while creating unintended consequences.[204] As the Hong Kong Copyright Alliance declared:

> In recent years, while some countries have considered and/or adopted a fair use doctrine, the greater international norm has been to dismiss arguments made by the proponents for fair use rather than adopt them (including most recently, Australia). At present, fewer than ten jurisdictions around the world adhere to a fair use regime. While we expect further attempts to initiate or resume similar discussions, using similar arguments and [The Computer & Communications Industry Association's] statistics, throughout the world we urge policy makers in Hong Kong to keep *real* international norms in mind during any subsequent consideration of this issue in the future.[205]

Section 107 of the U.S. Copyright Act is the oft-cited and oft-transplanted fair use model. Yet, "there is nothing so intrinsically American about a fair use exception that one could not be enacted in

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204. *See* ALRC DISCUSSION PAPER, *supra* note 106, at 76-77 (discussing the criticism that "fair use originated in a different legal environment"); *cf.* Yu, *Digital Copyright Reform*, *supra* note 8, at 770 ("[If legal transplants] are hastily adopted without careful evaluation and adaptation, they may be both ineffective and insensitive to local conditions. They may also stifle local development while upsetting the existing local tradition.").

205. Letter from Sam Ho, Honorary Secretary, Hong Kong Copyright Alliance, to Yue Tin-Po, Clerk, Bills Committee on Copyright (Amendment) Bill 2014 (Aug. 31, 2015) (LC Paper No. CB(4)1450/14-15(01)), http://www.legco.gov.hk/yr13-14/english/bc/bc106/papers/bc1060923cb4-1450-1-e.pdf; *see also Facts and Truth*, *supra* note 186 (stating that fair use has only been adopted in select countries, such as the United States, South Korea, and Singapore); Medeiros, *supra* note 143 ("The US 'fair use' system is grounded in litigation developed over 150 years of case law. Hong Kong's legal system is based on UK frameworks and precedents, and not those in the US.").

Australia [or other jurisdictions]," as the ALRC rightly acknowledged.[206] Indeed, as the previous Section noted, fair use can be traced back to the British concept of fair abridgement.[207] Given its historical origin, fair use is unlikely to be the alien transplant that the critics have portrayed. It also may fit well with the Hong Kong's common law system which originates from, and continues to be heavily influenced by, British law.

Moreover, as far as Hong Kong is concerned, many of its Asia Pacific neighbors—such as Singapore, South Korea, Sri Lanka, the Philippines, and Taiwan—have already embraced the fair use model.[208] Countries such as Australia, Ireland, and Japan have also considered similar changes.[209] Meanwhile, China, of which Hong Kong is a special administrative region, is considering the inclusion of the catch-all category of "other circumstances" in its provision on limitations and exceptions in the Third Amendment to the Chinese Copyright Law, similar to the open-ended, catch-all fair use proposal before the LegCo.[210] Hong Kong's adoption of this proposal will therefore move its copyright law closer to that of both its motherland

206. ALRC DISCUSSION PAPER, *supra* note 106, at 86; *see also* ALRC FINAL REPORT, *supra* note 41, at 88 ("Fair use . . . largely codifies the common law, and may be seen as an extension of Australia's fair dealing exceptions. Guidance on its meaning and application can be found in the case law on fair dealing in Australia, the United Kingdom and other countries with fair dealing exceptions."); IRISH COPYRIGHT REVIEW COMMITTEE, *supra* note 107, at 89 ("The [fair use] doctrine is not unique to the US; many other jurisdictions have adopted versions of it, most recently South Korea; and other jurisdictions, including Australia, are actively considering whether to do so.").

207. *See supra* text accompanying notes 162-65.

208. *See* JONATHAN BAND & JONATHAN GERAFI, THE FAIR USE/FAIR DEALING HANDBOOK 35-36, 46, 55-57, 60-62, 64 (2015), http://ssrn.com/abstract=2333863 (listing the fair use provisions in Singapore, South Korea, Sri Lanka, the Philippines, and Taiwan); HARGREAVES, *supra* note 89, at 45 ("The Philippines has a Fair Use doctrine, . . . and Singapore uses a Fair Use type multi factor test within its fair dealing."); PROGRESSIVE LAWYERS GROUP, SUBMISSIONS ON COPYRIGHT (AMENDMENT) BILL 2014, at 4-9 (2015) (LC Paper No. CB(4)1257/14-15(02)), http://www.legco.gov.hk/yr13-14/english/bc/bc106/papers/bc1060706cb4-1257-2-e.pdf (exemplifying the growing trend of fair use adoptions at the international level). Outside the Asia Pacific region, Israel also adopted the fair use model. *See* HARGREAVES, *supra* note 89, at 45.

209. *See* ALRC FINAL REPORT, *supra* note 41, at 123-60; IRISH COPYRIGHT REVIEW COMMITTEE, *supra* note 107, at 93-94; Yoshiyuki Tamura, *Rethinking the Copyright Institution for the Digital Age*, 1 WIPO J. 63, 70 (2009).

210. *See supra* text accompanying notes 180-81.

and Asia-Pacific neighbors, thereby accruing the benefits of greater regional harmonization.

Even in the United Kingdom—the birthplace of the fair dealing model[211]—the influential *Hargreaves Review* described fair use as "the big once and for all fix of the UK."[212] The report only refrained from recommending the introduction of the fair use model into the United Kingdom, because "importing Fair Use wholesale was unlikely to be legally feasible in Europe."[213] As long as the United Kingdom remains part of the European Union, fair use is unlikely to be a viable reform option in the country. Jurisdictions such as Hong Kong, however, do not have the same constraint. It also remains to be seen whether fair use will be finally adopted in the United Kingdom should the country depart from the European Union following the Brexit vote.[214]

Finally, the reason why the fair dealing model still remains dominant in the world is not necessarily due to its popularity or proven superiority. Instead, its dominance is a historical legacy. Many countries are former colonies of European powers. They had no choice but to transplant from their mother countries a closed-

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211. *See* D'Agostino, *supra* note 159, at 312 ("The copyright doctrine of fair dealing could have made its first statutory appearance as early as 1842. It was 1842 when a fair dealing facsimile was introduced for debate in Parliament in the United Kingdom. . . . However, this provision was eventually deleted before the bill arrived to the House of Lords . . . .").

212. HARGREAVES, *supra* note 89, at 52.

213. *Id.* at 5; *see also* Directive 2001/29, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society art. 5, 2001 O.J. (L 167) 10, 16-17 (providing an exhaustive list of exceptions and limitations). The Irish Copyright Review Committee disagreed, however. As its final report declared:

> [T]here is scope under EU law for member states to adopt a fair use doctrine as a matter of national law, and that EUCD [EU Copyright Directive] does not necessarily preclude it (not least because, in our view, EUCD has not harmonized the adaptation right). In particular, . . . while EU law accords a high protection to intellectual property rights such as copyright under the EUCD, case law in both the [Court of Justice of the European Union] and the [European Court of Human Rights] is increasingly stressing that these rights must be balanced against the protection of other fundamental rights. Our tentative draft fair use exception was an attempt to weigh up these issues and achieve an appropriate balance consistent with general principles of EU law.

IRISH COPYRIGHT REVIEW COMMITTEE, *supra* note 107, at 91.

214. *See* Steven Erlanger, *British Stun World with Vote to Leave E.U.*, N.Y. TIMES, June 24, 2016, at A1 (reporting the Brexit vote).

ended regime of limitations and exceptions (such as the fair dealing model).[215] The textbook colonial examples are former British colonies such as Australia, Canada, and Singapore—countries whose copyright laws the Hong Kong government actively considered in the three public consultations. Nevertheless, more and more countries, including some of these former British colonies, are now moving, or considering to move, from fair dealing to fair use or adopt a hybrid fair dealing/fair use model. In fact, I am not yet aware of any jurisdiction that has ever moved in the opposite direction—that is, from fair use back to fair dealing.

2. Weaker Protection

The second argument is that a fair use regime may offer users protection that is weaker, or at least no stronger, than what a fair dealing regime provides.[216] Some of the illustrative cases utilized by the critics of the open-ended, catch-all fair use proposal concerned parodies and satires. For instance, while the proposed fair dealing provisions in Hong Kong covered both parodies and satires, U.S. courts have found some parodies not to constitute fair use.[217] In

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215. *See, e.g.*, Katz, *supra* note 161, at 93 ("A century ago, on 16 December 1911, the UK Copyright Act, 1911 received royal assent, and for the first time fair dealing was explicitly recognized in the imperial copyright legislation. Ten years later, the same fair dealing provision would appear in the Canadian Copyright Act, 1921 and would remain the basis of the current fair dealing provisions."); Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMP. L. 315, 324 (2003) ("Intellectual property law was not merely an incidental part of the colonial legal apparatus, but a central technique in the commercial superiority sought by European powers in their interactions with each other in regions beyond Europe.").

216. *See Facts and Truth*, *supra* note 186 (stating that the boundaries of the fair use provision may not be wider than those of the fair dealing provisions because such boundaries depend on the final determination of the court); *see also* Press Release, Hong Kong Copyright Alliance, Hong Kong Creative Industries Support Passage of Copyright (Amendment) Bill 2014 to Combat Online Piracy and Object to the 3 Committee Stage Amendments (Dec. 17, 2015) ("[I]t is a fundamental misconception to suggest that fair use is necessarily more permissive. In fact, in one way it is more flexible but less certain, but it is not necessarily more permissive. Many cases of satire but less of parody have been denied under the fair use regime." (quoting Winnie Tam, the chair of the Hong Kong Bar Association and a noted intellectual property lawyer in Hong Kong)).

217. *See, e.g.*, *Columbia Pictures Indus. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1188 (N.D. Cal. 1998) ("Rather than commenting on or criticizing

Campbell v. Acuff-Rose Music, Inc., the United States Supreme Court also stated explicitly that satires might not receive the same level of protection as parodies.[218] As Justice David Souter reasoned: "Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[219] Thus, the scope of the American fair use provision, the critics argued, may not be wider than that of Hong Kong's fair use provisions.

This argument is appealing at first glance, but unpersuasive upon further analysis. Although these critics are correct in pointing out the failure of the U.S. fair use provision to protect all parodies and satires, their observation does not show that the fair dealing model will offer stronger protection than the fair use model, as those U.S. cases could easily have been found to be infringing in Hong Kong under the fair dealing model. In fact, I will argue that, at least on paper, the fair dealing model will offer users weaker protection than the fair use model.[220]

The comparison between the Hong Kong and U.S. models is particularly easy, considering that identical factors have been used in the fair dealing or fair use provisions in both jurisdictions. In the United States, courts determine fair use based on whether those factors, on balance, favor the conduct at issue. In Hong Kong, a similar determination will be made, but there is an additional step before this determination.[221] That step requires a determination of whether the conduct fits within a specified category—for example, research and private study (Section 38); criticism, review and news reporting (Section 39); giving or receiving instruction (Section 41A);

Plaintiffs' ads, Defendants' ads seek to use Plaintiffs' ads as a vehicle to entice viewers to see 'The Big One' in the same manner as Plaintiffs used their own ads to entice viewers to see 'Men In Black.' In such circumstances, Defendants have not created a transformative work which alters the original with new expression, meaning or message.").

218. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

219. *Id.* at 580-81.

220. My view is the same as that of the ALRC, which stated in its final report that "fair dealing is necessarily narrower than fair use." ALRC FINAL REPORT, *supra* note 41, at 164.

221. *See id.* at 94 (describing the application of a fair dealing exception as "a two-step process").

public administration (Section 54A); quotation and commenting on current events (amended Section 39); or parody, satire, caricature, and pastiche (proposed Section 39A).[222] As Michael Geist observed in regard to the distinction between fair dealing and fair use: "The [fair dealing] model creates a two-stage analysis: first, whether the intended use qualifies for one of the permitted purposes, and second, whether the use itself meets the fairness criteria. By contrast, fair use raises only the second-stage analysis, since there are no statutory limitations on permitted purposes."[223]

Assuming that Hong Kong and U.S. judges will reach the same conclusions when balancing the fairness factors, conducts that have been deemed to be fair use in the United States may not always constitute fair dealing in Hong Kong, because the conducts at issue may not be covered by the enumerated categories. That is, the conducts in question may not pass the first step of the Hong Kong fair dealing analysis, even if they successfully pass its second step (as well as the single-step U.S. fair use analysis). By contrast, because the second step of the Hong Kong fair dealing analysis is identical to the single-step U.S. fair use analysis, conducts that have been deemed to be fair dealing in Hong Kong will be deemed to be fair use in the United States (as long as the judges reach the same conclusions when balancing the fairness factors). Thus, on paper, the fair use model will offer users stronger protection than the fair dealing model—the opposite of what the critics of the open-ended, catch-all fair use proposal have claimed.

To be certain, the assumption that Hong Kong and U.S. judges will reach the same conclusions when balancing the fairness factors is not always valid. There may also be situations in which Hong Kong judges offer stronger fair dealing protection than their American counterparts. For instance, a certain type of satire may be protected in Hong Kong even though it has been found to be infringing in the United States. After all, judges decide cases differently all the time.

Nevertheless, there is thus far no indication that judges under the

222. *See* Hong Kong Copyright Ordinance, *supra* note 2, §§ 38, 39, 41A, 54A; 2014 Bill, *supra* note 4, §§ 39, 39A.

223. Michael Geist, *Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use*, *in* COPYRIGHT PENTALOGY, *supra* note 161, at 157, 158.

fair dealing model will offer users stronger protection than those under the fair use model. Nor is there indication that Hong Kong judges will be more protective of users' rights than U.S. judges. In fact, the case law concerning the fair use provision and the transformative use doctrine in the United States seems to suggest that American judges tend to be more protective of users' rights than those in other jurisdictions.

3. Lack of Statutory Damages

The third argument concerns the need to introduce statutory damages for copyright infringement to complement the introduction of fair use. For example, in its *Position Paper on Copyright (Amendment) Bill 2014*, the Law Society of Hong Kong declared:

> In Asia, a number of countries have an exception for fair use or extended fair dealings, including—Korea, Philippines, Singapore, Sri Lanka and Taiwan. Notably, these Asian countries, like the US, have statutory damages as a remedy for infringement. Statutory damages are actually not common. According to a research paper published in November 2013, including the US, only 24 out the 179 WIPO member states surveyed allow recovery of statutory damages for copyright infringement. Statutory damages allow successful plaintiffs to recover monetary damages without any proof that defendant profited from the infringement. In the US, such damages can be awarded in whatever amount the judge or jury deems "just" in a range between US$750 and US$30,000 (~HK$5,850–HK$234,000) per infringed work, and up to US$150,000 (~HK$1,170,000) per work if infringement is willful. In Singapore, the courts can grant not more than S$10,000 (~HK$ 55,200) for each work or subject matter in respect of which the copyright has been infringed but not more than S$200,000 (~HK$ 1,104,000) in the aggregate, unless the owner proves that his actual loss from such infringement exceeds $200,000 (~HK$ 1,104,000).
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> *It does not appear a mere coincidence that the above countries which adopt fair use or extended fair dealings have balanced this with an element of statutory damages for copyright infringement.* This possibility should be looked into further in deciding whether or not to change to a fair use system.[224]

While the Law Society's observation regarding the availability of

224. LAW SOC'Y OF H.K., POSITION PAPER ON COPYRIGHT (AMENDMENT) BILL 2014, at 2-3 (2015), http://www.hklawsoc.org.hk/pub_e/news/submissions/20151229.pdf (emphasis added).

statutory damages awards in those Asian countries listed in the position paper was correct—and the copyright industries in other jurisdictions have also made that observation[225]—the Law Society confused correlation with causation and overstated the existence of a causal relationship. Such a relationship not only may not have existed, but may have existed in the opposite direction.

That the position paper linked statutory damages to fair use is understandable, considering that the free trade agreements that many Asian countries signed with the United States do require considerably strengthened levels of copyright protection and enforcement, such as the introduction of statutory or pre-established damages.[226] To restore the balance of the copyright system, Asian countries such as Singapore and South Korea have therefore turned to fair use as a counterbalancing measure. After all, the longstanding history of the U.S. fair use provision has made it difficult, if not hypocritical, for the United States to complain about the introduction of a similar provision by its Asian trading partner.[227] Nevertheless, if the sequence of these developments is correct, it is the strengthening of copyright protection and enforcement standards through the U.S. free trade agreements that led the Asian countries listed in the position paper to embrace the fair use model, not the other way

225. *See* ALRC DISCUSSION PAPER, *supra* note 106, at 76 (citing a submission of the Australasian Music Publishers Association).

226. *See* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009) (discussing statutory damages in U.S. copyright law); Yu, *Digital Copyright Reform*, *supra* note 8, at 716-19 (discussing statutory damages in the context of digital copyright reform in Hong Kong); Peter K. Yu, *Tales of the Unintended in Copyright Law*, 67 STUD. LAW, POL. & SOC'Y 1, 6-9 (2015) (discussing the unintended consequences caused by the award of statutory damages); J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004) (criticizing statutory damages in the context of online file-sharing activities).

227. Such difficulty, however, does not prevent U.S. officials from discouraging their foreign counterparts from adopting the fair use model. *See US Department of State Demarche Against Fair Use in WIPO Treaty for Blind*, KNOWLEDGE ECOLOGY INT'L (June 23, 2013), http://keionline.org/node/1760 (reporting about the secret demarche issued by the U.S. State Department to encourage the removal of references to fair use in the draft text of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled at the World Intellectual Property Organization).

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Moreover, the problem with statutory damages is not the award of these damages per se, but that the minimum and maximum limits were not set with individual Internet users and noncommercial copyright infringement in mind. Instead, the limits were instituted primarily to deter commercial-scale copyright piracy.[228] As I noted in the past:

> Unfortunately, unauthorized downloading and uploading is not an appropriate area for introducing statutory damages. Consider a provision that sets statutory damages at HK$150,000 per copy (as compared to US$150,000 under the U.S. Copyright Act). A wilful infringement of 10 songs will result in statutory damages of $1.5 million, while a wilful infringement of 10,000 songs will result in statutory damages of $1.5 billion. To be certain, the illegal reproduction and distribution of 10,000 songs are considered egregious and therefore should be heavily punished. However, a $1.5 billion damage award for distributing 10,000 songs is likely to be deemed unfair, arbitrary, and excessive by any standards.[229]

Given the significant mismatch between existing statutory damages provisions and noncommercial copyright infringements in the digital environment, countries have begun to limit their statutory damages awards. In Canada, for instance, Section 38.1(1) of the Copyright Modernization Act allows copyright holders to elect to recover an award of statutory damages "in a sum of not less than $100 and not more than $5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes."[230]

Even in the United States, a strong worldwide champion of statutory damages awards, the Internet Policy Task Force of the U.S. Department of Commerce recommended legislative fixes in its *White Paper on Remixes, First Sale, and Statutory Damages*.[231] As this

228. *See* Yu, *Digital Copyright Reform*, *supra* note 8, at 717 ("Imposing statutory damages therefore serves as a major deterrent, similar to the imposition of punitive damages. It also provides an effective tool to punish repeat offenders.").

229. FIRST POSITION PAPER, *supra* note 100, at 10.

230. Copyright Modernisation Act, R.S.C., ch. C-20, § 38.1 (2012) (Can.).

231. INTERNET POLICY TASK FORCE, U.S. DEP'T OF COMMERCE, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES: COPYRIGHT POLICY,

recently published document declared:

> The Task Force recommends the following three amendments to the Copyright Act to address some of the concerns presented and to better balance the needs of copyright owners, users, and intermediaries:
>
> - Incorporate into the Copyright Act a list of factors for courts and juries to consider when determining the amount of a statutory damages award;
> - Implement changes to the copyright notice provisions that would expand eligibility for the lower "innocent infringement" statutory damages awards; and
> - In cases involving non-willful secondary liability for online services offering a large number of works, give courts discretion to assess statutory damages other than on a strict per-work basis.
>
> Furthermore, the Task Force supports the creation of a streamlined procedure for adjudicating small claims of copyright infringement and believes that further consideration should be given to the proposal of the Copyright Office to establish a small claims tribunal. This could help diminish the risk of disproportionate levels of damages against individual file-sharers.[232]

Finally, it is worth recalling that the Hong Kong government rejected the proposal to introduce statutory damages for copyright infringement following the 2006 consultation exercise. As the government declared in the second consultation paper:

> We are not aware of any example of statutory damages for tort actions in Hong Kong. In other words, the introduction of statutory damages into our intellectual property rights protection regime could have far-reaching implications on other civil proceedings. Moreover, we envisage substantive difficulties in specifying a range (or ranges) of damages that could do justice over a wide spectrum of infringements, ranging from massive blatant cases to innocent ones.[233]

In both the 2011 and 2014 Bills, the government opted instead to prescribe new factors to assist the court in considering the award of additional damages.[234] As the government reasoned at that time,

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CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2016).

232. *Id.* at 5.

233. SECOND CONSULTATION PAPER, *supra* note 3, at 8.

234. *See* 2011 Bill, *supra* note 4, §§ 108(2), 221(2) (providing additional factors for the determination of damages in infringement action); 2014 Bill, *supra* note 4, §§ 108(2), 221(2) (same).

"Copyright infringement is a statutory tort. Damages in tort are generally awarded to place the claimant in the position he/she would have been had the tort not taken place."[235] Given that the Bill already included new factors for determining additional damages, the introduction of statutory damages was no longer necessary.

Indeed, in the first consultation exercise that launched this round of digital copyright reform, some practitioners in the intellectual property field, including members of the Law Society of Hong Kong, "questioned whether the mechanism currently available to copyright owners in asserting their civil rights against online infringements were causing insurmountable problems to the extent that warranted such draconian relief measures as fettering the court's discretion in determining the appropriate damages."[236] Thus, the position taken by the Law Society in its position paper on the 2014 Bill is rather inconsistent with the position some of its members took in the 2006 consultation exercise.

4. Past Rejections

The final argument is that, because the call for a switch from Hong Kong's fair dealing provisions to a U.S.-style fair use model was rejected in the government's public consultation in 2004,[237] the open-ended, catch-all fair use proposal before the LegCo should be likewise rejected, or at least delayed until the next round of copyright consultation.

While I do not intend to challenge the conclusion of that consultation exercise, 2004 was a long, long time ago in the Internet age. At that time, Facebook has not yet entered the mainstream, and YouTube, Twitter, Tumblr, and Instagram did not even exist. In addition, smartphones were not as popular as today, and most people

235. SECOND CONSULTATION PAPER, *supra* note 3, at 7 n.5.

236. *Id.* at 2.

237. *See* BILLS COMMITTEE'S REPORT, *supra* note 29, at 13 ("The Administration has pointed out that the public was consulted on whether the fair dealing approach should be replaced by the fair use approach in 2004. . . . The Administration has further advised that it does not rule out the possibility of reconsidering the adoption of the fair use doctrine in Hong Kong. Nevertheless, the reasons for maintaining the fair dealing exceptions following the [earlier] public consultation remain valid and any major changes to the existing copyright regime should only be introduced after a due process of thorough public consultation and discussion in LegCo.").

certainly did not use smartphones or other hand-held devices for entertainment the same way they do today. In fact, if we were still in 2004, many of the highly challenging problems in the 2011 and 2014 Bills, such as the treatment of UGC, would not have emerged. Thus, as far as digital copyright reform is concerned, the conditions in 2004 were just very different from what we have in 2016.

In 2004, the international copyright landscape also stood in sharp contrast to the landscape today. At that time, the United States has only just begun to negotiate bilateral and regional free trade agreements. Consider, for instance, the U.S. free trade agreements with Hong Kong's Asia-Pacific neighbors. The agreements with Singapore, Australia, and South Korea were not adopted until May 2003, May 2004, and December 2010, respectively.[238] The negotiations surrounding plurilateral agreements, such as the Anti-Counterfeiting Trade Agreement[239] and the Trans-Pacific Partnership Agreement,[240] have not even been launched.

In short, in 2004, Hong Kong's Asia-Pacific neighbors, such as Australia, Singapore and South Korea, were not yet required to greatly strengthen their intellectual property protection and

238. *See* Australia–United States Free Trade Agreement, U.S.-Austl., May 18, 2004, http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text; U.S.-Singapore–United States Free Trade Agreement, U.S.-Sing., May 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf; Korea-United States Free Trade Agreement, U.S.-S. Kor., Dec. 3, 2010, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.

239. The United States' intent to negotiate a new anti-counterfeiting trade agreement with its key trading partners was announced on October 23, 2007, two weeks after WIPO adopted its Development Agenda. Press Release, Office of the U.S. Trade Rep., Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes (Oct. 23, 2007), http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreement-fight-fakes; *see also* Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 980-87 (2011) (tracing the origin of the Anti-Counterfeiting Trade Agreement).

240. Trans-Pacific Partnership Agreement, Feb. 4, 2016, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text. For the Author's discussions of the TPP, see generally Peter K. Yu, *Investor-State Dispute Settlement and the Trans-Pacific Partnership*, *in* INTELLECTUAL PROPERTY AND THE JUDICIARY (Christophe Geiger ed., forthcoming 2017); Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT'L L.J. 1129 (2014); Peter K. Yu, *The Alphabet Soup of Transborder Intellectual Property Enforcement*, 60 DRAKE L. REV. 16, 24-28 (2012).

enforcement standards—beyond what would be optimal under local conditions, perhaps. As a result, these countries did not need to introduce fair use to restore the balance of the copyright system. It is indeed no surprise that Singapore and South Korea introduced fair use provisions only after the adoption of these free trade agreements.

Finally, the 2004 consultation concerned a switch from the existing hybrid fair dealing regime in Hong Kong to the American fair use regime. This consulted switch is irrelevant to the open-ended, catch-all fair use proposal before the LegCo. Just because Hong Kong should not have a fundamental revamp of the copyright regime by switching from its existing hybrid model to the American model does not mean that it should not use an open-ended, catch-all fair use provision to supplement its fair dealing provisions and address their inadequacies. Such a supplemental effort is simply not the subject of the 2004 consultation exercise.

V. MORATORIUM ON LAWSUITS

The final proposal calls for the introduction of a moratorium on lawsuits against individual Internet users based on noncommercial copyright infringement. I first advanced this proposal during a LegCo presentation at the invitation of Councilor Charles Mok.[241] Mok represented the information technology functional constituency at the Council. In December 2015, I also shared the proposal with some LegCo councilors, their aides,[242] and various local media.[243]

This proposal did not catch much public attention until LegCo

241. *See Professor Peter K. Yu—"Disassembling the Copyright (Amendment) Bill 2014" Seminar*, YOUTUBE (July 28, 2014), https://www.youtube.com/watch?v=ZJg3aX4QXME (in Cantonese); *see also* Yu, *Canadian UGC Exception*, *supra* note 131, at 202 (outlining the proposal).

242. *See* Professor *Peter K. Yu—Hong Kong "Copyright (Amendment) Bill 2014" Seminar*, YOUTUBE (Dec. 23, 2015), https://www.youtube.com/watch? v=u-9lNOK_OdE (in Cantonese).

243. *See* Ho Hiu Kan, *U.S. Scholar Comments on Copyright Bill and Calls for Moratorium on Lawsuits Against Netizens*, MING PAO DAILY NEWS, Dec. 23, 2015 (in Chinese); Alvin Lum, *Scholar Calls for Moratorium on Lawsuits Against Netizens*, H.K. ECON. J., Dec. 21, 2015 (in Chinese). For the Author's opinion pieces, see Peter K. Yu, *How to Break the Current Copyright Amendment Impasse?*, INITIUM MEDIA (Jan. 6, 2016), https://theinitium.com/article/20160106-opinion-peteryu-copyright/ (in Chinese); Peter K. Yu, *Is a Moratorium on Lawsuits Feasible in Hong Kong?*, H.K. IN-MEDIA (Jan. 26, 2015), http://www.inmediahk.net/node/1040262 (in Chinese).

Councilor Cyd Ho tabled a motion to form a select committee to handle the remaining details of the 2014 Bill. The motion was made on January 21, 2016, after the completion of the second reading debate and two premature adjournments of the Council's debate.[244] Under Rule 55(1)(a) of the LegCo Rules of Procedure, any councilor can move to commit a bill to a select committee.[245] Although this committee can only discuss the bill's details but not its principles, it has "power to make such amendments therein as they shall think fit, provided that the amendments, including new clauses and new schedules, are relevant to the subject matter of the bill."[246]

On the floor, Ho suggested that the establishment of such a select committee could help generate the compromise needed to ensure the adoption of the 2014 Bill.[247] She noted that the Bills Committee did not yet have an opportunity to consider this particular proposal due to its late arrival.[248] The establishment of a select committee would also allow legislators to consider other issues that might help facilitate the development of a compromise to break the impasse at the LegCo. In addition, she believed that committing the bill to a select committee would free up the Committee of the Whole Council

244. *See* Cheng, *Controversial Copyright Bill*, *supra* note 66.

245. As Rule 55(1)(a) provides:

> When a motion for the second reading of a bill has been agreed to, the bill shall stand committed to a committee of the whole Council, unless . . . the Council, on a motion which may be moved without notice by any Member immediately after the bill has been read the second time, commit the bill to a select committee . . . .

Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region, Rule 55(1)(a) (u.d.) (H.K.), http://www.legco.gov.hk/general/english/procedur/content/rop.pdf.

246. *Id.* Rule 56; *see also* Kris Cheng, *Lawmaker Plans to Propose Unprecedented Way out for Copyright Bill Debate*, H.K. FREE PRESS (Jan. 7, 2016), https://www.hongkongfp.com/2016/01/07/lawmaker-plans-to-propose-unprecedented-way-out-for-copyright-bill-debate/ [hereinafter Cheng, *Lawmaker Plans to Propose Way out*] ("A select committee is established for in-depth consideration of matters or bills referred by the Council. Where so authorized by the Council, select committees may, as required when exercising its powers and functions, summon persons concerned to attend before the committee to give evidence or to produce documents. As soon as a select committee has completed consideration of the matter or bill referred to it, it reports to the Council and is thereupon dissolved.").

247. *See* Cheng, *Lawmaker Plans to Propose Way out*, *supra* note 246.

248. *See* Hong Kong *Hansard* 21 Jan. 2016 Col 4002-03 (H.K.), http://www.legco.gov.hk/yr15-16/english/counmtg/hansard/cm20160121-translate-e.pdf (the remarks of Hon. Cyd Ho, LegCo Councilor).

to consider other pressing legislative matters, such as the government's yet-to-be-approved annual budget and other outstanding bills.

A. MODEL

The inspiration of the proposed moratorium came from Section 1008 of the U.S. Copyright Act, which was part of the Audio Home Recording Act of 1992 ("AHRA"). AHRA was adopted as a legislative compromise in response to the arrival of digital audio recording technology. The provision specifically provides:

> No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.[249]

The specific wording used in this provision is critical. Instead of stipulating what conduct is legal and illegal, the provision punted on the legality issue, merely stating that "[n]o action may be brought under this title alleging infringement of copyright" based on the specified conditions.[250]

The circumstances surrounding the adoption of the AHRA in the United States were also quite similar to the circumstances surrounding the deadlock at the Hong Kong LegCo. In the late 1980s and the early 1990s, the recording industry and the home electronics industry were in the middle of a potentially very costly litigation campaign.[251] Although the 1984 U.S. Supreme Court case of *Sony Corp. of America v. Universal City Studios, Inc.* provided a safe harbor for the manufacture, importation, or distribution of commercial devices "capable of substantial noninfringing uses,"[252] digital audio recording technology provided a graver threat than the

249. 17 U.S.C. § 1008 (2012).

250. *Id.*

251. *See Cahn v. Sony Corp.*, No. 90 Civ. 4537 (S.D.N.Y. July 11, 1991); *see also* Gary S. Lutzker, *Dat's All Folks: Cahn v. Sony and the Audio Home Recording Act of 1991—Merrie Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 164-74 (1992) (discussing *Cahn*).

252. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

one posed by the analog technology at issue in *Sony*. Because it is unclear which industry would prevail in the end, a quick compromise between these two industries was badly needed.[253]

To be certain, Section 1008 was adopted as part a legislative compromise backed by three industries (recording, home electronics, and computer hardware[254]) as well as music publishers, songwriters and performing rights organizations[255]—a uniquely American way of negotiating copyright laws.[256] Nevertheless, the same drafting technique can be found in laws outside of the United States. Notable examples are the statute-of-limitations provisions found around the world, including Hong Kong. Like Section 1008, these provisions punt on the legality of the conduct involved. Instead, they regulate the time allowed for taking legal action.

Consider, for instance, the laws in Hong Kong. Section 4 of the Limitation Ordinance states that "actions founded on simple contract or on tort," such as copyright infringement, "shall not be brought

253. As David Nimmer observed in his noted treatise:

> The plaintiff side had the incentive to settle for less than full control over the uses to which [digital audio tape] machines could be put, lest history repeat itself and Sony triumph again. Sony and its fellow manufacturers, for their part, also had the incentive to offer concessions, to free their marketing plans from the specter of injunctions and damages.

MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8B.01[B] (Perm. ed. 2016).

254. The computer hardware industry managed to secure a carve-out in the AHRA. *See* 17 U.S.C. § 1001(3) (2012) (defining "digital audio recording device" as "any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use"); *see also Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1078 (9th Cir. 1999) ("Unlike digital audio tape machines, for example, whose primary purpose is to make digital audio copied recordings, the primary purpose of a computer is to run various programs and to record the data necessary to run those programs and perform various tasks.").

255. *See* NIMMER & NIMMER, *supra* note 253, § 8B.01[C].

256. *See* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 53 (1994) ("[T]he only way that copyright laws get passed in this country is for all of the lawyers who represent the current stakeholders to get together and hash out all of the details among themselves."); *see also* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 862 (1987) (arguing that the legislative history of the 1976 Copyright Act reflects "an anomalous legislative process designed to force special interest groups to negotiate with one another").

after the expiration of 6 years from the date on which the cause of action accrued."[257] In regard to criminal copyright infringement, Section 120A of the Copyright Ordinance further states: "No prosecution for an offence under this Ordinance shall be commenced after the expiration of 3 years from the date of commission of the offence."[258] Notably, none of these two provisions speaks to the legality of the defendant's conduct. Instead, it stipulates the conditions under which civil action and criminal prosecution can be commenced.

That these two provisions already exist in Hong Kong law demonstrates that the drafting technique in Section 1008 is not uniquely American. These provisions are also important because they show that the law can be drafted in a way that would prevent individual Internet users from being sued while at the same time avoiding the legalization of the conduct involved. Although the copyright industries repeatedly asserted that they did not intend to take legal action against individual Internet users, they were particularly concerned about legalizing the users' unauthorized activities. Such legalization would prevent them from not only taking legal action against OSPs, social media platforms, or other third parties, but also negotiating with these third parties in the shadow of litigation or the threats thereof. If the individual Internet users' activities were deemed legal, the indirect activities conducted by these third parties would certainly be considered legal as well. After all, it is widely accepted in copyright law that there should be no indirect liability without direct liability.[259]

B. PROPOSAL

Using the model exemplified by either Section 1008 of the U.S. Copyright Act or statute-of-limitations provisions in Hong Kong and other jurisdictions, the Bill could be easily amended by adding the following provision: "No prosecution or action shall be commenced under this Ordinance alleging noncommercial infringement of copyright."

257. Hong Kong Limitation Ordinance, (1997) Cap. 347, § 4(1) (H.K.).
258. Hong Kong Copyright Ordinance, *supra* note 2, § 120A.
259. *See, e.g.*, *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 911 (N.D. Cal. 2000) ("To prevail on a contributory or vicarious copyright infringement claim, a plaintiff must show direct infringement by a third party.").

If the government or the LegCo do not want to create a moratorium on lawsuits against individual Internet users based on noncommercial copyright infringement, they could further modify the proposal to stipulate the conditions under which legal action may not be brought. For example, they could create a carve-out for situations in which market substitution occurs. The reformulated provision would read as follows: "No prosecution or action shall be commenced under this Ordinance alleging noncommercial infringement of copyright *unless the infringement amounts to a substitute for the copyright work.*"

The government or the LegCo could also combine the current proposal with the proposal for a PNCUGC exception, which Part III discussed. The combined proposal, with modifications in italics, would read as follows:

> *No prosecution or action shall be commenced under this Ordinance alleging* infringement of copyright *when* an individual *uses* an existing work or other subject matter (or copy of one) which has been published or otherwise made available to the public, in the creation of a new work or other subject matter in which copyright subsists and *when* the individual (or, with the individual's authorization, a member of their household) *uses* the new work or other subject matter or *authorizes* an intermediary to disseminate it, if—
>
> (a) the use of, or the authorisation to disseminate, the new work or other subject-matter is done predominantly for non-commercial purposes;
>
> (b) the source—and, if given in the source, the name of the author, performer, maker or broadcaster—of the existing work or other subject-matter—or copy of it—are mentioned, if it is reasonable in the circumstances to do so;
>
> (c) the individual had reasonable grounds to believe that the existing work or other subject-matter—or copy of it—as the case may be, was not infringing copyright; and
>
> (d) the use of, or the authorisation to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter—or copy of it—or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

The main difference between the proposed wording here and the

earlier proposal for a PNCUGC exception is that the current proposal states that "[n]o action may be brought under this Ordinance" while the earlier proposal states that "[i]t is not an infringement of copyright." Put differently, the current proposal prohibits civil lawsuits and criminal prosecutions without legalizing the conduct at issue, while the earlier proposal legalizes that particular conduct, making it difficult for copyright holders to take legal action against OSPs, social media platforms, and other indirect infringers.

C. BENEFITS

As with virtually all other difficult-to-reach compromises, the proposal here cannot completely satisfy either the copyright industries or Internet user groups. It simply will not provide the same benefits as the two earlier proposals. For instance, subjecting OSPs and social media platforms to legal liability for noncommercial copyright infringement could ultimately affect the Internet users' ability to disseminate information via websites, Internet services, and social media platforms. In addition, the proposed moratorium will provide OSPs and social media platforms with very limited benefits, other than to accelerate the adoption of the 2014 Bill, which in turn will provide them with the safe harbor provisions and the accompanying code of conduct.[260]

Notwithstanding these limitations, this proposal will achieve four sets of outcomes that will address some of the key concerns of both the copyright industries and Internet user groups. While the latter were concerned about the civil lawsuits and criminal prosecutions against individual users, the former were concerned about legalizing the users' unlicensed activities.

The first outcome is that the proposal will address a key concern of Internet user groups. It will protect individual Internet users against civil and criminal liability for noncommercial copyright infringement. If the provision includes conditions, the proposal will instead prevent these users from being subjected to civil actions and criminal prosecutions based on unauthorized activities that do not meet the permissible conditions.

This proposal will also not constrain the legal action to be taken by

260. *See* 2014 Bill, *supra* note 4, §§ 88A-88J.

the copyright industries or the government, considering that both parties have already made repeated oral promises not to take action against individual Internet users. That the proposed moratorium applies to all copyright holders is important, because these industries, as well-intended as these promises may be, cannot speak on behalf of all copyright holders. Even if their promises are honored, Internet users can still face lawsuits from other copyright holders without the institution of the proposed moratorium.

Even better, the proposal will prevent Internet users from being subjected to legal threats or cease-and-desist letters even when their conducts are arguably permissible under the law. As I noted in the first position paper submitted to the government as part of the 2006 consultation exercise, legal threats and cease-and-desist letters can be quite problematic for individual Internet users even if lawsuits are not eventually filed.[261] Most of these users simply do not have ready access to legal assistance on copyright matters, and they may be forced to settle the disputes regardless of the legality of their actions.[262]

The second outcome is that the proposal will address a key concern of the copyright industries. It will allow copyright holders and the government to take legal action against individual Internet users based on *commercial* copyright infringement. If the provision includes conditions, the proposal will instead allow copyright holders

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261. As I noted in regard to the introduction of statutory damages into Hong Kong and the lawsuits and legal threats that take advantage of these damages:

> While courts have discretion to determine whether it is appropriate to award statutory damages and how much of such damages should be awarded, the biggest concern about statutory damages stem from the threat of damages (and its intimidating effect), rather than the damages themselves. In fact, the provision is likely to be abused—to the point that individual users would be "blackmailed" into settling infringement lawsuits even if they had a good-faith belief that their unauthorized use was legal—or, worse, if their use was in fact legal.

FIRST POSITION PAPER, *supra* note 100, at 10.

262. *See* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 51-52 (2004) (noting "a mafia-like choice" between a costly settlement and an outrageously high legal bill incurred in defending the lawsuit); Yu, *Digital Copyright Reform*, *supra* note 8, at 718 ("If one were given a choice . . . between a statutory damage award of $1.5 billion and a settlement offer of $10,000, most rational people would pick the settlement offer regardless of whether they had violated any law. The potential loss is just too high, and fighting the lawsuit can be costly.").

and the government to take legal action against individual Internet users based on unauthorized activities that do not meet the permissible conditions.

During the public debate, industry representatives repeatedly lamented how some individual Internet users had made substantial profits by unfairly exploiting their copyrights. While I am sympathetic to these industries, their concern is irrelevant to the current proposal, as the proposed moratorium applies only to noncommercial copyright infringement. It will therefore not shield commercial infringers from legal liability.

The third outcome is that the proposal will allow copyright holders and the government to take legal action against OSPs, social media platforms, or other third parties that are not individual Internet users. Under this proposal, they will certainly be able to take action against those third parties who have made substantial profits off the unauthorized activities conducted by individual Internet users as well as those who have engaged in commercial copyright infringement. Because the current proposal is confined to individual Internet users, it will not protect other third parties. Thus, if these parties fail to obtain licenses from the relevant copyright holders or additional protection under the Ordinance or in other parts of the 2014 Bill—such as the OSPs' safe harbors[263]—they may face both civil lawsuits and criminal prosecutions.

Although OSPs, social media platforms, or other third parties understandably will resist this proposal, it is fair to require them to share pecuniary benefits with copyright holders considering their substantial profits from the users' unauthorized exploitation of the copyrighted works—through advertising or other avenues. Moreover, as these third parties continue to secure licenses from copyright holders, such as those obtained by YouTube, benefit-sharing arrangements—through licenses or otherwise—will become standard business practices.

The final outcome is that this proposal will not prevent copyright holders from using the notice-and-takedown mechanism introduced by the 2014 Bill. Nor will it reduce the incentives for OSPs and social media platforms to respond to the copyright holders' takedown

263. *See* 2014 Bill, *supra* note 4, §§ 88A-88J.

notices. The notice-and-takedown mechanism is a key part of the OSPs' safe harbors. If these providers want to take advantage of these safe harbors, they will have to respond to takedown notices regardless of whether individual Internet users will ultimately be sued. After all, the main concern of these providers is not whether their customers will be sued, but whether they themselves will be sued.

D. CRITICISMS AND RESPONSES

Immediately after the proposal was mentioned on the floor, its critics contended that this proposal should be rejected, because it would require Hong Kong to introduce a levy system, which the region currently does not have.[264] These critics also believed that the establishment of a select committee would only delay the legislative process. Some lawmakers further feared that, if the bill were committed to a select committee, it would be effectively killed. With only a few months before the end of the LegCo term, it was very unlikely that the bill would have emerged out of the committee in time for it to be passed.[265]

It is difficult to determine whether these critics, in hindsight, would have viewed the proposal for establishing a select committee differently—perhaps as a last chance to save the Bill. At the time of the motion, however, the government, the copyright industries, and their supportive legislators were quite confident that the Bill would be passed as planned. Given the majority of seats (and votes) held by pro-establishment legislators, it is indeed not far-fetched to state that the Bill would have been passed had it been put to vote in January 2016 without further legislative debate. A major concern of the Bill's opponents at that time was that the Bill's proponents would manage

264. *See, e.g.*, Hong Kong *Hansard* 27 Jan. 2016 Col 4353 (H.K.), http://www.legco.gov.hk/yr15-16/english/counmtg/hansard/cm20160127-translate-e.pdf (the remarks of Hon. Cyd Ho, LegCo Councilor) (noting LegCo Councilor Martin Liao's suggestion that "in the United States, there is a pre-paid mechanism . . . [where] people have to join the pre-paid mechanism first to be members before they can obtain an injunction against prosecution").

265. *See* Cheng, *Lawmaker Plans to Propose Way out*, *supra* note 246 ("[LegCo President Jasper] Tsang said that since there are only a few months left in the Council's current term of office, the bill may expire if it is transferred to a select committee. If the legislative process is not completed in time, it will have to be restarted in the next term.").

to force the vote by cutting short the debate.[266]

Although I do not intend to discuss the desirability of the proposal to establish a select committee—its merits notwithstanding—it is important to dispel the myth that my proposal for a moratorium on lawsuits would require the introduction of a levy system. There are at least four reasons why such a requirement does not exist.[267]

First, although Section 1008 inspired this proposal, the approach taken is equally supported by statute-of-limitations provisions found around the world. Even within the copyright field, the introduction of statute-of-limitations provisions (such as Section 120A of the Hong Kong Copyright Ordinance) is not contingent upon the introduction of a levy system.

Second, although the AHRA introduced a levy system[268] (and a serial copyright management system[269]) when it added Section 1008 to the U.S. Copyright Act, the levy system was introduced mostly to strike a balance between the recording industry and the home electronics industry, not the balance between the recording industry and consumers at large. Because the AHRA prohibits copyright infringement actions based on the manufacture, importation, or distribution of digital audio recording technology for private, noncommercial use, it is only logical that Section 1003 requires the beneficiaries to compensate copyright holders for the injury that this

266. *Compare* Kris Cheng, *Chaotic Scenes at LegCo as Additional Funds for Express Rail Link Approved in Sudden Vote*, H.K. FREE PRESS (Mar. 11, 2016), https://www.hongkongfp.com/2016/03/11/breaking-chaotic-scenes-at-legco-as-additional-funds-for-express-rail-link-approved-in-sudden-vote/ (reporting efforts to bypass the LegCo debate to force the vote on the proposal to provide additional public funding for the Hong Kong section of the Guangzhou–Shenzhen–Hong Kong Express Rail Link).

267. Although the proposed moratorium does not require the introduction of a levy system, such a system is a possible reform option and could help break the deadlock at the LegCo. *See* Yu, *Canadian UGC Exception*, *supra* note 131, at 201 ("A levy of HK$4 per month from the 2 million existing Internet households in Hong Kong, for example, would easily create a highly attractive annual pool of close to HK$100 million for authors, copyright holders and other parties.").

268. *See* 17 U.S.C. § 1003 (2012) (creating an obligation to make royalty payments).

269. *See id.* § 1001 (requiring the installation of a serial copy management system to the covered recording devices to provide copyright and generation status information and to prevent the production of a chain of perfect digital copies).

technology may cause.[270]

Third, the levy system put in place by the AHRA covers only digital audio recording equipment and media.[271] It speaks nothing about analog audio recording technology. This digital-analog distinction is significant because it greatly weakens the critics' claim about the causal relationship between Section 1008 and the introduction of a levy system. If the creation of such a provision required the introduction of compensatory royalties, the AHRA would have extended the royalties to all activities covered—that is, both digital and analog audio recording activities. The AHRA was simply not drafted this way.

Finally, Section 1008 cannot be read outside the political context surrounding the passage of the AHRA. The statute was largely a legal settlement between the recording and home electronics industries (with a carve-out for the computer hardware industry and the subsequent endorsement of music publishers, songwriters, and performing rights organizations). As David Nimmer recounted:

> On July 28, 1989, in Athens, Greece, worldwide negotiations between record companies and hardware manufacturers culminated in an accord between those two factions. Other factions of the music industry nonetheless remained dissatisfied with that bilateral solution. Accordingly, further negotiations ensued among music publishers, songwriters, performing rights societies, and the groups that had previously reached agreement.[272]

If this private settlement were to be adopted as law, some benefits to consumers would have to be added to generate Congressional support. Section 1008 was therefore a logical choice at that time to provide these much-needed incentives, considering that a long list of legislative proposals had already been advanced to exempt copyright protection from home audio and video taping.[273] After all, the industry-based settlement was negotiated without the participation of either Congress or consumer groups.

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270. *See id.* § 1003.
271. *See id.*
272. NIMMER & NIMMER, *supra* note 253, § 8B.01[C].
273. *See* Lutzker, *supra* note 251, at 171-74 (outlining the various proposals).

VI. CONCLUSION

In July 2016, the fifth LegCo term came to an end without amending the Copyright Ordinance. The 2014 Bill suffered the same fate as its equally controversial predecessor. If the government is to restart the effort to provide a digital upgrade of the Hong Kong copyright regime, it will have to submit a new bill to the LegCo in the new term. Although it is quite certain that the government will submit such a bill, it remains to be seen whether it will undertake a new consultation exercise before introducing the bill. It is also unclear whether the government will resubmit the 2014 bill with only cosmetic changes or introduce a new bill that includes substantial changes.

Regardless of the government's actions, the quest for a user-friendly copyright regime in this region will continue. Hopefully, the three proposals discussed in this Article—and the past decade of groundwork laid down by Internet user groups and their supportive legislators—will help Hong Kong finally complete this difficult yet important quest. In the digital environment, users play as important a role as copyright holders. A copyright regime that is friendly to users will greatly benefit Hong Kong.