Digital Copyright Reform in Hong Kong

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Introduction

- Copyright Reform in Hong Kong
- Limitations and Exceptions
Balance of Interests in Copyright System

incentive

access
Policy Goal of Copyright Law

- A statutory creation designed
  - Primarily to enhance the public interest
  - Secondarily to confer a reward upon authors
• Introduction

✓ Copyright Reform in Hong Kong

• Limitations and Exceptions
• Public consultations on digital copyright
  – December 2006
  – April 2008
  – July 2013
• Copyright (Amendment) Bills introduced to the Legislative Council
  – June 2011
  – June 2014
• Introduction

• Copyright Reform in Hong Kong

✓ Limitations and Exceptions
Limitations or Exceptions

✓ International Treaties
• Fair Use and Fair Dealing
• Current Hong Kong Copyright Ordinance
• Legislative Proposals
Limitations or Exceptions to Copyright

• **Art. 9(2), Berne Convention**
  
  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.

• **Art. 13, TRIPs Agreement**
  
  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.
• s.37(3)

— In determining whether an act specified in this Division may be done in relation to a copyright work notwithstanding the subsistence of copyright, the primary consideration is that the act does not conflict with a normal exploitation of the work by the copyright owner and does not unreasonably prejudice the legitimate interests of the copyright owner.
Limitations or Exceptions

• International Treaties
✓ Fair Use and FairDealing
• Current Hong Kong Copyright Ordinance
• Legislative Proposals
Exceptions or Limitations

• The U.S. Approach (The General Non-Exclusive Fair Use Regime)
  – 17 U.S. §107: 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.

Limitations or Exceptions

- International Treaties
- Fair Use and Fair Dealing
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- Legislative Proposals
Exceptions or Limitations


• H.K. Copyright Ordinance:

**Fair Dealing**
- Research and Private Study (s. 38)
- Criticism, Review, and News Reporting (s. 39)
- Education (s. 41A~45)

**Other Exceptions**
- Incidental Inclusion (s. 40)
- Person with Disability (s. 40A~40C)
- Libraries & Archives (s. 46~53)
Limitations or Exceptions

- International Treaties
- Fair Use and Fair Dealing
- Current Hong Kong Copyright Ordinance

✓ Legislative Proposals
• Background:

  – Introducing a new right of communication to the public:

     • Covering all modes of electronic transmission
     • Featuring both criminal and civil liabilities
Legislative Proposals

- Parody
- UGC
- Fair Use
A Parody is a work that mimics in an absurd or ridiculous way the conventions and style of another work - in order to derive ridicule, ironic comment or affectionate fun.
Limitations or Exceptions

• Copyright (Amendment) Bill 2011
  – Parodies, satires, etc.

• Copyright (Amendment) Bill 2011
  – Parody, satire, caricature, and pastiche
  – Quotation
  – Commenting on current events
Parody

• Definition
  – HKIPD: Parody is used as a collective term to refer to a wide scope of works, such as “parody”, “satire”, “caricature” or “pastiche.”
  – An imitation of an existing copyright work for humorous or satirical effect
  – No definition in international treaties and national legislations
  – **Example**
    • Combining existing news photos or movie posters with pictures of political figures
    • Providing new lyrics to popular songs
    • Editing a short clips from a TV drama or movie to relate to a current event

• Tension between the parodist and copyright owner
  – Because the use is satire and ridicule, some copyright owners will not license their work for this purpose

Copyright vs. Creativity/Freedom of Expression
Parody

• Treatment of Parody
  – Art. 5, E.C. Copyright in the Information Society Directive
    • 3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
      – (k) use for the purpose of caricature, parody or pastiche

  – National Law
    • Fair Use Case Law: U.S.
Parody

- Court of Justice in European Union (CJEU)---Deckmyn and Vrijheidsfonds VZW v. Vandersteen, C-201/13:

- Parody as an exemption shall
  - Evoking an existing work while being noticeably different from it; and
  - Constituting an expression of humour or mockery
Criticism

• Parody exception does not include all reasonable Internet use of copyright work
  – Secondary creation
    • HKIPD:
      – “Secondary creation” is NOT a term used in copyright jurisprudence
Legislative Proposals

- Parody

✓ UGC

- Fair Use
UGC Exception

• “predominantly noncommercial user-generated content” exception

• Supporters:
  – Internet User Groups: Concern Group of Rights of Derivative Works, Keyboard Frontline, Copyright and Derivative Works Alliance, etc.
UGC Exception

— Proposal:

• User Generated Content (UGC) is legally permitted if it
  — is not for commercial use
  — is not a substitute of the existing copyright materials
  — does not cause harm or negatively impact on the existing or potential market and reputation on the existing materials as long as the existing materials were legitimately acquired;
  — sufficient acknowledgement
UGC Exception

• Criticism
  – Lack of consultation
  – Scope of the exception is too broad
  – Lack of comparative law experience (only Canada)
Legislative Proposals

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✓ Fair Use
Fair Use

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Fair Use

• Advantage
  – Flexibility

• Disadvantage
  – Uncertainty
THANK YOU FOR YOUR ATTENTION