

From Fair Dealing to User-Generated Content: Legal La La Land in Hong Kong

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Here's to the ones who dream
Foolish as they may seem
Here's to the hearts that ache
Here's to the mess we make³

In March 2016, the Hong Kong government abandoned its latest attempt to reform copyright law for the digital era. Notwithstanding strong support from the business sector, opposition to the Copyright (Amendment) Bill 2014 had become a crusade for civil rights activists and internet user interest groups, who protested it online and outside the legislature, and also for pro-democracy lawmakers, who filibustered tirelessly until the Bill's demise.

Had the Bill become law, copyright users would have gained new fair dealing exceptions covering parody, satire, caricature, pastiche, comment on current events and quotation – provisions and protections they had requested when the predecessor Copyright (Amendment) Bill 2011 was rejected – along with greater clarity on various technology-related matters. Instead, Hong Kong retains a limited and dated range of exceptions in the areas of education, journalism and public administration.

To understand this counter-intuitive result, it is necessary to consider not only the copyright reform process – all ten fruitless years of it – but also Hong Kong's political climate. Since the return to Chinese sovereignty in 1997, the mood in the city has shifted from intermittently tense to frequently tumultuous. By the time the 2014 Bill was proposed, political conflict had reached a high point as the public lost patience with Beijing's refusal to countenance democratic reform. Hundreds of thousands took to the streets and occupied them from September to December 2014.

Amid the prevailing atmosphere of confrontation and mistrust, the Bill's opponents proclaimed it a threat to free speech and internet freedom and demanded broader protections for user-generated content (UGC), which had by then become a notable mode of anti-establishment expression. A shell-shocked government, seemingly lacking the wherewithal to sell the reform package or mediate between copyright owners and users, moved the controversial item to the back of the legislative agenda to allow the budget and other essential business through.

Thus copyright remains analogue and decreasingly fit for purpose in Hong Kong. But, despite the political stalemate over its future, the impetus for reform has not evaporated. With treaty obligations unmet, and with copyright owners and users stubbornly staking out their claims, there will be further chapters to this saga. It remains to be seen whether the next attempt at reform will be incremental in

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³ Audition (song), *La La Land* (Summit Entertainment, 2016).

nature or, bowing to popular opinion, if it will revolutionise Hong Kong copyright law by architecting a UGC Utopia.⁴

Background: Hong Kong's unique constitutional context

On 1 July 1997, the British Crown Colony of Hong Kong became a Special Administrative Region of the People's Republic of China. The territorial handover took place in accordance with a treaty between the outgoing and incoming sovereigns.⁵ Recognising Hong Kong's success as a freewheeling hub for international trade and a global financial centre, the United Kingdom and China agreed that the city's established ways of life and commerce, and many of its core institutions, would remain unchanged for at least 50 years.⁶

Hong Kong's de facto constitution is the Basic Law.⁷ It guarantees fundamental rights and freedoms in the territory.⁸ It provides for the continuation of laws in force at the time of the handover, judicial independence, the common law legal system and the use of overseas precedent.⁹ And, in the political sphere, it promises Hong Kong a high degree of autonomy, independent legislative and executive branches, and gradual and orderly progress towards elections via universal suffrage.¹⁰

Despite the trappings of a liberal democratic state, Hong Kong is subject to a superior, non-democratic governing body: the Central Government of the People's Republic of China. The Basic Law reserves certain powers to China, including acts of state and the powers to amend and finally interpret the Basic Law itself.¹¹ "Interpretations" can be, and have been, issued by the Chinese government to guide or override decisions of Hong Kong's highest court.¹²

Hong Kong is not a state in a federal system with clearly delineated jurisdictional boundaries between regional and national governments. It is part of a hybrid regime, enjoying limited regional autonomy which can be overridden at the discretion of the national government.¹³ Although the Basic Law sets out discrete areas of responsibility, its underlying "One Country, Two Systems" concept¹⁴ accommodates the

⁴ Alice Lee, "From Fair Dealing to Fair Use to UGC – Three Steps to Copyright Reform or Pseutopia?" at NUS-UPenn-HKU Conference on Comparative Dimensions of Limitations and Exceptions in Copyright Law, 21-22 July 2016.

⁵ The 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.

⁶ See further Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd Ed, Hong Kong University Press, 1999).

⁷ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

⁸ Basic Law Chapter III.

⁹ Basic Law Arts 8, 81, 84 and 85. See also arts 82 and 94 which provide, respectively, that overseas judges may be invited to sit on the Hong Kong Court of Final Appeal, the territory's apex court, and that overseas lawyers may be admitted to practice in the region.

¹⁰ Basic Law Arts 12, 16-18 and 68.

¹¹ Basic Law Arts 13-14 and 158-159.

¹² For a description of this power and examples of its exercise, see Anthony Mason, "The Rule of Law in the Shadow of the Giant: The Hong Kong Experience" 33(4) *Sydney Law Review* 623 (2011).

¹³ See Yash Ghai, "The Imperatives of Autonomy: Contradictions of the Basic Law" in Johannes Chan & Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong Law Journal Limited, 2005).

¹⁴ For an official account of this state policy, which is applied in the Special Administrative Regions of Hong Kong and Macao, see Wu Bangguo, *The Basic Law and Hong Kong: The 15th Anniversary of Reunification with the*

view that Hong Kong's integrity as a self-contained autonomous system may be overridden in the interests of "one country".¹⁵

Politics: The Basic Law and elections

Since the early days of the Special Administrative Region, the inherent contradictions of this "schizophrenic" constitutional set-up¹⁶ have been apparent in the wrangling over electoral models. The topic can flare up at any time but reliably does so around the election of the Chief Executive, Hong Kong's de facto leader, scheduled to occur every five years.

The Basic Law describes the method for selecting the Chief Executive, a method which may be amended by China's National People's Congress if the amendment is consented to by two-thirds of Hong Kong's legislature, the Legislative Council.¹⁷ The Basic Law states that the "ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures".¹⁸

Currently, the Chief Executive is chosen by a committee of 1200 members which is divided into sub-sectors largely representing commercial and professional interests.¹⁹ Although members are elected, this is not by universal suffrage. The representatives of the general public – legislators and district council members – constitute only around 10 per cent of the committee. Many seats on the committee are decided solely by corporate voters and many are uncontested.²⁰

The opaque and undemocratic nature of this committee, which reliably produces Chief Executives from the pro-establishment side of politics, has long been a source of agitation. In 2014, the Hong Kong government acceded to calls to reconsider the process and ran a consultation on the electoral model to be used in 2017. Public engagement was high — an online survey by the University of Hong Kong attracted more than half a million votes. Pro-democracy groups openly advocated universal suffrage,

Motherland (Working Group on Overseas Community of the Basic Law Promotion Steering Committee, 2012): accessible at http://www.basiclaw.gov.hk/en/publications/15anniversary_reunification/

¹⁵ This is the current policy position of the Central Government as described in its White Paper "The Practice of the 'One Country, Two Systems' Policy in the Hong Kong Special Administrative Region", 10 June 2014: full text available at <http://www.fmcofpc.gov.hk/eng/xwtdt/gsxw/t1164057.htm>. As to the search for coherence in China's Basic Law interpretation methodology, see Lin Feng & P Y Lo, "One Term, Two Interpretations: The Justifications and the Future of Basic Law Interpretation" in Hualing Fu, Lison Harris & Simon N M Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave MacMillan, 2007). For an argument that China's approach is mere *ipse dixit*, see Robert Morris, "The 'Replacement' Chief Executive's Two-Year Term: A Pure and Unambiguous Common Law Analysis" 35 *Hong Kong Law Journal* 17 (2005).

¹⁶ Todd Schneider, "David v Goliath: The Hong Kong Courts and China's National People's Congress Standing Committee" 20 *Berkeley Journal of International Law* 575 (2002).

¹⁷ Basic Law Art 159.

¹⁸ Basic Law Art 45.

¹⁹ Basic Law Annex I.

²⁰ See generally Simon N M Young & Richard Cullen (eds), *Electing Hong Kong's Chief Executive* (Hong Kong University Press, 2010). It is noteworthy that only half of the seats in the Legislative Council are elected by universal suffrage, the other half being functional constituencies with restricted voting, some of it corporate. This too is an ongoing source of controversy.

And some announced plans to stage civil disobedience campaigns unless genuine progress towards democracy was made.

When the consultation closed, Beijing announced its decision on the new model: the selection committee would remain in place to vet the candidates for Chief Executive. Those who were not screened out by the committee would be eligible to stand for election by the Hong Kong public. Outraged opposition legislators vowed to use their veto to block the half-hearted reform. University and school students launched an extended strike, which tipped into the streets when police blocked access to protest sites around government offices. When police resorted to batons, pepper spray and 87 canisters of tear gas, hundreds of thousands of ordinary Hong Kongers joined the students and flooded the city streets. The Umbrella Movement, a mass protest which would blockade the Central, Causeway Bay and Mongkok districts for 72 consecutive days, had begun.²¹

This was the backdrop against which the latest copyright reform consultation was launched.

Copyright: The law and exceptions

At the time of the handover, a raft of new, local laws took effect in Hong Kong. These included the territory's first comprehensive copyright statute, the Copyright Ordinance.²² The Ordinance filled the void left by the UK Copyright Act 1956, which had applied in the colony until that point, and was based in most respects on the successor to the 1956 Act: the Copyright, Designs and Patents Act 1988.²³

Under the Ordinance, copyright subsists in a work of a prescribed type if it is original and fixed in material form.²⁴ The jurisprudence on these criteria remains English in origin. Thus the originality requirement has a low threshold focused on independence of creation rather than inventiveness; a minimum degree of skill, judgment, labour or investment is required; and copyright ultimately protects not an idea but its expression.²⁵

The exclusive rights of copyright owners, set out in terms of "restricted acts", include the right to reproduce the work in any material form, in whole or substantial part.²⁶ Both physical and electronic reproductions fall within this restriction, and the copyright owner enjoys exclusive rights of first issue of

²¹ For an account of the movement, see Jason Y Ng, *Umbrellas in Bloom: Hong Kong's Occupy Movement Uncovered* (Blacksmith Books, 2015).

²² Chapter 528 of the Laws of Hong Kong, or "Cap 528". This is not the same as the short Copyright Ordinance (Cap 39, now repealed) which merely supplemented the UK Copyright Act 1956 when it still applied in the colony.

²³ Michael D Pendleton, Jared Margolis & Alice Lee, *Intellectual Property Rights: HKSAR & PRC* (LexisNexis, loose-leaf service) Division IV paras [1], [5]-[50]; Kenny K S Wong & Alice S C Lee, *Intellectual Property Law and Practice in Hong Kong* (Sweet & Maxwell Asia, 2010) para 3.003. The 1956 Act remains influential: Cap 528 s 193(2) provides that a provision which "corresponds to" a provision of the 1956 Act shall be construed in accordance with the previous law, notwithstanding a change of expression.

²⁴ Cap 528 ss 2 and 4 to 10.

²⁵ See eg *McMillan & Co Ltd v Cooper* (1924) 40 TLR 186; *Interlego AG v Tyco Industries Inc* [1989] AC 217; *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 113.

²⁶ Cap 528 s 22.

the work to the public and of making it available online.²⁷ Infringements of these rights are termed “primary” infringements.

“Secondary” infringements involve dealing with infringing items in connection with a trade or business. This category also proscribes the distribution of an infringing item, not in connection with a trade or business, to an extent that prejudicially affects the copyright owner.²⁸ It is a defence to secondary infringement to prove reasonable belief, on the facts subjectively known, that the copy was not an infringing copy.²⁹

Certain infringements are offences under the Ordinance, mostly those done in connection with a trade or business. The primary infringement of making available online does not attract criminal liability, however, whereas the secondary infringement of prejudicial non-commercial distribution does.³⁰ Damages are available to the copyright owner unless it is shown that the infringer did not know and had no reason to believe copyright subsisted in the work.³¹

Largely based on the UK Copyright, Designs and Patent Act 1988, the Ordinance contains a long list of “acts permitted in relation to copyright works”,³² ranging from fair dealing to education, libraries and archives. It may be said that the Hong Kong exceptions are comparable to those found throughout Europe and the Commonwealth.³³ There is an explicit provision that, in determining whether an act may be done in relation to a copyright work notwithstanding the subsistence of copyright, the primary consideration is whether the act conflicts with a normal exploitation of the work by, or unreasonably prejudices the legitimate interests of, the copyright owner.³⁴

Fair dealing and parody: where law meets politics

The major exceptions to copyright infringement are found in the fair dealing provisions of the Copyright Ordinance.³⁵ Before 2007, fair dealing was confined to the purposes of research and private study;³⁶ criticism, review and news reporting.³⁷ The range of exceptions was expanded after criticisms that the Copyright Ordinance was unfairly tilted in favour of copyright owners, and it now includes acts done for the purposes of giving or receiving instruction³⁸ and public administration.³⁹

²⁷ Cap 528 ss 23, 24 and 26.

²⁸ Cap 528 s 31(1)(d).

²⁹ Cap 528 s 36.

³⁰ Cap 528 s 118.

³¹ Cap 528 s 108. Other remedies, including an account of profits, may still be available.

³² Cap 528, Part II, Division III (ss 37 to 88)

³³ Based on Art 9(2) of the Berne Convention for the Protection of Literary and Artistic Works.

³⁴ Cap 528 s 37(3). The wording is reminiscent of the international “three-step test” (see below). See eg Kevin H Pun, “Reform of Copyright Law in Hong Kong: Time to Redraw the Balance” 32(1) Hong Kong Law Journal 83 (2002).

³⁵ Cap 528 ss 38, 39, 41A and 54A.

³⁶ Cap 528 s 38.

³⁷ Cap 528 s 39.

³⁸ Cap 528 s 41A (added in 2007).

³⁹ Cap 528 s 54A (added in 2007).

The 2007 amendments liberalised the education exceptions by making them medium-neutral⁴⁰ and added a fourth fair dealing factor, the effect of the dealing on the potential market for or value of the work.⁴¹ Despite these moves to broaden fair dealing, its specific heads or purposes still have their own further criteria, contributing to the granularity of the current law. For example, fair dealing for the purposes of criticism, review and news reporting must contain “sufficient acknowledgement” identifying the copied work and its author.⁴²

The Ordinance contains no express exception or defence for a work of parody that reproduces the whole or a substantial part of a copyright work. There is no reason why copyright cannot subsist in a work of parody if it meets the standard criteria; in the case of an artistic work, irrespective of its quality.⁴³ A mere tracing may not meet the threshold for protection; a painted or sculpted reproduction may.⁴⁴ However, an unauthorised derivative work is liable to infringe the original copyright, even if the copying is unintentional or inadvertent.⁴⁵

Despite the lack of a dedicated exception, it has been suggested that the terms “criticism” and “review” are broad enough in scope to encompass parodic works, particularly given the underlying assumption that the fair dealing provisions provide for copyright exceptions justifiable in the public interest.. On the other hand, it has also been observed that the requirement for acknowledgement does not sit well with many forms of parody.⁴⁶

In the UK, a 2014 amendment to the Copyright, Designs and Patents Act 1988 introduced a new fair dealing exception for “caricature, parody or pastiche”⁴⁷ – without any acknowledgement requirement – as well as adding a new category of “quotation” to the existing exception for criticism, review and news reporting.⁴⁸ These exceptions were legislated in recognition of the public interest in parody and the adoption of such exceptions in several European countries.⁴⁹

⁴⁰ Cap 528 s 41 to s 45. The education exceptions used to be medium-specific, with separate provisions for reprographic copying (s 45) and non-reprographic copying (s 41). Now, under s 41A, anything could be done for the purposes of giving or receiving instruction provided that it is fair. See Alice Lee, *Butterworths Hong Kong Copyright Handbook* (3rd ed, LexisNexis, 2011).

⁴¹ Under the original fair dealing provisions, the court shall take in to account all the circumstances including (a) the purpose and nature of the dealing, (b) the nature of the work, and (c) the amount and substantiality of the portion dealt with in relation to the work as a whole. Since 2007, a fourth factor has been added: (d) the effect of the dealing on the potential market for or value of the work.

⁴² If the author’s identity can be ascertained by reasonable inquiry: Cap 528 ss 39 and 198.

⁴³ Cap 528 s 5.

⁴⁴ *British Northrop v Texteam (Blackburn)* [1974] RPC 57; *Martin v Polyplas* [1969] NZLR 1046: see Michael D Pendleton, Jared Margolis & Alice Lee, *Intellectual Property Rights: HKSAR & PRC* (LexisNexis, loose-leaf service) Div IV para [552].

⁴⁵ Michael D Pendleton & Alice Lee, *Intellectual Property in Hong Kong* (LexisNexis, 2008) p 145; *Chow Wai Man Vivian v Easy Finder Ltd* (unreported, HCA 4042/1995).

⁴⁶ Michael D Pendleton, Jared Margolis & Alice Lee, *Intellectual Property Rights: HKSAR & PRC* (LexisNexis, loose-leaf service) Div IV paras [2152]-[2153]; and see “Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions” (Intellectual Property Office, 2007) para 200.

⁴⁷ Section 30A.

⁴⁸ Section 30.

⁴⁹ Parody exceptions are provided for by Art 5(3) of the Information Society Directive (Directive 2001/29/EC 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). See “Taking Forward the Gowers Review of Intellectual Property:

Similar exceptions have been legislated elsewhere, including Australia⁵⁰ and Canada,⁵¹ while courts in the United States have held that a right of parody exists within the fair use exception.⁵² More so than fair dealing, fair use has proven to be broad and flexible in judicial hands, able to be sculpted to the circumstances on policy grounds without legislative intervention, although it comes with a corresponding lack of certainty.⁵³

First attempt: the Copyright (Amendment) Bill 2011

In 2008, Hong Kong signed the World Intellectual Property Organization (WIPO)'s Copyright Treaty and Performances and Phonograms Treaty, instruments which had spurred widespread modernisations of copyright law including the US Digital Millennium Copyright Act in 1998 and the EU Copyright Directive in 2001. In anticipation of following suit, the Hong Kong government had launched a consultation, entitled "Copyright Protection in the Digital Environment", in 2006.

The consultation led to the 2008 "Preliminary Proposals for Strengthening Copyright Protection in the Digital Environment"⁵⁴ and, after further consultation, the 2009 "Proposals for Strengthening Copyright Protection in the Digital Environment".⁵⁵ This process laid the foundations for the Copyright (Amendment) Bill 2011, which was introduced with the declared aims of technology neutrality, strengthened protection against online infringement, and the facilitation of new modes of uses.⁵⁶

The centrepiece of the 2011 Bill was a new right of communication to the public: a technology-neutral right wide enough to encompass future developments in electronic transmission. The right would be infringed by any person who, without the licence of the copyright owner, communicated the work to the public (1) for the purpose of or in the course of any trade or business that consisted of communicating works to the public for profit or reward, or (2) to such an extent as to affect prejudicially the copyright owner.⁵⁷ In addition to civil liability, infringement was to carry criminal sanctions.

Proposed Changes to Copyright Exceptions" (Intellectual Property Office, 2007) para 195; Dinusha Mendis & Martin Kretschmer, "The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles - Parody and Pastiche: Study II" (Intellectual Property Office, 2013).

⁵⁰ Copyright Act 1968 s 41A.

⁵¹ Copyright Act 1985 s 29.

⁵² *Campbell v Acuff-Rose Music* 510 US 569 (1994). Other countries employing fair use doctrine include the Philippines and Israel.

⁵³ Ian Hargreaves, "Digital Opportunity: A Review of Intellectual Property and Growth" (2011) para 5.9. For a statement of the US view on the public interest in parody, see *SOFA Entertainment v Dodger Productions* 709 F 3d 1273 (9th Cir 2013). The Hong Kong government noted that US courts are less likely to regard satire as fair use than they are parody: see "Treatment of Parody under the Copyright Regime: Consultation Paper", para 21, accessible at http://www.cedb.gov.hk/citb/doc/en/Consultation_Paper_English.pdf

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[http://www.ipd.gov.hk/eng/intellectual_property/copyright/Consultation_Document_Prelim_Proposals_Eng\(full\).pdf](http://www.ipd.gov.hk/eng/intellectual_property/copyright/Consultation_Document_Prelim_Proposals_Eng(full).pdf)

⁵⁵ http://www.cedb.gov.hk/citb/doc/en/consultation/Panel_Paper_Digital_Eng_Full.pdf

⁵⁶ Legislative Council Brief, Copyright (Amendment) Bill 2011, CITB 07/09/17, para 3, accessible at http://www.legco.gov.hk/yr10-11/english/bills/brief/b35_brf.pdf

⁵⁷ Amending Cap 528 s 118.

This communication right would have superseded the extant “making available” provision of the Ordinance, which carries no criminal sanction, substantially toughening online copyright protection. Such a right is envisioned by Article 8 of the WIPO Copyright Treaty and appears in the copyright laws of various jurisdictions, including the UK.⁵⁸ Its scope elsewhere, however, is less broad. For example, European jurisprudence has incorporated the additional requirement that profit has been made from the communication to the public.⁵⁹

Between the 2008 and 2009 proposal documents, the overall reform proposition was softened. Limitations were placed on online service provider (OSP) liability for infringing materials via “safe harbour” provisions. The proposed criminalisation of unauthorised transmission through streaming technologies was amended to remove criminal liability for peer-to-peer file-sharing and unauthorised downloading except for acts which involved actively making unauthorised communications to the public. And exceptions were added for temporary reproductions and media shifting between formats.⁶⁰

But the communication right remained unaltered, and it became the focus of debate. Copyright owners supported criminal sanctions which were technology-neutral and applied regardless of commercial motivation, arguing that this was the most effective way to combat online piracy and would not affect legitimate use of the internet. Users objected, suggesting that the criminalisation of non-commercial activities would inhibit the free flow of information, stymie Hong Kong’s development as an internet services hub, and chill speech.⁶¹

Concerns over the Bill’s effect on freedom of speech saw it labelled “Cyberspace Article 23” by its detractors. This was a reference to a deeply unpopular Hong Kong government proposal to enact a draconian national security law in accordance with Article 23 of the Basic Law. In July 2003, half a million residents took to the streets in protest against the perceived authoritarian thrust of that law. Presaging the fate of copyright reform, the government lacked sufficient support in the Legislative Council to push through the security law which was withdrawn and indefinitely shelved.⁶²

Hong Kong’s political opposition, comprising an array of community groups, political parties and legislators – the latter informally affiliated under the “pan-democrats” banner – thus took copyright into its stable of causes. There it sits alongside – and now intertwined with – issues including Hong Kong autonomy, the implementation of universal suffrage, remembrance of the 1989 Tiananmen Square massacre, and local concerns from housing to graft.

Perhaps with democratic ideals in mind, parody and satire were identified as activities deserving of protection, activities which were not addressed by the proposed amendments but had been expressly

⁵⁸ Copyright, Designs and Patents Act 1988 s 20.

⁵⁹ *SGAE v Rafael Hoteles SL* [2006] EUECJ C-306/05, [2007] Bus LR 521.

⁶⁰ Legislative Council Brief, Copyright (Amendment) Bill 2011, CITB 07/09/17, para 4.

⁶¹ See Wenwei Guan, “When Copyrights Meet Human Rights: ‘Cyberspace Article 23’ and Hong Kong’s Copyright Protection in the Digital Era” 42 *Hong Kong Law Journal* 785 (2012).

⁶² Under Article 23 of the Basic Law of the HKSAR, Hong Kong “shall enact laws on its own to prohibit any act of treason, secession, sedition [or] subversion” against the Central Government of the People’s Republic of China. See Wong Yiu-chung, “‘Super Paradox’ or ‘Leninist Integration’: The Politics of Legislating Article 23 of Hong Kong’s Basic Law” 30(2) *Asian Perspective* 65 (2006).

protected elsewhere. Pan-democrat lawmakers, urged on by emerging organisations of internet users,⁶³ held up the Bill by raising the suggestion that a parody exception be added.⁶⁴ The goalposts having shifted, the Bill was allowed to lapse at the expiry of the 2012 Legislative Council term.

Second attempt: the Copyright (Amendment) Bill 2014

Following the abandonment of the 2011 Bill, another round of consultation was held to address the unresolved concerns. This was entitled “Treatment of Parody under the Copyright Regime”.⁶⁵ With the resultant Copyright (Amendment) Bill 2014, the government proposed to introduce a range of new fair dealing exceptions to the Copyright Ordinance in terms not dissimilar to the then-imminent amendments to the UK Copyright, Patents and Designs Act 1988.

Fundamentally, the government deemed each of the newly-proposed exceptions to be acceptable because its scope was clear and confined, affording a reasonable degree of legal certainty. The government was especially concerned that exceptions comply with Hong Kong’s international obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); particularly Article 61, requiring deterrent criminal penalties in cases of commercial piracy, and Article 13, providing that limitations or exceptions must be confined to certain special cases which do not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights holder (the “three-step test”).⁶⁶

Addressing parody directly, a new section exempted fair dealing for the purpose of “parody, satire, caricature or pastiche”.⁶⁷ In determining whether dealing was fair, all the circumstances were to be taken into account, in particular the purpose and nature of the dealing, whether it was non-profit-making or commercial, the nature of the work, the amount and substantially of the portion dealt with, and the effect of the dealing on the potential market for or value of the work.

The government expressed the view that the amendments were justified because the acts were well-recognised practices which had been accommodated in overseas copyright regimes; they were common means for the public to express views or comment on current events and may promote freedom of expression; they may encourage creativity, nurture new talent and boost the entertainment business, contributing to economic and cultural development; and they were commonly critical or transformative in nature and would be unlikely to compete with or substitute the original works.

⁶³ Such groups include Keyboard Frontline, Netizens Power and the Copyrights and Derivative Works Alliance. Members of these groups, active on social media sites and internet discussion forums, are increasingly vocal in the offline world. Of the 2455 written submissions received in the lead up to the 2014 Bill, 2387 were from internet users and netizen groups, of which 2125 originated or were generated from online templates: Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 4, accessible at http://www.ipd.gov.hk/eng/intellectual_property/copyright/LegCo_Brief_2014_e.pdf

⁶⁴ Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 3.

⁶⁵ http://www.cedb.gov.hk/citb/doc/en/Consultation_Paper_English.pdf

⁶⁶ Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 5.

⁶⁷ The proposed s 39A.

Beyond citing dictionary definitions and opining that the acts taken together constituted a broad exemption, the government did not define parody, satire, caricature or pastiche.⁶⁸ In doing so it was aware of the lack of a unified approach to parody in the corresponding provisions in Australia, the US, Canada and the UK.⁶⁹

Addressing parody-related acts, the Bill proposed to expand the section covering fair dealing for the purposes of criticism, review and news reporting, a move intended to clarify the rights of internet users in particular.⁷⁰ First, a provision was to be added exempting fair dealing for the purpose of commenting on current events, on the basis that users commonly used copyright works when commenting on political or social matters. Second, a quotation exception, to no greater an extent than necessary for the specific purpose, allowing users to quote copyright works in facilitating discussion, providing information or expressing opinions, for example on blogs and social media.⁷¹ These two additions were aimed at addressing internet users' concerns. While "commenting" is clearly wider than "reporting", the proposed quotation exception may be invoked "whether for the purpose of criticism, review or otherwise".

However, the consultation revealed that respondent users believed the scope of permitted acts should include a wide range of common internet activities involving the use of copyright works as well as the circulation of the results on social media sites like YouTube and Facebook or discussion forums or blogs. Products and acts cited included mash-ups, altered pictures or videos, doujinshi, image or video capture, streaming of video game playing, posting of earnest performances of copyright works and rewriting song lyrics.⁷² Criticism of the Bill focused on the contention that such acts would fall outside the exemptions if not done for the purposes covered by the fair dealing provisions. The concern was also raised that there was no "contract override" provision to prevent copyright owners from contractually excluding the exceptions.⁷³

Most problematically, despite offering up the previously-requested exceptions, the 2014 Bill could not shake the pejorative tag of "Internet Article 23". Its coincidence with the Umbrella Movement exposed the Bill to the skepticism and boiling resentment that had been engendered by broken promises of democracy and the sting of tear gas.⁷⁴ Satirical imagery – inserting the Chief Executive into Cultural Revolution-style propaganda posters, or superimposing his leadership team's faces onto a movie poster for "The Avengers" retitled "The Suppressors" – featured in the anti-Bill campaign. Ironically, such examples would likely have fallen within the proposed fair dealing exceptions.

But they, and the overall message, struck a chord. An online petition opposing the Bill attracted more than 55,000 signatures ahead of the second reading. Online user groups clamoured for greater protection, by introducing fair use or blanket exception for non-commercial UGC. Pan-democrat

⁶⁸ Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, paras 1 and 19.

⁶⁹ Hong Kong government, "Treatment of Parody under the Copyright Regime: Consultation Paper" para 25.

⁷⁰ Cap 528 s 39.

⁷¹ Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 13.

⁷² Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 13.

⁷³ Stuart Lau, "Hong Kong copyright bill explained: Why are people so concerned about this?", South China Morning Post, 17 December 2015: <http://www.scmp.com/news/hong-kong/politics/article/1888931/hong-kong-copyright-bill-explained-why-are-people-so>

⁷⁴ The association is also drawn by Peter K Yu, "The quest for a user-friendly copyright regime in Hong Kong" 32(1) American University International Law Review 283 (2016).

lawmakers came on board and promised to filibuster the Bill,⁷⁵ one of them duly proposing over 1000 amendments.⁷⁶

Despite its anxiety to see digital copyright reforms passed into law,⁷⁷ the government – claiming to have the support of copyright owners – rejected the suggestion of a UGC exception.⁷⁸ First, it stated that the exception may not comply with TRIPS Article 13, not being confined to certain special cases – an objection equally applicable to the open-ended doctrine of fair use. Second, it was unclear on which acts might be covered by a UGC exception that were not covered by the proposed fair dealing exceptions, and why those acts deserved protection. Third, it opined that the concept was unsettled and developing, with only Canada having adopted it in legislation.⁷⁹

After three months of filibustering and negotiations,⁸⁰ with all sides bemoaning the others' unwillingness to compromise,⁸¹ the Bill was moved to the back of the agenda and effectively dropped

⁷⁵ Kris Cheng, "Gov't says new copyright law will not restrict speech amid concerns of parody ban", Hong Kong Free Press, 3 December 2015: <https://www.hongkongfp.com/2015/12/03/govt-says-new-copyright-law-will-not-restrict-speech-amid-concerns-of-parody-ban/>

⁷⁶ Stuart Lau, "Hong Kong government's shelving of controversial copyright bill: what went wrong?", South China Morning Post, 26 February 2016: <http://www.scmp.com/news/hong-kong/politics/article/1917070/hong-kong-governments-shelving-controversial-copyright-bill>

⁷⁷ The Legislative Council Brief to 2014 Bill warned: "We are not free from the watchful eyes of the international community. Some US copyright owners associations have made submissions to the Office of the United States Trade Representative (USTR) suggesting that Hong Kong should be put under a list of 'Deserving Special Mention' and 'Watch List' in the Special 301 Report as they allege that the existing copyright legislation of Hong Kong provides inadequate copyright protection in the digital environment." See CITB 07/09/17, para 2.

⁷⁸ Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 19. Note that some submissions on UGC used the term "secondary creations". The government observed that such a term is not commonly used in copyright jurisprudence and may cover a wider range of activities, including the creation of derivative works by adaptation or modification. It declined to take the analysis of secondary creations any further. *Ibid*, para 5.

⁷⁹ Canadian Copyright Modernisation Act 2012 s 29.21. The Hong Kong government observed that Australia and the UK had declined to adopt the concept for the time being, while the US and the EU were examining it: Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 19. The same concerns have been raised by the Hong Kong Bar Association in its Position Paper on the Copyright (Amendment) Bill 2014: [http://www.hkba.org/sites/default/files/Copyright%20\(Amendment\)%20Bill%202014%20...%20\(E\).pdf](http://www.hkba.org/sites/default/files/Copyright%20(Amendment)%20Bill%202014%20...%20(E).pdf). In a statement, the Law Society of Hong Kong said UGC or contract override provisions required "serious and thorough evaluation" which should not delay the passing of the bill: Stuart Lau, "Hong Kong copyright bill explained: Why are people so concerned about this?", South China Morning Post, 17 December 2015: <http://www.scmp.com/news/hong-kong/politics/article/1888931/hong-kong-copyright-bill-explained-why-are-people-so>

⁸⁰ Kris Cheng, "Copyright bill officially withdrawn after months of filibustering", Hong Kong Free Press, 15 April 2016: <https://www.hongkongfp.com/2016/04/15/copyright-bill-officially-withdrawn-after-months-of-filibustering/>

⁸¹ Eric Cheung, "Copyright owners, netizens fail to reach consensus in Copyright Bill talks", Hong Kong Free Press, 18 February 2016: <https://www.hongkongfp.com/2016/02/18/four-sides-fail-to-reach-consensus-on-copyright-bill/>

for the remainder of the government's term.⁸² Optimistic appraisals were few and far between as stakeholders lamented a lose-lose result.⁸³

Analysing the outcome

Copyright has always contained a tension between restrictive rights in private property and the right to freedom of speech. If a fair balance is to be maintained, the law must adapt to changing circumstances. The in-tandem evolution of the digital economy, on the one hand, and norms of netizen behaviour, on the other, presents a major challenge to the fragile equilibrium that copyright law seeks to maintain between competing interests. The longer copyright reform is delayed in Hong Kong, the longer parties on both sides of the debate must tolerate an increasingly uncertain and inapposite legal framework.

Did the 2014 Bill fairly balance these competing interests? The government and copyright owners appeared to be satisfied that it did, even after conceding on additional exemptions. The opposition's objections – and the calls for UGC exceptions and fair use – largely focused on the risk that users might inadvertently incur criminal liability for non-commercial infringement of the communication right. This raises the question whether the proposed reform cast the criminal net wider than was necessary to protect the interests of copyright owners.

The answer seems to be no. In the “prejudice” limb of the communication right in the 2014 Bill, the government dropped the previous wording “more than trivial economic prejudice”, which had been criticised as unclear and overly broad.⁸⁴ The revised provision described specific economic considerations: the purpose of the communication; the nature of the work including its commercial value; the amount and substantiality of the portion communicated in relation to the work as a whole; the mode of communication; and the economic prejudice caused to the copyright owner including the effect on the potential market for or value of the work.⁸⁵ The scope and specificity of these factors would exclude the vast majority of non-commercial and non-piratical activity by ordinary internet users.⁸⁶

⁸² Chantal Yuen, “Copyright bill fails to pass before gov't imposed deadline”, Hong Kong Free Press, 4 March 2016: <https://www.hongkongfp.com/2016/03/04/copyright-bill-fails-to-pass-before-govt-imposed-deadline/>

⁸³ Stuart Lau & Vivienne Chow, “Blame game begins as Hong Kong copyright bill shelved indefinitely”, South China Morning Post, 4 March 2016: <http://www.scmp.com/news/hong-kong/politics/article/1920593/blame-game-begins-hong-kong-copyright-bill-shelved>

⁸⁴ It was once proposed that the infringing communication must cause “more than trivial economic prejudice” to the copyright owners. It was hoped that the proposed wording could “allay netizens’ concerns regarding the possible impact of the criminal liability for the proposed prejudicial communication offence”: Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 9. It turned out to be false hope.

⁸⁵ Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 10. See also Alice Lee's Submissions to the Legislative Council dated 26 July 2011: <http://www.legco.gov.hk/yr10-11/english/bc/bc10/papers/bc100723cb1-2825-1-e.pdf>

⁸⁶ During the public debates over the Bill, Ada Leung Ka-lai, Director of the Hong Kong SAR Intellectual Property Department, gave assurances that the public could rely on the new exemptions and would not be targeted, saying: “We target large-scale copyright infringement, not individual users.” Stuart Lau, “Hong Kong copyright bill explained: Why are people so concerned about this?”, South China Morning Post, 17 December 2015: <http://www.scmp.com/news/hong-kong/politics/article/1888931/hong-kong-copyright-bill-explained-why-are-people-so>

It is apparent that a real issue, if not the real issue, behind the hostile reception to “Cyberspace Article 23” was the conflation of copyright law with the perceived government interest in controlling speech. This position was understandable but misconceived. It has been suggested that, as against the government, copyright owners and users have a commonality rather than a conflict of interest: copyright’s protection of ideas is a critical element of the freedom of speech. A law which enhances copyright protection while protecting parodic expression creates dual limitations on government authority, with the rights of the individual being the ultimate beneficiary.⁸⁷

Guan suggests, convincingly, that the government’s possible interference with free speech is a serious constitutional issue which should be hashed out elsewhere, not in the copyright amendment process.⁸⁸ The fact that the issues were conflated shows that the most unlikely of matters can snowball when tensions between the rulers and the ruled are running high.⁸⁹ The case of copyright reform reveals that, in Hong Kong, those conflicts are being addressed in a manner which can ultimately negate progress. That may be explained by the city’s unusual constitutional set-up.

Yam posits that hybrid regimes are inherently unstable and prone to generating political conflict due to their governments’ ineffectiveness at suppressing opposition. In a purely authoritarian state, the ruling party dominates all arenas of contestation. Hong Kong, by contrast, enjoys a free press and a legislature which is partially democratically elected, granting a voice to the political opposition. The opposition cannot form a government, but it can filibuster, thus forcing the government to the negotiation table. It can also defend against attempts to ban this tactic by filibustering away proposed changes to the procedural rules of the legislature.⁹⁰ Copyright reform is not the only worthwhile initiative to fall by the wayside as genuine legislative deliberation is replaced with bickering and gamesmanship.

Where do we go from here?

Hong Kong copyright law is not entirely bereft of digital adaptations. The Copyright Ordinance ushered in a range of innovations to an outdated British law that had been superseded in Britain almost a decade earlier. The “making available” right, though now dated by international standards, appears to have been the first such provision in Asia.⁹¹ Where the express terms of the Ordinance are ambiguous in their application to the online realm, the courts have been willing to step in and innovate. This occurred in

⁸⁷ Wenwei Guan, “When Copyrights Meet Human Rights: ‘Cyberspace Article 23’ and Hong Kong’s Copyright Protection in the Digital Era” 42 *Hong Kong Law Journal* 785 (2012).

⁸⁸ *Ibid.*

⁸⁹ For example, medical practitioners demanded that lawmakers reject legislation reforming the Hong Kong Medical Council citing suspicions as to the Chief Executives intentions for appointments to the Council: Albert Cheng, “Hong Kong doctors’ advice: reject medical reform bill, and then get rid of CY Leung” *South China Morning Post*, 14 July 2016: <http://www.scmp.com/comment/insight-opinion/article/1989806/hong-kong-doctors-advice-reject-medical-reform-bill-and-then>

⁹⁰ Julius Yam, “The Role of Courts in Hybrid Regimes and a Reconceptualisation of Separation of Powers: The Case of Filibuster in Hong Kong” 187(1) *Australian Journal of Asian Law* article 3 (2016).

⁹¹ Michael D Pendleton, Jared Margolis & Alice Lee, *Intellectual Property Rights: HKSAR & PRC* (LexisNexis, loose-leaf service) Div IV para [1803].

the case of a BitTorrent seeder who was held to have infringed the distribution right, rather than the non-criminal and online-specific right of making available, facilitating criminal liability for online piracy.⁹²

But useful innovations, many of which reflect common sense and accepted norms of digital conduct, are not reflected in the law. A media-shifting exemption, permitting conversion of CDs to MP3 files for personal use, would validate a widely-practiced activity lacking in detriment to copyright owners.⁹³ OSP provisions regulating notification and takedown of infringing materials would be a sensible addition clarifying proper procedures and allocating responsibility appropriately. Both media-shifting and OSP codes of practice were proposed in the decade-long digital copyright consultation, but they have lapsed with the 2014 Bill. It may be argued that acquiescence or voluntary codes of practice could fill the breach. But, as was pointed out in submissions to the UK's Hargreaves report, copyright law should be relevant to consumers and provide certainty to the creative and the technology industries which innovate within the limits of the regulatory framework.⁹⁴

There are legitimate arguments that the dynamic, participative nature of the internet requires some form of UGC protection⁹⁵ which may not contravene TRIPS,⁹⁶ and the Hong Kong government has left open the possibility of returning to the idea should it gain wider international acceptance.⁹⁷ Many regard the UGC model as the only way to achieve a digital utopia. In Hong Kong, as in many other jurisdictions, the copyright conversation has boiled down to “UGC or no UGC”. Innovative and powerful provisions such as those for “commenting on current events” and “quotation” have been brushed aside. As has been seen, the former is broader than the existing fair dealing exception for “reporting current events” and should facilitate freedom of expression.⁹⁸ The latter goes even further in leaving the purpose of quotation open. Had it been enacted, quotations of all kinds of copyright work would have been permitted, provided that the work had been released, the use of the quotation was fair, the extent of the quotation was no more than was required by the specific purpose for which it was used, and the use was accompanied by a sufficient acknowledgment (unless it was not reasonably practicable to do so).⁹⁹

Such an exception would cover common uses of copyright works whether they were altered or not, whether there was any parodic element or not. Possible examples include quotations of literary or

⁹² *Chan Nai Ming v HKSAR* (2007) 10 HKCFAR 273, [2007] 3 HKC 255.

⁹³ Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 12. At the time of the 2014 Bill, such an exception had been legislated in Australia and New Zealand.

⁹⁴ Ian Hargreaves, “Digital Opportunity: A Review of Intellectual Property and Growth” (2011) para 5.12 (Consumer Focus submission).

⁹⁵ See Peter K Yu, “The quest for a user-friendly copyright regime in Hong Kong” 32(1) *American University International Law Review* 283 (2016); Wenwei Guan, “Fair Dealing Doctrine Caught between Parody and UGC Exemptions: Hong Kong’s 2014 Copyright Amendment and Beyond” 45 *Hong Kong Law Journal* 719 (2015).

⁹⁶ If confining the exemption to non-commercial copying satisfies the requirement of restriction to “certain special cases”: Jojo Y C Mo, “The Copyright (Amendment) Bill 2014 in Hong Kong: A Blessing or a Curse?” *Statute Law Review* 2016 hmw025.

⁹⁷ Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 19.

⁹⁸ Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 13. Even the existing exception for reporting current events has been construed liberally in the UK: Copinger and Skone James on Copyright (16th ed, Sweet & Maxwell, 2011), cited in CITB 07/09/17, para 13.

⁹⁹ The proposed s 39(2) and (6), which were modelled on the newly added “quotation” provisions in the UK, which were in turn based on Art 10 of the Berne Convention: Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 13, citing the UK Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.

artistic works, films or sound recordings for the purposes of facilitating discussions, providing information or expressing opinions as used on blogs and social media websites.¹⁰⁰ It is hard to see why such a broad exception cannot do what the UGC model can.

Perhaps the ultimate question is not a legal one. Even if UGC or similar exceptions had been written into the Bill, the filibustering would not have subsided. It is political stalemate that has condemned copyright reform in Hong Kong, at least for now.¹⁰¹

¹⁰⁰ Legislative Council Brief, Copyright (Amendment) Bill 2014, CITB 07/09/17, para 13. See also Tanya Aplin, “The Case for Mandatory, Global Fair Use” at NUS-UPenn-HKU Conference on Comparative Dimensions of Limitations and Exceptions in Copyright Law, 21-22 July 2016.

¹⁰¹ Stuart Lau, “Five reasons the Hong Kong copyright bill failed”, South China Morning Post, 4 March 2016: <http://www.scmp.com/news/hong-kong/politics/article/1920569/five-reasons-hong-kong-copyright-bill-failed>