

Hong Kong Bar Association - Special Committee on Intellectual Property
Position Paper on the Copyright (Amendment) Bill 2014 and the 3 Amendments
Proposed by Certain LegCo Members

I. Purpose

1. The Special Committee on Intellectual Property of the Hong Kong Bar Association (“the **IP Committee**”) registers its concerns arising from the recent discussion on the Copyright (Amendment) Bill 2014 (“the **Bill**”) and the three major proposed amendments suggested by certain legislative councillors. This Paper aims to clarify some concepts that are prone to be misunderstood, to state the views shared by senior specialist IP barristers, and to encourage a more rational and constructive dialogue on the issue.

II. Overview

2. First and foremost, copyright is a property right, the protection of which is guaranteed by the Basic Law.¹ The scope of protection requires a balance to be struck between the rights of the copyright owner and the rights of those desiring to make use of copyright works in a way that is not damaging to or unfairly takes advantage of such property. The rights and freedom of the individual, including freedom of speech², is also to be balanced against the property rights and other rights of the owner.
3. Second, it is noted that the primary objective of the Bill is to bring the law up to date by including a **communication right**.³ This is in order to remove a lacuna that effectively leaves unauthorised distribution of copyright works by modern means impossible to restrain under the existing law. Modern technology obviates the necessity to make what is defined as “infringing copies” available before distribution.
4. Under the existing law, restricted acts have always included **making copies** of a work or a substantial part of the work without authorisation.⁴ Restricted acts such as copying if done without authorisation of the copyright owner is an infringement, and the copies so made are “infringing copies”.⁵ Uploading copyright works onto and downloading copyright works from digital platforms involve making digital copies of the works, transient though they may be.

¹ Article 6 of the Basic Law provides that “The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law”. Article 105 of the Basic Law provides, *inter alia*, that “The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property...”. Article 140 of the Basic Law requires the Government to “protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation.”

² Guaranteed by Article 27 of the Basic Law.

³ The new s.22(1)(fa) proposed in the Bill.

⁴ Copyright Ordinance (Cap. 528) ss.22(1)(a), 22(3) and 23.

⁵ Copyright Ordinance (Cap. 528) s.35.

When unauthorised, this form of copying is no different from making physical copies from works such as photocopying and transferring a sound recording.

5. It may not have been widely known that the existing law has always caught traditional means of distribution of infringing copies, be it hard copies or soft copies.⁶ However, some modern means of distribution of infringing copies, e.g. by streaming, is of the same nature and effect as distribution of infringing copies via traditional means, if only more facile. It is at present unrestricted only because of the outdated wording of the provisions on infringement.
6. Hitherto, the unauthorised **copying** described above have hardly ever attracted civil liability, let alone criminal prosecution, for the obvious reasons that rights owners approved of such use or had no objections to it, or would have had no incentive to exercise the right of action unless there is real harm done to justify an injunction with or without compensation. For criminal prosecution, there could have been no viable case brought to court **unless** the investigation was supported if not initiated by a request from the copyright owner, and the subsequent prosecution was also with the full support of the copyright owner, subject further to a criminal standard of proof and a lack of knowledge defence.⁷
7. Civil action or criminal prosecutions against non-commercial unauthorised use of copyright works, whether or not in the digital environment, is unheard of. This accounts for the previous lack of public awareness, and lack of reason for public concern, over harmless but unauthorised private use or distribution of copyright works being technically capable of being infringed under the existing law.
8. The proposed amendments in the Bill introduced the **communication right** by creating civil⁸ and criminal liability⁹ for unauthorised communication. All this is done in substantially the same wording corresponding to the existing provisions for unauthorised distribution of infringing copies.
9. In addition, in response to the demand, particularly from the sector of the public who claimed freedom of “secondary creation” and freedom of speech for the purpose of political or social commentary, a range of exemptions from civil and criminal liability were **added** by way of “**fair dealing**” provisions. These provisions exempt the unauthorised user from liability based on the purpose of use, subject to the fairness test similar to the considerations adopted for the open ended “Fair Use” regime in some jurisdictions. The range of exemptions covers purposes of use some of which are not widely recognised as fair or

⁶ Copyright Ordinance (Cap. 528) ss.24 and 31 etc.

⁷ Copyright Ordinance (Cap. 528) s.118(3).

⁸ The new ss.28A and 32(2) proposed in the Bill.

⁹ The new s.118(8B) proposed in the Bill.

necessary in the interest of the public, e.g. satire¹⁰, and commenting on (as opposed to reporting) current affairs.¹¹ However, they do not give a *carte blanche* for uses for other uncategorised purposes, leaving the intended user to seek permission from the owner unless permission is expressly or impliedly given.

10. There is yet to be any consensus between the copyright owners and the sector of the public represented by Internet users and those wishing a *carte blanche* on any use subject to the wide open “Fair Use” regime and/or “User Generated Content” (“UGC”) regime adopted in some jurisdictions that fall outside the wide range of fair dealing exemptions.
11. Three major amendments were proposed, namely – (1) to include provisions to restrict circumscribing statutory exemptions with contract terms, which means that copyright owners and users cannot freely negotiate terms to contract out of the statutory exceptions; (2) to introduce UGC as an exception which permits users to incorporate existing copyright material in the creation of new works, such as creating a "mash-up" of video clips; and (3) to include “fair use” as a *carte blanche* for uses that satisfy the “fairness factors” regardless of their purposes. Hong Kong’s current Copyright Ordinance and the Bill adopt the “fair dealing” mechanism.
12. Several issues arise: (1) whether the three proposed amendments are compatible with each other and with the existing fair dealing mechanism; (2) whether there are any overseas jurisdictions utilising any hybrid system or combination of different mechanisms; and if so, (3) whether it is appropriate to directly transplant the examples from other jurisdictions into Hong Kong.
13. It is salient to first look at the merits and demerits of each proposed amendment.

III. Prohibition against Circumscribing Statutory Exemptions with Contract Terms

14. This proposal means that copyright owners and users cannot freely negotiate and agree on terms to contract out of the statutory exceptions.
15. In the amendments to the 1988 Copyright, Designs and Patents Act in the United Kingdom in 2014 recently made by the Secretary of State for Business, Innovation and Skills, apart from adding new fair dealing exceptions to infringement of “quotation...whether for criticism or review or otherwise” and to acts done for the purposes of caricature, parody and pastiche”, the new provisions also specify that to the extent that a term of a contract purporting to

¹⁰ The new s.39A proposed in the Bill.

¹¹ The new s.39 proposed in the Bill.

prevent or restrict the doing of any act which, by virtue of the provisions for exceptions, would not infringe copyright, that term is unenforceable.¹²

16. On the other hand, the United States took the approach that respects freedom of contract and therefore did not legislate on any restrictions on contracting out.
17. The Australian Law Reform Commission (“the **ALRC**”) recommended in its Final Report on Copyright and the Digital Economy that the fair use exception be adopted.¹³ Alternatively, if the fair use exception is not enacted, it proposed to expand the current fair dealing exceptions.¹⁴ It further recommended that there should only be prohibition against contracting out of specific libraries and archives exceptions, which is a fairly narrow recommendation.¹⁵ It also clearly indicated that no statutory limitations on contracting out should be provided if the fair use exception is enacted, thereby indicating its view of the incompatibility between a general fair use exception and a statutory limitation on contracting out, which is also the position in the United States.¹⁶ Only in the event that fair use is not enacted and the back-up recommendation to expand the current fair dealing exceptions is accepted, limitations on contracting out would apply to the new fair dealing exceptions.¹⁷
18. Having analysed the experience of other jurisdictions, it can be seen that the proposal of prohibiting contracting out presents the following problems and challenges:
 - (i) The proposal does not address the major concerns of most ordinary users like netizens. Since most users (especially netizens) would seldom be in any contractual relationship with copyright owners when they carry out conducts on the Internet (such as making and posting screen captures, creating new lyrics for old songs, editing existing copyright pictures or photos etc.), any provisions regarding contracting out or any restrictions or limitations thereon are unlikely to be of relevance to such users, and no uncertainty as to the scope of the legislative protection is thereby created. Restrictions on contracting out are unlikely to afford any additional protection to such users.

¹² The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 ss.3(6), 4(4), 5(1); The Copyright and Rights in Performances (Disability) Regulations 2014 ss.2(5), 3; The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 ss.3(1), 3(3).

¹³ ALRC, Copyright and the Digital Economy (Final Report 122) (November 2013) (“the **ALRC Report**”). Recommendation 4-1.

¹⁴ The ALRC Report, Recommendation 6-6.

¹⁵ The ALRC Report, Recommendation 20-1.

¹⁶ The ALRC Report, paras. 20.92-20.93. The IP Committee notes that the Committee Stage Amendments proposed do not have the effect of providing for a general limitation on contracting out of the proposed fair use exception.

¹⁷ The ALRC Report, Recommendation 20-2.

- (ii) The proposal would harm the deeply-rooted spirit of freedom and sanctity of contract, and may deter copyright owners from entering into flexible agreements with users. This would stifle the sharing of creative work and further creation.
- (iii) If contracting out of the statutory exceptions is not permitted, parties would not be able to ascertain with sufficient certainty that the terms in the agreements satisfy the “fairness” test, until the Court gives a determination on the issue. Such uncertainty may further deter parties from entering into any sharing agreements and would increase the risk of litigation.
- (iv) It is possible that parties may agree on terms which are looser and more lenient to users than the provisions of the Bill, for example, to allow users to use the copyright work for purposes which are not listed as one of the exceptions in the Bill, or to copy the whole of the existing work for large-scale commercial exploitation which may not pass the fairness test. The law should respect the parties’ rights and allow them to enter into agreements with such flexible terms if the parties so wish. As stated by the ALRC, removing freedom to contract risks reducing the flexibility of the copyright regime, and the scope to develop new business models for distributing copyright materials.¹⁸
- (v) This proposal only deals with civil liability but not criminal liability.
- (vi) Most significantly, this proposal is not supported by any empirical evidence of injustice, therefore no compelling case can be presented to support such a change. Thus far, there has been no evidence that any person has been sued or prosecuted for uses that would otherwise have been exempted had the exemptions been in force – it follows that there is no evidence of any tendency to take advantage of the absence of the subject exemptions when it was possible to do so against acts of unlicensed reproduction.

IV. User-generated Content

- 19. UGC as an exception is a new concept. This exception would permit users to incorporate existing copyright material in the creation of new works, such as making a home video of friends and family members dancing to a popular song and posting it online, or creating a “mash-up” of video clips.
- 20. Currently, apart from Canada, no major overseas jurisdictions have adopted UGC in their copyright regimes. The Canadian provisions providing for non-commercial UGC as a copyright infringement exception read as follows:-

¹⁸ The ALRC Report, para. 20.6.

“(1) It is not an infringement of copyright for an individual to use 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 for the individual — or, with the individual’s authorisation, a member of their household — to use the new work or other subject-matter or to authorise an intermediary to disseminate it, if

- (a) the use of, or the authorisation to disseminate, the new work or other subject-matter is done solely 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.”¹⁹ (emphasis added)

21. However, as rightly pointed out by the ALRC, the main problem with the UGC exception is that the boundary between non-commercial and commercial purposes is not clear, especially in “a digital environment that monetises social relations, friendships and social interactions”.²⁰ The ALRC concluded in a Discussion Paper that there is no case for introducing a stand-alone transformative use exception.²¹ It further emphasised in its Report that user-generated content “reflects a full spectrum of creative and non-creative re-uses” and should not automatically qualify for protection under any proposed exception aimed at fostering innovation and creativity.²²
22. Moreover, the requirement that the new work does not have a substantial adverse effect, “financial or otherwise” on the exploitation or potential exploitation of the existing work leads to further uncertainty. The use of the language “or otherwise” leaves open a potentially broad range of impacts, such as cultural impact, trivialisation of the significance of the work, or tarnishment of the reputation of the work etc.

¹⁹ Copyright Modernization Act (Bill C-11) of Canada s.29.21.

²⁰ ALRC, Copyright and the Digital Economy (Discussion Paper 79) (5 June 2013) para. 10.85.

²¹ ALRC, Copyright and the Digital Economy (Discussion Paper 79) (5 June 2013) para. 10.76.

²² The ALRC Report, para. 10.108.

23. Further, most of the normal users cannot benefit from the exception as the exception requires the work created by the user to be a “new” work in which copyright subsists, which requires a certain degree of originality, skill and judgment. Conduct such as making and posting screen captures, editing existing pictures or photos, compiling “mix tapes” will still not necessarily and automatically be protected from infringement.
24. Where even the existing provisions adopted by Canada pose the above potential problems, it is not hard to foresee that the amendment on UGC proposed by the Copyrights and Derivative Works Alliance²³ (“the **Alliance**”) which is even broader and more loosely-framed than the Canadian provisions may introduce further undesirable uncertainties. For example, in the Alliance’s proposal, acknowledgement of the source of the existing work (if it is reasonable in the circumstances to do so) is merely **one of the factors** for the court to determine whether it is reasonable to believe that the existing work is not infringing. On the contrary, in the Canadian Copyright Modernization Act, acknowledgement of the source of the existing work (if it is reasonable in the circumstances to do so) is one of the **qualifying conditions** for invoking the exception. Another example is that the Alliance proposed that the new work only has to be done **mainly** for non-profit making purposes or not in the course of business, whereas the Canadian provision requires that the use or the authorisation to disseminate the work to be **solely** for non-commercial purposes. Yet another example is that the threshold for “substantial adverse effect” is set to at an unjustifiably high standard by the Alliance – to the extent that the work substitutes for the existing work. In Canada, whether or not the new work is a substitute for the existing one is only one of the factors to be considered in examining the existence of substantial adverse effect.

V. Fair Use

25. “Fair use” has been utilised by the United States for almost 40 years. The major difference between “fair use” and “fair dealing” is that the former provides for a sweeping and unified exception in general terms whereas the latter sets out more specific and focused exceptions based on purpose of use. Fair use will not necessarily be broader than what is provided for in the Bill to embrace what netizens ask for. Even in the Copyright Act of 1976 of the United States, only the most typical and traditional illustrative examples of non-infringing purposes are given in the provision, such as criticism, comments, news reporting, teaching, scholarship, or research.²⁴ Precedents in the United States have shown that satire and commenting on current affairs may not be exempted from infringement. This is because while parody focuses on the original work itself, necessitating the need to quote or use the original work; satire and commenting on current affairs utilise the original work to satirise and comment on other

²³ Copyrights and Derivative Works Alliance, Further Submissions on Copyright Amendment Bill 2014 (29 June 2015) p.10. It is noted that the Alliance provided various other alternative proposed wordings.

²⁴ Copyright Act of 1976 of the United States s.107.

works, events, affairs or subject-matters. There is, therefore, no necessity in quoting or using the original work for the purpose of satire and commenting on current affairs. As a result, these purposes are generally devoid of public interest, and they will not easily pass the fairness test unless other fairness factors outweigh the public interest concern. This fair use regime requires the balancing of the purpose of use against other factors to test fairness, with the various purposes receiving varying degrees of merit or demerit when weighed against other factors.

26. The system adopted in Singapore is labelled as a “fair dealing” regime, but is in nature a fair use test applied to specific closed categories of works²⁵, such as literary, dramatic, musical and artistic works, and audio-visual items²⁶. Other exemptions not subject to the fairness test are traditionally exempted purpose-based uses, such as, criticism, review or reporting current events²⁷, but not any wider.
27. The existing Copyright Ordinance in Hong Kong and the Bill provide for a two-step test: (1) the Court first looks at whether the dealing is for one of the purposes set out in the Ordinance/Bill, such as parody, satire, caricature, pastiche, commenting on current affairs, quotation, education and research etc.; then (2) examines all the circumstances of the case (i.e. the fairness factors), in particular the purpose and nature of the dealing, the nature of the work, the amount and substantiality of the portion dealt with in relation to the work as a whole and the effect of the dealing on the potential market for or value of the work.²⁸ In fact, the second step has incorporated the fairness factors adopted in the United States’ regime to provide for more flexible examination of the specific facts of each case. The first step is not non-expandable either. With the introduction of more fair dealing exceptions in the Bill and the adoption of the fairness factors, Hong Kong’s regime is gradually progressing towards fair use, but at the same time maintaining a certain level of certainty so that users would know dealings for which kinds of purposes would be exempted from infringement if the dealings pass the fairness test. A fair balance is struck.
28. Further, it may not be appropriate to directly “transplant” the fair use mechanism adopted in the United States into Hong Kong. Although there are readily-available precedents in the United States for reference, every place has different culture and social norms and the fairness factors and weight attached to each factor would likely differ. Such possible differences can be illustrated by the divergent practices in Canada and the United States. Commercial nature of the allegedly infringing copy is a less important consideration in Canada compared to in the United States, and the nature of the work as a factor is

²⁵ Copyright Act (Cap. 63) of Singapore ss.35 and 109.

²⁶ Which include sound recording, cinematograph film, sound broadcast, television broadcast and cable programme: Copyright Act (Cap. 63) of Singapore s.102.

²⁷ Copyright Act (Cap. 63) of Singapore ss.36-37 and ss.110-111 etc.

²⁸ Copyright Ordinance (Cap. 528) s.38.

weighed differently in Canada than in the United States. The availability of a license is not a relevant consideration in Canada but may be relevant in the fair use examination in the United States. The suggestion that Hong Kong courts can simply follow US precedents, or indeed precedents from any one or more countries, does not begin to answer to the netizens' own demand for greater certainty of the law.

VI. Combining the Proposed Amendments with Fair Dealing?

29. This section analyses whether any overseas jurisdictions combine the uses of fair use, contract override and/or UGC with fair dealing.

Australia

30. Some suggested that Australia adopted a “hybrid system” of fair dealing and fair use. However, that is an inaccurate description. As clearly indicated in its Final Report, the ALRC’s primary recommendation is shifting to fair use. Only if fair use were not enacted, fair dealing would be used with a number of new fair dealing exceptions to be introduced into the Copyright Act.²⁹ Therefore, the two mechanisms are **alternative** proposals.

31. As explained in §27 above, the second step in the two-step approach adopted in the existing Copyright Ordinance and the Bill already incorporated the fairness factors which are used in the “fair use” approach in the United States to provide for more flexible examination of the specific facts of each case. It is hard to see how the correct balance can be struck by a wider than usual range of purpose-specific exceptions, to be topped up by an open-ended regime which, if applied alone, may take the former outside the concept of fairness. The two systems are therefore conceptually incongruous and incompatible with a regime based on public interest.

Canada

32. Canada combines fair dealing with UGC. However, (1) as analysed and as shown in Figure 1, Canada’s fair dealing is narrower than that proposed in the Bill (in the Canadian Copyright Act, dealing with a work for the purpose of commenting on current affairs and use of a quotation from a work are not exempted from liability); and (2) the UGC currently adopted by Canada is also much narrower than that proposed by the Alliance as explained in §24 above.

United Kingdom

33. As shown in Figure 1, the United Kingdom adopts a fair dealing regime which is more limited than that proposed in the Bill (the UK 2014 amendments did not include exceptions for fair dealing for the purpose of satire and commenting on current affairs).

34. Although the general principle that benefits of exemptions should not be allowed to be overridden by contract was accepted, no “blanket ban” on

²⁹ The ALRC Report, Recommendation 6-1.

contract overriding copyright was enacted. Rather, the consultation conducted in 2011-12 by the United Kingdom Government highlighted a “distinct divergence of views” on the “contract override” issue.³⁰ The 2014 amendments prohibit only specific (but not all) permitted acts to be undermined or waived by contract.³¹

VII. Criminal Liability

35. Neither the Customs and Excise Department nor the Department of Justice has any means to prosecute criminal proceedings without the active assistance of the copyright owners. The criminal provisions in Hong Kong copyright law both in its existing form and in the Bill target acts such as possession, sale and distribution for commercial purposes³² and distribution (if not for commercial purposes) to an extent which causes prejudicial effect to the copyright owner³³. The newly added provisions on criminal liability on communication of copyright work in the Bill correspond to the existing provisions for unauthorised distribution of infringing copies. Normal acts of private use would rarely, if at all, have such an effect. The burden of proof rests on the prosecution and the standard of proof is that of beyond reasonable doubt.
36. Further, it is a defence for the person charged with an offence to prove that he did not know and had no reason to believe that the copy in question was an infringing copy of the copyright work.³⁴
37. Between 2005 and 2014, on average, there were only 9 prosecutions per year in relation to uses on the Internet. Therefore, it can be seen that risk of abusive or excessive prosecution is not supported by any empirical evidence.

VIII. Conclusion: The Way Forward

38. With the introduction of a wide range of fair dealing exceptions, the Bill confers broader and more certain protection to users compared to most other overseas jurisdictions. For example, in the United Kingdom, the legislation does not provide for satire and commenting on current affairs exceptions. Even in the ALRC Report, commenting on current affairs is not one of the proposed new exceptions to be included (See Figure 1). There is therefore support for the view that the Bill would better satisfy the outcry (in its original form) for protection from interference in secondary creation for social or political commentary.

³⁰ The Intellectual Property Office, “Modernising Copyright: A Modern, Robust and Flexible Framework, Government Response to Consultation on Copyright Exceptions and Clarifying Copyright Law” (December 2012) p.17.

³¹ The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 ss.3(6), 4(4), 5(1); The Copyright and Rights in Performances (Disability) Regulations 2014 ss.2(5), 3; The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 ss.3(1), 3(3).

³² Copyright Ordinance (Cap. 528) s.118(1)(e) and (f) etc.

³³ Copyright Ordinance (Cap. 528) s.118(1)(g).

³⁴ Copyright Ordinance (Cap. 528) s.118(3).

39. As for the additional demands for a general freedom to use others' copyright works for "creative" purposes, there must be allowed a fair opportunity of a consensus to be reached between the rights holders on the one hand and those demanding further surrender of such rights without compensation on the other.
40. **In the absence of evidence of real risk of injustice, pressing social or economic need by way of stunted creativity but for the free use of others' copyright works, unfair civil suits or prosecutions, or threats of the same, the argument for forcing immediate further relaxation of the rights upon copyright owners in the name of encouraging creativity is hardly convincing. It could equally be argued that the relaxation would encourage convenient adoption of existing works as a basis of deriving one's own work, and might discourage creativity. In short, there are arguments both ways, and only a calm and rational discussion between the opposing parties to the arguments would be conducive to any consensus at the end of the day. For Internet users demanding even more freedom to hold the pressing reform to ransom does not appear to the Association to be a just cause.**
41. To insist on the acceptance of all three incompatible major proposed amendments is not only unnecessary but would lead to further problems. **As for combining more than one regime, we regard it as advisable to observe the outcome of such combined use in countries where they have recently been implemented, and to take advantage of their experience before carving out a regime in due course with combined elements suitable to Hong Kong, if appropriate.**
42. **The IP Committee however strongly supports efforts on the part of the creative industry and the HKSAR Government to expand and propagate platforms such as Creative Commons, Open Data Commons and Open Source where copyright works are made known to be open for use by those whose interest is not harmed by free use for whatever purposes. The IP Committee notes that some authors, composers and owners of copyright have already openly invited use of their works for secondary creation. This is to be encouraged for those who so choose, but can hardly be imposed upon all copyright owners across the board. Freedom of use by third parties of private property rights without compensation is better achieved by mutual consent than by force upon the owners, whether instigated by the government or by the legislature, unless there are obvious and compelling reasons firmly grounded on public interest.**
43. **In the circumstances, unless consensus can be reached in the immediate future on further exemptions, the IP Committee is compelled to take the view that it is in the interests of Hong Kong's community as a whole to pass the Bill in its present form in order to enable Hong Kong to meet the**

pressing need to comply with international obligations and match global standards of protection of copyright.

- 44. However, it is recognised that the present Bill is far from perfect in meeting the increasing demands of users, especially in terms of providing assurances of exemption from liability for harmless private use, and in order to provide even greater freedom of creation for some. However, these demands must be balanced against the rights of copyright holders and the need for protection against damaging use, so as not to discourage investment into developing the knowledge industry.**
- 45. Going forward, the IP Committee recommends a study to immediately commence on further broadening the fair dealing exceptions, such as private non-commercial use on certain types of works. The IP Committee believes that these more realistic approaches would be more conducive to obtaining social consensus. We recommend that sharing platforms like Creative Commons, Open Data Commons and Open Source etc. be more widely propagated and utilised to strike a balance between the traditional notion of “all rights reserved” and the other extreme of “open sharing without copyright protection”.**

17 February 2016

Special Committee on Intellectual Property
Hong Kong Bar Association

	The Bill	UK	Singapore	ALRC	Canada	US
Fair use / Fair dealing	Fair dealing	Fair dealing	Fair use on specific closed categories of works + Traditionally exempted purpose-based uses not subject to fairness test	Fair dealing <u>or</u> fair use	Fair dealing	Fair use
Parody	✓	✓	According to the fairness factors of each case	✓	✓	According to the fairness factors of each case, but illustrative examples are given, such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research
Satire	✓	✗		✓	✓	
Commenting on current affairs	✓	✗		✗	✗	
Quotation	✓	✓		✓	✗	
Prohibition on Contracting Out		✓	✗	✓ (limited to specific libraries and archives exceptions and only if fair use is not adopted)	✗	✗
UGC		✗	✗	✗	✓	✗

Figure 1