

Nationalism vs Globalism: Regional and Transnational Legal Issues Reshaping the Entertainment Industry.

Edited by William Genereux & Marijn Kingma



Message from the President: Jeff Liebenson



Welcome to our 2021 IAEL book. The topic of Nationalism vs Globalism has exceeded my expectations, even covering issues arising from working during a pandemic.

We can only hope that the devastation the pandemic has brought across the globe will subside and we will once again meet in France in next June for our annual IAEL meeting during Midem.

The ongoing relevancy of the topics in the book reflects the world we live in today as the rise of nationalism separates countries and globalization brings them together. While the book focuses on digital and other entertainment deals crossing borders, it also addresses what legal needs still should be considered on a national or country-by-country basis.

I want to thank Marijn Kingma from The Netherlands and William Genereux from Canada, our co-editors who have brought their experiences from where they live and their legal expertise to life in this book. Our contributors from around the world illuminate these developments from their own perspectives which inform their articles.

Thanks to Duncan Calow and Marcel Bunders for your continued support, guidance and humor with respect to the many adversities we have weathered these past two years.

Our hope is that exploring these legal trends will help us in guiding our clients to deal with our multicultural world of entertainment law, notwithstanding the nationalistic urges of our time. Perhaps this mirrors our IAEL meetings with members from around the world enjoying our different cultures and coordinating our common interests.

We hope this book furthers that spirit, our 35th annual book published by the IAEL, Nationalism vs Globalism: Regional and Transnational Legal Issues Reshaping the Entertainment Industry.

Editors' Introduction: William Genereux & Marijn Kingma



When we had our last IAEL General Meeting in June 2019, we could not have foreseen we would not be able to come together in Cannes for the next two summers – or that as a result of a pandemic we would not be publishing the entire book until well into 2021. We also could not have foreseen how relevant the topic of our book would turn out to be. Over the last year and a half we have been on a global rollercoaster ride and it has become more clear than ever that we do not live in separated worlds, and that national borders do not mean anything when push comes to shove. We have also learned that global efforts are needed to solve global problems. Many countries came together to find the vaccines needed to get us out of this situation. The COVAX program is trying to provide global equitable access to vaccines so that not just some countries, but the whole world can hopefully return back to normal soon. Hopefully we will learn from this experience for that other, even more pressing, global emergency: climate change.

Although it was a difficult decision to postpone the release of our book last year, we believe it was the right decision. It gave us the opportunity to include additional contributions dealing with the impacts of the pandemic on the entertainment industry and take a look at how to move forward. The chapters that were written last year have been updated, resulting in a comprehensive publication that we believe was worth waiting for.

The chapters in this year's IAEL book explore the longstanding conflict between nationalism and globalism as it relates to the entertainment industry. Originally we had intended to use the term "globalization" in the title rather than globalism. That probably would have been more correct, insofar as

globalization is a word used by economists to describe a process by which businesses or other organizations develop international reach or increase the international scale of their operations. Globalism, on the other hand, tends to be more of a raw, emotional, political concept. It describes a potential threat that can be rallied-against. It's often rejected by nationalists, conspiracy theorists and indeed anyone who might be content to sit in their own backyard and let the rest of the world be damned. It's used often in a defensive way – to describe existential threats that are perceived to have been created by others, like having rules or market forces emanating from outside our own borders that nevertheless come to affect us.

We decided to go with the more difficult word, globalism, because it more accurately describes the zeitgeist of our times. Our entertainment industry already is global, and international trade, which is what globalization is all about, has been occurring and disrupting markets since at least the early days of spice trading thousands of years ago. Now of course the Internet allows us unprecedented new types of access to foreign markets and the promise of having our services and products seen, heard and used by countless millions of others. This development has moved up a gear due to the pandemic. But here's the thing, there are a lot of vested interests that get in the way. The forces of disruption invariably leave footprints across the backs of incumbents. There usually are winners and losers, and even the venue where this all happens – our planet Earth – becomes a stakeholder as we take environmental issues into consideration. The discussion about what's best for the entertainment industry moving forward becomes nuanced, because it's not simply about changes that make things cheaper, faster or most transparent. Folded into the discussion are issues about people, culture, autonomy, stability, flexibility, privacy, freedom and sexuality. The tension between all these forces is beguiling. It makes for interesting reading but leads to much deeper conclusions. One region or territory might want to defend its culture from being diluted by outside influences, yet might want that same culture to find an audience abroad. A territory or region might enact laws that purport to have transnational reach, yet this might directly encroach on the sovereignty of others. Our willingness to embrace change is tempered with fears of losing the status quo. Ultimately, these are

all political issues laced with policy considerations that demand to be understood.

The 2020-2021 IAEL book examines an array of regional and transnational forces that currently are shaping the entertainment industry. Chapters have been subdivided into three major categories, as shown in the table of contents. The first category focuses on issues in specific jurisdictions and markets. The second attempts to map-out the expansion of regional forces into wider applications. The third seeks to bring a holistic view that reconciles many of the vital issues affecting the industry at large, and which are shaping our future world.

The first part of the book focuses on regional issues and differences. This part includes articles on sometimes underexposed but increasingly important markets: India and Nigeria. A contribution from Italy focuses on documentary films and cultural heritage, and the viability of specific Italian legislation in the light of Europe's DSM Directive. There are several articles about major legislative developments in the U.S. and the EU, including the U.S. Music Modernization Act and the EU Audiovisual Media Directive. A comparative contribution from three of our authors describes the limitations and exceptions to copyright in three major territories: the EU, the U.S. and Asia.

The second part of the book shows that regional developments can have global consequences. The GDPR, for example, has left its marks all around the world as countries are adapting their data protection legislation to keep up with Europe's strict rules. The infamous article 17 of the EU DSM Directive is bound to have an impact on the rest of the world. These global influences of regional legislation are discussed in this part of the book. This chapter also looks at the global impact of new technology and new industry economics. Important issues that are discussed include licensing in the age of globalization, how to deal with aggregators, and new types of platforms. And let's not forget something that we all have in common: paying taxes. A contribution from the Netherlands looks at the influence of globalization on international tax principles. Finally, we have an article that focuses on jurisdiction of U.S. courts. Under what circumstances can a non-U.S. entity be hauled into a

U.S. Court thousands of miles away to defend itself under United States law?

The third part of the book takes a look at some of the broader social and environmental issues of our current and future world. A contribution from Denmark discusses the changing expectations for artists as global role models. Another article looks at the (im)possibility to regulate fake news and political advertising on social media platforms. We also have a very helpful contribution on transgender music artists and the legal issues they encounter. We are also very pleased to have an article on what is no doubt the biggest challenge of our times: global warming. And then there are pandemic-related chapters that we never thought we'd be writing about. They are intended to provide useful information. There's information on data protection laws and privacy from the perspective of several different global regions, and there's information on how the pandemic has affected contractual relations. We also have chapters looking at the effect of the pandemic on future of the entertainment market, such as the acceleration of the shift to streaming and the changed relationship between brands and customers. As the global entertainment industry becomes more entwined, we believe these topics are instructive for everyone in all regions.

We would like to thank IAEL's president Jeff Liebenson for his time, effort and leadership as we've planned, changed our plans, planned again and finally executed on the making of our book. We would also like to thank Janneke Popma, associate at Höcker, for her indispensable organizational skills. Additionally, the authors all need to be recognized for their creativity, diligence and flexibility. A lot of energy that could have been directed toward remunerative, billable work instead has been gifted to us all, so that we can see the issues in their chapters through their specialists' eyes. Without the generosity of all the contributors this book could not have happened. Thank you everyone.

Finally, to quote Vera Lynn who passed away last summer at the respectable age of 103: we'll meet again.

William Genereux & Marijn Kingma

Exceptions and Limitations to Copyright in Asia

“It is important, therefore to consider how the existing copyright laws and any proposed amendments seek to maintain a healthy balance between providing adequate protection for right holders and ensuring users’ ability to create derivative works without violating the laws.”



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John has acted in commercial transactions in most Asian jurisdictions. He has been acknowledged by AsiaLaw and Who’s Who of the Law as one of Asia’s leading media and entertainment lawyers. John is a frequent speaker at international media conferences and is legal advisor to a number of industry bodies. He is an executive committee member of the International Association of Entertainment Lawyers and sits on the Advisory Board for BAFTA in Asia.

>> Introduction

With technological advancements, the creation of new works has never been easier. While this ease of creation empowers everyone to create and disseminate new or secondary works, it also brings with it concerns as to whether existing legal frameworks offer sufficient protection for copyright owners. It is important, therefore to consider how the existing copyright laws and any proposed amendments seek to maintain a healthy balance between providing adequate protection for right holders and ensuring users’ ability to create derivative works without violating the laws. In this chapter, we will examine the existing “fair dealing” exceptions to copyright infringement and the proposed amendments to these exceptions in three APAC jurisdictions, namely, Hong Kong, the People’s Republic of China and the Philippines.

B. Hong Kong

The Hong Kong Copyright Ordinance

Fair dealing exceptions can be found in Hong Kong’s Copyright Ordinance (the “Ordinance”). Whilst the Ordinance does not define “fair dealing”, it states that a person does not infringe any copyright in the work under the following circumstances; namely, fair dealing with a work for the purposes of research, private study, criticism, review, news reporting, education and public administration. In determining whether a use falls within the aforesaid exceptions, courts will consider the circumstances of each on a case-by-case basis and the following four factors:

1. Purpose and nature of the dealing, including whether it is for non-profit-making purpose and whether the dealing is of a commercial nature;²
2. Nature of the work;
3. Amount and substantiality of the portion dealt with in relation to the work as a whole; and
4. Effect of the dealing on the potential market for or value of the work.

For use in relation to songs, movies and other content created by artists, users often rely on the exception of use for the purpose of criticism, review or news reporting³ to counter allegations of infringement. A person may criticize, review or report copyright works and a performance of the work on the news without infringing copyrights so long as such acts are accompanied by adequate acknowledgement.

In *Capcom Co Ltd v Pioneer Technologies Ltd*,⁴ the plaintiffs, a manufacturer and publisher of video games and related strategy guide books, sought to obtain a summary judgment against the defendant, a magazine publisher and its director for infringing the copyright of a popular video game by reproducing images and frames identical or substantially similar to those in the game in a magazine article.

In assessing the applicability of the “fair dealing” exceptions, aside from considering the extent of use, the use made and the perceived purpose of use,⁵ the judge also cited English authorities that “fair dealing” is a question of degree or of impression and a liberal approach

“The liberal approach adopted by the District Court of Hong Kong seems to suggest that some parodies could come within the fair dealing exception for criticism or review, and thus, allow users greater flexibility in using copyright works within these exceptions.”

should be adopted.⁶ Ultimately, it was held that the defendants were able to establish triable issues of fair dealing, i.e. inclusion of images in the article was for the purpose of criticism or review. As the article reviewed the new gaming experience, the judge accepted that: (i) an account of how the game is played can come within the scope of “review;” and (ii) the inclusion of copyright frames was reasonably necessary to let readers understand what the accompanying texts mean.⁷ The liberal approach adopted by the District Court of Hong Kong seems to suggest that some parodies could come within the fair dealing exception for criticism or review, and thus, allow users greater flexibility in using copyright works within these exceptions.

The Copyright (Amendment) Bill 2014

In June 2014, the Copyright (Amendment) Bill 2014 (the “2014 Bill”) was introduced to update Hong Kong’s copyright regime in light of technological developments and the need to ensure a “robust intellectual property regime.”⁸ The major amendments proposed included introducing:

1. New “fair dealing” exceptions (the “New Fair Dealing Exceptions”);
2. New right to communicate works to the public by way of electronic communication;
3. New criminal sanctions against unauthorised communication of copyright works to the public.

The New Fair Dealing Exceptions covered use for the purposes of: (i) parody, satire, caricature and pastiche; (ii) commenting on current events; and (iii) quotation.

The proposed exception concerning parody, satire, caricature and pastiche proved to be the most controversial among all proposed amendments.

It was reported that 1 million signatures (Hong Kong’s population is 7.3 million) had been gathered for a petition in opposition to the bill.⁹

“Parody” in the 2014 Bill refers to “an imitation of the style of a particular artist or genre with deliberate exaggeration for comic effect. “Satire”, on the other hand, covers the use of humour, irony, exaggeration, or ridicule to expose and criticise people’s stupidity or vices. Yet, it was feared that these exceptions did not

sufficiently protect those who sought to create and disseminate user-generated content (“UGC”), such as cover versions of songs with rewritten lyrics. Supporters of UGC hoped that a broader concept could protect them from alleged infringement, whereas the government and copyright owners perceive UGC as vague and lacking a globally-accepted definition. Thus, they believed that given the uncertainty, the proposed exceptions were already adequate to allow non-right owners’ fair use.¹⁰ As the application of these exceptions are fact-sensitive, users feared that a breach might be used to justify political prosecution and as such, they might face criminal sanctions for unauthorized communication of copyright works. Due to the controversies and failure to pass the 2014 Bill before the adjournment of the Legislative Council meeting, the government withdrew the bill and it ultimately lapsed on 16 July 2016.¹¹ It remains to be seen whether the government will re-introduce any such amendments to the Ordinance in the near future. As of March 2021, there is still no update as to whether the New Fair Dealing Exceptions will be introduced to Hong Kong at all.

Anti-Extradition Law Amendment Bill Movement in 2019-2020 (the “Anti-ELAB Movement”)

All that aside, it might be worth considering how the 2014 Bill might have influenced the way in which the Anti-ELAB Movement in 2019¹² was promoted, had it been passed. The use of copyright works by different political camps in promotional materials during the Anti-ELAB Movement presents interesting real-life scenarios to evaluate and analyze the relevance of the New Fair Dealing Exceptions, in particular, for the purpose of parody and satire.

“Glory to Hong Kong” is a song widely regarded as the movement’s anthem and has been widely communicated amongst participants of the movement. Subsequently, “Glory to Hong Kong (Police Version MV),” a video spoof, was uploaded on YouTube by a user who opposed the activists. The original music and lyrics were adopted but certain lyrics on-screen such as “revolution of our times” were replaced with phrases in support of the police. Moreover, the visuals of the original video were replaced with scenes including

13 the Hong Kong Police using crowd-control measures, such as tear gas on protestors. The video was later taken down by YouTube as it contained copyrighted work owned by Goomusic, a record label owned by singer Denise Ho¹³ an avid supporter of the activists. Had the 2014 Bill been passed, the spoof video would have fallen under the New Fair Dealing Exceptions since the original song was used for satire/parody as evidenced by the strong elements of irony and ridicule from the perspective of the pro-police supporters.

Besides the aforementioned spoof video, many promotional materials such as posters involved the use of well-known characters such as Winnie the Pooh (as an insinuation of Xi Jinping, President of the PRC) and Piglet (as an insinuation of Carrie Lam, Chief Executive of Hong Kong). While such use would constitute copyright infringement now, if the 2014 Bill was passed, the replication of the Winnie the Pooh characters might fall under the New Fair Dealing Exception of parody/satire due to their alleged resemblance to political figures.

In light of the above analysis, it could be said that the New Fair Dealing Exception would have catered to the expression of political views and the freedom of speech. Conversely, since determination of whether such use is for the purpose of satire/parody involves subjective interpretation, the New Fair Dealing exceptions may give rise to uncertainty and potential accusations of political bias.

Copyright challenges relating to teaching via e-learning platforms during the COVID-19 epidemic

As the COVID-19 pandemic swept through Hong Kong in February 2020, the Hong Kong Education Bureau announced that all face-to-face classes and school activities in all kindergartens, as well as primary and secondary schools to be suspended until further notice. As such, schools in Hong Kong had no alternative but to transit, in a relatively short period of time, from the face-to-face teaching in a traditional classroom setting, to remote online learning via various e-platforms.

There are clearly potential copyright infringement issues if and when teachers upload scanned copies of textbook materials onto the Internet and distribute such materials among students via e-platforms. In Hong Kong, schools have generally entered into licence agreements with licensing bodies such as the Hong Kong Reprographic Rights Licensing Society (“HKRRLS”) for making available multiple copies of printed works for instruction purposes. However, those license agreements usually only permit the photocopying to be carried out by the teachers or staff of the schools within the specified premises and with the specified machines. In view of necessary latest changes in teaching media, schools are encouraged to review these agreements to ensure that uploading scanned copies of textbooks/ teaching materials is permitted under the license.

14 If uploading scanned copies of textbook materials is not permitted under the license, then such license might not cater for the change from physical to virtual teaching media. As such, it may be necessary to revisit the “fair use” exception in the Copyright Ordinance.

A teacher or student who, for the purpose of education, makes a copy of a copyright work without authorisation will not contravene the law provided that the copying is a fair dealing of the work. Section 45 of the Copyright Ordinance allows reprographic copying of literary works to a reasonable extent by or on behalf of educational establishments for instruction purposes where no relevant licensing schemes are available. However, what amount to a “reasonable extent” is far from clear. There is currently no precise percentage set out as to the extent of permissible copying under the Copyright Ordinance. A work is infringed if a substantial part is taken. In determining whether a substantial part is taken, both the “quantity” and “quality” of the materials being copied have to be considered. There could be an infringement even if a relatively small proportion of the copyright work has been copied, if that particular proportion represents the “essence” of the work.

This said copyright issue is certainly a “live” issue concerning most if not all teaching establishments around the globe. For example, Japan did not originally adopt the “fair use” doctrine. However, in view of the COVID-19 situation and the recent changes of teaching media, the Government of Japan has expedited its amendments to its relevant copyright laws and it was announced on 10 April 2020 that it shall implement an exception to copyright infringement for use of copyrighted materials via online classes from 28 April 2020 onwards. As for use of copyrighted material before such amendments in the academic year of 2020-2021, the Government of Japan will financially cover the license fees for the use of copyrighted materials in online classes.¹⁴

The European Union has also taken the initiatives to implement relevant changes to its existing laws in order to accommodate the new teaching mode. In April 2020, the European Union published a Directive on copyright and related rights in the Digital Single Market¹⁵. In June 2020, the Hungarian Government passed a new law in its COVID-19 state-of-emergency decree, implementing the exception for use of works in digital and cross-border teaching activities (i.e. Article 5 of the CDSM Directive) into its existing Copyright Act of 1999¹⁶. Following the amendments, educational establishments in Hungary will be able to make non-commercial use of copyrighted works for educational purposes, provided that, inter alia, such use takes place under the responsibility of an educational establishment through a secure electronic environment accessible only by the educational establishment’s pupils or students and teaching staff with appropriate references / source.

Given the “fair dealing” exceptions to copyright infringement in Hong Kong is not in any way amended to accommodate the latest change in teaching media, schools in Hong Kong are strongly advised to take sufficient precautions to prevent potential copyright infringement. Schools in Hong Kong are also encouraged to review existing license agreements with the licensing bodies to ensure consistency with the new mode of teaching via e-platforms; and to provide sufficient training and guidelines to its teaching staff and students as to how teaching materials are to be used and distributed via the e-platforms.

C. People’s Republic of China (“PRC”)¹⁷

Copyright Law of the PRC

Article 22 of the PRC Copyright Law¹⁸ includes 12 specific exceptions to the unauthorized use of copyrighted work. It is worth noting that although the law does not use terms such as “fair dealing/fair use”, the exceptions are often referred to as “fair use” in judicial practice and academic discussions. Examples of these exceptions include:

1. use of a published work for the purposes of the user’s own private study, research or self-entertainment;
2. appropriate quotation from a published work in one’s own work for the purposes of introduction of, or comment on, a work, or demonstration of a point;
3. use of a published work by a State organ within the reasonable scope for the purpose of fulfilling its official duties;
4. copying, drawing, photographing, or video recording of an artistic work located or on display in an outdoor public place;
5. translation of a published work into Braille and publication of the work so translated.

Article 21 of the Implementing Regulations of the Copyright Law further elaborates that

“The use of a published work without the copyright owner’s authorization, as stated in the relevant provisions of the Copyright Law, shall neither affect the normal use of the work, nor harm, in an unreasonable manner, the copyright owner’s lawful rights and interest”.¹⁹

This can be seen as an adaptation of the Berne three-step test²⁰.

On November 11th, 2020, China’s National People’s Congress approved amendments to the Copyright Law²¹ which will become effective 1 June 2021. Under these amendments, the prior Article 22 becomes Article 24 and includes the following changes: (1) adding one more exception (i.e. “any other circumstances stipulated

by laws and administrative regulations”); (2) incorporating Article 21 of the Implementing Regulations into Article 22 of the Copyright Law; and (3) making separate amendments to some of the original exceptions (i.e. item 5 listed above has been modified to include “provision of a published work to a person with dyslexia in a way that is accessible to him/her”). Overall, these changes are incremental, and exhaustive enumeration approach for exceptions remains in place.

Determination of Fair Use in Judicial Practice

Given rapid developments in technology and business practices, market participants and judges have sometimes found that the exceptions and limitations laid out under Article 22 do not fully address all possible scenarios. As a result, in practice some courts have directly adopted the three-step test or/and refer to the four-factor balancing test (i.e. the test used when considering fair dealing in Hong Kong) in determining whether a use made of a work that falls outside of Article 22 is a fair use.

For example, *Guangzhou NetEase Computer System Co., Ltd. v. Guangzhou Huaduo Network Technology Co., Ltd.* (2019) presents an interesting example in relation to game webcasting. NetEase, the owner of the internet game “Fantasy Westward Journey,” sued for copyright infringement when the defendant organized online live game streaming related to the plaintiff’s game without authorization. The defendant argued that (i) online live game streaming transforms the purpose of online games into individual expression and social communication, and this can be considered a transformative use, and (ii) therefore, using the online game during an online live game stream should fall under the “fair use” exception, even if this does not exactly fit into the 12 exceptions under the Article 22 of the PRC Copyright Law. The PRC court adopted the three-step test and four-factor balancing test, and held that the defendant’s live broadcast activities cannot be “protected” by its fair use argument.

Another interesting example concerns TV clips or screenshots, in the case *Beijing IQIYI Science & Technology Co., Ltd. v. Wasu Media & Network Co., Ltd* (2019). In this case, multiple 2-to 4-minute clips of a TV series owned by the plaintiff

(iQiyi) were viewable through the Huashu TV app. The defendants claimed that the videos they circulated were only clips, limited in number and repetitive in content (and thus could not express the complete story) and objectively did not substitute for the infringed work (thus constituting fair use). The court adopted the three step test and held that the use had clearly gone beyond the limits of fair use, and that there was a diminution in value as consumers might not need/want to watch the complete work after watching the relevant clips.

Similarly, in *Wang Shen v. Google, Inc., Beijing Gu Xiang Information Technology Co., Ltd.* (2012), the Beijing No. 1 Intermediate People’s Court, based on the three-step test, ruled that provision of snippets of plaintiff’s novel did not conflict with the normal exploitation of a novel in the marketplace, nor did they unreasonably prejudice the legitimate interests of its author, thus constituting fair use.

The main basis for the use of these standards is the 2011 Supreme Court Notice²², which was a response to the emerging problems encountered by judges in practice, and the desire to have PRC copyright practice better promote business and technological innovation. In Article 8, the Notice states that,

“under special circumstances where any acts of use are considered necessary for technological innovation and commercial development, such acts can be recognized as fair use provided said acts do not conflict with normal use of the works and do not irrationally damage the legitimate interests of copyright owners, based on considerations of the nature and purpose of the acts, the nature of the works used, the quantity and quality of the part used and the value and impact of the use on the potential market of the works.”

D. The Philippines²³

Intellectual Property Code of the Philippines

Section 185 of the Intellectual Property Code of the Philippines (“IP Code”) expressly provides for the doctrine of fair use, i.e., that the fair use of a copyrighted work for criticism, comment, news reporting, teaching, scholarship, research, and similar purposes is a valid defense against a claim of copyright infringement. The same section also lists four non-exclusive factors that must be considered in determining whether the use of a copyright work is fair (i.e. similar to the four factors used in Hong Kong).²⁴

Section 184 of the IP Code specifies certain uses of copyright work that do not consist of copyright infringement. Most of those provisions do not need to be tested using the four-factor test, subject to the following which the provision expressly requires the application of the four-factor test:

1. The making of quotations from a published work if they are compatible with fair use and only to the extent justified for the purpose, including quotations from newspaper articles and periodicals in the form of press summaries: provided, that the source and the name of the author, if appearing on the work, are mentioned;
2. The inclusion of a work in a publication, broadcast or other communication to the public, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair use; provided, that the source and the name of the author, appearing on the work, are mentioned; and
3. The use made of a work by or under the direction or control of the Government, by the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use.

The landmark case of ABS-CBN Corporation (ABS-CBN) vs. Gozon, G.R. No. 195956 (11 March 2015), elucidates the fair use doctrine in the context of news reporting and the broadcasting industry in the Philippines. Among others, the case also clarifies the

concept of “copyrightable material” in relation to material that is re-broadcasted live as a news story and whether copyright infringement may be negated by good faith.

ABS-CBN is a media and entertainment group which had a special embargo agreement with Reuters Television Service (“Reuters”) allowing the footage taken by ABS-CBN for the use of Reuters’ international subscribers only. Specifically, the agreement disallowed use by any other Philippine subscriber of Reuters without ABS-CBN’s consent. Controversy arose when a rival network company, subscribed to Reuters, carried a live newsfeed from Reuters not knowing that Reuters was airing footage of ABS-CBN, on the basis of which ABS-CBN filed a criminal case for copyright infringement.

Under the IP Code, “news of the day and other miscellaneous facts having the character of mere items of press information” are unprotected subject matter for copyright. But while news or the event itself is not copyrightable, an event can be captured and presented in a specific medium of expression. News coverage in television involves framing shots, using images, graphics and sound effects involving creative process and originality. Television news footage is an expression of the news and, therefore, copyrightable material.

On whether or not the use of the footage constitutes fair use, negating copyright infringement and probable cause to indict the rival company, the Supreme Court deferred to the lower courts for the determination of whether the exception applies. However, it had the opportunity to discuss how fair use applies in broadcasting. The Supreme Court defined fair use as “a privilege to use the copyrighted material in a reasonable manner without the consent of the copyright owner or as copying the theme or ideas rather than their expression.”

To determine fair use, it considered, first, the four-factor test and second, the high value assigned for each second of broadcast or airtime. Therefore, while not ruling on the existence of fair use, the (1) purpose, specifically commercial use, of the copyrighted material; (2) factual nature, as opposed to creative,

nature of the of the copyrighted work; (3) exact reproduction of the work, even if only a small portion was used; and (4) negative impact on the copyrighted work's market, must be considered to determine if the exception applies.

Finally, the Supreme Court of the Philippines clarified that good faith is not a proper defense as the IP Code requires strict liability for copyright infringement. Criminal intent is not material as it is the very act of infringement, not the intent, which causes the damage. To require or assume the need to prove intent defeats the purpose of intellectual property protection.

Proposed amendments to the IP Code of the Philippines

In November 2018, the Philippine Intellectual Property Office (“IPO”) submitted to the House of Representatives its proposed amendments to the IP Code.²⁵

While there are no proposed changes to Section 185 of the IP Code and the four-factor test, there are proposed amendments to Sections 184 in relation to the specified use of reproduction of works for use of visually impaired persons. It is proposed to be broadened to include reproduction of works for use of “those unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.”

Moreover, it is proposed that the IPO be authorized to limit the specified uses in Section 184 through the issuance of rules and regulations.

It was also proposed that Section 212 of the IP Code be amended to confirm that the doctrine of fair use in Section 185 applies to performances, sound recordings, and broadcasted works. Moreover, the following specified uses relating to performances, sound recordings, and broadcasted works are proposed to be permitted as additional statutory cases of fair use: (1) use by a natural person exclusively for personal purposes; (2) short excerpts for reporting current events; and (3) use solely for the purpose of teaching or scientific research.

These proposed amendments remain pending with the Committee on Trade and Industry of the House of Representatives as House Bill No. 9148.²⁶

In February 2021, House Bill No. 8620 was filed proposing amendments to Section 184 of the IP Code.²⁷ The bill adds the use of a work by or under the direction of the Bureau of Copyright and Related Rights of the IPO, where such use is in the public interest and is compatible with fair use, as an act that does not consist of copyright infringement.

The bill also adds the following as an exception to copyright infringement:

“The copyright in a work that is situated, otherwise than temporarily, in a public place, or in premises open to the public, is not infringed by the making of a painting, drawing, engraving or photograph of the work or by the inclusion of the work in a cinematograph film or in a television broadcast.”

E. Comparison of the “fair dealing”/“fair use” exceptions in Hong Kong, PRC and the Philippines

The following is a comparison table highlighting the similarities and differences between the exceptions and limitations in the copyright law of Hong Kong, PRC and the Philippines.

Aspect	Hong Kong	PRC	The Philippines
Exceptions to copyright infringement are listed rather than open-ended	✓	✓	✓
Codification of the “4-factor test”	✓	✗	✓
Codification of the “three-step test” as seen in the Berne Convention	✓ ²⁸	✓ ²⁹	✓ ³⁰
Nature of the “fair dealing/fair use” exceptions	“Fair dealing” to be considered in light of the 4-factor test, use must fall within: research, private study, criticism, review/comment, news reporting, education, or public administration.	“Fair use” to be considered in light of “three-step test”; use must fall within the exceptions enumerated in the Copyright Law.	“Fair use” to be considered in light of the 4 factor test, use must fall within: criticism, comment, news reporting, teaching, scholarship, research, and similar purposes. Other exceptions permitted if “fair use” is found: -Quotations from newspaper articles and periodicals in the form of press summaries. -The inclusion of a work by way of illustration for teaching purposes -Use controlled by the Government, the National Library or by educational, scientific or professional institutions.

Direction of proposed amendments (in relation to fair dealing/ fair use exceptions)	New Fair Dealing Exceptions for: - Commenting on current events - Parody, satire, caricature and pastiche - Quotation.		Expand the fair use exceptions to cover: - Performances, sound recordings, broadcasted works for personal use, short excerpts to report current events and teaching or scientific research. - Making of a painting, drawing, engraving, photograph, or including in a cinematograph film or in a television broadcast a work that is situated, otherwise than temporarily, in a public place, or in premises open to the public.
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“Given the practice of PRC courts in directly applying the 4-factor or the 3-step test, the range of excepted infringing acts in the PRC might be wider than those in Hong Kong and the Philippines.”

F. Conclusion

The exceptions to copyright infringement in Asia are close-ended rather than open-ended, but concepts such as the 4 factors, the 3-step test and “fair use” are well ingrained in the assessment of copyright infringement in the 3 jurisdictions, either at the legislative or judicial level. Thus, the “fair dealing” or “fair use” considerations are similar.

Still, given the practice of PRC courts in directly applying the 4-factor or the 3-step test, the range of excepted infringing acts in the PRC might be wider than those in Hong Kong and the Philippines. The “fair use” exceptions in the Philippines is slightly more open than that in Hong Kong as purposes that are similar to “criticism, comment, news reporting, teaching, scholarship, research” may also be considered by the court. In the long run, amendments to the existing copyright laws in Hong Kong are necessary to expand the types or scope of fair dealing exceptions to better protect creative use of copyright works by non-right holders.

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- Section on the Philippines: Patricia A. O. Bunye of Messrs. Cruz Marcelo & Tenefrancia

- [1] In creating this chapter I would like to acknowledge research by Emily Cheung, Able Au and Kelly Ho.
- [2] Sections 38(3), 41A(2) and 54A(2) of the Ordinance.
- [3] Section 39 of the Ordinance.
- [4] DCCJ 2655/2007. The plaintiffs applied for leave to appeal at the Court of Appeal (HCMP 828/2008) but the application was dismissed.
- [5] Para 28 of *Capcom Co Ltd v Pioneer Technologies Ltd*.
- [6] Para 21 of *Capcom Co Ltd v Pioneer Technologies Ltd*.
- [7] Para 29 of *Capcom Co Ltd v Pioneer Technologies Ltd*.
- [8] P.2 and 3 of the full Legislative Council Brief https://www.ipd.gov.hk/eng/intellectual_property/copyright/LegCo_Brief_2014_e.pdf ("LegCo Brief").
- [9] <https://hacked.com/hong-kongs-netizens-protest-internet-bill/>
- [10] https://www.ipd.gov.hk/eng/intellectual_property/copyright/O_A_2014.htm#q7
- [11] <https://www.legco.gov.hk/yr13-14/english/bc/bc106/general/bc106.htm>
- [12] The Anti-ELAB Movement, was, initially, a protest demanding the withdrawal of the Extradition Bill proposed by the Hong Kong government in February 2019; wherein it was proposed that a mechanism be established for transfers of fugitives not only for Taiwan, but also for Mainland China and Macau, which are currently excluded in the existing laws.
- [13] <https://www.scmp.com/news/hong-kong/politics/article/3030798/youtube-pulls-down-video-spoof-protest-anthem-glory-hong>
- [14] <https://keisenassociates.com/japan-approves-kind-of-fair-use-treatment-of-works-in-online-classes-early/>
- [15] <https://eur-lex.europa.eu/eli/dir/2019/790/oj>
- [16] Article 5 of the CDSM Directive requires Member States to provide for an exception or limitation for the use of copyrighted works as part of "digital and cross-border teaching activities."
- [17] This section is contributed by Mr. Philip Ou, Managing Partner of TransAsia Lawyers Fay Fan, Associate of TransAsia Lawyers.
- [18] http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987430.htm
- [19] https://www.hfgip.com/sites/default/files/law/implementing_regulations_of_copyright_law_2013_english.pdf
- [20] Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (as amended in 1979) states that "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."
- [21] <https://lawinfochina.com/display.aspx?lib=law&id=34232>
- [22] Circular of the Supreme People's Court on Issuing the Opinions on Exerting the Function of Intellectual Property Rights Judgment in Facilitating Socialist Cultural Development and Prosperity and Promoting Independent and Coordinated Economic Development
- [23] This section is contributed by Ms. Patricia A.O. Bunye, Deputy Managing Partner and Senior Partner of Messrs. Cruz Marcelo & Tenefrancia.
- [24] The four-factor test under the IP Code involves the following elements:
1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.
- [25] https://drive.google.com/file/d/1hShp6GrTenMdKQfJaRNQs_M6GR5memHi/view
- [26] https://www.congress.gov.ph/legisdocs/basic_17/HB09148.pdf
- [27] https://www.congress.gov.ph/legisdocs/basic_18/HB08620.pdf
- [28] Section 37(3) of the Ordinance.
- [29] Article 21 of the Implementing Regulations of the Copyright Law; Article 24 of the Copyright Law (effective 1 June, 2021).
- [30] Section 184.2 of the IP Code.