



representing the
recording industry
worldwide

IFPI Response to the Submission of the Progressive Lawyers Group on the Hong Kong Copyright (Amendment) Bill 2014 regarding Fair Use

July 2015

INTRODUCTION

IFPI, the association representing the recording industry worldwide, has over 1300 members in 62 countries. IFPI promotes the value of recorded music, campaigns for record producer rights and seeks to expand the commercial uses of recorded music in all relevant markets, in particular via new digital services. Our membership includes the major multinational recording companies and hundreds of independent record companies, large and small, located throughout the world, including in Hong Kong.

We are aware that the Progressive Lawyers Group (“PLG”) has recently made a submission regarding the Copyright (Amendment) Bill 2014. PLG proposed to introduce the fair use doctrine to the Hong Kong copyright regime.

We do not believe there is any basis for introducing fair use in Hong Kong. Innovative digital services are thriving in jurisdictions around the world without fair use, including in Hong Kong. We urge extreme caution about introducing a doctrine that would lead to a prolonged period of legal and commercial uncertainty, harming the development of digital market.

The development of the digital music market demonstrates clearly that innovative music distribution services are thriving without fair use

Despite the rarity of fair use in copyright regimes internationally¹, in recent years there has been a global proliferation of technological innovations which have use of third party copyrighted content at their hearts (typically content distribution). Record companies alone have licensed around 43 million tracks and more than 450 digital music services in some 200 countries worldwide. Therefore, fair use is evidently not a pre-requisite for innovation, and we are not aware of any substantiated public policy argument to support the introduction of a fair use exception.

Innovation can happen with or without fair use. So far as the music industry is concerned, this is evidenced by the fact that some of the most successful global digital music services

¹ Fair use exists in **only five jurisdictions** (US, Israel, Philippines, South Korea, and Taiwan).

were developed and launched in countries that do not adopt the fair use doctrine, including Spotify (Sweden), Tidal / WiMP (Norway) and Deezer (France).

Certainty can be achieved through clearly defined exceptions and, most importantly in the area of technological innovation, direct licensing, which enables technology companies and rightholders to work together to experiment with creative ways of using copyright works. Claims that fair use drives innovation are without merit, as was recognized in the UK in the Hargreaves Report², which concluded that:

“Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law.”

The introduction of fair use would create uncertainty and an increase in litigation

Unlike “fair dealing”, the fair use doctrine provides for open-ended exceptions, the scope of which is not defined or limited. It sets out the principles which should be considered by the courts when determining whether a use of copyright material is “fair” and, therefore, permitted.

The scope of fair use in the US has been developed through litigation over a period of 150 years of case law. Introducing fair use would result in legal uncertainty and an increase in litigation for a prolonged period while the courts determine the scope of fair use by reference to the cases brought before it. Even in the US where a very substantial body of case law examining the parameters of fair use has developed over many years, the scope of fair use is still uncertain. Some commentators criticized the fair use doctrine as “hopelessly unpredictable and indeterminate”, and “it is exceedingly difficult to predict whether a given use in a given case will qualify for the privilege”, whereas a court describes fair use’s case-by-case analysis as “a sort of rough justice”³. For example, the varying interpretations of the “transformative use” test which the US courts have applied in recent years illustrate the uncertainty and unpredictability intrinsic to the fair use exception⁴ (see also the section below concerning the potential effect of such uncertainty on the compatibility of fair use with the three-step test).

² Professor Ian Hargreaves was commissioned by Prime Minister David Cameron to chair a review of how the IP framework supports economic growth and innovation in November 2010. The resultant report “Digital Opportunity: A review of Intellectual Property and Growth” was published in May 2011 and made 10 recommendations to “ensure that the UK has an IP framework best suited to supporting innovation and promoting economic growth in the digital age”.

³ “Making Sense of Fair Use”, Neil Netanel, 15 Lewis & Clark L.Rev. 715, 716 (2011)

⁴ The “transformative use” test asks whether the defendant has created a new transformative work, using a work for a different purpose than the author’s original purpose. Some judgments have applied very low thresholds for “transformative use” resulting in findings of non-infringement in cases where infringement seems to be clear by most international standards.

The legal uncertainty created by the introduction of fair use would likely generate litigation and cause commercial uncertainty, creating an environment which is not conducive to the development of new services and technologies.

Fair use exception may be inconsistent with the Three-Step Test

The inherent uncertainty of the scope of fair use does not sit well with the first requirement of the three-step-test⁵, that exceptions must be limited to “certain special cases”. This is particularly true when fair use is implemented without the benefit of years of case law determining its parameters.

As the noted international copyright scholar Professor Sam Ricketson has observed, the open-ended nature of fair use creates difficulties in “knowing in advance what purposes, other than those specifically mentioned, will meet this requirement, and, in this regard, it might be argued that the rationale behind the first part of the three-step is precisely to avoid this indeterminacy, so that it is clear in advance what purpose a particular exception is to serve.” He concludes that “it is unlikely that the indeterminate ‘other purposes’ that are covered by Section 107 of the US Copyright Act meet the requirements of the first step of the three-step test”⁶.

Fair use doctrine is applied in only a small number of jurisdictions

PLG alleged in its submission that more and more countries are shifting from fair dealing to fair use recently, for instance Singapore. IFPI has National Groups and affiliated organisations in 57 countries and we are not aware of any such trend. In fact, as mentioned above, the doctrine of fair use is applied in only five jurisdictions, (the US, Israel, the Philippines, South Korea and Taiwan).

It is also not true that “Singapore shifted from fair dealing to the US fair use”. As a matter of fact, Singapore is still applying the fair dealing doctrine, as can be seen from the clear choice of the term “fair dealing” under sections 35, 36, 37, 109, 110 and 111 of the Singapore Copyright Act. It could be said that Singapore has expanded the fair dealing exception by including “any purpose” other than the specified purposes of criticism or review and reporting news, but it remains that the test is one of “fair dealing”. At most, it can be said to be a hybrid fair use and fair dealing model.

The PLG submission also cited Australia in support of the fair use doctrine. Although the Australian Law Reform Commission (ALRC) recommended in February 2014 that a fair use exception be introduced, the Australian Government has stated that it is not convinced by

⁵ The Three-step test established under Article 13 of the TRIPS Agreement and Article 16 of WIPO Performances and Phonograms Treaty (“WPPT”) (“Three-Step Test”), namely that any exceptions and limitations shall: (i) only apply to certain special cases – this requires that an exception should be clearly defined and narrow in its scope; (ii) which do not conflict with the normal exploitation of the work; and (iii) do not unreasonably prejudice the legitimate interest of the rights holder.

⁶ S. Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, WIPO SCCR/9/7 at pages 68-69 (2003)

the recommendation⁷. It is notable that since then the Australian Government has not taken any further steps in relation to the ALRC recommendation.

We should also point out that in 2013, the UK Government considered and rejected the adoption of the fair use doctrine, following the Hargreaves Report recommendation to reject the same. They cited the legal uncertainty which may be caused as to whether it had complied with its obligations under the Berne Convention and whether it would leave the UK out of step with other EU Member States.

Conclusion

IFPI believes firmly that, where exceptions are appropriate, clearly defined exceptions better achieve legal and commercial certainty, promote innovation, and are more likely to be consistent with the three-step-test. We are not aware of any sound evidence that supports claims that fair use is a pre-requisite for innovation, and the huge increase in innovative licensed digital music services globally is evidence that it is not.

If Hong Kong adopts an open-ended fair use exception, it may run afoul of its international treaty obligations that any exceptions or limitations must comply with the three-step test. The policy makers in Hong Kong should be very cautious before introducing this doctrine, and be warned that it is highly likely to create uncertainty in the law, threatening further innovations in the market. We urge the policy-makers to carefully assess any proposals to introduce the fair use doctrine in Hong Kong by reference to objective criteria and factual evidence.



For further information, please contact:

Kwee Tiang Ang, Regional Director, email: kweetiang.ang@ifpi.org

Candy Lam, Regional Counsel, email: candy.lam@ifpi.org

IFPI Asian Regional Office, 22/F Shanghai Industrial Investment Building, 48-62 Hennessy Road, Wanchai, Hong Kong, Tel: +852 2866 6862, Fax: +852 2865 6326

⁷See, for example, the press report at:
<http://www.theguardian.com/world/2014/feb/14/copyright-fair-use-clause-fails-to-persuade-george-brandis>