

Customizing Fair Use Transplants

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ABSTRACT

In the past decade, policymakers and commentators across the world have called for the introduction of copyright reform based on the fair use model in the United States. Thus far, Israel, Liberia, Malaysia, the Philippines, Singapore, South Korea, Sri Lanka and Taiwan have adopted the fair use regime or its close variants. Other jurisdictions such as Australia, Hong Kong and Ireland have also advanced proposals to facilitate such adoption. This article examines the increasing efforts to transplant fair use into the copyright system based on the U.S. model. It begins by briefly recapturing the strengths and weaknesses of legal transplants. The article then scrutinizes the ongoing effort to transplant fair use from the United States. Specifically, it identifies eight modalities of transplantation. This article concludes with five lessons that can be drawn from studying the ongoing transplant efforts.

1. INTRODUCTION

In the past two decades, the digital environment has brought to internet users many political, social, economic, cultural, educational and career opportunities. Yet, efforts to update copyright law have lagged behind technological developments. As a result, many users not only fail to realize their full potential, but also fear that they will be caught in the copyright infringement net. As the influential *Hargreaves Review of Intellectual Property and Growth* (*Hargreaves Review*) lamented in the educational context:

Researchers want to use every technological tool available, and they want to develop new ones. However, the law can block valuable new technologies, like text and data mining, simply because those technologies were not imagined when the law was formed. In teaching, the greatly expanded scope of what is possible is often

unnecessarily limited by uncertainty about what is legal. Many university academics—along with teachers elsewhere in the education sector—are uncertain what copyright permits for themselves and their students.¹

To make the copyright system more responsive to technological change and to accommodate the many new uses, technologies and services that have now emerged in the digital environment, policymakers and commentators across the world have called for the introduction of copyright reform based on the fair use model in the United States.² For instance, Recommendation 11 of the Gowers Review of Intellectual Property called for amending article 5 of the EU Information Society Directive “to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three Step Test.”³ The later Hargreaves Review also extolled the benefits of fair use and described it as “the big once and for all fix of the UK.”⁴

Although the review declined to recommend fair use in the end, it did so not because of the regime’s lack of merits but because of impracticality—namely, “importing fair use wholesale was unlikely to be legally feasible in Europe.”⁵

In recent years, the copyright law developments across the world have shown a growing willingness on the part of both developed and developing countries to adopt fair use or its close variants. Examples of jurisdictions that have made such adoption are Israel, Liberia, Malaysia, the Philippines, Singapore, South Korea, Sri Lanka and Taiwan.⁶ Other jurisdictions such as Australia, Hong Kong and Ireland have also advanced proposals to facilitate such adoption.⁷ In addition, there are remarkable similarities between the fair dealing regime in Canada and the fair use regime in the United States.⁸

As exciting as it is to see an increasing number of jurisdictions embracing fair use, one should not overlook the complexities concerning the transplant of the U.S. fair use model on to foreign soil. Focusing on fair use transplants, this article begins by briefly recapturing the strengths and weaknesses of legal transplants. It then scrutinizes the ongoing effort to transplant fair use from the United States. Specifically, it identifies eight modalities of transplanta-

¹ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, (Newport: U.K. Intellectual Property Office, 2011): 41.

² 17 U.S.C. 107 § (2012).

³ Andrew Gowers, *Gowers Review of Intellectual Property*, (London: Stationery Office, 2006): 68.

⁴ Hargreaves, *Digital Opportunity*, 52.

⁵ *Ibid.*, 5.

⁶ Band, Jonathan, and Jonathan Gerafi, *The*

Fair Use/Fair Dealing Handbook, (Washington: Policybandwidth, 2013): 30, 35-38, 56, 55-57, 60-62, 64.

⁷ Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report*, (Sydney: Australian Law Reform Commission, 2013): 123-60; Copyright Review Committee (Ireland), *Modernising Copyright: The Report of the Copyright Review Committee*, (Dublin:

Copyright Review Committee, 2013): 93-94; Legislative Council (Hong Kong), *Amendments to Be Moved by the Honourable CHAN Kam-Lam*, SBS, JP. LC Paper No. CB(3) 219/15-16. (Hong Kong: Legislative Council, 2015): 4.

⁸ Michael Geist, *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, (Ottawa: University of Ottawa Press, 2013): 176; Ariel

tion, drawing on experiences in China, Australia, Hong Kong, Ireland, Israel, Liberia, Malaysia, the Philippines, Singapore, South Korea, Sri Lanka and Taiwan. This article concludes with five lessons that can be drawn from studying these transplant efforts. It is my hope that the identification of these modalities and lessons will provide useful information to those working on digital copyright reform.

2. LEGAL TRANSPLANTS

Legal transplants are very common in the intellectual property field. Among the most controversial transplants are those induced by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization (WTO), the 1996 Internet Treaties of the World Intellectual Property Organization (WIPO) and, most recently, the bilateral, regional and plurilateral trade agreements, such as the Anti-Counterfeiting Trade Agreement, the Trans-Pacific Partnership Agreement (now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership) and the proposed Regional Economic Comprehensive Partnership Agreement.

Oftentimes, these agreements are filled with standards that are transplanted from major intellectual property-exporting countries.⁹ Although developing countries fought hard to retain their sovereignty, autonomy and limited policy space, developed countries pushed aggressively for the much higher standards of protection and enforcement found in their own countries. In the end, the weaker and poorer countries are often forced to transplant laws from abroad regardless of whether those laws match their internal needs, interests, conditions or priorities.¹⁰

In view of these inequitable conditions, intellectual property commentators have always been wary about legal transplants. As they rightly point out, hastily transplanted laws can be both ineffective and insensitive to local conditions.¹¹ These transplants can also stifle local development while upsetting the existing local tradition.¹² In addition, they may bring problems from abroad, thus exacerbating the problems they seek to address.¹³ They may even take

away the valuable opportunities for experimentation with new regulatory and economic policies.¹⁴

Nevertheless, legal transplants can be quite beneficial, especially if they are carefully selected and appropriately customized. In an earlier article, I noted the following benefits of legal transplants:

[L]egal transplantation allows countries, especially those with limited resources, to take a free ride on the legislative efforts of other, usually more economically developed, countries. The process also provides laws that have served as time-tested solutions to similar problems, drawing on lessons learned from the experiences in the source countries—both positive and negative. Transplants may even help provide preemptory defenses to countries that face repeated and intense pressure from their more powerful trading partners, not to mention the strong likelihood that the laws in these powerful countries will eventually become international standards by virtue of the source countries' sheer economic and political might.¹⁵

Katz, "Fair Use 2.0: The Rebirth of Fair Dealing in Canada," in *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*. Ed. Michael Geist. (Ottawa: University of Ottawa Press, 2013): 95.

⁹ Peter K. Yu, "The International Enclosure Movement," *Indian Law Journal* 82, (2007): 855-72.

¹⁰ Peter K. Yu, "TRIPS and Its Discontents," *Marquette Intellectual Property Law Review* 10 (2006): 373-75; Peter K. Yu, "The Quest for

a User-Friendly Copyright Regime in Hong Kong," *American University International Law Review* 32, (2016): 34.

¹¹ Peter K. Yu, "Digital Copyright Reform and Legal Transplants in Hong Kong," *University of Louisville Law Review* 48, (2010): 770; Peter K. Yu, "The Transplant and Transformation of Intellectual Property Laws in China" in *Governance of Intellectual Property Rights in China and Europe*. Ed. Nari Lee, Niklas Bruun and Li Mingde, (Cheltenham: Edward Elgar Publishing, 2016): 30, 38-39.

¹² Michael, Birnhack, "Judicial Snapshots and Fair Use Theory," *Queen Mary Journal of Intellectual Property* 5, (2015): 264-84; Peter K. Yu, "Can the Canadian UGC Exception Be Transplanted Abroad?" *Intellectual Property Journal* 26 (2014): 181-82.

¹³ Yu, "The Transplant and Transformation," 31-32.

¹⁴ *Ibid.*, 30-31; John F. Duffy, "Harmony and Diversity in Global Patent Law," *Berkeley Technology Law Journal* 17, (2002): 707-08.

¹⁵ Yu, "Digital Copyright Reform," 754-55.

In short, legal transplants have both strengths and weaknesses. Whether they will become effective and successful will depend largely on the process by which they are transplanted. Before transplant, policymakers should identify what they seek to achieve through law reform. They should not just transplant laws for the sake of transplantation, or even harmonization. Instead, they should evaluate local conditions and select a model that would best fit these conditions. They should also explore whether adaptations are needed to make the transplanted laws effective. As Watson, father of the study of legal transplants, reminded us, “a time of transplant is often a moment when reforms can be introduced.”¹⁶

Once the laws have been adopted, policymakers should continue to scrutinize them to determine if further adjustments are needed at the implementation stage to assimilate them to local conditions. After all, “like the transplant of plants or human organs, the [legal transplantation] process requires a careful process of evaluation, selection, adaptation, and assimilation.”¹⁷ To facilitate this process, some laws come with sunset provisions that allow policymakers and legislators to determine later extension or modification.¹⁸

3. MODALITIES OF TRANSPLANTATION

Commentators have widely criticized the undesirable transplants induced by the U.S. Trade Representative’s Section 301 process¹⁹ and the newly negotiated bilateral, regional and plurilateral trade agreements. An oft-cited example is the anticircumvention provision of the Digital Millennium Copyright Act of 1998 (17 U.S.C. § 1201) (2012). (DMCA), which has been pushed upon developing countries through both the Section 301 process and the negotiation of TRIPS-plus agreements. Because that provision fails to take into account the drastically different local conditions of many developing countries,²⁰ its direct transplant on to foreign soil has serious deleterious effects.

While many policymakers and commentators in the developing world have lambasted the transplant of the

DMCA, they are more willing to accept or even embrace transplants that are based on copyright limitations and exceptions found in foreign laws. After all, such transplants are conducive to increasing access to copyright works, a goal widely shared by developing country policymakers and commentators.²¹ A case in point is the transplant of the U.S. fair use provision, the primary focus of this article. Instead of pushing for greater protection of copyright holders, fair use transplants seek to enlarge the freedom of users in the copyright system and to enhance their access to copyright works.

Thus far, developing countries have yet to actively transplant copyright limitations and exceptions. Their lack of action can be largely attributed to their weak bargaining positions in international trade and intellectual property negotiations and their fear that the introduction of these limitations and exceptions could reduce foreign investment, invite WTO complaints, harm diplomatic relations with powerful countries or all of the above. Countries such as the United States have also been actively discouraging the adoption of fair use in international instruments or through domestic legislation. A somewhat embarrassing example is the secret demarche issued by the U.S. State Department to encourage the removal of references to fair use in the draft text of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.²²

Notwithstanding these hurdles and challenges, many developed and developing countries have now slowly introduced fair use into their copyright systems. That many countries have undertaken proactive efforts to transplant the U.S. fair use provision has given hope to those working tirelessly for digital copyright reforms to protect internet users and to maximize the opportunities and benefits provided by the digital revolution. Nevertheless, the transplant experience to date has been somewhat different from what many have anticipated.

To be sure, the strong contrast between the arguably undesirable DMCA transplants and the more desirable fair use transplants has caused one to expect fair use to be transplanted verbatim or substantially verbatim. In reali-

¹⁶ Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens: University of Georgia Press, 1993): 35.

¹⁷ Yu, “Digital Copyright Reform,” 755.

¹⁸ Yu, “Can the Canadian UGC,” 201-02.

¹⁹ Jagdish Bhagwati, and Hugh T. Patrick, *Aggressive Unilateralism: America’s 301 Trade Policy and the World Trading System*, (Ann Arbor: The University of Michigan Press, 1990); Joe Karaganis and Sean Flynn, “Networked Governance and the USTR,” in *Media Piracy in Emerging Goods* ed. Joe Karaganis, (New York: Social Science Research Council, 2011); Paul C. B. Liu, “U.S. Industry’s Influence on Intellectual Property Negotiations and Special 301 Actions,” *UCLA Pacific Basin Law Journal* 13, (1994).

²⁰ Yu, “Anticircumvention and Anti-anticircumvention,” *Denver University Law Review* 84, (2006): 40-57.

²¹ Sara Bannerman, *International Copyright and*

Access to Knowledge, (Cambridge: Cambridge University Press, 2015); Gaëlle Krikorian and Amy Kapczynski, *Access to Knowledge in the Age of Intellectual Property*, (New York: Zone Books, 2015).

²² Knowledge Ecology International. 2013. US Department of State Demarche against Fair Use in WIPO Treaty for Blind. Available online: <https://keionline.org/node/1760> (accessed on 14 February 2018).

²³ Jacques deLisle, “Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond,” *University of Pennsylvania Journal of International Economic Law* 20, (1999); James A. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America*, (Madison: University of Wisconsin Press, 1980); John V. Orth, “Exporting the Rule of Law,” *North Carolina Journal of International Law and Commercial Regulation* 24,

(1998); Ann Seidman and Robert B. Seidman, “Drafting Legislation for Development: Lessons from a Chinese Project,” *American Journal of Comparative Law* 44, (1996).

²⁴ Section 2.14 of the Liberian Copyright Law provides specific arrangement concerning the copyright limitations and exceptions relating to computer programs.

²⁵ As modified in February 2013, the language now reads, “Decompilation, which is understood here to be the reproduction of the code and translation of the forms of a computer program to achieve the interoperability of an independently created computer program with other programs may also constitute fair use under the criteria established by this section, to the extent that such decompilation is done for the purpose of obtaining the information necessary to achieve such interoperability.”

ty, however, a close scrutiny of the “fair use” provisions that have been adopted or proposed reveal that the reform-minded jurisdictions did not directly transplant the U.S. fair use provision. Instead, they undertook elaborate efforts to customize that provision to local conditions.

To illustrate these customization efforts, this section identifies eight distinct modalities of transplantation that have been deployed when jurisdictions introduce fair use into their copyright systems. The discussion of these modalities reminds us of the need for customization in the legal transplantation process, a topic that has been widely explored in law and development literature.²³ Such discussion also resonates with the repeated calls for flexibilities and policy space in intellectual property law and policy. It highlights the multiple paths jurisdictions can take to develop an open system of copyright limitations and exceptions.

3.1. Introduce a Verbatim or Substantially Verbatim Transplant

The most obvious modality is verbatim transplant. Although countries rarely adopt the same statutory language, Liberia, a signatory of the original Berne Convention for the Protection of Literary and Artistic Works, provides an excellent example of a country introducing a verbatim, or at least substantially verbatim, transplant. Section 2.7 of the Copyright Law of the Republic of Liberia provides:

Notwithstanding the provisions of Section 2.6 [which covers the exclusive rights of copyright owners], the fair use of a copyright work, including such use by reproduction in copies or sound recordings or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (a) *the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;*
- (b) *the nature of the copyright work;*
- (c) *the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (d) *the effect of the use upon the potential market for or value of the work.*

This section includes the four fairness factors that are identical to those found in Section 107 of the U.S. Copyright Act. Its preambular language—“for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research”—is also identical to the language in the U.S. fair use provision. The only difference is that the Liberian fair use provision does not apply to the reproduction of a computer program. The limitation and exception in that area, which falls outside the scope of this article, is covered by a different part of the statute.²⁴

Another example is the Philippines. Adopted in June 1997, Section 185.1 of the Intellectual Property Code of the Philippines (Republic Act No. 8293) provides:

The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright . . . In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:

- (a) *The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes;*
- (b) *The nature of the copyrighted work;*
- (c) *The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (d) *The effect of the use upon the potential market for or value of the copyrighted work.*

The fact that a work is unpublished shall not by itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

While this section was undoubtedly modeled after the U.S. fair use provision, it also includes specific language stating explicitly that the decompilation of a computer program “may also constitute fair use.”²⁵ A third example is Malaysia. Section 13 of the Copyright Act 1987, which was amended in February 2012, provides:

(2) *Notwithstanding subsection (1) [which covers the exclusive rights of copyright owners], the right of control under that subsection does not include the right to control*

(a) *the doing of any of the acts referred to in subsection (1) by way of fair dealing including for purposes of research, private study, criticism, review or the reporting of news or current events: Provided that it is accompanied by an acknowledgement of the title of the work and its authorship, except that no acknowledgement is required in connection with the reporting of news or current events by means of a sound recording, film or broadcast;*

(2a) *For the purposes of paragraph (2)(a), in determining whether a dealing constitutes a fair dealing, the factors to be considered shall include:*

- (a) *the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;*
- (b) *the nature of the copyright work;*
- (c) *the amount and substantiality of the portion used in relation to the copyright work as a whole; and*
- (d) *the effect of the dealing upon the potential market for or value of the copyright work.*

Interestingly, this section does not use the term “fair use,” despite its remarkable similarities to Section 107 of the U.S. Copyright Act. Instead, like Singapore, which will be discussed below, Malaysia has a fair dealing regime that functions like a fair use regime. Although fair dealing is generally described as a rule while fair use a standard,²⁶ this rule-standard distinction no longer works well because both regimes now require the case-by-case balancing of multiple fairness factors.²⁷ As a result, policymakers and commentators increasingly identify fair dealing by the specified purposes and the closed system of copyright limitations and exceptions. Because the word “including” precedes the purposes specified in the Malaysian fair dealing provision, it suggests a non-exhaustive list of copyright limitations and exceptions. The provision is therefore open-ended and functions like a fair use provision.

3.2. Add the Three-Step Test

The second modality is the transplant of the U.S. fair use provision with built-in language covering the three-step test used in the TRIPS Agreement and the WIPO Copyright Treaty. Article 13 of the TRIPS Agreement requires all WTO members to “confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” Similarly, article 10(1) of the WIPO Copyright Treaty provides:

Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Although many jurisdictions have built the three-step test into their system of copyright limitations and exceptions,²⁸ in part to avoid WTO disputes, South Korea provides the best example of a fair use provision that includes the three-step test as a built-in constraining device. Section 35-3(1) of the Copyright Act of South Korea specifically provides, “[e]xcept as provided in Articles 23 through 35-2 and 101-3 through 101-5, where a person does not unreasonably prejudice an author’s legitimate interest without conflicting with the normal exploitation of works, he/she may use such works” (translated by the Korea Copyright Commission). Because this provision requires any interpretation to pass the last two steps of the three-step test, it will never fail those steps if it is correctly interpreted.

The only remaining issue is whether the provision will pass the first step. The answer is highly likely, for three reasons. First, no country has ever challenged the U.S. fair use provision before the WTO Dispute Settlement Body.²⁹ Second, even though the Korean provision functions like the U.S. fair use provision, it is narrower than that provision. Third, some commentators have argued that the first step of the three-step test deserves much less focus and attention than the last two steps.³⁰ In short, the chance of the Korean fair use provision becoming part of a WTO dispute is minimal.

Notwithstanding the proactive efforts on the part of South Korea and other jurisdictions to inject the three-step test into their copyright laws,³¹ policymakers and commentators have called for caution, if not expressed reservation.³² Even if the incorporated three-step test language is to be liberally interpreted, such incorporation will burden those using the fair use provision with an additional layer of legal analysis, which in turn will raise administrative, enforcement or litigation costs. If the interpretation turns out to be unduly restrictive, the added language will greatly curtail the benefits provided by the new fair use provision, thereby dampening, if not negating, the success of the transplant-based reform.

3.3. Add Regulatory Authority

The third modality is the transplant of the fair use provision with added regulatory authority. Israel provides the only example of such a transplant. Pursuant to Section 19(c) of the 2007 Copyright Act, “[t]he Minister [of Justice] may make regulations prescribing conditions under which a use shall be deemed a fair use.” As Elkin-Koren explained, “The purpose of establishing this authority was to reduce the uncertainty resulting from the open-ended nature of the fair use doctrine.”³³ The addition of regulatory authority into a fair use provision is not ideal, considering that rigid regulations could be introduced to undermine the flexibility provided by the fair use model.

Nevertheless, no regulation has been issued in Israel so far, despite the decade-long existence of its fair use provision.³⁴ If regulatory authority is merely included to increase the political support for the change from a closed system of copyright limitations and exceptions to an open one, the addition can be easily justified. In fact, should no regulation be introduced in the end, the added language will have no negative impact on the flexibility of the fair use regime.

3.4. Add Deference to a Side Agreement

The fourth modality is the transplant of the fair use provision with added deference to an external agreement to be negotiated by copyright owners and users. Taiwan provides the only example of such a transplant. Article 65 of the 2016 Copyright Act of Taiwan states:

Where the copyright owner organization and the exploiter organization have formed an agreement on the scope of the fair use of a work, it may be taken as reference in the determination referred to in the preceding paragraph.

In the course of forming an agreement referred to in the preceding paragraph, advice may be sought from the specialized agency in charge of copyright matters.

The addition of this reference is similar to the incorporation of a code of practice.³⁵ Similar agreements or codes of practice have been adopted or proposed in other jurisdictions. Cases in point are the proposed voluntary code of practice for online service providers advanced in Hong Kong,³⁶ and the rather unsuccessful fair use guidelines

that have been repeatedly proposed for educators in the United States.³⁷ These agreements or codes of practice are particularly difficult to negotiate. As I noted in regard to the proposed voluntary code of practice in Hong Kong, “While copyright holders [could not] promise the [online service providers] a broad safe harbor because of the rapidly changing nature of digital technology, [these providers were] reluctant to abide by a code of practice without any further promise from the content industries.”³⁸

3.5. Mix the Transplant with Fair Dealing

The fifth modality is to mix the fair use transplant with preexisting fair dealing provisions, creating a truly hybrid model. An excellent example is Singapore. Section 35 of the Copyright Act, which ironically carries the heading “fair dealing in relation to work,” tracks closely the fair use language in Section 107 of the U.S. Copyright Act. Added to the four fairness factors in the U.S. fair use provision is the last factor concerning “the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.” Although this factor has support in U.S. case law, such as *Harper & Row, Publishers, Inc. v. Nation Enterprises*³⁹ and *American Geophysical Union v. Texaco Inc.*,⁴⁰ judges, policymakers and commentators have widely criticized the factor for sparking circular reasoning.⁴¹ Section 35 of the Singaporean Copyright Act is therefore a fair dealing provision in name but a fair use provision in effect, similar to Section 13 of the Malaysian Copyright Act.

Regardless of how Section 35 is named, its two ensuing provisions—Sections 36 and 37—retain the fair dealing model and function like traditional fair dealing exceptions. While the former focuses on “the purpose of criticism or review,” the latter targets “the purpose of, or is associated with, the reporting of current events.” Similar to traditional fair dealing provisions found in other Commonwealth jurisdictions, both Sections 36 and 37 also omit explicit language on the fairness factors, even though such omissions will not prevent courts from considering those factors.

Like Singapore, Sri Lanka includes a mixture of fair dealing and fair use. Section 11(3) of the Intellectual Property Act (Act No. 36 of 2003) states that “[t]he acts of fair

use shall include the circumstances specified in Section 12.” Section 12 then outlines the different acts of fair use, similar to what is commonly found in a traditional fair dealing regime. The structure of this provision parallels Section 13 of the Code of Intellectual Property (Act No. 52 of 1979), which has since been repealed. Interestingly, Section 13 also uses the term “fair use” even though the provision functions like a traditional close-ended, purpose-based fair dealing provision.⁴² Thus, although Section 11 of the Intellectual Property Act did not introduce the term “fair use,” the addition of fairness factors mixes the old fair dealing arrangements with fair use.

3.6. Require the Priority Consideration of Fair Dealing

The sixth modality is the transplant of the U.S. fair use provision with an additional requirement that courts should give priority consideration to preexisting fair dealing exceptions. The best example is Ireland. In its report providing a wholesale examination of the copyright system, the Copyright Review Committee⁴³ called for the introduction of a meticulously drafted fair use exception as proposed 49A of the Irish Copyright and Related Rights

²⁶ Australian Law Reform Commission, *Copyright and the Digital Economy*, 98-10; Ruth Okediji, “Toward an International Fair Use Doctrine,” *Columbia Journal of Transnational Law* 39, [2000]: 159; Yu, “The Quest,” 321.

²⁷ *Ibid.*, 321-27.

²⁸ Yu, “Can the Canadian UGC,” 199.

²⁹ Australian Law Reform Commission, *Copyright and the Digital Economy*, 120; Yu, “The Quest,” 309.

³⁰ Daniel J. Gervais, “Towards a New Core International Copyright Norm: The Reverse Three-Step Test,” *Marquette Intellectual Property Law Review* 9, [2005]: 15-16.

³¹ Daniel J. Gervais, “(Re)Structuring Copyright: A Comprehensive Path to International Copyright Reform,” [Cheltenham: Edward

Elgar Publishing, 2017]: 74-84.

³² Electronic Frontier Foundation. n.d. The Three-Step Test. Available online: https://www.eff.org/files/filenode/three-step_test_fnl.pdf (accessed on 14 February 2018).

³³ Niva Elkin-Koren, “The New Frontiers of User Rights,” *American University International Law Review* 32, [2016]: 21-22.

³⁴ *Ibid.*

³⁵ Thanks to Professor Liu Kung-Chung for providing guidance and materials concerning the Taiwanese fair use provision.

³⁶ Yu, “Digital Copyright Reform,” 736-39.

³⁷ Ann Bartow, “Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely,” *University of Pittsburgh Law Review* 60, [1998]: 159-63; Kenneth D. Crews, “The

Law of Fair Use and the Illusion of Fair-Use Guidelines,” *Ohio State Law Journal* 62, [2001].

³⁸ Yu, “Digital Copyright Reform,” 738.

³⁹ 471 U.S. 539, 562 (1985).

⁴⁰ 60 F.3d 913, 930-31 [2d Cir. 1994].

⁴¹ Australian Law Reform Commission, *Copyright and the Digital Economy*, 141-43; Pierre N. Leval, “Nimmer Lecture: Fair Use Rescued,” *UCLA Law Review* 44 [1997]: 1460.

⁴² A contemporary counterpart is Section 72 of the Bangladesh Copyright Act 2000 (Act No. 28 of 2000), which uses the term “fair use” but functions like a close-ended, purpose-based fair dealing provision.

⁴³ Copyright Review Committee [Ireland], *Moderating Copyright*, 93-94.

Act. This provision calls on courts to consider eight non-exhaustive factors—four more than in the U.S. fair use provision.⁴⁴

In addition, the proposed Irish provision includes the following language: “The other acts permitted by this Part shall be regarded as examples of fair use, and, in any particular case, the court shall not consider whether a use constitutes a fair use without first considering whether that use amounts to another act permitted by this Part.”⁴⁵ Based on this unique language, the Copyright Review Committee, in effect, proposed a regime that allows fair use to cover unforeseen circumstances but requires courts to first consider whether the statute includes an exception that already covers the implicated use of a copyright work. As the Committee explained:

The Report acknowledges that fair use is a controversial topic, with powerful views expressed both for and against it. It does not recommend the introduction of . . . “the US style ‘fair use’ doctrine” which it considered under its terms of reference, but rather a specifically Irish version.

It recommends the introduction of a new [Copyright and Related Rights Act] section allowing for fair use, but tying it very closely to existing exceptions and making it clear that these exceptions should be exhausted before any claim to fair use should be considered. The exceptions should be regarded as examples of fair use so as to allow workable analogies to be developed, and sets [sic] out the criteria for the court to take into account in determining whether or not a matter amounts to fair use.⁴⁶

3.7. Create a List of Illustrative Purposes

The seventh modality is the transplant of the U.S. fair use provision with the addition of a non-exhaustive list of illustrative purposes that is drawn from preexisting copyright limitations and exceptions. The best example is the proposal advanced by the Australian Law Reform Commission in its final report, although one could arguably

include Section 12 of the Sri Lanka Intellectual Property Act discussed earlier.

The Australian Law Reform Commission’s proposal, which has since earned the support of the Australian Productivity Commission,⁴⁷ called for the introduction of a fair use exception, similar to what is available in the United States.⁴⁸ Although the proposed exception includes the fairness factors that have been codified in Section 107 of the U.S. Copyright Act, such inclusion will require an alignment of existing Australian copyright law with its U.S. counterpart. For instance, Section 40 of the Australian Copyright Act, which covers fair dealing for purpose of research or study, requires courts to consider five factors, not four. Similar to Section 35 of the Singapore Copyright Act, this provision includes an extra third factor concerning “the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.”⁴⁹

In addition, the Australian Law Reform Commission called for the creation of a non-exhaustive list of eleven illustrative purposes:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) professional advice;
- (f) quotation;
- (g) non-commercial private use;
- (h) incidental or technical use;
- (i) library or archive use;
- (j) education; and
- (k) access for people with disability.⁵⁰

As Kathy Bowrey explained, the creation of this non-exhaustive list can be quite useful as it will “document established cultural practices that might generally be indicative of fair use, where the fairness factors are also met.”⁵¹ Like Australia, the Irish Copyright Review Committee expressed preference for the existence of illustrative purposes. Instead of developing a separate non-exhaustive list, however, the Committee included language stating that “[t]he other acts permitted by this Part shall be regarded

⁴⁴ Ibid; The four additional factors are as follows: (a) the extent to which the use in question is analogically similar or related to the other acts permitted by this Part, (f) the possibility of obtaining the work, or sufficient rights therein, within a reasonable time at an ordinary commercial price, such that the use in question is not necessary in all the circumstances of the case, (g) whether the legitimate interests of the owner of the rights in the work are unreasonably prejudiced by the use in question, and (h) whether the use in question is accompanied by a sufficient acknowledgement, unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise.

⁴⁵ Ibid, 93.

⁴⁶ Ibid, 176-177.

⁴⁷ Productivity Commission (Australia), Intellectual Property Arrangements: Productivity Commission Inquiry Report, [Canberra: Productivity Commission, 2016]: 8-10, 33.

⁴⁸ Australian Law Reform Commission, Copyright and the Digital Economy, 123-125.

⁴⁹ Copyright Act 1968 s. 40[2].

⁵⁰ Australian Law Reform Commission, Copyright and the Digital Economy, 150-51.

⁵¹ Ibid, 124.

⁵² Copyright Review Committee (Ireland), Modernising Copyright, 93.

⁵³ Both the bill and its committee stage amendments have now lapsed following the conclusion of the legislative term in July 2016.

⁵⁴ Yu, “The Quest,” 296.

⁵⁵ Yu, “Can the Canadian UGC,” 184; Teresa Scassa, “Acknowledging Copyright’s Illegitimate Offspring: User-Generated Content and

Canadian Copyright Law,” in The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law ed. Michael Geist, (Ottawa: University of Ottawa Press, 2013).

⁵⁶ Roscoe Pound, “Law in Books and Law in Action,” American Law Review 44, (1910).

⁵⁷ Yu, “The Quest,” 331, 335.

⁵⁸ Tarleton Gillespie, Wired Shut: Copyright and the Shape of Digital Culture, (Cambridge: MIT Press, 2007): 167-91; Ian R. Kerr, et al., “Technical Protection Measures: Tilting at Copyright’s Windmill,” Ottawa Law Review 34, (2002); Jessica Litman, Digital Copyright, (Amherst: Prometheus Books, 2001): 125-44; Yu, “Anticircumvention and Anti-anticircumvention.”

as examples of fair use.”⁵² Thus, if one seeks to create a list of illustrative purposes similar to the Australian proposal, one can collect all the different permissible acts in the Irish Copyright and Related Rights Act.

3.8. Introduce Fair Use as a General Saving Clause or a Supplemental Catch-All Provision

The final modality is the transplant of fair use in the form of a general saving clause or a supplemental catch-all provision. The goal of this transplant is to address unforeseen circumstances not yet covered by preexisting copyright limitations and exceptions. The added fair use provision aims to enhance these limitations and exceptions, not replace them or disrupt their operation.

A case in point is the proposed fair use legislation advanced in Hong Kong during the consideration of the Copyright (Amendment) Bill 2014.⁵³ Although the Hong Kong proposal included language taken verbatim from the U.S. fair use provision, it was designed to supplement the existing fair dealing provisions.⁵⁴ At the time of the introduction of the copyright amendment bill, Hong Kong already has fair dealing provisions covering research and private study; criticism, review and news reporting; giving or receiving instruction; and public administration. The amendment bill also added new fair dealing provisions for the purposes of quotation and commenting on current events as well as for parody, satire, caricature and pastiche. Because the proposed fair use provision was introduced as a general saving clause, the provision would not have undermined the operation of all of these fair dealing provisions.

Another example is China, which does not yet have a fair use regime. In its latest draft of the Third Amendment to the Copyright Law, the proposed Article 43 calls for the addition of the phrase “other circumstances” at the end of the enumerated list of circumstances in which a copyright work may be used without authorization or remuneration. This new provision will replace Article 22 of the current statute, which includes twelve permissible circumstances, covering activities such as personal study, research or appreciation; news reporting; and classroom teaching or scientific research. The addition of the open-ended phrase “other circumstances” is highly important because it will transform the list of permissible circumstances from a closed list to an open one. Even though the proposed Article 43 is technically not a fair use provision, its open-endedness will allow it to achieve the same result of such a provision. More importantly, because China is a civil law country, the addition of this provision will pave the way for similar reforms in other civil law jurisdictions.

3.9. Summary

In sum, even if a country concludes that the transplant of the U.S. fair use provision is in its best interest, there are still many different modalities of transplantation. Because the modalities discussed in this section represent only some of the examples, there are many other ways to facilitate the development of an open system of copyright limitations and exceptions. For instance, Section 29.21 of the

Canadian Copyright Modernization Act introduced a new exception for developing user-generated content in copyright law, activities that are generally allowed under a fair use regime.⁵⁵ Similarly, a jurisdiction that refuses to introduce fair use but is open to adopting a broad fair dealing exception for quotation could easily achieve many important benefits provided by the fair use provision, especially if judges are willing to liberally construe the quotation exception.

It is worth noting that this section focuses primarily on statutory language, even though a full understanding of the statute’s operation will require follow-up studies on its utilization and interpretation by courts, law enforcement authorities, copyright holders and other parties. These follow-up studies will be important, as they will enable us to evaluate whether the transplanted language has been interpreted differently. They will also allow us to determine whether “law in books” is the same as “law in action.”⁵⁶

Unfortunately, the limited scope and length of this article do not allow for a more in-depth analysis. At this early stage, there are also some practical challenges. Most of the fair use transplants discussed in this article are rather new, and interpretations of the relevant provisions remain scarce and infrequent. Many of the jurisdictions mentioned in the article also have a low volume of copyright litigation, not to mention specific litigation involving the new fair use transplants.⁵⁷ In addition, questions remain over the appropriate treatment of case law in civil law jurisdictions such as South Korea and Taiwan. In short, a full analysis of the interpretation, evolution and impact of fair use transplants will have to await future studies.

4. LESSONS

The previous section has shown eight different ways to transplant the fair use provision from the United States. While cataloging these modalities can provide useful information to policymakers and commentators seeking to introduce fair use into the copyright system, one can also draw important lessons by closely analyzing the “fair use” provisions that have been adopted or proposed in the jurisdictions mentioned. This section discusses five specific lessons that will be important for future copyright reform.

First, regardless of whether a legal transplant is widely supported by the local populace or forced upon them from abroad, the transplanted law needs to be customized to local conditions if it is to be effective and if it is to receive wide public support. Commentators have repeatedly criticized the problems and unintended consequences posed by the un-customized transplant of the DMCA anti-circumvention provision.⁵⁸ Given these criticisms, one may wonder whether a more desirable transplant like fair use requires less customization. The answer is negative, however. As shown in the transplant experiences explored in the previous section, few jurisdictions have transplanted the U.S. fair use provision verbatim or substantially verbatim. Indeed, out of all the jurisdictions that have switched from a closed system of copyright limitations and exceptions to an open one, a large number of them have made a conscious choice to retain a considerable part of the status

quo, including preexisting fair dealing provisions. Thus, policymakers and commentators advocating copyright reform should avoid focusing too much on efforts to transplant fair use. Rather, they should put more time, effort, energy and resources into exploring ways to design or customize fair use.

Second, as Elkin-Koren and Fischman-Afori⁵⁹ and other commentators have rightly noted, fair dealing and fair use lie on two ends of a continuum, with both requiring the case-by-case balancing of multiple fairness factors. Because deciding what type of regime one should adopt is not a simple binary choice,⁶⁰ policymakers and commentators should retire the debate on whether a jurisdiction has fair dealing or fair use. Instead, they are much better off examining whether the system of copyright limitations and exceptions is open or closed.

Third, although there are still high hopes for fair use to be adopted in different parts of the world, the analysis in the previous section has shown that the future of global fair use will unlikely be based on the U.S. fair use model. Rather, that future will be based on a hybrid model that includes not only some transplanted elements from the U.S. fair use provision, but also part of the status quo, such as preexisting fair dealing provisions. Recognizing the growing interest in adopting a hybrid model is important because many contemporary criticisms of fair use, be they legal or empirical, have focused primarily on a potential paradigm shift from fair dealing to fair use.⁶¹ What many reform-minded jurisdictions will end up with, however, is not a shift but an evolution. How much change this paradigm evolution will precipitate will largely depend on how much of the status quo a particular jurisdiction retains. Thus, policymakers and commentators should not have the copyright debate fixated on the paradigm shift from fair dealing to fair use. Such a shift is likely to have only limited relevance to the adopted or proposed legislation unless there is a wholesale transplant of the U.S. fair use provision.

Fourth, as shown in the previous discussion on China, South Korea and Taiwan, fair use is compatible with the

civil law tradition. Japan, which has a continuous fair use debate, is also a civil law jurisdiction.⁶² To be sure, continental Europe has remained persistently resistant to adopting an open system of copyright limitations and exceptions. Nevertheless, a growing number of European commentators have advanced proposals on how the existing EU copyright system can be adjusted to accommodate an open list of limitations and exceptions.⁶³ A case in point is the Model European Copyright Code developed by the Wittem Group, a collective of distinguished European copyright scholars. Entitling “further limitations,” Article 5.5 of this model code states:

Any other use that is comparable to the uses enumerated... is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or right-holder, taking account of the legitimate interests of third parties.

In light of the developments in all of these jurisdictions, policymakers and commentators in civil law jurisdictions should avoid having knee-jerk resistance to proposals for fair use legislation.

Finally, copyright law developments have remained path dependent by nature.⁶⁴ Policymakers and commentators should therefore be careful about the choices they make in the legal transplantation process, as these choices may not be easily undone. Critics have repeatedly noted that the fair use model has been adopted in only a limited number of jurisdictions. Yet, they fail to acknowledge the continued and far-reaching impact of colonization on legal rules. They also overlook the fact that, although countries have been moving from fair dealing to fair use, or from fair dealing to a hybrid regime, no country has ever moved from fair use to fair dealing.⁶⁵ Many of the jurisdictions discussed thus far in this article are former colonies. For example, Australia, Malaysia, Hong Kong, Israel (as Mandate Palestine), Singapore and Sri Lanka were all parts of the

⁵⁹ Niva Elkin-Koren and Orit Fischman-Afori, “Rulifying Fair Use,” *Arizona Law Review* 59, (2017): 163.

⁶⁰ *Ibid*; Niva Elkin-Koren and Orit Fischman-Afori, Taking Users’ Rights to the Next Level: A Pragmatist Approach to Fair Use. *Cardozo Arts and Entertainment Law Journal* 33 (2015): 5-6.

⁶¹ Bills Committee on Copyright (Amendment) Bill 2014 (Hong Kong), “Paper for the House Committee Meeting on 13 November 2015: Report of the Bills Committee on Copyright (Amendment) Bill 2014,” LC Paper No. CB(4)199/15-16, (Hong Kong: Bills Committee on Copyright (Amendment) Bill 2014, 2015): 14; PricewaterhouseCoopers, Understanding the Costs and Benefits of Introducing a “Fair Use” Exception, [Canberra: PricewaterhouseCoopers, 2016]: 14-15.

⁶² Yoshiyuki Tamura, “Rethinking the Copyright Institution for the Digital Age,” *WIPO Journal* 1, (2009): 70; Tatsuhiro Ueno, “Rethinking the Provisions on Limitations of Rights in the

Japanese Copyright Act—Toward a Japanese-Style “Fair Use” Clause, *AIPPI Journal* 34, (2009).

⁶³ Bernt Hugenholtz and Martin R. F. Senftleben, “Fair Use in Europe. In Search of Flexibilities,” *Institute for Information Law, University of Amsterdam, Research Paper No. 2012-33*, [Amsterdam: University of Amsterdam, 2012.]: 2; Marie-Christine Janssens, “The Issue of Exceptions: Reshaping the Keys to the Gates in the Territory of Literary, Musical and Artistic Creation,” in *Research Handbook on the Future of EU Copyright*, ed. Estelle Derclaye. [Cheltenham: Edward Elgar Publishing, 2009]: 337-38; Martin Senftleben, “Fair Use in the Netherlands—A Renaissance?” *Tijdschrift Voor Auteurs, Media en Informatierecht* 33, (2009): 7; Martin Senftleben, “The International Three-Step Test: A Model Provision for EC Fair Use Legislation,” *Journal of Intellectual Property, Information Technology and Electronic Commerce* 1, (2010): 76; Martin Senftleben,

“The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions,” *American University International Law Review* 33, (2017).

⁶⁴ Bannerman, *International Copyright*, 2; Yu, “The Quest,” 340-41.

⁶⁵ *Ibid*.

⁶⁶ Ruth L. Okediji, “The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System,” *Singapore Journal of International and Comparative Law* 7, (2003): 324-25.

⁶⁷ Robert Burrell, “Reining in Copyright Law: Is Fair Use the Answer?” *Intellectual Property Quarterly* 4, (2001): 362.

⁶⁸ Watson, *Legal Transplants*, 99.

⁶⁹ Jeremy Bentham, “Of the Influence of Time and Place in Matters of Legislation.” [1843]: Chp. 4, Available online: <https://www.laits.utexas.edu/poltheory/bentham/timeplace/index.html> [accessed on 14 February 2018].

British Empire. Because of their colonial status, they had no choice but to adopt the British fair dealing model.⁶⁶ Even after these jurisdictions became independent, many of them retained strong ties to the British system as part of the Commonwealth.⁶⁷ These former colonies therefore did not explore the introduction of fair use until the past decade, when the development of digital communication technologies began to accelerate.

5. CONCLUSIONS

By focusing on the efforts to introduce fair use into the copyright system based on the U.S. model, this article documents the different ways countries have customized foreign legal transplants. Analyzing these transplant experiences provides important lessons to those working on digital copyright reform. Although much of the discussion in this article is about developments in jurisdictions into which the laws are being transplanted (the recipient jurisdictions), such discussion should be equally insightful to those in the United States (the source or donor jurisdiction).

As Watson rightly reminded us in his seminal book, “the time of reception is often a time when the provision is looked at closely, hence a time when law can be reformed or made more sophisticated. It thus gives the recipient society a fine opportunity to become a donor in its turn.”⁶⁸ It is for the same reason Bentham noted more than a century ago, “That a system might be devised, which, while it would be better for Bengal, would also be better even for England.”⁶⁹

The efforts to transplant fair use across the world will provide important insight to policymakers and commentators in jurisdictions seeking to introduce fair use into the copyright system. They will also be useful to those in jurisdictions that have already embraced fair use, such as the United States, as well as those that have previously rejected it. The lessons discussed in this article will be useful to not only recipient jurisdictions, but also donor jurisdictions and other members of the international community.

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