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Comments of the Organization for Transformative Works

We are a group of Copyright Law scholars who submit this comment on behalf of the Organization for Transformative Works (“OTW”), a global nonprofit established to protect and defend fans and fanworks from commercial exploitation and legal challenge. Individually, we are professors of Copyright Law and related subjects at Harvard Law School, University of Tulsa College of Law (Oklahoma), and University of Colorado, Boulder. Collectively, we have decades of experience teaching copyright, writing scholarly works about copyright law published in major law journals, litigating copyright cases, and consulting with governments on copyright matters. We volunteer on behalf of the OTW, which was founded in 2007 and has members around the world, including Hong Kong. Since the OTW’s founding, we have participated in similar copyright law consultation processes in the United States, South Africa, Australia, New Zealand, and elsewhere.

The OTW’s members make and share works commenting on and transforming existing works, adding new meaning and insights—from retelling a film or television show from the perspective of the “villain,” to incorporating new and original characters into existing stories, to finding community and personal expression by recasting an existing story in a different setting or combining two existing fictional worlds. In other settings, their work is often described as “remix.”

The OTW’s members are not only creators, but also consumers, and the global reach of fan creativity encourages people from around the world to discover and contribute to a global market for Hong Kong cinema and television that they might not encounter otherwise.

We appreciate the Hong Kong Government’s invitation to comment on proposed revisions to the Copyright Ordinance, and particularly appreciate the Public Consultation Paper’s recognition of the importance of common activities that make use of copyright works, such as mash-ups, altered pictures/videos, doujinshi, image/video capture, streaming of video game playing, homemade videos, posting of earnest performance of copyright works, and rewriting lyrics for songs. These sorts of uses—which we describe as “transformative uses” both because they transform the copyright works on which they are based, and because they lead to positive transformation of the

fan-creators who engage in them—are the sorts of uses at the center of the OTW’s expertise, and uses that our members value. We write to contribute our expertise concerning how to strike a balance that permits and encourages these sorts of uses while maintaining the value of copyright to media companies.

I. Transformative Works Are Important To Hongkongers

Empirical research reveals that remix culture is a global phenomenon, with similar characteristics around the world.¹ Remix cultures provide important benefits to participants and to society at large. Historically, painters have learned to paint by studying, and copying, the work of existing painters. By beginning with a clear model, painters develop their techniques and learn to create their own styles, both building on and diverging from what’s gone before. Composers historically follow a similar arc; singers also regularly learn their craft from singing existing songs and learning from existing performers’ styles. So too with writers, who often begin with pastiche as they master the relevant skills. And so too with more recent arts, including audio editing and video editing. Noncommercial remix is the foundation of much future creativity; suppressing it means suppressing a key step in many artists’ paths.

Separately, as studies from multiple disciplines have found, remix plays a unique and positive role in society. Transformative uses provide people with an entry point into larger communities of creative endeavors. The passion that brings fans together also impels them to support each other’s creations. A fannish creative community can provide a safe space for otherwise isolated creators to discover their own voices and talents. The noncommercial, make-it-yourself nature of fannish communities makes them easy to enter, even for people who lack economic resources. Because transformative fandoms thrive on variation and new works, they encourage even very beginning artists to experiment and find unique voices. This kind of support, predicated on shared interests, isn’t readily available outside noncommercial remix communities.

In response to the Hong Kong Government’s invitation for comments proposed revisions to the copyright ordinance, we solicited comments from Hongkongers who are part of our organization about “why making and enjoying fanworks matters to you,” and received a number of

¹ See Aram Sinnreich & Mark Latonero, *Tracking Configurable Culture from the Margins to the Mainstream*, 19 J. COMPUTER-MEDIATED COMMUNIC. 798, 798 (2014) (“Our analysis, based on results from thousands of adults around the globe, shows that not only have remixes, mashups and other forms of ‘configurable culture’ become mainstream phenomena, but also that the attitudes surrounding their cultural legitimacy are shifting. While copyright industries still promote a binary theft/permission framework, many people acknowledge the validity of some appropriation, and are actively negotiating the law’s limitations.”); Michael B. McNally et al., *User-Generated Online Content 2: Policy Implications*” (2012) 17:6 FIRST MONDAY, <https://firstmonday.org/ojs/index.php/fm/article/view/3912/3266>.

enthusiastic responses about how important fanworks are in their lives, and how they hope that the law continues to support these works and the communities that grow around them.

In describing the benefits of fanworks, nearly every comment we received mentioned the importance of the online communities that form around them, in terms of friendship, and often, critical social support. For example, one fan wrote about how when they were suffering from depression, “creating fanworks had allowed me to discover my passion for writing and connect with a like-minded, online community” and said they “don’t think I would be here today had I not discovered the fanfic community.” Another fan wrote about how these communities allow “introverted individuals to interact with people with the same interests” and that “some of my best friends are the ones I’ve met through writing fan fiction.” Fans also saw contributing to be a way of helping others, that they want to “leave stories for others out there who also have felt the same way I did that it might not always be like this, and that they’re not wrong for simply being the way they are.” Scholarly research has also shown that communities surrounding fanworks are important spaces for online social support.²

This community connection also comes in the form of cultural exchange. One fan wrote that as a result of their engagement with fanworks, they were “making new friends across the globe.” Another fan wrote of how their work translating fanfiction provides a bridge across continents, and that “creating transformative works allows me to have cultural exchanges with fans of the original work across the world.” Similarly, another fan reported that fanfiction was a way for them to “shar[e] my love for Hong Kong.” This same fan worries that “Without flexible copyright laws, these invaluable experiences will no longer be available to people from Hong Kong who wish to learn more about the wider world through an accessible space, or share what makes Hong Kong special with others who otherwise do not have a reason to care.”

² See Dym, Brianna, Jed R. Brubaker, Casey Fiesler, and Bryan Semaan. “*Coming Out Okay: Community Narratives for LGBTQ Identity Recovery Work*,” PROCEEDINGS OF THE ACM ON HUMAN-COMPUTER INTERACTION 3, NO. CSCW 1-28 (2019); McInroy, Lauren B. *Building connections and slaying basilisks: Fostering support, resilience, and positive adjustment for sexual and gender minority youth in online fandom communities*, 23: 13 INFORMATION, COMMUNICATION & SOCIETY 1874-1891 (2020); Rebecca Tushnet, Org. for Transformative Works, Rebecca Tushnet, Org. for Transformative Works, Comments of the Organization for Transformative Works to the USPTO/NTIA, http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf (2013); Betsy Rosenblatt & Rebecca Tushnet, Transformative Works: Young Women’s Voices on Fandom and Fair Use, in EGIRLS, ECITIZENS: PUTTING TECHNOLOGY THEORY, POLICY AND EDUCATION INTO DIALOGUE WITH GIRLS’ AND YOUNG WOMEN’S VOICES (University of Ottawa Press, Jane Bailey & Valerie Steeves eds., 2015).

Beyond aspects of support and friendship, the skill of creating fanworks is known to have positive benefits to learning.³ Many commenters wrote about how important fanworks were to their own professional and personal growth, and about learning opportunities associated with their fan activity. Fanfiction especially is a critical resource for improving writing skills. One fan wrote that “My writing has improved drastically ever since writing fanfiction because I get to be inspired by so many other great authors and realize my own writing mistakes,” and another that “Writing fanfiction provides writers like me with valuable opportunities to sharpen writing skills and receive helpful feedback from readers and fellow writers.” One fan, after they began writing fanfiction, even “won local and international writing awards, and [is] hoping to publish my first novel soon.”

Multiple comments also mentioned how writing fanfiction directly contributed to success in college. One fan wrote that fanfiction was “positively affecting my school work in every aspect,” and another that they “even ended up including fanfic as part of my university applications.” As a fan in college shared: “This hobby of mine has directly paved the way for my entrance into university: at 17, I submitted a writing portfolio that included one of my fanfiction pieces with its serial numbers filed off, and it has gotten me into my ideal writing programme. In a way, writing fanfiction has more or less opened doors that had previously seemed inaccessible to me.”

Finally, fans see themselves as both benefiting from and contributing to the underlying source material that brings them together. Commenters also expressed ways in which fanworks and the community surrounding them are unlikely to create any harm to copyright owners, and in many cases, how it can directly contribute to market value for the underlying media. One fan wrote about how fanworks “led me to supporting the official sources by buying their content” and another more broadly pointed out that “fandoms are essential to the modern-day entertainment industry.” As one comment summarized, “Creating fanworks in no way replaces the original content. It's a way for fans to explore new dynamics and to re-define canon content in different ways that are also personal and meaningful to them.”⁴

³ See Aragon, Cecilia, and Katie Davis. *Writers in the secret garden: Fanfiction, youth, and new forms of mentoring*. MIT Press, 2019; Fiesler, Casey, Shannon Morrison, R. Benjamin Shapiro, and Amy S. Bruckman. *Growing their own: Legitimate peripheral participation for computational learning in an online fandom community*, In *PROCEEDINGS OF THE 2017 ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK AND SOCIAL COMPUTING*, 1375-1386 (2017).

⁴ Studies demonstrate the relevance of user-generated content platforms and fan economies in China. See, e.g., Xinming Jia, Kineta Hung, and Ke Zhang, *Celebrity Fans in China: Motives, Characteristics, and Marketing Impacts*, in *HANDBOOK OF RESEARCH ON THE IMPACT OF FANDOM IN SOCIETY AND CONSUMERISM* (IGI Global, 2020); Yilu Liang and Wanqi Shen, *Fan Economy in the Chinese Media and Entertainment Industry: How Feedback from Super Fans Can Propel Creative Industries' Revenue*, 1(4) *Global Media and China* 331-349 (2017).

It is clear that the fans who sent us comments feel very strongly about this issue (as one commenter put it, “car[ing] deeply about the creative expression that flourishes in this city”), and hope to see the Hong Kong Government adopt a copyright exception that reflects this passion.

II. Hong Kong Copyright Law Should Facilitate A Wide Range of Transformative Works

Our support for a non-exhaustive fair use and/or flexible fair dealing standard is based on decades of research into communities that make transformative, noncommercial works and rely on fair use and fair dealing. In addition to the voices of Hongkongers above, further details and citations, including the voices of individual remixers themselves from around the world, can be found in the comment the OTW submitted to the U.S. Patent and Trademark Office/NTIA inquiry on similar issues.⁵ This research reveals that copyright reform should recognise and protect the conditions for noncommercial remix, and that fair use or flexible fair dealing provisions are vital to noncommercial remix cultures. Well-functioning, healthy communities should not be disrupted, whether deliberately or incidentally, for the prospect of some hypothetical future gain. Therefore, any reform should adhere to the basic principle that fair use or fair dealing does not require permission, and that a copyright owner cannot create a right to control a transformative use merely by being willing to accept payment for it.

In particular, we write in response to the Public Consultation Paper’s invitation to present views concerning whether Hong Kong should continue to maintain an exhaustive approach to copyright exceptions by continuing to set out all copyright exceptions based on specific purposes or circumstances. While we agree with the Public Consultation Paper that the proposed Fair Dealing exceptions would “go a long way to addressing the major concerns of many users who make use of existing copyright works,” the proposed new fair dealing exception would leave

Similar studies highlight the relevance of user-generated content platforms and fair use to the U.S. economy. *See, e.g.*, Computer and Communications Industry Association (CCIA), Fair Use in the U.S. Economy (Washington, D.C.: CCIA, 2017), <https://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>; Re:Create Coalition, Unlocking the Gates: America’s New Creative Economy (Re:Create Coalition, 2018), <http://www.recreatecoalition.org/wp-content/uploads/2018/02/ReCreate-Creative-Economy-Study-Report.pdf>.

⁵ Rebecca Tushnet, Org. for Transformative Works, Comments of the Organization for Transformative Works to the USPTO/NTIA, http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf (2013).

important gaps for fans. Accordingly, we recommend that Hong Kong adopt a non-exhaustive approach to copyright exceptions or, at a minimum, adopt flexible fair dealing standards that take into account a wider array of common transformative remix activities.

A. The Benefits of a Non-Exhaustive Framework

As the Public Consultation Paper notes, a number of nations have adopted a non-exhaustive framework for copyright exceptions, including the U.S., Israel, the Philippines, Singapore, and South Korea. Hong Kong's Copyright Ordinance currently combines the language of fair use with an exhaustive framework, so shifting to a non-exhaustive framework would not represent a radical change to Hong Kong's system of copyright limitations and exceptions.⁶ The adoption of a non-exhaustive framework would follow global trends among common law and civil law jurisdictions.⁷

In the OTW's experience, the non-exhaustive approach provides the best framework for the important work of noncommercial remix communities and the works they produce. While the practice of building on existing works is ages-old, technological and cultural development now requires increased flexibility in the legal framework surrounding it. As technology provides tools to increasingly innovative user-creators, reactive laws cannot keep up, and a flexible legal framework will support creators of all kinds.⁸

The Public Consultation Paper itself demonstrates the challenges of adjusting fair dealing exceptions to the needs of creators and institutions: many of the practices it identifies as "common" are practices that have only emerged as common in recent decades, and they can neither take into account nor predict what common practices are likely to emerge as technology and culture continue to advance. Notably absent from the discussion, for example, are fan practices of recreating or re-imagining fictional costumes (known as "cosplay"); or of using multiplayer video game environments as animation engines to create new works within games

⁶ See Peter K. Yu, *The Quest for a User-Friendly Copyright Regime in Hong Kong*, 32 AM. U. INT'L L. REV. 283, 326-29 (2016) (describing Hong Kong system as a "hybrid" model and explaining why a non-exhaustive framework would not constitute a fundamental change to the Hong Kong copyright regime).

⁷ See generally Peter K. Yu, *Fair Use and its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111 (describing global paradigm shift toward fair use principles and the adoption of a hybrid non-exhaustive model).

⁸ See Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 757 (2010) ("The expansion of the fair-dealing privilege or the introduction of a broad fair-use standard would certainly allow Hong Kong to become more competitive in the information technology area, in attracting Internet-related foreign investments, and in developing its creative environment").

(known as “machinima”). Both cosplay and machinima involve the unlicensed use of copyrighted materials for transformative purposes, and provide the values discussed above. But they may not fit easily into the categories of as “parody, satire, caricature, or pastiche.” These are but two of countless examples of how it may be difficult for an exhaustive approach to copyright exceptions to keep up with technological and cultural developments.

Moreover, installing a flexible standard is preferable to continually revisiting a rigid one. In this respect, the U.S. experience is instructive. When enacting prohibitions on the circumvention of technological protection measures on copyrighted material, the U.S. Congress prohibited *all* circumvention, but authorised the U.S. Copyright Office to establish three-year exemptions to its anti-circumvention rules. The result is a burdensome, reactive, and resource-intensive process that consumes from nine to fifteen months of time every three years for proponents and opponents of exemptions, and for the staff of the Copyright Office. The process is frustrating for all involved, with constant revisions to processes and multiple rounds of comments and hearings—all in a futile attempt to keep up with changing technology and creative practices. In contrast, OTW research shows that a flexible non-exhaustive standard is well-suited to promoting transformative works and the fan cultures that support them.⁹

In addition, it is now possible to create and gain important insights from large corpuses of materials, including images, text, and other media. In the United States, a flexible standard allowed courts to recognize the obvious transformative benefits of such datasets in allowing new insights and new purposes distinct from the purpose of any component work, combined with the lack of harm to traditional copyright interests in using individual works as inputs to a dataset. The result was that court decisions quickly confirmed that copying to create a corpus for analysis did not violate copyright owners’ rights. The U.S. quickly became a leader in this new field. Subsequently, a number of countries amended their copyright laws to add a new exception for “big data” research. But they were already years behind, and this reactive approach means that the same pattern is likely to repeat for the next innovation.¹⁰

B. Expanding Fair Dealing Exceptions

In the event that the Government does not favor a non-exhaustive approach, or in the event that the Government favors a hybrid approach that combines an exhaustive fair dealing approach

⁹ Rebecca Tushnet, Org. for Transformative Works, Comments of the Organization for Transformative Works to the USPTO/NTIA, http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf (2013).

¹⁰ See Justin Hughes, *Rules, Standards, and Copyright Fair Use* (May 4, 2020). Loyola Law School, Los Angeles Legal Studies Research Paper No. 2020-08, <https://ssrn.com/abstract=3592312>.

with a flexible implementation,¹¹ we urge the expansion of fair dealing to allow flexibility in the face of technological and cultural change.

Although broad definitions of “parody, satire, caricature and pastiche,” and “commenting on current events” would encompass many fan creative practices, we encourage the Government to adopt a flexible version of this list that would take into account many common and legitimate fan activities. As an example, fans frequently create “cross-over” and “alternative universe” works that explore the possibilities of placing existing characters in different real-life settings or pre-existing fictional worlds. Another example is fan “vidding,” which uses short clips of existing media, often combined with music, to add new meaning to the underlying works, such as highlighting and exploring a particular aspect of the work, examining a relationship that may be suggested or implied within the work, or juxtaposing clips of multiple works to highlight or make a new story or highlight similarities and differences between works. In addition, common fan practices such as cosplay and machinima may not easily qualify as “parody, satire, caricature, or pastiche,” but are no less valuable for free expression, and are no less vulnerable to legal challenge. These common practices—and many others—are unquestionably transformative and valuable in the ways discussed above, do not compete with or substitute for the underlying works, and yet could fall through the cracks of the exception as currently posed.

Accordingly, we propose modifying the proposed fair dealing category of “parody, satire, caricature and pastiche” to include “parody, satire, caricature, pastiche, and other critical or transformative uses that add something new, with a further purpose or different character, altering the underlying copyright work with new expression, meaning or message.”¹² Alternatively, the provision could employ more specific language by providing a fair dealing category of “parody, satire, caricature, pastiche, and other critical uses that transform the meaning, message, or purpose of the underlying work.”

This would be subject to the Copyright Ordinance’s existing framework for permitted acts in section 37(3) of the Copyright Ordinance, which provides for exceptions that do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightsholder. This flexible approach may be found in Germany’s proposed implementation of Article 17 of the EU Digital Single Market Directive, which would consider certain categories of uses “presumably authorized by law”;¹³ as well as China’s adoption of exceptions that include not only an enumeration of particular exceptions to

¹¹ See Peter K. Yu, *The Quest for a User-Friendly Copyright Regime in Hong Kong*, 32 AM. U. INT’L L. REV. 283, 335 *et seq.* (2016) (describing benefits of hybrid non-exhaustive model for Hong Kong).

¹² *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1995).

¹³ See <https://dserver.bundestag.de/btd/19/298/1929894.pdf>, Teil 4 (“Presumed Permitted Uses”).

infringement, but also “other circumstances as provided by laws and administrative regulations.”¹⁴

In addition, Hong Kong should consider adopting an explicit exception for predominantly non-commercial user-generated content that does not compete with exploitation of the market for the underlying work, such as that adopted by Canada in 2012. See Copyright Act Canada 29.21. This exception augments Canada’s fair dealing regime by providing ex-ante predictability that UGC falling within the provision’s ambit is not an infringement of copyright law. Hong Kong’s fan creators and remixers would benefit from such an explicit exception as well as a flexible fair dealing or fair use regime.

On behalf fans in Hong Kong who are part of the Organization for Transformative Works, we urge the Hong Kong Government to help protect fans’ critical works of creativity. As one Hongkonger wrote to us, “I hope other young fans in Hong Kong can have the same freedom to create fanworks and cultivate their own fan communities for many years to come.”

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¹⁴ See § 4, Art. 24 (11); See Peter K. Yu, *The Quest for a User-Friendly Copyright Regime in Hong Kong*, 32 AM. U. INT’L L. REV. 283, 329 (2016) (describing Chinese “other circumstances” category).