REEVALUATING FAIR USE IN CHINA—A COMPARATIVE COPYRIGHT ANALYSIS OF CHINESE FAIR USE LEGISLATION, THE U.S. FAIR USE DOCTRINE, AND THE EUROPEAN FAIR DEALING MODEL

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I. INTRODUCTION

In the recent copyright reform debates in China,[1] commentators have been suggesting a review of fair use, a legal doctrine that allows use of a substantial part of a copyrighted work without permission from rights holders for purposes such as commentary, criticism, news reporting, research or teaching, et cetera.[2] The current Chinese fair use provision has been criticized for being restrictive and non-flexible, applying only to works that are included in an enumerated list of purposes.[3]

The origin of fair-use doctrine lies in the judge-made law of "fair abridgement" that was developed in a number of eighteenth-century cases in which the English courts took a liberal view of how a person other than the au-

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1 The term "China" in this paper refers to the jurisdiction of mainland China ("P.R.C.") only, and does not cover Hong Kong, Macau, or Taiwan.

2 Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1990) art. 22, *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383888.htm.

3 Wang Qian, *Parody, One Type of Fair Use Under Chinese Copyright Law*, Technology and Law Journal, No.1 2006.; s*ee also* LIU Weiyi, *合理使用抑或著作权侵权* [*Copyright Infringement or Fair Use*], www.gy.yn.gov.cn/Article/sflt/xsyd/200903/13833.html (last visited Nov. 10, 2010.

thor could "abridge" a work without permission from the author.[4] To date, the fair-use doctrine, known as fair dealing in U.K. Commonwealth and Continental European countries,[5] has been codified under the Berne Convention,[6] Rome Convention,[7] TRIPS agreement,[8] WCT,[9] and WPPT treaties[10] and is widely accepted in many countries, although with variations.

Generally speaking, there are three models of fair use/fair dealing: 1) the U.S. fair-use model that allows an open-ended list of permissible uses based on consideration of statutory factors;[11] 2) the fair dealing model in most U.K. Commonwealth and Continental European countries that features an enumerated list of defined copyright limitations and exceptions;[12] and 3) a combination of

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4 Gyles v. Wilcox, (1740) 26 Eng. Rep. 489 (Ch.); Millar v. Taylor, (1769) 98 Eng. Rep. 201 (K.B.) 207; Tonson v. Walker, (1752) 36 Eng. Rep. 1017 (Ch.) 1020–21.

5 Fair dealing is commonly found in the Commonwealth countries (e.g. Canada, Australia and the United Kingdom) and continental European countries (e.g. Germany, France, etc.). The UK fair dealing model, therefore, is not representative of the common-law jurisdictions, but rather an example of fair-dealing model in both the Commonwealth and Continental European countries.

6 Berne Convention for the Protection of Literary and Artistic Works art. 9(2), 10, Sept. 9, 1886 *as revised at* Paris July 24, 1971 *as amended on* Sept. 28, 1979, 25 U.S.T. 1341, 828 U.N.T.S. 221.

7 Rome Convention art. 15, Oct. 26, 1961, 496 U.N.T.S. 4 ("Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards: *(a)* private use; *(b)* use of short excerpts in connection with the reporting of current events; *(c)* ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; *(d)* use solely for the purposes of teaching or scientific research.").

8 Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, 33 I.L.M. 81, 1869 U.N.T.S. 299 (enunciating the Berne "Three-Step Test" for limitations: "Members shall confine limitations and 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 rights holder.").

9 World Intellectual Property Organization Copyright Treaty (WCT), Art. 10, Dec. 20, 1996, 36 I.L.M. 65 ("(1) 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*.") (emphasis added).

10 WIPO Performances and Phonograms Treaty (WPPT) art. 16, Dec 20, 1996, 36 I.L.M. 76 ("Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.").

11 17 U.S.C. § 107 (2006).

12 Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 2(1)(i) (Eng.).

the U.S. and U.K. models found in the Taiwanese Copyright Act[13] and the recently revised South Korean Copyright Act,[14] which offer both an enumerated list of permissible uses (as with the United Kingdom) and a number of factors to be considered in determining whether the particular use is fair (as with the United States).

This article reviews the fair-use doctrine around the world and makes recommendations for Chinese legislative reform. Part II begins with a review of fair-use doctrine in the United States and how courts apply the four-factor analysis.[15] Part III then turns to the fair-dealing doctrine in U.K. Commonwealth (e.g. the United Kingdom and Canada) and Continental European countries (e.g. Germany and France) and analyzes their fair-dealing-related copyright infringement cases. Part IV discusses exceptions and limitations of copyright under the Chinese legal regime, and then examines several fair use cases decided by the Chinese courts. Part V addresses problems with the current PRC copyright law's fair-use provision, and then makes a number of recommendations to be considered in future legislative reform.

II. FAIR USE UNDER UNITED STATES LAW

A. U. S. Legislation

Under U.S. Copyright law, fair use is a limitation on the exclusive rights granted to the copyright owner.[16] In a case of copyright infringement, the de-

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13 *See* Taiwanese Copyright Act, arts. 44–63, 65 (2010), *available at* http://www.tipo.gov.tw/en/AllInOne_Show.aspx?path=2557&guid=26944d88-de19-4d63-b89f-864d2bdb2dac&lang=en-us (containing a list of enumerated uses such as "state agencies, education, academic research, cultural preservation and promotion, news reporting, nonprofit purpose, computer program adaptation, etc." and a four-factor analysis test similar to that of the United States.)

14 *See* [Copyright Act], Act. No. 8101, Dec. 28, 2006, arts. 23–35, 101-3–101-5 (S. Kor.). In the recently revised Draft of the Korean Copyright Act, in addition to its original enumerated list of copyright exceptions and limitations from Articles 23 through 35 and Articles 101-3 through 101-5, the newly inserted Article 35-2 "Fair Uses of Works" also included a four-factor analysis test mirroring the U.S. four-factor analysis test.

15 17 U.S.C. § 107.

16 *Id.* The U.S. Copyright Law also contains specific exceptions for educational institutions and libraries, archives and museums, as well as for copying works deposited in archives and reproducing copyrighted works for persons with disabilities. 17 U.S.C. §§ 108, 110, 112, 117, 119, 121.

fendant must prove fair use as an affirmative defense.[17] The doctrine originated from judicial interpretation of the Statute of Anne of 1710, one of Great Britain's first copyright laws,[18] in cases including *Gyles v. Wilcox*.[19] Justice Story drew on these English cases when he introduced the fair use concept under U.S. copyright law in his 1841 opinion in *Folsom v. Marsh*.[20] Fair use was later codified into the Copyright Act of 1976, 17 U.S.C. § 107.[21]

Section 107 includes three parts: 1) a preamble that identifies the fair use of a copyrighted work as an exception to the copyright owner's exclusive rights and provides a non-exhaustive list of potentially permissible uses such as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" for illustrative purpose,[22] 2) a list of four factors that courts must consider in determining whether or not a particular use is fair;[23] and 3) an additional statement added in 1992 regarding unpublished books.[24] Section 107 does not provide a rule to be automatically applied in deciding whether a particular use is fair or not. Instead, all four factors must be considered in each specific fair-use case.[25]

B. Four-Factor Balancing Test:

1. The Purpose and Character of the Use

The first factor listed in section 107 is "the purpose and character of the use, including whether such a use is of a commercial nature or is for nonprofit

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17 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985); Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 197 (3d Cir. 2003).

18 Craig W. Dallon, *The Problem With Congress and Copyright Law: Forgetting The Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 398 (2004).

19 Gyles v. Wilcox, (1740) 26 Eng. Rep. 489, 490–92 (Ch.).

20 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901). For an overview of the case, *see* R. Anthony Reese, *The Story of* Folsom v. Marsh*: Distinguishing Between Infringing and Legitimate Uses*, *in* INTELLECTUAL PROPERTY STORIES 259 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

21 Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

22 17 U.S.C. § 107 (2006).

23 *Id.*

24 Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (codified at the end of 17 U.S.C. § 107) ("The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.").

25 17 U.S.C. § 107.

education purposes."[26] In general, commercial use as opposed to nonprofit education purposes tends to weigh against a finding of fair use.[27] However in most cases, the two corners of "venal commercial"[28] and "altruistic instructive"[29] are not always so easy to distinguish—"publishers of education textbooks are as profit-driven as publishers of scandal-mongering tabloid newspapers; and a serious scholar should not be despised and denied the law's protection because he hopes to make a living through his scholarship."[30]

a. *Commercial Use*

In some early cases interpreting the Copyright Act of 1976, courts considered commercial use of the copyrighted works as presumptively unfair and ruled this factor against a finding of fair use. In *Sony Corp. of America v. Universal City Studios, Inc.*,[31] which involved the use of the Betamax videotape recorder for private "time shifting" of television programs, the Supreme Court found "time shifting" to be a non-commercial use, and stated in obiter dictum that "every commercial use of copyrighted material is presumptively . . . unfair."[32]

This bright-line rule of interpreting fair use was later rejected in *Campbell v. Acuff-Rose Music*.[33] In *Campbell*, the defendant, the rap group 2 Live Crew, was sued for copyright infringement because it made a parody of Roy Orbinson's song "Pretty Woman."[34] Relying on the *Sony* presumption, the Sixth Circuit reversed the district court's opinion and found that fair use did not exonerate 2 Live Crew.[35] However, the Supreme Court reversed this decision, holding that the commercial nature of a work should not be dispositive.[36] Rather, the Court held that "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial

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26 *Id.* § 107(1).

27 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 540 (1985).

28 Salinger v. Random House, Inc., 650 F. Supp. 413, 425 (S.D.N.Y.1986), *rev'd on other grounds*, 811 F.2d 90 (2d Cir. 1987).

29 *Id.*

30 *Id.*

31 464 U.S. 417 (1984).

32 *Id.* at 451.

33 510 U.S. 569, 584 (1994).

34 *Id.* at 571–72.

35 *Id.* at 573–74.

36 *Id.* at 593–94.

character of a use bars a finding of fairness."[37] Today, the defendant's commercial use no longer creates a presumption against fair use, but it does weigh in favor of the plaintiff.

Additionally, in *Harper & Row Publishers v. Nation Enterprises*[38] the Supreme Court made a fine distinction between commercial and non-profit uses, holding that the "crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[39] In other words, commercial use is not about whether the users are organized for profit or non-profit, but rather whether users have commercially exploited copyrighted works.

b. *Transformative Use*

In *Campbell*, the Supreme Court defined a "transformative use"[40] as a use that does not "merely supersede[] the objects"[41] of the original creation, but rather "instead adds something new, with a further purpose or different character."[42] The Court reasoned that "the goal of copyright . . . is generally furthered by the creation of transformative works,"[43] thus concluding that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[44]

The Court noted that parody, like other comments or criticism, has an "obvious claim to transformative value" and "can provide social benefit, by shedding light on an earlier work . . . in the process, creating a new one" and "may claim fair use under [section] 107."[45] By defining parody as "the use of some elements of a prior author's composition to create a new one that, at least in part, comments on the author's works,"[46] the Court found the necessary criti-

37 *Id.* at 584

38 471 U.S. 539 (1985).

39 *Id.* at 562.

40 Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

41 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)).

42 *Id.* (citing Leval, *supra* note 40, at 1111).

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 580.

cal element in 2 Live Crew's new version of the song, thus accepting it as a parody.[47]

Although the Supreme Court in *Campbell* was unwilling to presume that all parodies are presumptively fair,[48] courts in "every subsequent parody case" have found parody to be fair use.[49] For instance, in *Suntrust Bank v. Houghton Mifflin Co.*, [50] the district court had granted the plaintiff an injunction barring the publication of the book *Wind Done Gone*, which reused many of the characters and situations from *Gone with the Wind* to comment on its portrayal of slavery.[51] The Eleventh Circuit, applying *Campbell*, recognized that the *Wind Done Gone* was a protected parody as "a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in" *Gone with the Wind*,[52] and thus vacated the district court's injunction against its publication.[53]

2. The Nature of the Copyrighted Work

For this factor, courts consider whether the works is factual or fictional and whether it is published or unpublished.

a. *Factual or Fictional*

Generally, the more creative a work, the more protection it enjoys.[54] Of course, a work will always need to be original in the first place to pass the copyrightability test before the fair use analysis is applied. Here, analysis under the second factor test goes further than the threshold originality inquiry.[55] As the *Campbell* court explained, the second factor "calls for recognition that some works are closer to the core of intended copyright protection than others, with

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47 *Campbell*, 510 U.S. at 582. On the other hand, "satire can stand on its own two feet and so requires justification for the very act of borrowing" because it does not comment on an original work. *Id.* at 581, 581 n.15 (citation omitted).

48 *Id.* at 581.

49 *See* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2550 n.71 (2009) (citing more than a dozen fair use parody cases decided since *Campbell*).

50 268 F.3d 1257 (11th Cir. 2001).

51 *Id.* at 1259.

52 *Id.* at 1269.

53 *Id.* at 1269, 1276.

54 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][2][a] (Matthew Bender rev. ed. 2010).

55 *Id.*

the consequence that fair use is more difficult to establish when the former works are copied."[56] According to this rationale, fictional or fantasy works are more creative, thus making a finding of fair use less likely. Factual works, on the other hand, are less creative and original, thus making a finding of fair use more likely.

In cases of transformative use, however, whether the original work is factual or fictional tends to have little influence on the outcome of a fair use inquiry. For instance, the *Campbell* Court acknowledged that the second factor is "not much help" or "ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works."[57] In *Bill Graham Archives v. Dorling Kindersley Ltd.*,[58] the court made a similar comment noting that "[w]e recognize, however, that the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose."[59]

b. *Unpublished Works*

In *Harper & Row Publishers Inc. v. Nation Enterprises*,[60] the Supreme Court considered the unpublished status of a work "a crucial element of its 'nature'"[61] and that "the scope of fair use is narrower with respect to unpublished works."[62] The Court found this factor against the defendant stating that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."[63] Writing in dissent, Justice Brennan declared that this latter statement "introduces into analysis of this case a categorical presumption against prepublication fair use."[64] This bright-line rule of categorizing unpublished works as a factor against fair use was followed in a number of later cases[65] until Congress intervened with its

56 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

57 *Id.*

58 448 F.3d 605 (2d Cir. 2006).

59 *Id.* at 612 (citation omitted).

60 471 U.S. 539 (1985).

61 *Id.* at 564 (citation omitted).

62 *Id.*

63 *Id.* at 555.

64 *Id.* at 595 (Brennan, J., dissenting).

65 *See* Wright v. Warner Books, Inc., 953 F.2d 731, 737 (2d Cir. 1991) ("Unpublished works are the favorite sons of factor two. . . . Our precedents . . . leave little room for discussion of this factor once it has been determined that the copyrighted work is unpublished."); New Era Publ'ns Int'l ApS v. Henry Holt & Co., 873 F.2d 576, 583 (2d Cir. 1989) ("Where use is

1992 Amendment, which was later codified in section 107, providing that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." [66] Hence, the publication status of the original copyrighted work becomes less relevant in a fair-use inquiry.

3. The Amount and Substantiality of the Use

For this factor, the focus of the inquiry includes not just quantitative analysis, but also qualitative substantiality. Sometimes the use of copyrighted works might be very little in quantity, but a court might still find the amount of use unfair if the extracted part were the heart and core of the original copyrighted works. There are also times when the defendant copied the entire work, but the court found this factor favored the defendant if the use was transformative and if the amount of copying was necessary to achieve that transformative purpose.[67]

In *Harper & Row Publishers*, although the defendant (the *Nation* magazine) only quoted 300 words out of President Ford's 200,000-word memoirs, the Supreme Court took a qualitative analysis and found what the *Nation* took was "essentially the heart of the book,"[68] thus ruling against the *Nation* on this factor.[69] On the other hand, even if the entire work were copied, the defendant might still win this factor if he could prove his use was for a different, especially transformative, purpose. For example, in *Bill Graham Archives*, [70] the court found the defendant publisher not liable for copyright infringement despite its use of some of the plaintiff's concert posters in its book of Grateful Dead histo-

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made of materials of an 'unpublished nature,' the second fair use factor has yet to be applied in favor of an infringer, and we do not do so here."); Ass'n of Am. Med. Colls. v. Carey, 728 F. Supp. 873, 885 (N.D.N.Y 1990) ("[A] copyrighted work which is both published and factual in nature is more properly subject to a fair use than an unpublished work that is fictional in nature . . . ."), *rev'd on other grounds sub nom.*, Am. Med. Colls. v. Cuomo, 928 F.2d 519 (2d Cir. 1991).

66 Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (codified at the end of 17 U.S.C. § 107 (2006)).

67 Even a non-transformative use of an entire work need not weigh strongly against fair use. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449–50 (1984) (holding that the reproduction of entire broadcast television program did "not have its ordinary effect of militating against a finding of fair use").

68 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985) (citation omitted) (internal quotation marks omitted).

69 *Id.* at 565–66.

70 448 F.3d 605 (2d Cir. 2006).

ry.[71] The defendant used thumbnail reproductions of seven concert posters to commemorate concert events as part of a timeline running throughout the book.[72] The Second Circuit found that the thumbnail reproductions were an "insignificant taking" [73] of the original work because of their diminutive size, that no more had been taken than was necessary for the transformative purpose, and that the use was reasonable.[74]

4. The Effect of Use upon the Market

Copyright is believed to provide economic incentives for authors to create.[75] Therefore, if unauthorized use would reduce a copyright owner's ability to profit from the work, such uses might be deemed unfair. However, the Supreme Court has distinguished between suppressing demand because of a defendant's unfavorable reference to a plaintiff's work, such as in a parody, and usurping a plaintiff's profits in both original and potential markets. In *Campbell*, the court ruled that "when a lethal parody, like a scathing theatre review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act,"[76] thus finding the defendant not liable for the losses that the plaintiff might suffer in the market for the original work. On the other hand, in *Basic Books v. Kinko's Graphics Corp.*,[77] the court held that the defendant's copying and selling course packets to college students was more likely to suppress the demand for purchase of full textbooks, thus harming the plaintiff's original markets of selling full textbooks and collecting permission fees.[78] As a result, the court found this factor "weight[ed] heavily against [the] defendant."[79]

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71 *Id.* at 615.

72 *Id.* at 611.

73 *Id.*

74 *Id.*

75 1 NIMMER & NIMMER, *supra* note 54 at § 1.03[A] ("The economic philosophy behind the [U.S. constitutional] clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'") (quoting U.S. CONST. art. I, § 8, cl. 8).

76 Campbell v. Acuff-Rose Music, 510 U.S. 569, 592 (1994).

77 758 F. Supp. 1522 (S.D.N.Y. 1991).

78 *Id.* at 1543.

79 *Id.*

C. Fair Use in the Digital Environment

There have been a number of fair use-cases involving the Internet in recent years, where an Internet search engine copied entire works for indexing purposes or for making information about such works more accessible to the public. Typically, these Internet search engines use web-crawling software to cache copies of copyrighted works to enable faster access, to index content, and to create thumbnail images, and will displays links to the original websites.[80] U.S. courts usually found fair use in such cases after applying the four-factor analysis.

1. *Kelly v. Arriba Soft Corporation*[81]

In *Kelly v. Arriba Soft Corp*., the defendant Arriba Soft was ran a visual search engine that displayed search results in the form of thumbnails (small pictures).[82] By clicking on a thumbnail image provided by Arriba, users could view the full-size version of the image within the context of an Arriba web page.[83] The plaintiff, Leslie Kelly, a commercial photographer, sued the Arriba for copyright infringement for both its use of thumbnail-size images and use of full-sized images.[84]

The district court granted summary judgment to Arriba based on findings of fair use for both its uses of thumbnail images and full-size images.[85] The Ninth Circuit affirmed the district court's finding of fair use for thumbnail images, but reversed the lower court's ruling as to the full-size images, holding

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80 Samuelson, *supra* note 49, at 2610–11.

81 336 F.3d 811 (9th Cir. 2003).

82 *Id.* at 815.

83 Arriba's software had two features, i.e. crawling and in-line linking:

> [First the] crawler downloads full-sized copies of the images onto Arriba's server. The program then uses these copies to generate smaller, lower-resolution thumbnails of the images. . . .
>
> The second component of the Arriba program occurs when the user double-clicks on the thumbnail. . . . [C]licking on the thumbnail produced [a page that] used in-line linking to display the original full-sized image, surrounded by text describing the size of the image, a link to the original web site, the Arriba banner, and Arriba advertising.

Id. at 815–16. The Ninth Circuit held that use of the thumbnail image was fair and remanded the question of whether use of the full-image was fair. *Id.* at 815.

84 *Id.*

85 *Id.*

that the district court had made a decision it should not have made at that stage of the proceedings.[86]

As to the thumbnails, the Ninth Circuit applied the four-factor analysis and found Arriba's use was fair.[87] For the purpose factor, the court held that creating thumbnail images as previews was substantially "transformative" because it was impossible to view the images in the same resolution as in the original work.[88] The court also found Arriba's purpose for creating the thumbnail images was to "improve access to images on the [I]nternet"[89] rather than to "supplant the need" for the aesthetic experience that Kelly's original photos provided to consumers,[90] and thus found this factor favored the defendant.[91]

For the nature of the work factor, although the copied works were highly creative, that was counterbalanced by the fact that the copied photos were already published on Kelly's website.[92] Therefore, the court found that this factor slightly favored the plaintiff.[93]

For the amount of the taking factor, the court found it favored neither party because although the defendant copied the entire work, such copying was "necessary for Arriba . . . to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site."[94]

With regard to the last factor, impact to the potential market, the court found that the creation of a thumbnail image did not substantially diminish the market for the original work but instead might even help users find Kelly's pho-

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86 *Id.* at 815–17. The Court held that because neither party moved for summary judgment as to copyright infringement of the full-size images nor did Arriba have an opportunity to contest the prima-facie case for infringement as to those images, the district court should not have granted summary judgment on a claim where a party had not requested it. *Id.* at 817. Therefore, the court reversed the "full-size image" part of the district court's opinion and remanded for further proceedings. *Id.* at 822.

87 Kelly v. Arriba Soft Corp., 336 F.3d 811, 817–22 (9th Cir. 2003).

88 *Id.* at 819.

89 *Id.*

90 *Id.* at 820. The court acknowledged that should users try to enlarge the thumbnail image, the image would lose clarity. *Id.* at 815. Thus, the court believed that the thumbnail image would "not supplant the demand for the original" photos. *Id.* at 820.

91 *Id.*

92 *Id.*

93 Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003).

94 *Id.* at 820–21.

tos so that they could buy them.[95] Balancing the four factors, the court held that Arriba was not liable for copyright infringement for its use of the thumbnail images.[96]

2. *Perfect 10, Inc. v. Amazon.com, Inc.*[97]

In this case, Perfect 10, an adult-magazine site offering subscription services, sued Google for direct and secondary copyright infringement.[98] Google's software accessed, copied, cached, and created thumbnail images of the plaintiff's works from third-party websites that published the plaintiff's subscription-based works without authorization.[99]

The Ninth Circuit reversed the district court and found fair use for Google after applying the four-factor test to Google's creation of thumbnail images.[100] For the nature of the use factor, the court found that Google's use of thumbnails was highly "transformative,"[101] because it was "fundamentally different than the use intended by Perfect 10,"[102] and thus provided "a significant benefit to the public."[103] Despite Google's use of the thumbnails for a commercial purpose had a potential adverse impact on the plaintiff's license market,[104] the Ninth Circuit held that "the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails,"[105] and thus found the first factor heavily in favor of Google.

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95 *Id.* at 821. The court also considered that Kelly did not have a thumbnail license market, thus ruling that Arriba's use of creating thumbnail images would not diminish Kelly's potential market in thumbnail images. *Id.* at 821–22.

96 *Id.* at 822.

97 508 F.3d 1146 (9th Cir. 2007).

98 *Id.* at 1159, 1168–69 (stating that the plaintiff believed that Google's linking constituted indirect infringement, while its copying and creating thumbnail images constituted direct infringement).

99 *Id.* at 1157.

100 *Id.* at 1168.

101 *Id.* at 1165.

102 *Id.* at 1168.

103 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007).

104 *Id.* at 1165–67 (stating that the district court found that the plaintiff sold small-sized images for cell phones).

105 *Id.* at 1166.

For the nature of the copyrighted work factor, the court recognized the works to be highly creative.[106] Yet, in view of its published status on the Internet, the court found this factor to be slightly in favor of the plaintiff.[107]

The court referred to *Kelly* when it considered the amount of the use factor.[108] The court held that Google's use was reasonable and necessary for the transformative purpose, finding this factor favored neither party.[109]

For the final factor, the court dismissed as "hypothetical" the plaintiff's argument that Google's use caused potential harm to a thumbnail market, finding this factor favored neither party.[110] In reversing the district court's decision, the Ninth Circuit indicated that Google's fair use argument was likely to succeed at trial.[111]

3. *Google Books*

In late 2004, Google partnered with a number of research libraries to launch a Book Search Project to scan millions of books into a searchable online database and make the texts available either in their entirety (if in the public domain) or as excerpts.[112] Within less than a year, representatives of authors and publishers sued Google for massive copyright infringement. They alleged that Google's scanning of books into the Book Search Database and the display of search results constituted direct infringement of copyright holders' exclusive rights to reproduce.[113] Later these lawsuits were consolidated into one single class action.[114]

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106 *Id.* at 1167.

107 *Id.*

108 *Id.* at 1168–69.

109 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168–69 (9th Cir. 2007).

110 *Id.* at 1168.

111 *Id.* at 1177 ("We conclude that Google's fair use defense is likely to succeed at trial, and therefore we reverse the district court's determination that Google's thumbnail versions of Perfect 10's images likely constituted a direct infringement.").

112 The initial five library partners included Harvard University, University of Michigan, New York Public Library, University of Oxford and Stanford University. The list of participating institutions has grown since. For an updated partner list, see GOOGLE BOOKS LIBRARY PARTNERS, http://books.google.com/googlebooks/partners.html (last visited Jan. 11, 2011).

113 *See* Authors Guild v. Google, Inc., No. 05-8136, 2009 U.S. Dist. LEXIS 102837, at *2 (S.D.N.Y. Nov. 4, 2009); Complaint at 3, The McGraw-Hill Co, v. Google, No. 05 Civ. 8881, 2005 WL 2778878 (S.D.N.Y. Oct. 2005).

114 *See Authors Guild*, No. 05-8136, 2009 U.S. Dist. LEXIS 102837, at *2.

Google cited Kelly[115] in pursuing its fair use defense.[116] It further argued that the existence of databases and excerpts would not cause harm to the market of the original works; rather, the Book Search Project would actually promote the sales of the books by better enabling users to identify works of interest to them.[117]

In October 2008, Google reached a class settlement with the plaintiffs for $125 million, which allowed its Book Search Project to go forward.[118] Various parties raised concerns, including the Department of Justice,[119] the U.S. Copyright Office,[120] and some of Google's competitors.[121] In November 2009, the parties revised the settlement agreement, removing foreign works from its scope and a "most favored nation" clause that guaranteed Google the best licensing rates for electronic uses.[122] Orphan works—works of which copyright owners are difficult or impossible to identify—were also taken away from the authority of the Books Rights Registry and put under the supervision of an independent fiduciary.[123] In November 2009, the U.S. District Court for the Southern District of New York gave preliminary approval to the revised deal; and in

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115 *See* Cong. Research Serv., The Google Book Search Project: Is Online Indexing a Fair Use Under Copyright Law? 3 (Jan. 22, 2007), *available at* http://opencrs.com/document/RS22356.

116 *See* Adam Mathes, *The Point of Google Print*, The Official Google Blog (Oct. 19, 2005), http://googleblog.blogspot.com/2005/10/point-of-google-print.html.

117 *See Id.*

118 Miguel Helft & Motoko Rich, *Google Settles Suit Over Book-Scanning*, N.Y.TIMES, Oct. 28, 2008, at B1, *available at* http://www.nytimes.com/2008/10/29/technology/internet/29google.html?_r=2.

119 *See* Press Release, Dep't of Justice, Justice Department Submits Views on Amended Google Book Search Settlement (Feb. 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/February/10-opa-128.html (recommending rejection of the settlement agreement because that the settlement was not consistent with U.S. antitrust law, as well as class certification and copyright issues).

120 Nathan Pollard, *Copyright Office Opposes Google Settlement, Orphan Works Issue Also Topic at Hearing*, 78 PAT. TRADEMARK & COPYRIGHT J. (BNA) 588, 588–89 (2009).

121 Geoff Duncan, *Amazon, Microsoft, Yahoo Take Stand Against Google Books*, DIGITAL TRENDS (Aug. 21, 2009), http://www.digitaltrends.com/lifestyle/amazon-microsoft-yahoo-take-stand-against-google-books/.

122 *See Supplemental Notice to Authors, Publishers And Other Book Rightsholders About the Google Book Settlement*, http://static.googleusercontent.com/external_content/untrusted_dlcp/www.googlebooksettlement.com/en/us/Supplemental-Notice.pdf (last visited April 14, 2011), which summarizes the changes made in the November 2009 Amended Settlement Agreement.

123 *Id.*

February 2010 it held another hearing regarding that deal.[124] In March 2011, The U.S. District Court for the Southern District of New York rejected the third draft settlement agreement on the grounds that the proposed deal between the search engine and the authors "is not fair, adequate, and reasonable."[125]

III. FAIR USE/FAIR DEALING IN OTHER COUNTRIES

Similar to fair use, fair dealing is a doctrine of limitations and exceptions to copyright in a number of U.K. Commonwealth and Continental European countries, including the United Kingdom, Canada, Germany and France. Unlike the fair-use doctrine in the United States, fair dealing is an enumerated list of copyright exceptions and cannot apply to actions that do not fall within such categories.[126] Because of this, the fair-dealing doctrine has been criticized for being overly restrictive and inflexible.[127]

A. Fair Dealing in the United Kingdom

1. Legislative Context

The U.K. doctrine of fair dealing originated from the English judge-made doctrine of "fair abridgement"[128] and was codified in the U.K. Copyright Act of 1911.[129] The current provision, in Chapter III of the Copyright, Designs

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124 *See* Greg Sandoval, *Judge in Google Books Case Says No Ruling Thursday*, CNET NEWS (Feb. 18, 2010), http://news.cnet.com/8301-31001_3-10455667-261.html.

125 *See* The Authors Guild v. Google, Inc., No. 05 Civ. 8136, 2011 WL 986049, at *15 (S.D.N.Y Mar. 22, 2011).

126 *See, e.g.*, Copyright, Designs and Patents Act, 1988, c. 48, pt. 1, ch. 3 (U.K.), *available at* http://www.opsi.gov.uk/acts/acts1988/ukpga_19880048_en_3#pt1-ch3-pb2-l1g29.

127 *See* Justice Laddie, *Copyright: Over-strength, Over-regulated, Over-rated?*, 18 EUR. INTELL. PROP. REV. 253, 258–89 (1996); *see also* Gerald Dworkin, *Whitford Committee Report on Copyright and Designs Law*, 40 MOD. L. REV. 685, 688 (1977) (recommending that the U.K. adopt a general purpose fair use defense, although this proposal was eventually rejected by the legislature); 78 Hansard Parliamentary Debates 10 [Debate 2004] (Sing.) (statement of S. Jayakumar, Deputy Prime Minister and Minister for Law) (describing the need to move away from the U.K. model, which was too "restrictive").

128 Gyles v. Wilcox, [1740] 26 Eng. Rep. 489 (Ch.) 491. In this case, the court ruled that abridgements fell under two categories "fair abridgements" and "colourably shortened." *Id.* at 491. Fair abridgements represented true efforts from the editor to constitute a new work which did not infringe copyrights of the original work. *Id.* Based on the literary and legal experts' reading of the repackaged book, the court held that the repackaged book was not a true abridgement, but merely a piracy intending to circumvent the law. *Id.*

129 Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 2(1)(i) (U.K.).

and Patents Act of 1988, is entitled "Acts Permitted in Relation to Copyright Works."[130] The fair-dealing provisions in sections 29–30 set out enumerated permissible uses including: 1) research or private study; 2) criticism or review; and 3) reporting of current events.[131]

To claim fair dealing under U.K. law, a defendant must prove three elements: 1) the dealing must fall into an enumerated category; 2) the dealing must be fair in accordance with common-law criteria; and 3) there must be sufficient acknowledgement of the original work in cases of criticism/review and reporting current events.[132] Unlike U.S. law, which identifies a non-exhaustive list of favored purposes, under the U.K. fair-dealing approach, a defendant must pass the initial test by proving that its dealing falls into an enumerated category before the "fairness" component of the dealing will be considered.

The question of "fairness" in the fair-dealing assessment considers many factors that are similar to those in the U.S. approach. *Hubbard v. Vosper*[133] may be the "first major judicial attempt to define the concept of 'fairness' with respect to the fair-dealing provisions contained, at that time, in section 6 of the 1956 Copyright Act."[134] The *Hubbard* court stated that the question of whether a dealing is fair is a matter of fact and all the circumstances of a particular case must be taken into account.[135] To date, U.K. case law had developed the following factors to determine the fairness of a dealing: 1) the nature of the

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130 Copyright, Designs and Patents Act, 1988, c. 48, pt. 1, ch. 3 (U.K.), *available at* http://www.opsi.gov.uk/acts/acts1988/ukpga_19880048_en_3#pt1-ch3-pb2-l1g29.

131 *Id.* Additionally, section 31 of the Copyright, Designs and Patents Act permits certain instances of incidental inclusion of copyrighted works; sections 32–36A allow permitted uses for education purposes; sections 37–44 contain provisions regarding libraries and archives; sections 45–50 is related to public administration; sections 51–53 deal with designs; sections 54–55 deal with typefaces; section 56 is related to works in electronic forms; sections 57–75 includes miscellaneous provisions; and section 76 includes defenses for adaptation. *Id.*

132 *Id* § 30(3). Note that reporting current events by means of sound recordings, film, broadcast (if impractical), acknowledgement is not required. *Id.*

133 [1972] 2 Q.B. 84 at 89–90 (Eng.). The Copyright Act of 1956 was passed in order to bring U.K. copyright law in line with international copyright law and technological developments. Copyright Act, 1956, 4 Eliz. 2, c. 74 § 6(2) (Eng.), *available at* http://www.opsi.gov.uk/acts/acts1956/pdf/ukpga_19560074_en.pdf.

134 Guiseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use.*, 53 MCGILL L.J. 309, 341 (2008) (citing Carys Jane Craig, Fair Dealing and the Purposes of Copyright Protection (2000) (unpublished L.L.M. Thesis, Queen's University)).

135 Hubbard v. Vosper, [1972] 2 Q.B. 84 at 88 (Eng.).

work;[136] 2) how the defendant obtained the work;[137] 3) the amount taken from the work;[138] 4) purposes of the use;[139] 5) effect of the use to the market;[140] and 6) alternatives to the dealing.[141]

2. Fair-Dealing Cases in the United Kingdom

a. Pro Sieben Media AG v. Carlton U.K. Television Ltd.[142]

In *Pro Sieben*, the plaintiff, a German television company, sued the defendant, a U.K. broadcaster, for copyright infringement because it had included an unauthorized thirty-second extract from the plaintiff's work in one of its programs.[143] The defendants' program was directed at, and critical of, checkbook journalism.[144] The defendant showed an excerpt from the plaintiff's program with its own name appearing prominently in the bottom right-hand corner of the picture, and the plaintiff's logo, a stylized figure seven, appearing less prominently in the top right-hand corner.[145]

The lower court rejected the defendant's argument that the extract was included for the purpose of criticism, review, or news reporting within section 30(1) and (2) of the Copyright Designs and Patents Act 1988.[146] The court also held that the use of the plaintiff's trademark logo appearing in the program was

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136 If the work is unpublished, this factor will weigh against the defendant. Hyde Park Residence Ltd. v. Yelland, [2001] Ch. 143 at 146 (Eng.).

137 If the work is stolen or obtained by breach of confidence, its use will be less fair. *See* Beloff v. Pressdram Ltd. [1973] 1 All E.R. 241 (Ch.) 264 (Eng.).

138 The evaluation of this factor is similar to the U.S. approach. In other words, generally speaking the less that it is taken, the more fair the use is. However, courts may find the copying of an entire work fair as well. *See generally* Hubbard v. Vosper, [1972] 2 Q.B. 84 (Eng.).

139 This factor asks whether the use is commercial, transformative, or altruistic. *See* Newspaper Licensing Agency Ltd. v. Marks & Spencer PLC, [1999] E.C.C. (Ch.) 425, 436 (Eng.); Hyde Park Residence Ltd. v. Yelland, [2001] Ch. 143 at 170 (Eng.); Pro Sieben Media AG v. Carlton U.K. Television Ltd. [1999] 1 W.L.R. 605 at 614 (Eng.).

140 If the new work substitutes for the original, fair dealing is less likely. *See* Hubbard v. Vosper, [1972] 2 Q.B. 84 at 89–90 (Eng.).

141 If there are alternatives to the dealing, finding of fair dealing is less likely. *See* Hyde Park Residence Ltd. v. Yelland, [2001] Ch. 143 at 157, 171 (Eng.).

142 [1999] 1 W.L.R. (Civ) 605 (Eng.).

143 *Id.* at 607.

144 *Id.* at 615.

145 *Id.* at 610.

146 *Id.* at 611.

sufficient acknowledgement.[147] Finally the court concluded that even if the use fell under section 30(1) or (2), the use was not fair, thus finding the defendant liable for copyright infringement.[148]

The appellate court overruled the district court's opinion and held that criticism or review and reporting of current events are expressions of "wide and indefinite scope" that should be "interpreted liberally,"[149] thus recognizing that the instant use of the plaintiff's works fell into sections 30(1) and (2). As to the fairness of the dealing, the court concluded that the use was fair because the extract was short (only thirty seconds), the clip contained no words spoken by the person interviewed in the original work, and there was no realistic unfair competition with the plaintiff's exploitation of rights.[150] The appellate court held the appearance of the plaintiff's trademark logo on the defendant's program was sufficient acknowledgement, "especially if the logo was the means by which the author of a television programme was accustomed to identify itself."[151] In conclusion, the appellate court reversed the district court and found fair dealing in favor of the defendant.[152]

b. Ashdown v. Telegraph Group Ltd.[153]

In *Ashdown*, a prominent politician, Lord Ashdown, sued a U.K. newspaper for copyright infringement.[154] The newspaper had published the confidential minutes of a meeting that Ashdown held with the Prime Minister regarding the pending formation of a new-U.K. government.[155] The lower court found the defendant liable for copyright infringement and issued an injunction in favor of Ashdown.[156] The defendant appealed.[157]

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147 *Id.*

148 *See* Pro Sieben Media AG v. Carlton U.K. Television Ltd., [1999] 1 W.L.R. (Civ) 611 [611] (Eng.).

149 *Id.* at 614.

150 *Id.* at 617–18.

151 *Id.* at 618.

152 *Id.* at 619.

153 2001 EWCA (Civ) 1142 (Eng.).

154 *Id.* at [4], [11].

155 *Id.* at [5], [7], [8], [11].

156 *Id.* at [12].

157 *Id.* at [1].

Applying *Pro Sieben's* liberal interpretation of "current events," the appellate court held that the defendant's use of the copyrighted works for "for purpose[s] of news reporting" fell into section 30(2).[158]

When evaluating the fairness of the use, the appellate court laid out a hierarchy of factors rather than relying on an open-ended list of criteria developed in the case law.[159] The factors were laid out in the following order for consideration: 1) commercial competition, e.g. whether the new work was competing with the proprietor's exploitation of the copyrighted work;[160] 2) prior publication, e.g. whether the work was published or previously exposed to the public (if not, a fair-dealing defense might fail especially if the work were obtained by breach of confidence or other unfair means);[161] and 3) the amount and importance of the portion of the original work taken.[162]

For the most important factor, commercial competition, the appellate court found that the copied extract "added a flavor to the descriptions of the event" and "made the article more attractive to read," thus increasing the commercial value of the newspaper[163] More importantly, the appellate court found evidence showing that the defendant newspaper's publication of the meeting minutes damaged the value of the memoir that Ashdown planned to and eventually did sell.[164]

In considering the second most important factor, prior publication, the appellate court found that the plaintiff had not published the minutes.[165] Additionally, the newspaper obtained it through a breach of confidence; therefore, the court found this factor against the defendant.[166]

Finally, the appellate court agreed with the district court that "[a] substantial portion of the minute[s were] copied" and found that the amount and importance of the work taken factor weighed against the defendant as well.[167] Balancing all factors, the appellate court affirmed the district court and rejected the defendant's appeal.[168]

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158 *Id.* at [62]–[66].

159 Ashdown v. Telegraph Group Ltd., 2001 EWCA (Civ) 1142 [70]–[71] (Eng.).

160 *Id.* at [70].

161 *Id.*

162 *Id.*

163 *Id.* at [70], [72].

164 *Id.* at [72].

165 Ashdown v. Telegraph Group Ltd., 2001 EWCA (Civ) 1142 [70], [74] (Eng.).

166 *Id.* at [74]–[75].

167 *Id.* at [76].

168 *Id.* at [82], [85].

B. Canada

1. Legislative Context

A fair-dealing provision was included in the Canadian Copyright Act of 1921[169] and has since been revised twice.[170] Mirroring the U.K. Copyright Act, section 29 of the current Canadian Copyright Act provides that copyright will not be infringed by fair dealing for the purposes of "research or private study," "criticism or review," or "news reporting."[171] As with the U.S. Copyright Law, the Canadian Copyright Act also contains specific exceptions for educational institutions, libraries, archives, museums, for copying works deposited into archives, and for reproducing copyrighted works for persons with disabilities.[172]

Fair dealing in Canada was traditionally considered a defense for copyright infringement.[173] As with the U.K. model, the defendant had to prove that 1) the action fell into one of the enumerated purposes;[174] 2) the action was fair, based on an assessment similar to the U.S. factors; and 3) there was acknowledgement in cases of criticism or review and news reporting.[175] However, *CCH Canadian Ltd. v. Law Society of Upper Canada*,[176] unanimously decided by the Supreme Court of Canada, is believed to have changed the rules of the game.[177] The court held that the fair-dealing exception should not be interpreted only as a "defense" for copyright infringement.[178] Rather, it should be interpreted more as "an integral part of the Copyright Act than simply a defense" and is a "user's right."[179] The court thus elevated users' rights above all other rights, which arguably has expanded the scope of fair use.

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169 Copyright Act, S.C. 1921, c. 24, s. 16(1) (Can.).

170 North American Free Trade Agreement Implementations Act, S.C. 1993, c. 44, s. 64(1) (Can.); An Act to Amend the Copyright Act, S.C. 1997, c. 24, s. 18 (Can.).

171 Copyright Act, R.S.C. 1985, c. C-24, ss. 29, 29.1, 29.2 (Can.).

172 *Id.* ss. 30.1–30.5, 32.

173 D'Agostino, *supra* note 134, at 318.

174 *Id.*

175 *Id.* at 319.

176 [2004] 1 S.C.R. 339 (Can.).

177 D'Agostino, *supra* note 134, at 319.

178 *CCH Canadian Ltd.*, [2004] 1 S.C.R. 339, at para. 48.

179 *Id.*

2. *CCH Canadian Ltd. v. Law Society of Upper Canada*[180]

In *CCH*, publishers sued the Law Society for copyright infringement because the Law Society, acting without a license, provided lawyers and others with copies of reported decisions, case summaries, statutes, and regulations to assist them with for-profit activities, such as advising clients, giving opinions, preparing legal documents and arguing cases.[181]

a. *The Section 29 Exception*

With respect to the issue whether the *research* conducted by lawyers carrying on the business of law for profit fell within the enumerated list of section 29 of the Act, the court liberally interpreted section 29, holding that section 29 exceptions "must *not* be interpreted restrictively."[182] The court stated that *research* should be accorded a "large and liberal interpretation in order to ensure that users' rights are not unduly constrained" and are "not limited to non-commercial or private contexts."[183] As a result, the court recognized lawyers' research as non-infringing use within section 29.[184]

This liberal interpretation of "research" under section 29 stands in sharp contrast to other pre-*CCH* cases, which have applied a restrictive interpretation of fair dealing. In *Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*,[185] the Michelin tire company sued the union for copyright infringement because the union used the Michelin Man logo in leaflets distributed during a labor dispute.[186] The defendant argued that their use of the logo was a parody, and thus not infringement under the section 29.1 exception for purposes of criticism.[187] However, the court rejected the defendant's parody argument holding that parody was not an exception to infringement under the Canadian Copyright Act or jurisprudence[188] and was not synonymous with criticism.[189] The court further ruled that exceptions should be

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180 *Id.* at para. 1.

181 *Id.* at paras. 1–3, 51.

182 *Id.* at para. 48 (emphasis added).

183 *Id.* at para. 51.

184 CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] 1 S.C.R. 339, at para. 51.

185 [1997] 2 F.C. 306 (Can.).

186 *Id.* paras. 1, 2.

187 *Id.* para. 15.

188 *Id.* at para. 65.

189 *Id.* at para. 66.

strictly interpreted and that fair dealing had an exclusive set of grounds as enumerated in the Canadian Copyright Act.[190]

b. *Fairness of the Dealing*

When determining the fairness of the dealing, the *CCH* court applied six factors, drawing on the decision in *Hubbard*: 1) the purpose (and commercial nature) of the dealing;[191] 2) the character of the dealing;[192] 3) the amount of the dealing;[193] 4) the nature of the work;[194] 5) available alternative to the dealing;[195] and 6) the effect of the dealing on the work.[196]

For the first factor, the court found that the purpose of the dealing was fair because the defendant's Great Library's policy provided reasonable safeguards to ensure that the materials were only used for research and private study; thus, the court found this factor in favor of the defendant.[197]

Regarding the character of the dealing, the court weighed this factor in favor of the defendant because there was no indication that the defendant provided more than single copies of the works.[198]

For the amount of the dealing factor, the court reasoned that because the Great Library's policy required its librarians to exercise their discretion to en-

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190 *Id.* at para. 70 (citing Bishop v. Stevens, [1990] 2. S.C.R. 467, 483–484 (Can.)).

191 CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] 1 S.C.R. 339, para. 54 (Can.). The court will look into whether the purpose of the dealing is one of the allowable purposes under section 29 of the Canadian Copyright Act, which will not be "given a restrictive interpretation." *Id.*

192 *Id.* at para. 55. If multiple copies are widely distributed, it will be less fair, but if only a single copy is provided, it is easier to conclude that it was fair dealing.

193 *Id.* at para. 56. The court considered this factor to be trivial. *Id.*

194 *Id.* at para. 58. Interestingly, in contrast with the U.S. and U.K. approach, the *CCH* court believed that if a work has not been published, then the dealing would be "more fair" because its reproduction with acknowledgement could lead to a wider public dissemination of the work. *Id.*

195 *Id.* at para. 57. The court would consider factors such as whether "there is a non-copyrighted equivalent of the work that could have been used" or "whether the criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing." *Id.*

196 *Id.* at para. 59 ("If the reproduced work is likely to compete with the market of the original work, then the dealing[may] not be fair. Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.") (citation omitted).

197 CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] 1 S.C.R. 339, para. 66 (Can.).

198 *Id.* at para. 67.

sure that the amount of the dealing was reasonable, the court found this factor in favor of the defendant as well.[199]

With regard to alternatives to the dealing, the court ruled there were no alternatives to the Toronto-based Great Library's photocopying service because: 1) twenty percent of the Great Library customers were outside Toronto; and 2) researchers were not allowed to borrow materials from the Library.[200] Again, the court adopted a user-centric approach and focused more on the ease of access to the works than the actual availability of the works.

In terms of the nature of the work, the court took a view contrary to U.K. and U.S. case law holding that "if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work."[201] The statement reflects the court's user-centric approach of elevating users' rights above copyright owner's rights. The court agreed with the appellate court that it is "in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained," and found this factor favored the defendant.[202]

As to the effect on the market factor, instead of imposing the burden of proof on the defendant, the court held the plaintiff should show that it was negatively affected by the dealing.[203] The court reasoned that the defendant "lacked access to evidence about the effect of the dealing on the publishers' markets."[204] Again, the court reinforced the notion that the fair-dealing exception should not be interpreted as an affirmative defense where the defendant must bear the burden of proof, rather it is a "user's right."[205]

From the *CCH* case, we clearly see a shift of the Canadian Supreme Court to a user-centric approach since it elevated the fair-dealing exception from an affirmative defense to a user right. The rationale is better demonstrated by the court's interpretation of the purpose of the Canadian Copyright Act, which it described as serving dual objectives: "a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."[206] The *CCH* opinion triggered

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199 *Id.* at para. 68.

200 *Id.* at para. 69.

201 *Id.* at para. 58; *supra* Parts II & III.A (discussing U.S. fair use and U.K. fair dealing).

202 CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] 1 S.C.R. 339, para. 71 (Can.).

203 *Id.* at para. 72.

204 *Id.*

205 *Id.* at para. 48.

206 *Id.* at para. 10 (quoting Theberge v. Galerie d'Art du Petit Champlian, [2002] 2. S.C.R. 336, paras. 30–31 (Can.)).

heated debates among commentators. On the one hand, the court's liberal interpretation of fair dealing was considered a positive step, allowing more flexibility in future fair-dealing cases under Canadian case law. On the other hand, it raised concerns from rights holders regarding the expanded scope of user rights and possible uncertainty in future case law.[207]

C. Other European Countries

As with the United Kingdom, most continental-European countries provide fair dealing in an exhaustive list of exceptions to copyright, rather than an open-ended list of permissible uses. These exhaustive lists are why Google's fair-use argument is experiencing difficulty in several European countries, including Germany and France.

1. The Google Thumbnail Litigation in Germany

In October 2008, a court in Hamburg, Germany ruled that Google's display of thumbnail images, as part of the hyperlinked results its search engine produced, constituted copyright infringement of the original image owners' rights.[208] In two lawsuits, German comic book artist Thomas Horn and German photographer Michael Bernhard challenged the display of scaled-down version of their copyrighted images in the results of Google Image Search and several other search engines.[209] The court did not accept Google's "transformative use" argument, holding that "[i]t doesn't matter that thumbnails are much smaller than original pictures and are displayed in a lower resolution. . . . By using photos in thumbnails, no new work is created;" thus, the court found Google liable for copyright infringement.[210] The court suggested that Google replace the thumbnails with text describing them, something Google said is not a practical, user-friendly solution.[211] Google later appealed.

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207 D'Agostino, *supra* note 134, at 327–29.

208 Karin Matussek, *Google Loses German Copyright Cases over Image-Search Previews*, BLOOMBERG (Oct. 13, 2008), http://www.bloomberg.com/apps/news?pid=20601204&sid=a_C1wVkCvPww.

209 *Id.*

210 Adi Robertson, *Google Image Search Thumbnails "Infringement" Under German Ruling*, PUBLIC KNOWLEDGE (Oct. 17, 2008), http://www.publicknowledge.org/node/1803 (quoting the *Bernhard* decision).

211 *Id.*

2. Google Books in France

In December 2009, a French court decided a case involving a copyright infringement suit filed by several French publishers and authors against Google.[212] The court addressed two issues in the Google Books case in France: 1) the conflict of law question as to which law should apply to the alleged infringement; and 2) if French law applied, whether Google was liable for making infringing reproduction available without authorization.[213]

For the conflicts of law issue, the court rejected Google's argument that U.S. law should apply (where Google could rely on a fair-use argument) and ruled instead that France was the country with the "closest links" with the dispute, and thus French law should apply.[214]

Regarding the infringement issue, Google argued that users never receive access to the entire works but only extracts "within appropriate limits."[215] Thus, it was not liable for copyright infringement, relying on the "brief quotation exception" provided in Article L 122-5 3.[216] The court rejected Google's arguments holding that "the digitalization of a work . . . constitutes reproduction of the work which as such, when it is protected, requires the prior authorization of the author or his successors in title."[217] After rejecting Google's brief quotation exception argument, the court concluded that Google had infringed by "reproducing in full and making accessible extracts from [the] works of [plaintiffs] without their authorization."[218]

IV. FAIR USE/FAIR DEALING IN CHINA

A. Legislative Context

Like the U.K. model, China also adopted a fair-dealing doctrine that allows users to use copyrighted works without seeking permission from rights holders. Article 22 of the P.R.C. Copyright Law provides an enumerated list of

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212 Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., Dec. 18, 2009, 09/00540 (Fr.).

213 *Id.*

214 *Id.* at 15.

215 *Id.*

216 *Id.*

217 *Id.*

218 Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., Dec. 18, 2009, 09/00540 (Fr.), at 21.

twelve exceptions to copyright,[219] including: for purposes of private study and research,[220] comments,[221] and reporting of current events. [222] To accommodate fair use in the digital world, Article 6 of the Regulations for the Protection of the Right of Communication through Information Network ("2006 Regulations")[223] extends the list of Article 22 permissible uses to the Internet.[224]

Despite legislative efforts to draft a clear and comprehensive list of fair-use scenarios, the ambiguity in the existing statutory language such as "*appro-*

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219 The Chinese fair-use limitation on rights first requires acknowledgement to the origin of source to claim fair use exception and then lists the twelve permissible uses. Copyright Law of People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1990) art. 22, *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383888.htm. The twelve permissible uses include: (l) 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 to, or *comments on*, a work, or demonstration of a point; (3) reuse or citation, for any unavoidable reason, of a published work in newspapers, periodicals, at radio stations, television stations or any other *media for the purpose of reporting current events*; (4) reprinting by newspapers or periodicals, or rebroadcasting by radio stations, television stations, or any other media, of articles on current issues relating to politics, economics or religion published by other newspapers, periodicals, or broadcast by other radio stations, television stations or any other media except where the author has declared that the reprinting and rebroadcasting is not permitted; (5) publication in newspapers or periodicals, or broadcasting by radio stations, television stations or any other media, of a speech delivered at a public gathering, except where the author has declared that the publication or broadcasting is not permitted; (6) translation, or reproduction in a small quantity of copies, of a published work for use by teachers or scientific researchers, in classroom teaching or scientific research, provided that the translation or reproduction shall not be published or distributed; (7) use of a published work, *within proper scope*, by a State organ for the purpose of fulfilling its official duties; (8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery or any similar institution, for the purposes of the display, or preservation of a copy, of the work; (9) free-of-charge live performance of a published work and said performance neither collects any fees from the members of the public nor pays remuneration to the performers; (10) copying, drawing, photographing or video recording of an artistic work located or on display in an outdoor public place; (11) translation of a published work of a Chinese citizen, legal entity or any other organization from the Han language into any minority nationality language for publication and distribution within the country; and (12) transliteration of a published work into Braille and publication of the work so transliterated. *Id.*

220 *Id.* art. 22(1).

221 *Id.* art. 22(2).

222 *Id.* art. 22(3).

223 Regulations for the Protection of the Right of Communication through Information Network (promulgated by the State Council, May 10, 2006, effective July 1, 2006) art. 6 (China), *available at* http://www.cpahkltd.com/Archives/063A-p90.pdf.

224 *Id.*

priate quotation from another person's published work"[225] and "within *proper* scope" [226] requires judges to exercise discretion in determining what constitutes "appropriate" and "proper." Furthermore, because Article 22 originated from the fair-use language of continental European law, which was drafted decades ago, it has been criticized for being "insufficient" to deal with new trend of permissible uses.[227]

B. Fair Use Cases in China

A close examination of recent Chinese fair-use caselaw fails to provide clear guidance on how judges determine fair use. It seems that judges have exercised their own discretion in deciding what constitutes fair use, with opinions varying from strict interpretation of Article 22 to a more liberal approach, as seen in the U.S. fair-use model that allows an open-ended list of permissible uses based on consideration of multiple factors. These different approaches have created uncertainty in predicting the outcome of fair use cases in China.

1. Strict Interpretation of Article 22

In *Chen Yuzhong v. Yicheng Historical Record Office*, [228]the plaintiff sued a state-owned publisher of historical documents for copyright infringement because it included the plaintiff's copyrighted works in its publications without authorization.[229] The defendant cited the Article 22(7) "state institution enforcing official duty" exception[230] and argued fair use.[231] The court blatantly reject-

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225 *See* Copyright Law of People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1990) art. 22(2), *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383888.htm (stating that "*appropriate quotation* from another person's published work in one's own work for the purpose of introducing or commenting on a certain work, or explaining a certain point" constitutes fair dealing) (emphasis added).

226 *See id.* art. 22(7) (stating that use of a published work, *within proper scope*, by a State organ for the purpose of fulfilling its official duties constitutes fair use) (emphasis added).

227 For instance, parody, which is a permissible use under the U.S. case law, was not included under Article 22 of the P.R.C. Copyright Law.

228 ZAO SHANG ZHI CHU ZI DI, at 1 (Shandong Zaozhuang Intermediate Ct. 2008) (China).

229 *Id.* at 10.

230 Copyright Law of People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1990) art. 22(7), *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383888.htm (stating that "use of a published work by a State organ to a justifiable extent for the purpose of fulfilling its official duties" constitutes fair use).

ed the defendant's fair-use argument.[232] It ruled that the defendant did not fall within the Article, but the court did not address why not, and found the defendant liable for copyright infringement.[233]

2. Multifactor Analysis Applying Article 22

Although Article 22 of the P.R.C. Copyright Law lists twelve exceptions to copyright that allows use of copyrighted works without permission from rights holders, its vague language still requires courts to exercise discretion when determining whether a particular use falls within the enumerated list.

In *Beijing Sanmian v. Hefei Bang Lue*,[234] the plaintiff sued for copyright infringement when the defendant published the plaintiff's copyrighted article (which described the recent trends of mobile telephone service in China) on its website without authorization.[235] The defendant relied on the "reporting of current events" exception provided under Article 22(3) of the P.R.C. Copyright Law and Article 6(7) of the 2006 Regulations to justify its fair use defense.[236] The court reasoned that to qualify for the "reporting of current events" exception, the events need to be both "timely sensitive" and "significant."[237] The court ruled that the copyrighted article was timely but not significant enough to qualify for the exception.[238] Therefore, the court concluded that the use of the article did not fall into Article 22(3) of the P.R.C. Copyright Law or Article 6(7) of the 2006 Regulations and found the defendant liable for copyright infringement.[239]

In another fair use copyright infringement case, *Yang Luo-Shu v. China Pictures Press*,[240] Mr. Yang Luo-Shu, a successor of the well-known painting family, sued China Pictures Press for copyright infringement when the defendant used sixteen of the plaintiff's pictures in its biography, *Picture Journey of Mr. Yang's Family*, without authorization.[241] The defendant relied on the Article

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231 *Chen Yuzhong*, ZAO SHANG ZHI CHU ZI DI, at 1.

232 *Id.*

233 *Id.*

234 WAN MIN SAN ZHONG ZI DI, at 29 (Anhui High Court 2007) (China).

235 *Id.*

236 *Id.* at 2.

237 *Id.*

238 *Id.*

239 *Id.*

240 LU MIN ZHONG ZI DI, at 94 (Shandong High Court 2007) (China).

241 *Id.* at 1.

22(2) fair-use exception, which provides that permissible uses such as "*appropriate quotation* from a *published work* in one's own work for the purposes *of introduction to, or comments on*, a work, or demonstration of a point" do not constitute copyright infringement.[242]

In determining whether the defendant's use fell into the Article 22(2) exception, the court applied a three-factor test, including 1) purpose of the use; 2) amount of the use; and 3) effect of the use on the market.[243] For the purpose of use factor, the court found that the use was not "to introduce or comment [on] the picture itself," but to describe "the history and events associated with Mr. Yang's family;" thus, the court found this factor against the defendant.[244] For the amount of use factor, the court held that the use of sixteen pictures had "exceeded the 'appropriate quotation' standard" under Article 22(2), although the court did not specify how many pictures would have been appropriate.[245] For the effect on the market factor, the court ruled that the inclusion of the plaintiff's sixteen pictures in the defendant's book adds aesthetic and commercial value to the book; thus, the unauthorized use had a negative impact on the plaintiff's ability to exploit the potential market.[246] In view of the above, the court concluded that the use did not fall into the Article 22(2) exception; thus, the court found the defendant liable for copyright infringement.[247]

3. Open-Ended List of Permissible Uses Beyond Article 22

Despite the traditional notion that fair use cases are decided strictly according to the enumerated list of permissible uses provided under Article 22, a few courts have chosen to adopt a more flexible approach when they feel that the existing law is "insufficient" to deal with the new cases. This approach is similar to the U.S. fair-use model that allows an open-ended list of permissible uses based on consideration of multiple factors.[248]

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242 *Id.* (emphasis added).

243 *Id.*

244 *Id.* at 3.

245 *Id.*

246 LU MIN ZHONG ZI DI, at 3 (Shandong High Court 2007) (China).

247 *Id.*

248 SARFT Movie Channel Prod. Center v. China Educ. TV Station, HAI MIN CHU ZI NO. 8877, at 2 (Beijing Haidian District Court 2006) (China).

In *SARFT Movie Channel Production Center v. China Education TV Station*,[249] the plaintiff, SARFT Movie Center, sued the China Education TV Station ("CETV"), for copyright infringement when CETV rebroadcasted the plaintiff's copyrighted movie *Out to Amazon River* without authorization. CETV argued fair use claiming that as a state-owned television station devoted to the broadcasting of educational programs, the purpose of its broadcasting fell into the Article 22(6) "educational purpose exception," which provides that "translation, or reproduction in a small quantity of copies of a published work by teachers or scientific researchers for use in classroom teaching or scientific research, provided that the translation or the reproductions are not published for distribution" without permission or payment is not copyright infringement.[250]

When evaluating CETV's fair use defense, the court held that "classroom teaching" defined in Article 22(6) is restricted to "in-classroom person-to-person teaching" only and does not include "remote education/teaching by radio broadcasting, television broadcasting or other electronic means," thus rejecting CETV's quotation of Article 22(6). [251]

However, the court did not stop after concluding that CETV's use did not fall within Article 22(6), but continued its analysis to decide whether CETV's use was fair. The court acknowledged that "fair use, as a key element of the Copyright Law, should be stable and predictable, but on the other hand, it should also evolve to accommodate [] new development[s] and demand[s]."[252] The court refused to be bound by the enumerated list of permissible uses provided in Article 22 and went further to explore other possible permissible uses for which the defendant's rebroadcast might have qualified.[253] The court applied two factors: 1) purpose of the use; and 2) effect of the use on the market.[254]

For the first factor, the court held that CETV's use was commercial because it inserted several advertisements during the broadcasting of the copyrighted movie; thus, finding this factor against the defendant.[255] For the second factor, the court defined the "the market" to include both the "actual market"

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249 *Id.*

250 *Id.* at [3]; Copyright Law of People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1990) art. 22(6), *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383888.htm.

251 *See* SARFT Movie Channel Prod. Center v. China Educ. TV Station, HAI MIN CHU ZI NO. 8877, at 2 (Beijing Haidian District Court 2006) (China).

252 *Id.*

253 *Id.*

254 *Id.*

255 *Id.*

and "potential market."[256] The court held that because both the plaintiff and the defendant were television stations with national broadcasting rights, CETV's rebroadcast of the copyrighted movie and its receipt of advertisement revenue would undoubtedly have a negative impact on the plaintiff's exploitation of its potential market; thus, the court found this factor against the defendant as well.[257] Overall, the court rejected the defendant's fair-use argument and found it liable for copyright infringement.[258]

V. RECOMMENDATION

A. Pros and Cons of the U.S. and the U.K. Fair-Use/Dealing Models

The advantage of the U.S. fair-use model is that, by allowing an open-ended list of permissible uses based on consideration of statutory factors, it is more flexible and robust compared to its counterpart in U.K. Commonwealth and Continental European countries; thus, the U.S. model is more ready to accommodate to the development of new technologies. The differing outcomes of the Google thumbnail cases decided by the U.S.[259] and European courts[260] illustrate this. On the other hand, the "flexibility" of the U.S. fair use model has its own disadvantages; it has been criticized for creating significant ex ante uncertainty.[261] Having examined many fair-use cases, David Nimmer concluded that "the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions."[262] Professor Barton Beebe's statistical analysis of more than two hundred fair-use cases is also consistent with this conclusion.[263] Therefore, critics of the current U.S. fair-use model argue that because of the lack of a bright-line rule, the high costs of litigation, and poten-

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256 *Id.*

257 SARFT Movie Channel Prod. Center v. China Educ. TV Station, HAI MIN CHU ZI NO. 8877, at 2 (Beijing Haidian District Court 2006) (China).

258 *Id.*

259 *Supra* Part II.C.2.

260 *Supra* Part III.C.1.

261 4 NIMMER & NIMMER, *supra* note 54 at § 13.05 [A][1][b] (citing Castle Rock Entm't, Inc., v. Carol Publ'g Group, Inc., 150 F.3d 132, 142 (2d Cir. 1998)); PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.2.2, at 12.34 (3d ed. 2005).

262 David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 281 (2003).

263 Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 585–86 (2008).

tial enormous statutory damages, potential fair users may be deterred from engaging in fair uses of copyrighted works; thus, the system is creating a culture of "clearing for fear."[264]

The fair-dealing model in the U.K. Commonwealth and Continental European countries, represented by the United Kingdom, has been criticized for being too restrictive; thus, it is unable to accommodate new business models and technologies. But, it is believed to create more certainty and clarity under the existing regime. In fact, a number of countries have recently rejected proposals that would have adopted open-ended fair-use models, including Australia,[265] the U.K.,[266] and New Zealand.[267]

B. Problems of the Fair Dealing/Use Model in China

The existing fair-dealing model in China originated from continental Europe and offered a specific list of twelve permissible uses under Article 22 of

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264 *See* Marjorie Heins & Tricia Beckles, *Will Fair Use Survive: Free Expression in the Age of Copyright Control*, The Free Expression Policy Project, 5–6 (2005), http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf (last visited Jan 11, 2011).

265 Australia debated and then rejected the proposal to introduce the fair use or expanded fair dealing model in favor of enacting a number of detailed and specific exceptions. *See* Philip Ruddock, Attorney-General, Australia Fair Use and Other Copyright Exceptions: Issues Paper (May 2005) (unpublished) (Austl.), *available at* http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf; Explanatory Memorandum from Philip Ruddock, Attorney-General on Copyright Amendment Bill 2006 (2006) (unpublished) (Austl.), *available at* http://legislation.gov.au/ComLaw/Legislation/Bills1.nsf/0/D052936F5620B888CA25721000039385/$file/06157em.pdf.

266 The U.K. government also rejected moving to an open-ended fair use model favoring instead adopting specific exceptions that are desirable in U.K. Law. *See* U.K. Intellectual Property Office, *Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions* (2008), *available at* http://www.ppa.co.uk/legal-and-public-affairs/ppa-responses-and-evidence/~/media/Documents/Legal/Consultations/Taking%20Forward%20Gowers/consult-copyrightexceptions.ashx (rejecting the open-ended fair-use model raised in the *2006 Gowers Review of Intellectual Property* (2006)).

267 The New Zealand government considered and rejected a fair use regime stating that they found no compelling reason to adopt any fair use models. *See* New Zealand Ministry of Economic Development, Digital Technology and the Copyright Act 1994, Internal Working Paper, at ¶¶ 252–65 (July 2002) (unpublished working paper), *available at* http://www.med.govt.nz/upload/2429/working.pdf; New Zealand Ministry of Economic Development, Digital Technology and the Copyright Act 1994, Position Paper, ¶¶ 160–61 (Dec. 2002) (unpublished working paper), *available at* http://www.med.govt.nz/upload/2334/digital-position.pdf.

the P.R.C. Copyright Law and Article 6 of the 2006 Regulations.[268] A review of recent Chinese fair-use cases suggests that despite legislative efforts to create clarity and certainty in defining fair use, courts have decided to exercise discretion to determine what constitutes fair use by adopting a "multi-factor analysis" approach in circumstances where the existing legislative language is too vague [269] or insufficient to deal with new challenges posed by new business models or technologies.[270]

In *Yang Luo-Shu*, the approach of the Shandong High Court was similar to the U.K. fair-dealing model. The court first decided whether the use fell into a specific category, which it did (Article 22(2)), and then applied a three-factor test to determine the fairness of the dealing.[271] Yet in *SARFT Movie Center*, the approach of the Beijing Haidian court resembled the U.S. fair-use model. After the court concluded that the defendant's use did not fall into any of the enumerated categories provided under Article 22, it took one step further and adopted the U.S. fair-use model, i.e. considering an open-ended list of permissible uses based on a multifactor analysis.[272]

The different approaches taken by Chinese courts, with or without a multifactor analysis, are more confusing than different lists of factors and these approaches have created uncertainty and ambiguity under the case law. This should be fixed.

C. Options for Fair Use Reform in China

Before making specific recommendations on how China should fix its current fair use model, the following two fair use models are worthy of special attention and might provide useful reference for China's future legislative reform.

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268 *See generally* Copyright Law of People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1990) art. 22, *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383888.htm; Regulations for the Protection of the Right of Communication through Information Network (promulgated by the State Council, May 10, 2006, effective July 1, 2006) art. 6 (China), *available at* http://www.cpahkltd.com/Archives/063A-p90.pdf; *supra* Part IV.A (discussing the Chinese fair-use model).

269 *See Yang Luo-Shu*, LU MIN ZHONG ZI DI 94; *supra* Part IV.B.2.

270 *See SARFT Movie Channel Prod. Ctr*, HAI MIN CHU ZI NO. 8877; *supra* Part IV.B.3.

271 *Yang Luo-Shu*, LU MIN ZHONG ZI DI 94

272 *Id.*

1. The Taiwanese Fair-Use Model

The fair-use model in Taiwan is an interesting mixture of the U.K. fair-dealing model and the U.S. fair-use model. A defendant claiming fair use under the Taiwanese Copyright Act must prove that 1) the use falls into a specific category provided by Articles 44–63;[273] and 2) the dealing is fair based on statutory factors provided by Article 65(2).[274] This portion of the Taiwanese model is similar to with the U.K. fair-dealing model. On the other hand, the Taiwanese fair-use model also shares similarity with the U.S. model. Article 65(2) of the Taiwanese Copyright Act adopts exactly the same four statutory factors as provided in section 107 of the U.S. Copyright Act, i.e. the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of use upon the potential market for or value of the copyrighted work.[275]

It is fair to say that the overall structure of the Taiwanese fair-use model resembles the U.K. fair-dealing model. Unlike the U.K. model however, where judges may exercise discretion in assessing the "fairness" of the dealing,[276] Taiwanese judges must rely on the exact same four statutory factors as section 107 of the U.S Copyright Act, to evaluate the fairness of the dealing.[277] Therefore, the fair-use model in Taiwan may might be the most rigid and stringent of all models.[278]

2. The South Korean Fair-Use Model

The newly proposed South Korean Copyright Amendment Bill ("the Draft") would add Article 35-2 to address fair use of works that do not fall within the enumerated categories of permissible uses in Articles 23 through 35 and Articles 101-3 through 101-5 of the South Korean Copyright Acts.[279]

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273 *See* Copyright Act, arts. 44–63(2010) (Taiwan) (listing enumerated uses such as state agencies, education, academic research, culture reservation and promotion, news reporting, non-profit purpose, computer program adaptation); *available at* http://www.tipo.gov.tw/en/AllInOne_Show.aspx?path=2557&guid=26944d88-de19-4d63-b89f-864d2bdb2dac&lang=en-us.

274 *Id.* art. 65(2).

275 *Compare* Copyright Act, art. 65(1)–(4) (2010) (Taiwan), *with* 17 U.S.C. § 107(1)–(4) (2006).

276 *See* discussion, *supra* Part III.A.2.

277 Copyright Act, art. 65(1)–(4) (2010) (Taiwan).

278 *See* Zhang Zhongxin, *Copyright Protection, Technology Development and Fair Use*, Taiwan Technology Legal Forum (Nov. 20, 2003).

279 *See* [Copyright Act], art.35-2, para. 1 (Proposed Amendments) (Feb. 2010) (S. Kor.).

Proposed Article 35-2 would provide that works not falling into the enumerated categories[280] may be used in exceptional cases where "there is no conflict with the normal methods to use such works and an author's legal interests are not unreasonably harmed."[281] To clarify the standard for determining whether use of a work is exceptional, the second paragraph of Article 35-2 would provide four statutory factors, which are exactly the same as section 107 of the U.S. Copyright Act: 1) purpose and nature of use, including a profit or non-profit purpose; 2) type and usage of a work; 3) portion of the use, the part in the entire work and importance thereof; and 4) effect that use of a work has on the present or future market or value of the work.[282]

The South Korean Draft seems to expand the scope of fair use by borrowing the U.S. approach to address works that are not covered under enumerated categories of permissible uses. Thus, the proposed Draft offers more flexibility.

3. China's Future Fair-Use Model: Balancing Clarity and Flexibility

As illustrated above, Chinese fair-use legislation and case law seems to have created two primary problems: 1) there is no clear guidance on what factors should be considered—thus, judges have developed disparate lists of factors in their opinions; and 2) the exhaustive list of twelve permissible uses may be too rigid to accommodate new challenges posed by new business models and technologies.

To address the first concern, i.e. disparate lists of factors to assess the fairness of a use, I recommend that China follow the Taiwanese/South Korean model and set out a list of statutory factors to provide more clarity and consistency. The statutory factors might be the same as those provided under section 107 of the U.S. Copyright Act, which seem to have become internationally recognized standards.

I resist the temptation to make a recommendation about the more general question of which model should China follow in its future legislative reform: a rigid interpretation of fair use—where the defendant needs to meet two

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280 Works that do not fall into enumerated categories are those not covered under existing provisions from Articles 23 through 35 and Articles 101-3 through 101-5 of the Korean Copyright Act. *See* [Copyright Act], Act. No. 8101, Dec. 28, 2006, arts. 23–35, 101-3–101-5 (S. Kor.), *available at* http://www.wipo.int/copyright/en/limitations/pdf/kr.pdf, at 7–8.

281 *See* [Copyright Act], art.35-2, para. 1 (Proposed Amendments) (Feb. 2010) (S. Kor.)

282 *See id.* at para. 2.

threshold tests (as with the Taiwanese model or the *Yang Luo-Shu* case)—or a more liberal model—where the defendant can first look at the enumerated list of categories of permissible uses, and if not found, then apply statutory factors for further analysis (as with the South Korean model or the *SARFT Movie Center* case). After all, eventually the question becomes a policy question that the Chinese government should consider after carefully balancing the interests of all the stakeholders. Does China want to expand the current scope of fair use?

If China decides to expand the scope of fair use based on public policy considerations, then the South Korean model, which seems to offer benefits of both worlds, might be a good example for China to follow. The South Korean model has clarity and certainty provided by an enumerated list of permissible uses and flexibility provided by an open-ended list of permissible uses based on statutory factors when such uses are not found in the enumerated categories. On the other hand, if China decides to keep its current scope of fair use, then China probably should follow the Taiwanese model and offer statutory factors in its new law to provide more consistency.

VI. CONCLUSION

Although the Chinese fair-use model originated from the fair-dealing model of the U.K. and Continental Europe, which features an enumerated list of permissible uses, a review of a number of Chinese fair-use cases seems to suggest that the legislation is vague and insufficient to deal with new challenges. Chinese courts have resorted to exercising their own discretion in interpreting what constitutes fair use. The different approaches adopted by various courts, from a rigid interpretation of Article 22 to a more liberal introduction of a multi-factor test, have created uncertainty and unpredictability in the case law. To provide more certainty and consistency for the assessment of "fairness" of dealing, China should consider applying a statutory-factor approach, as found in the U.S., Taiwanese, and South Korean Copyright Acts. As to the more important question of whether China should expand or keep its current scope of fair use, China should carefully review its public policy and the interests of various stakeholders and adjust its fair-use model either towards the Taiwanese model (more rigid) or the South Korean model (more liberal).