

Deacons Bitesize IP

Intellectual Property

6 January 2022

Could the third time be the charm for Hong Kong's copyright law?

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Did you know?

Nearly 2 decades after amendments to update Hong Kong's copyright law were first proposed, the discussion on improving copyright protection in Hong Kong to take account of the digital environment, has been re-opened. 2 previous bills in 2011 and 2014 failed to pass due to public concerns that the introduction of a "communication right" would impact on freedom of speech and misunderstanding of copyright law.

The Government published a consultation paper on 24 November 2021 reintroducing the key legislative proposals set out in the 2014 Bill including new copyright exceptions for parody, satire, caricature and pastiche.

Why does this matter to you?

Hong Kong's copyright law is significantly behind the international trend and it seems likely that the third time could be the charm.

The key proposals set out in the 2014 Bill were:

- The introduction of a ***new technology-neutral communication right*** that will allow owners to communicate their works through any mode of electronic transmission.
- ***Criminal sanctions*** for the ***unauthorized communication*** of a work where the act is either done in the course of trade or profit, or non-commercial communication to an extent that *prejudices* the copyright owner. The proposed criminal sanctions mirror the existing sanctions available in the CO against the distribution of infringing copies of works.
- ***Safe harbour for OSPs*** to protect them from liability for infringements occurring on their platform provided that they meet certain prescribed conditions, including taking reasonable steps to limit or stop a copyright infringement when being notified. The safe harbour was previously underpinned by a Voluntary Code of Practice which sets out practical guidelines and procedures for OSPs to follow after notification. A draft Code was prepared back in 2012.
- New ***fair dealing exceptions*** for ***parody, satire, caricature and pastiche***, commenting on current events and quotation.
- ***Additional factors*** that may assist the Court in considering whether an award of ***additional damages*** should be awarded in online infringement cases including:
 - the unreasonable conduct of the infringer after being informed of the infringement; and
 - the likelihood of widespread circulation of infringing copies as a result of the infringement.

The current consultation also raises 4 other topical issues not covered in the previous Bills:

- Whether the existing **exhaustive** approach to copyright exceptions should be maintained. Under Hong Kong law, exceptions to copyright infringement must constitute “fair dealing” under specified range of circumstances. The Government has now raised the possibility of a more general concept of “fair use” like the US, a **non-exhaustive** approach.
- Whether to continue to allow contractual arrangements to override a copyright exception.
- Specific provisions to deal with illicit streaming devices.
- Judicial site blocking. The power to order website blocking injunctions is specifically provided for under UK, Australian and Singapore law.

The paper makes clear that this consultation is just the beginning of reactivating a long overdue exercise to enhance copyright protection. The rapid developments in technology in the recent years means that new issues have already arisen, including copyright exceptions for text and data mining, and questions relating to AI and copyright. With the consultation period expiring on **23 February 2023**, this is a good opportunity to look at the proposals with fresh eyes, taking account of new technology and the practical experience of other countries.

Want to know more?

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