

Deacons Bitesize IP

Intellectual Property

18 January 2023

Hong Kong finally updates its copyright regime for the digital age

Did you know?

Just before Christmas, the Copyright (Amendment) Ordinance 2022 was finally passed, ending nearly 2 decades of debate over updating copyright protection in Hong Kong to take account of the digital environment.

Why does this matter to you?

The amendments introduce major changes to Hong Kong's copyright law and finally bring its copyright regime in line with international standards. Key amendments include:

- 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 **unauthorised 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.
- **Safe harbour for online service providers** (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 on being notified.
- New **fair dealing exceptions** for parody, satire, caricature and pastiche, commenting on current events and quotation.
- New **exceptions for the education sector, libraries, museums, archives, temporary reproduction of copyright works by OSPs, and media shifting**. These apply to communicating/using copyright works by the education sector when giving instructions for online/distance learning, as well as facilitating libraries, archives and museums' daily operations and in preserving valuable works, and allowing caching by OSPs, and media shifting of sound recordings for private and domestic use.
- **Additional factors** that may assist the Court in considering whether **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 introduction of a technology-neutral communication right and safe harbour for OSPs is long-overdue given the advances in digital technology and international developments. It appears that there have been some misconceptions regarding the proposed amendments in the past and it is important that the rationale and genuine impact of the changes are understood. The law makes clear that the protection afforded to copyright owners will cover any mode of electronic communication, including streaming. The changes also provide much needed clarity on the issue of OSP liability and the safe harbour mechanism is in line with international practice that has been in place overseas for years.

The proposed criminal sanctions for unauthorised electronic communication of works, which caused public concern when the previous amendment bills were debated, actually mirror existing sanctions available in relation to the prejudicial distribution of infringing copies of works. To address apprehensions about the possible impact of the existing “prejudicial distribution offence” and the proposed “prejudicial communication offence” on the free flow of information across the internet, and to provide greater legal certainty, the amendments clarify that the Court should consider all the circumstances of a case. In particular, when considering economic prejudice, whether the distribution or communication amounts to a substitution for the work. In relation to “prejudicial communication” there is also a defence if the person can prove that they did not know and had no reason to believe that they were infringing copyright by communicating the work in question.

The introduction of a new fair dealing exception for parody is also to be welcomed as most parodies cannot be created without reproducing substantial portions of the original work. This means that most parodies involve significant infringement risks. Under the current law, there is no explicit parody defence and a parodist may find it difficult to come within the existing exceptions, which are strictly defined.

Some of the less high profile changes may actually be of great practical importance to copyright owners, such as the introduction of additional factors to help the court decide whether or not to award additional damages in online infringement cases.

Want to know more?

Charmaine Koo
Partner

charmaine.koo@deacons.com
+852 2825 9300

Kelley Loo
Partner

kelley.loo@deacons.com
+852 2825 9575

Amy Chung
Partner

amy.chung@deacons.com
+852 2825 9671

Theresa Luk
Partner

theresa.luk@deacons.com
+852 2825 9482

The information contained herein is for general guidance only and should not be relied upon as, or treated as a substitute for, specific advice. Deacons accepts no responsibility for any loss which may arise from reliance on any of the information contained in these materials. No representation or warranty, express or implied, is given as to the accuracy, validity, timeliness or completeness of any such information. All proprietary rights in relation to the contents herein are hereby fully reserved.

0123 © Deacons 2023

www.deacons.com