

Hong Kong Introduces Major Updates to Its Copyright Regime

A recent amendment addresses key loopholes and aims to align Hong Kong's copyright regime with international standards.

On 16 December 2022, the Hong Kong [Copyright \(Amendment\) Ordinance 2022](#) (Amendment) was finally gazetted, providing a long-overdue update of the Copyright Ordinance (Cap. 528) (Ordinance). The Amendment introduces:

- 1) a new technology-neutral communication right for copyright owners to communicate their works to the public through any mode of electronic transmission, including streaming;
- 2) criminal sanctions against individuals who make unauthorised communication of copyright works to the public for profit or to prejudice copyright owners;
- 3) new copyright exceptions;
- 4) safe harbour provisions to limit online service providers' (OSPs') liability;
- 5) two additional factors for courts to consider when determining whether to award additional damages for copyright infringements; and
- 6) other technical amendments.

Background

Prior to the passing of the Amendment, the government had conducted three rounds of major consultations on strengthening copyright protection, and two amendment bills were introduced in 2011 and 2014. However, the corresponding legislative processes were not completed before the expiry of the respective Legislative Council (LegCo) terms, meaning that the Ordinance — which came into force in June 1997 — had never been updated to reflect the changes in the digital environment.

Against this backdrop, the government decided to update the copyright regime and conducted a public consultation from November 2021 to February 2022. The Amendment builds on the Copyright (Amendment) Bill 2014 and seeks to balance the opinions received from the government, LegCo, copyright owners, OSPs, and copyright users. The Amendment, which will come into effect on a date yet to be confirmed but

is expected to be soon, helps bring Hong Kong's copyright regime in line with international standards and addresses some of the key loopholes under the existing Ordinance.

Amendments to the Ordinance

The Amendment introduces:

- **A new technology-neutral communication right for copyright owners to communicate their works to the public through any mode of electronic transmission, including streaming**

The existing Ordinance gives copyright owners the exclusive right to make a copyright work available to the public on the internet, to broadcast a work, or to include a work in a cable programme service. This did not cover streaming (which does not technically involve any copying, unlike, for instance, downloading content from the internet) — a major loophole in this day and age of ubiquitous streaming. The Amendment seeks to address this loophole by introducing a technology-neutral exclusive communication right for copyright owners to communicate their works to the public through *any* mode of electronic transmission (including streaming). The Amendment also clarifies that the mere provision of facilities for the carriage of signals by parties, such as OSPs, and the daily and reasonable online behaviours of the general public, such as the mere forwarding of a hyperlink or access to materials communicated by others, would not be subject to legal liabilities for unauthorised “communication to the public”.

- **Criminal sanctions against individuals who make unauthorised communication of copyright works to the public for profit or to prejudice copyright owners**

The elements and sanctions of this new offence mirror those in the existing Ordinance against the distribution of infringing copies of works. When determining whether an action has a “prejudicial effect” to assess possible criminal liability, the Amendment provides that a court will examine all the circumstances of a case and in particular, consider whether the copyright owner was exposed to any economic prejudice.

- **New copyright exceptions**
 - ***Exceptions for the education sector, libraries, museums, archives, temporary reproduction of copyright works by OSPs, and media shifting***

The Amendment introduces the following copyright exceptions to:

- provide greater flexibility to the education sector in communicating copyright works when giving instructions, and to help libraries, archives, and museums in their daily operations and in preserving valuable works;
- allow OSPs to cache data (which technically involves copying and is a breach of the existing Ordinance), since caching is transient or incidental in nature and technically required for data transmission; and
- allow transfers of sound recordings between digital devices for private and domestic use.

– ***Fair dealing exceptions***

The Amendment introduces a number of fair dealing exceptions to the Ordinance:

- Fair dealing with a work for the purposes of criticism or review of the work or its performance, and the use of a quotation from the work do not infringe any copyrights if the use is accompanied by sufficient acknowledgement. Furthermore, fair dealing with a work for the purpose of reporting or commenting on current events does not infringe any copyright in the work if the use is accompanied by sufficient acknowledgement (as set out in Section 198 of the Ordinance, an “acknowledgement identifying the work in question by its title or other description, and identifying the author”).
 - A new fair dealing exception is also introduced to cover parody, satire, caricature, and pastiche.
- **Safe harbour provisions to limit OSPs’ liability for copyright infringement on their service platforms caused by subscribers after meeting prescribed conditions**

These provisions will be welcome news to OSPs, but are subject to certain prescribed conditions. These conditions include taking reasonable steps to limit or stop a copyright infringement when notified. A Code of Practice is expected to set out the requirements to meet compliance standards for OSPs and provide for practical guidance in relation to a:

- “Notice and Notice” system requiring OSPs to notify their subscribers or users that their accounts have been identified in connection with an alleged copyright infringement; and
 - “Notice and Takedown” system requiring OSPs to remove materials or disable access to materials on their platforms that are found to be infringing.
- **Two additional factors for courts to consider when determining whether to award additional damages for copyright infringements**

Copyright owners have a right to sue for copyright infringements and bear the burden of proving that they have suffered harm. The existing Ordinance allows courts to award additional damages for copyright infringements since civil damages are compensatory in nature and proving loss incurred by copyright infringements is intrinsically difficult. The Amendment expands the existing list of factors which courts should consider when awarding additional damages:

- the unreasonable conduct of an infringer after having been informed of the infringement; and
- the likelihood of widespread circulation of infringing copies as a result of the infringement.

Continuous Review of Copyright Regime

The LegCo Brief specifies the intention, upon passage of the Amendment, to begin a renewed copyright review exercise to study the issues raised by different stakeholders, but which are yet to be addressed in the Amendment. Key issues that have been raised include the extension of copyright term of protection, the introduction of specific copyright exceptions for text and data mining, issues related to artificial intelligence and copyright, the use of copyright works in which the owner cannot be identified, a review of the Copyright Tribunal’s jurisdiction, and updating the Copyright (Libraries) Regulations.

Latham & Watkins will continue to monitor developments in this area.

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