



Copyright (Amendment) Bill 2014

Submissions

The Law Society has the following comments on the Copyright (Amendment) Bill 2014:

1. It is a constant challenge to lawmakers to strike a careful balance between the interests of copyright users and those of creators/owners. Exceptions too broad may disincentivise right owners and too narrow may stifle creativity and innovation. This challenge is exemplified by modern technology which, on the one hand, extends exponentially the reach of a work and on the other, makes it very easy, cheap and fast to copy.
2. Our copyright law needs to be up-to-date to meet international trends, changing environment and expectations of stakeholders. Since 1997, Hong Kong has made 5 rounds of amendments.
3. This latest amendment exercise commenced with a consultation in December 2006 to seek public views on how best to strengthen copyright protection in the digital environment. At that time, Hong Kong successfully brought the world's first ever enforcement action leading to the conviction of a person who distributed infringing copies of movies using the Bit-Torrent technology.
4. Preliminary proposals were announced in April 2008 and were refined after further public engagement. The primary objectives were to (a) ensure that Hong Kong copyright law copes with the rapid technological advances in this digital age; (b) facilitate cooperation between copyright owners and online service providers in combating online infringement;

and (c) support reasonable use of copyright works via computer networks, e.g. e-learning. Consequently, the Copyright (Amendment) Bill 2011 was drafted to introduce a technology-neutral exclusive right of communication, a '*safe harbour*' for online service providers and new exceptions such as media shifting.

5. Yet, a year after it was tabled, the Copyright (Amendment) Bill 2011 was not proceeded with principally due to filibuster arising from the controversies about the need for a parody exception and concerns over the threshold of criminal liability associated with unauthorised communication of copyright works.
6. Whilst the Law Society does not consider it necessary or urgent to introduce a parody exception, we take the view that Hong Kong may follow Australia and the UK to introduce a parody exception provided that copyright is adequately protected against the possibility of such exception being abused. We hence accept an expansion of the fair dealing exceptions to include parody. We see that besides including the previous copyright amendment proposals with some refinement, the Copyright (Amendment) Bill 2014 has extended the fair dealing exceptions for not only those proposed in the Copyright (Amendment) Bill 2011 with the addition of parody, but also commenting on current events and quotation.
7. As for the threshold of criminal liability, instead of finding "*more than trivial economic prejudice*" and introducing a non-exhaustive list of factors to guide the Court in determining the magnitude of economic prejudice which may be caused to the copyright owner as a result of infringing activities, the new Amendment Bill replaces that by taking into account all the circumstances of the case, in particular whether the infringing copy amounts to a substitution for the work. Although the Law Society understands that this is generally accepted by copyright owners and netizens, we consider that the drafting can be improved to make sure that substitution is only one of the factors and not the prime factor to be considered.
8. The Law Society takes the view that the Copyright (Amendment) Bill 2014 has adequately addressed the issues of controversy in 2012 and restores Hong Kong in meeting international expectations on copyright

protection while introducing new exceptions to allow use without infringement.

9. Yet, the Law Society is aware that many netizens now urge for the inclusion of an exception for User Generated Content (“UGC”). Overseas, there are ongoing discussions about the ambit of UGC and whether it meets the “three-step test” requirement of the TRIPS Agreement for creating an infringement exception. So far only Canada has introduced this in its Copyright Act in 2012. The Copyright Review Committee of Ireland has recommended to add this as part of Ireland’s private copying exceptions in its October 2013 Report.
10. On the other hand, it is interesting to note that in Australia, while the Australian Law Reform Commission proposes (in its *Discussion Paper May 2013 – Copyright and the Digital Economy*) the replacement of “fair use” for fair dealing exceptions, it agrees that as UGC “*reflects a full spectrum of creative and non-creative re-uses*”, it should not automatically qualify for protection under any proposed exception aimed at fostering innovation and creativity. It considers the creation and sharing of UGC “social use” of copyright material which may be fair, particularly when transformative. Yet, it does not propose that “social uses” be an illustrative purpose in the fair use exception, or otherwise be given any special stature in copyright exceptions.
11. While the UK, in its February 2014 response to the *European Commission Consultation December 2013: Review of the EU Copyright Rules*, believes that more transparency regarding licensing arrangements for UGC platforms and more education to users and creators of UGC about copyright rules would be useful, it finds that “*the case for any other regulatory intervention in this area remains to be made*”.
12. Unlike parody, commenting on current events and quotation which are for specific purposes, UGC is of wide application and implication. In Europe, besides the initiatives outlined in “*A Single Market for Intellectual Property Rights*” which aims to create a seamless, integrated IP market for European inventors and creators, the European Commission has set up a User-Generated Content Working Group to explore problems and solutions related to UGC. In June 2013, Ofcom (independent regulator

and competition authority for the UK communications industry) published a report to define and assess the value of UGC. The report identifies both opportunities and challenges.

13. Clearly, UGC is not merely a legal issue but also a policy issue which can have significant impact on the economy and society at large. In the UK *Hargreaves Review*, it advocates that policy decisions should be based on economic evidence and recommends that Government should ensure that development of the IP system is driven as far as possible by objective evidence and that policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. Hence, if Hong Kong is to consider whether or not to introduce a UGC exception, it is important and also only fair that this should be seriously and thoroughly evaluated upon proper consultation with all stakeholders while drawing on the researches and experiences of other countries.
14. Yet, it will not serve the interest of Hong Kong to postpone passing the Copyright (Amendment) Bill 2014 pending resolution of the UGC issue. Hong Kong simply cannot wait further to update its copyright law.
15. Hong Kong was a founding member of the World Trade Organisation and until recent years, has always taken pride as a forerunner in intellectual property protection in Asia with a robust and up-to-date intellectual property regime. Regrettably, our copyright law now lacks seriously behind international trends, especially in protection in the digital environment. For that reason, it has even been suggested that Hong Kong should be put under a list of “Deserving Special Mention” and “Watch List” in the US Special 301 Report which identifies countries which do not provide “adequate and effective” protection of intellectual property rights. If that happens, it will not only embarrass Hong Kong and create a negative impression but will also undermine the efforts both government and private institutions have put to develop Hong Kong as an intellectual property trading hub when Hong Kong is already facing intense competition from Singapore and Korea.
16. According to the Global Competitiveness Report 2013-2014 published by the World Economic Forum, Hong Kong ranked 10th out of 148.

economies in IP protection while Singapore ranked 2nd. Hong Kong cannot afford to lose further ground.

17. The Law Society therefore strongly urges that the copyright law must be updated without further delay. With perhaps a few fine tuning, the Copyright (Amendment) Bill 2014 should be adopted and passed.

The Law Society of Hong Kong
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