

Hong Kong Copyright Law: Key Changes proposed in Copyright (Amendment) Bill 2014

With the rapid developments in information technology, new modes of electronic transmissions have emerged. In order to protect copyright owners in the digital environment and to keep pace with international copyright protection, the Hong Kong government perceived a need to update our current Copyright Ordinance (Cap. 528). The government conducted a public consultation from July to November 2013 with regards to certain issues surrounding the copyright regime in Hong Kong and issued the Copyright (Amendment) Bill 2014 (“**the 2014 Bill**”). This Article seeks to summarise the key proposed changes under the 2014 Bill.

Exclusive rights

Under section 22 of the Copyright Ordinance, copyright owners have certain exclusive rights¹ in dealing with their copyright works, including a communication right that is specific to cable programme services (“*to broadcast the work or include it in a cable programme service*” under section 22(1)(f) of the Copyright Ordinance). In view of the new modes of electronic transmissions, the Hong Kong government seeks to introduce a new right that allows copyright owners to communicate their copyright works on any electronic platforms². The 2014 Bill proposes to replace the communication right under section 22(1)(f) of the Copyright Ordinance with a general communication right³ that is defined broadly, in order to cover any existing or future modes of electronic transmissions. In appropriate cases, this new communication right will be subject to the copyright exceptions provided for in the Copyright Ordinance⁴.

Fair dealing exceptions

Under the Copyright Ordinance, certain acts are permitted in relation to the copyright works, for example fair dealings of copyright works are allowed for the purposes stipulated in the Copyright Ordinance, namely for the purposes of (a) research and private studies (section 38); (b) criticism, review and news reporting (section 39); (c) education (section 41A); and (d) public administration (section 54A).

During the consultation, Internet users expressed their view that certain common activities on social media sites (including Facebook, YouTube, discussion forums) making use of copyright works, for example, mash-ups, altered pictures/videos, homemade videos, rewriting lyrics (usually known as User-Generated Content (UGC)), should also be permitted⁵. The Hong Kong government has firmly rejected the introduction of a general exception for users who distribute UGC. It was of the view that there is a lack of widely accepted definition of UGC at international level and the concept in fact

¹ To copy the work; to issue copies of the work to the public; to rent copies of the work to the public; to make available copies of the work to the public; to perform, show or play the work in public; to broadcast the work or include it in a cable programme service; and to make an adaptation of the work or do any of the above in relation to an adaptation

² Legislative Council Brief, Copyright (Amendment) Bill 2014, File Ref.: CITB 07/09/17, page 6, paragraph 7

³ Clause 9(3) of the 2014 Bill

⁴ Supra note 2, page 9, paragraph 11

⁵ Supra note 2, page 10, paragraph 13

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changes with technological developments⁶. Secondly, the new fair dealing exceptions proposed under the 2014 Bill (as detailed below) are already sufficient to address the concerns⁷.

The 2014 Bill proposes to introduce three additional fair dealing exceptions.

Firstly, a new fair dealing exception will be added under a new section 39A of the Copyright Ordinance to cover the uses for the purposes of parody, satire, caricature and pastiche⁸. The terms “*parody, satire, caricature and pastiche*” are not defined in the 2014 Bill, instead the definitions of the terms in the Concise Oxford English Dictionary (12th Edition, 2012) are referred to in the Legislative Council Brief⁹. It remains to be seen if the Legislative Council will include the definitions in the Concise Oxford English Dictionary in the statute.

Further, a sub-section will be added under section 39 of the Copyright Ordinance to allow fair dealings of copyright works for the purposes of commenting on current events¹⁰. Currently, section 39 of the Copyright Ordinance provides for fair dealings for the purposes of news reporting. In view of the fact that it is common for Internet users to use copyright works when commenting on current political or social events (in addition to reporting current events), this new sub-section is added to ensure sufficient protection to the Internet users¹¹.

Another sub-section will be added under section 39 of the Copyright Ordinance to cover the use of a quotation to the extent which is no more than necessary for the specific intended purpose. This will allow the Internet users to quote copyright works (including academic or scholarly texts¹², literary or artistic works, films and sound recordings¹³) for the purposes of facilitating discussions, providing information or expressing opinions as used on blogs and social media websites¹⁴.

While it is of no doubt that the fair dealing exceptions in the 2014 Bill afford better protection to the Internet users than the current regime, some have argued that the scope is not wide enough to cover all common derivative works, for example cover songs, self-publish comic remixes, live-stream games, lyrics rewriting¹⁵ that are not created for the stipulated purposes are unlikely to be covered under the new scheme. In the Legislative Council Paper¹⁶, it was stated that “song singing with or without rewriting the lyrics based on the original melodies, which may be more akin to a mere expression of feelings of showing of talent” will not be covered if it is “devoid of any parodic or like elements or any quotation purposes” or “related to any current events”¹⁷.

⁶ Supra note 2, page 16, paragraph 19(a)

⁷ Ibid, paragraph 19(b)

⁸ Clause 19 of the 2014 Bill

⁹ Supra note 2, page 1, footnote 1

¹⁰ Clause 18 of the 2014 Bill

¹¹ Bills Committee on the Copyright (Amendment) Bill 2014, Application of fair dealing provisions, LC Paper No. CB(4) 153/14-15 (02), page 2, paragraph 7

¹² Ibid, page 3, paragraph 9

¹³ Supra note 2, page 12, footnote 30

¹⁴ Ibid

¹⁵ Kris Cheng, Govt’ says new copyright law will not restrict speech amid concerns of parody ban, HKFP, 3 December 2015

¹⁶ Legislative Council, Paper for the House Committee Meeting on 20 June 2014, Legal Service Division Report on Copyright (Amendment) Bill 2014, LC Paper No. LS63/13-14

¹⁷ Ibid, page 6, paragraph 15

There have been several public debates on widening the scope of the exceptions as many common online activities would appear not to fall within the current and proposed exceptions. It remains to be seen how this controversy is to be solved.

Safe Harbour

Given the growing importance of Online Service Providers (“**OSPs**”), safe harbour provisions were introduced for the first time in the 2011 Bill to limit the liability of OSPs in relation to the copyright infringements conducted by their users, provided that certain conditions are met, for example reasonable steps have to be taken to limit or stop the infringements when being notified¹⁸. During the recent consultation, concerns were raised by OSPs that the safe harbour provisions might increase their costs of compliance. However, considering that the provisions could limit their liabilities for copyright infringements on their service platforms, OSPs generally supported the introduction¹⁹. In view of this, the 2014 Bill seeks to retain the safe harbour provisions set out in the 2011 Bill.

Under the proposal²⁰, OSPs must, after receiving notices of infringements, notify their users that post the infringing contents on their platforms and remove the contents from their platforms. The users may file counter notices to dispute the infringements and request for the contents to be reinstated. In such cases, OSPs must reinstate the contents unless the OSPs are informed by the complainants in writing that they have commenced court proceedings in Hong Kong. Safeguards have been added under this proposal²¹: (a) civil liability and criminal liability will be imposed on persons making false statements in the notices; and (b) OSPs are advised to follow the voluntary Code of Practice that is to be issued.

Civil liability

In many instances, copyright owners may not bring civil claims in cases of infringements due to the difficulties of proving actual loss and enormous costs and time involved²². In view of the difficulties of proving actual loss, the current Copyright Ordinance allows the court to award additional damages, as justice may require, after considering the circumstances of a case²³, including the factors specified in the Copyright Ordinance (namely the flagrancy of the infringement; any benefit accruing to the defendant by reason of the infringement; and the completeness, accuracy and reliability of the defendant’s business accounts and records²⁴). During the consultation, copyright owners expressed their view that the copyright regime should be adjusted to address the difficulties in bringing civil actions in the digital environment, in particular the difficulties in proving actual loss in online piracy cases²⁵. In light of this, the 2014 Bill proposes to add two additional factors in the assessment of damages: (a) any unreasonable conduct of the defendant after having been informed of the

¹⁸ Supra note 2, page 13, paragraph 15

¹⁹ Ibid, paragraph 16

²⁰ Clause 50 of the 2014 Bill

²¹ Clause 50 of the 2014 Bill

²² Supra note 2, page 15, paragraph 18

²³ Ibid

²⁴ Section 108(2) of the Copyright Ordinance

²⁵ Supra note 2, page 14, paragraph 17

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infringement; and (b) the likelihood of widespread circulation of infringing copies as a result of the infringement²⁶.

Criminal liability

Under section 118(1)(g) of the current Copyright Ordinance, a person commits an offence if he distributes an infringing copy of the copyright work without the licence of the copyright owner to such an extent as to affect prejudicially the copyright owner. The definition of “*such an extent as to affect prejudicially the copyright owners*” is absent in the current Copyright Ordinance. During the public consultation, copyright owners expressed their view that they were only concerned about unauthorised communication/piracy that would amount to a substitution for the copyright works - the Internet users also accepted this point²⁷. In light of this, the 2014 Bill proposes to include criminal liability against unauthorised communication²⁸ and to list “whether the infringing copy amounts to a substitution for the work” as an important factor for criminal liability²⁹.

Status of the 2014 Bill

The second reading of the 2014 Bill was finally completed on 21 January 2016 and the 2014 Bill was passed on that day³⁰. It took several months for the Legislative Council to complete the second reading of the 2014 Bill due to the filibustering activities undertaken by the pan-democrats to prevent the 2014 Bill from being moved- they made long speeches during their 15-minute speech times, and repeatedly requested for quorum headcounts during the meetings³¹.

It was reported that the 2014 Bill was passed by reason of a “miscalculation” of the pan-democrats³². On the day when the 2014 Bill was passed, the pan-democrats did not make it in time to the chamber to request for quorum headcount before the 2014 Bill was passed by a vote of 37 to 25³³. One of the pan-democrats, Leung Kwok-Leung said they were at fault that they assumed that the lawmaker Frederick Fung Kin-kee would use up his 15-minute allocation, and they were not able to return to the chamber before the voting was made³⁴.

Immediately after the bill was passed, the Labour Party lawmaker Cyd Ho Sau-Ian proposed to the transfer the bill to a “select committee” for in-depth scrutiny³⁵. The motion is currently being

²⁶ Clause 55 of the 2014 Bill

²⁷ Supra note 2, page 8, paragraph 10

²⁸ A person commits an offence if the person infringes copyright in a work by (a) communicating the work to the public for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward; or (b) communicating the work to the public (otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward) to such an extent as to affect prejudicially the copyright owner (Clause 57(8) of the 2014 Bill).

²⁹ The court may examine all the circumstances of a case and in particular the economic prejudice caused to the copyright owner, having regard to whether the infringing copy amounts to a substitution for the work (Clause 57(1) of the 2014 Bill).

³⁰ Kris Cheng, Controversial copyright bill unexpectedly completes second reading, but longer debate awaits, HKFP, 21 January 2016

³¹ Ibid

³² Ibid

³³ Ibid

³⁴ Ibid

³⁵ Ibid

considered. In the event that the motion is passed, the lawmakers will be allowed to re-negotiate the bill before it is returned to the “committee of the whole” stage³⁶.

Conclusion

The main controversy surrounding the 2014 Bill concerns the fair dealing exceptions. While the Internet users urge for more exceptions to be included so as to promote their freedom of speech in this digital era, the Legislative Council has to be mindful to strike a balance between the interests of the Internet users and the interests of the copyright owners. Concerns from both the Internet users and the copyright owners have to be adequately addressed by the Legislative Council in making further amendments on the 2014 Bill in order to make the update of our copyright regime a real success.

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³⁶ Ibid

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