

## MEDIA & ENTERTAINMENT NEWSLETTER

### THE FIRM

**Haldanes** is a Hong Kong-based law firm since 1975, experienced in servicing the needs of clients both locally and throughout Asia.

#### Media and Entertainment Law

> Widely recognized for our work in both within Asia and internationally

> We represent

- major international record companies
- television and film production companies
- distributors and financiers
- broadcasters
- artists
- Digital media companies e.g. OTTs, content aggregators
- advertising agencies

> Our services cover all aspects of the film, television, music and digital media industries in:

- financing
- production
- licensing and distribution
- artist and talent agreements
- online and mobile deployment strategies and associated legal issues
- addressing regulatory issues

> In addition, we act for clients engaged in:

- sports
- event promotions
- theatrical productions
- advertising and other forms of media
- hospitality and leisure

> Advising on copyright and intellectual property matters generally.

## Morals Clauses in Endorsement Contracts

### *1. What is a Morals Clause?*

A morals clause is a provision in a contract which prohibits and / or restrains certain illegal and / or immoral and / or unethical behaviour of a party (s) to the contract, often used to protect the image and reputation of the company. Most importantly, it enables one party to unilaterally terminate the contract (or some other form of intermediate redress) if the other party engages in conduct that could have some sort of negative impact upon the particular company, or organisation.

### *2. The need for a morals clause*

A morals clause is of crucial importance to an endorsee, who is very often investing large sums of money to engage an endorser to endorse the company's products and / or services. In many cases, the company builds its advertising and marketing campaign around the endorser, in order to associate the endorser's talents and achievements with the company's products and / or services. It should be of major concern to the endorsee that its reputation and interests could be adversely affected by the acts (whether good or bad) of its endorser.

An effective morals clause can be viewed as a shield to protect a company's interests and reputation when an endorser has behaved immorally or improperly.

### *3. Morals Clause - Asia Perspective*

What constitutes an immoral or improper behaviour cannot be judged by simply looking at the wording of a morals clause in isolation. Immoral or improper behaviour, however, must always be considered in the context of the beliefs, culture, social norms, and customs of a society at a particular period of time.

Although a morals clause is commonly found in various endorsement contracts, the scope of the clause has to be judged in the context of the society or societies covered by the brand endorsement. Asian societies, in particular, may tend to uphold a more conservative attitude towards the behaviour of a public figure, for example, an artist caught smoking on the street could be on the headline of the entertainment page of a newspaper.

### *4. How can a company's position be better protected?*

(a) The morals clause should be drafted specifically. A company signs a particular endorser to endorse particular brands because the endorser represents a specific concept or image that the company wishes to be associated with the product, service or brand. Companies should think carefully as to what that concept or image is and draft a morals clause that addresses the particular behaviour or conduct that could tarnish such concept or image.

(b) The contract should provide for a mechanism to determine when a breach would occur. In the case of conduct resulting in a criminal investigation, the determination could be a criminal conviction or where a custodial sentence is imposed. However, there are often cases where inappropriate behaviour falls short of a criminal conduct, e.g. leaking of nude photos or scandalous videos online. In such situations, the company may set the determining trigger to be the disclosure of the particular photos by the news media.

(c) The contract should provide for actions that the company can take if an endorser breaches the morals clause. Termination could be one of the remedies. Some morals clauses allow companies to levy a penalty and / or deduct payment rather than termination of a contract. For endorsement contracts with multi-year initial terms, considering the risks associated with the endorser's behaviour, the company may consider an "early exit fee" to terminate the contract.

## 5. Latest trend - A reverse morals clause?

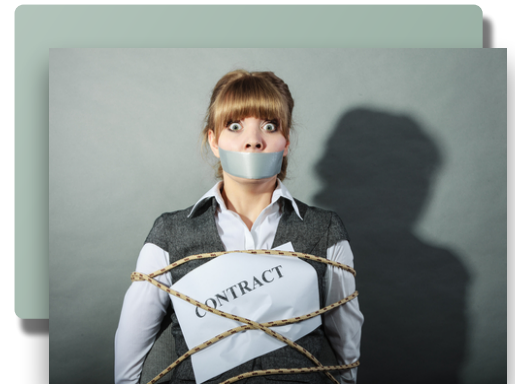
A relatively new twist is a so-called "reverse morals clause"; the purpose of which is to allow an endorser to receive compensation and / or terminate a contract if the company and / or its executives behave badly.

## 6. Social media and endorsement contract

A further consideration is the popular use of social media. For example, Facebook, Twitter, Weibo and Instagram, have become a very common means for celebrity endorsers to share their lives, opinions and whereabouts instantly. Social media's power to influence customers and brands is, to a certain extent, measurable, and can be calculated by the "likes" and "followers" that can be seen on any social media platform. World-over, celebrity endorsers often use Twitter (or equivalents) to promote brands openly.

Celebrities in Asia, like their counterparts in the West, have

started incorporating social media in their brand endorsement contracts or are getting paid separately for tweeting about brands. In an endorsement contract, one particular point to note is that an endorser should seek company's prior approval before posting any comments / pictures online. In reality, this may be difficult to implement, especially for multi-brands endorsers.



## BUZZ

### ATV's Shut Down and the Rise of Digital TV in the Hong Kong Market

ATV's free-to-air TV licence will soon expire on 1st April 2016. Following months of uncertainty and turmoil, all remaining ATV staff was laid off on 4th March 2016, and only approximately 160 staff members were rehired in order to maintain the minimal



operation of the TV station. For the past few decades, ATV (during the 90's) and TVB have been the major players in the Hong Kong free-to-air TV market. The demise of ATV brings in new competition in the Hong Kong TV market. Other players, including nowTV, Cable TV and Hong Kong Broadband bbTV, provide pay television services in Hong Kong. These local players provide live broadcasting, catch-up TV and video-on-demand services.

The Hong Kong TV market is about to have a revolutionary change with the arrival and latest launch of international

over-the-top (OTT) service providers, such as Netflix, mainland online platform LeTV, and Apple TV. OTT applications deliver services over the internet that bypass traditional distribution channels from telecommunications, cable or satellite network operators.

The digital revolution is not only changing the face of television market landscape but also the broadcasting regulations in the long run.

# HONG KONG COPYRIGHT LAW: KEY CHANGES PROPOSED IN COPYRIGHT (AMENDMENT) BILL 2014

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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, key changes have been proposed to update Hong Kong's copyright laws through the Copyright (Amendment) Bill 2014 (the "2014 Bill").

## (1) EXPANDING EXCLUSIVE RIGHTS

Copyright owners have certain exclusive rights in dealing with their copyright works, including a communication right that is specific to cable programme services (i.e. "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, a new right is proposed that allows copyright owners to communicate their copyright works on any electronic platforms. The 2014 Bill proposes to replace the communication right under section 22(1)(f) of the Copyright

Ordinance with a general communication right that is defined broadly, in order to cover any existing or future modes of electronic transmissions.

## (2) ADDITIONAL FAIR DEALING EXCEPTIONS

Under Hong Kong's Copyright laws, certain acts are permitted in relation to the copyright works, for example fair dealings of copyright works are allowed for the purposes of (a) research and private studies; (b) criticism, review and news reporting; (c) education; and (d) public administration.

Three additional fair dealing exceptions are proposed by the 2014 Bill:

- For the purposes of parody, satire, caricature and pastiche, although the terms "parody, satire, caricature and pastiche" are not defined in the 2014 Bill;
- Use for the purposes of commenting on current events. This would seem to expand on the current section 39 of the Copyright Ordinance which provides for fair dealings for the purposes of news reporting,

affording protection to Internet users who have been using copyright works when commenting on current political or social events (in addition to reporting current events); and

- Use of a quotation to the extent which is no more than necessary for the specific intended purpose. This is aimed at allowing the Internet users to quote copyright works (including academic or scholarly texts, literary or artistic works, films and sound recordings) for the purposes of facilitating discussions, providing information or expressing opinions as used on blogs and social media websites.

While the fair dealing exceptions in the 2014 Bill is intended to 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 rewriting that are not created for the stipulated purposes are unlikely to be covered under the new scheme.



## BUZZ

### Net Neutrality Principle

The banning of Netflix by Indonesia's ISP PT Telekomunikasi Indonesia or Telkom (as reported in the Jakarta Post on 3 Mar 2016) highlights again the debate on the power of ISPs in exerting more control in determining what content passes through the internet connections they manage. Telkom's justification for blocking Netflix was that the latter failed to conform to

Indonesian regulations by having pornographic content.

This would be contrary to the net neutrality principle which is predicated on the basic notion that one has the right to communicate freely online or open internet. An open internet means there is no blocking or discrimination against any lawful content; there is no

throttling ie degrading access to lawful content, services and applications and no request for payment for any content or application or services to create internet fast lanes. The net neutrality debate in Asia is growing as we see increasing internet traffic and tradition revenue and content distribution models replaced by new technologies and services.



### (3) SAFE HARBOUR PROVISIONS FOR OSPs

Given the growing importance of Online Service Providers ("OSPs"), safe harbour provisions were introduced to limit the liability of OSPs in relation to the copyright infringements conducted by their users, provided that certain conditions are met.

Under the proposal, OSPs must, after receiving notices of infringements, notify their users that they have posted infringing content on their platforms and must remove the same from their platforms. Civil liability and criminal liability will be imposed on persons making false statements in the notices. The users may file counter notices to dispute the infringements and request for the content to be reinstated. In such cases, OSPs must reinstate the content unless the OSPs are informed by the complainants in writing that they have commenced court proceedings in Hong Kong. OSPs are advised to follow the voluntary Code of Practice that is to be issued.

### (4) CIVIL LIABILITY – ADDITIONAL FEATURE FOR ASSESSING DAMAGES

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 involved especially in online piracy cases. In light of this, in addition to existing provisions under the Ordinance pertaining to awarding of damages by the Court, the 2014 Bill proposes to introduce two additional factors in the assessment of damages: (a) any unreasonable conduct of the defendant after having been informed of the infringement; and (b) the likelihood of widespread circulation of infringing copies as a result of the infringement.

### (5) 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. What the phrase of "such an extent as to affect prejudicially the copyright owners" means is not clear from the current Copyright Ordinance. The 2014 Bill attempts to clarify by providing that the court will examine all the circumstances of a case and in particular the economic prejudicial effect to the copyright owner, having regard to whether the infringing copy amounts to a substitution for the work.

### STATUS OF THE 2014 BILL

The second reading of the 2014 Bill was completed on 21 January 2016 and the 2014 Bill was passed on that day. However, the 2014 Bill has to go through the procedural stages of "three readings" before it can be published in the Gazette and come into operation.

The passing of the 2014 Bill has been controversial. Mr. Gregory So, the secretary for Commerce and Economic Development Bureau of the Hong Kong Government, announced on 25th February 2016 that if the 2014 Bill cannot be passed on 4th March 2016, it will be shelved. It remains to be seen whether the 2014 Bill can come into operation.



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