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## Hong Kong's Copyright (Amendment) Ordinance Finally Passes into Law

Long awaited legislation was gazetted by Hong Kong's Legislative Council on December 16, 2022 bringing Hong Kong's copyright protections into the digital age.

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### 1. Background

Copyright law protects intellectual property in all original works of authorship including literary, dramatic, musical, and artistic works. Copyright is essentially a bundle of rights that arise automatically when a protected work is created. The subsistence of copyright protection does not require the work to have any aesthetic value and can subsist in items as simple as a hand-drawn sketch or photograph taken using a mobile phone.

In Hong Kong, the primary legal framework for copyright has been the Copyright Ordinance (the "**Current Law**") which came into force in 1997 and has not been amended since.

As mentioned in our previous article<sup>1</sup>, the Current Law has not kept pace with rapid advancements in digital technology that have become commonplace over the past 25 years since the Current Law was enacted. It was obvious that if Hong Kong was to continue holding itself out as a competitive and open society, the Current Law would need to be updated. In fact, prior to passing the Copyright (Amendment) Ordinance 2022<sup>2</sup> (the "**Amended Law**"), the Hong Kong government drafted and introduced two amendment bills to Hong Kong's Legislative Council, in 2011 and 2014, but these failed to pass.

As summarised below, the Amended Law closes several key legal loopholes and aligns Hong Kong's copyright protections with international standards.

### 2. Safe Harbour Provisions

Under the Current Law, all online service providers ("**OSPs**") in Hong Kong are potentially liable for any

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<sup>1</sup> Further details available at this [link](#).

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copyright infringements that occur on their service platforms. This serves as disincentive for them to host a wide range of user content out of fears that some of it may later be found to infringe a copyright holder's rights. New 'safe harbour' provisions in the Amended Law afford OSPs a degree of protection which exempt them from liability stemming from infringing works on their platforms, provided they meet certain prescribed conditions and comply with the new notice and takedown procedures set out in the Amended Law. Under these procedures, in order to avoid liability, OSPs are required to remove infringing materials and to send notices to users either: (a) when OSPs have received a notice alleging infringement or (b) when the OSP itself suspects infringement.

### **3. Additional Statutory Factors for Determining Additional Damages**

In Hong Kong, copyright owners have long had the right to sue for copyright infringements and recover damages provided they are able to prove that they have suffered harm. The Current Law allows courts to award additional damages for copyright infringement since the usual civil damages are compensatory in nature and proving loss incurred by copyright infringements is typically difficult. The Amended Law expands the existing list of factors which courts are entitled to take into account with two additional factors, namely any unreasonable conduct on the part of the infringer after being informed of the infringement, as well as the likelihood of widespread circulation of infringing copies as a result of the infringement, thereby compounding the harm caused to the copyright owner.

### **4. Expanded Copyright Exceptions**

Every free society places importance on allowing fair access to and uses of copyrighted works by others, both to allow freedom of expression as well as the dissemination and advancement of knowledge. And, in fact, the Current Law contains over 60 permitted acts which can be done to copyrighted works – without the rightsholder's permission – but which do not constitute infringement.

The Amended Law expands the scope of copyright exceptions firstly by introducing a new category of exceptions for the education sector, libraries, museums, archives, temporary reproductions of copyright works by OSPs, and for media shifting and secondly, by expanding the list of exceptions for what is known as fair dealing. The new fair dealing exceptions are for the purposes of parody, satire, caricature and pastiche; and fair dealing for the purpose of commenting on current events and quoting copyright protected works under certain circumstances (e.g.: in online discussions).

### **5. New Right of Communication to the Public**

The Current Law gives copyright owners the exclusive right to make their work available to the public over the internet or a cable programme service, or to broadcast their work. However, this does not cover streaming so represents a major loophole today when streaming services have become so prevalent. The Amended Law closes this loophole by introducing a technology-neutral exclusive communication right for copyright owners to communicate their works to the public through any medium of electronic transmission.

The Amended Law also clarifies that the mere provision of systems or facilities for the carriage of signals by parties, such as OSPs, and reasonable online conduct of the general public, such as innocent forwarding of hyperlinks or access to materials communicated by others, will not give rise to liability.

### **6. Criminal Sanctions for Unauthorised Communication**

In addition to civil remedies that copyright owners can use to enforce their rights, this new communication right is backed up by criminal penalties. If convicted, enterprises and individuals who are caught engaging in unauthorised communications that result in copyright work being infringed on a for-profit basis – or simply on a scale that significantly deprives copyright owners of their right to exploit their works – will receive fines of up to HKD 50,000 and a maximum penalty of 4 years in prison.

## 7. Next Steps

The Amended Law will come into force on a date to be announced by the Hong Kong government, likely within the first half of 2023.

The Hong Kong government has also committed itself to a renewed copyright review exercise to study some of the issues raised in the public consultation exercise that was carried out between late 2021 and early 2022 but which were not addressed in the Amended Law. Some of the key issues include the possible introduction of specific copyright exceptions for text and data mining, issues relating to artificial intelligence and copyright, and a review of the Copyright Tribunal's jurisdiction. We will continue to monitor developments in this area as they unfold.

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**For any further clarification or research please contact:**

**Davide De Rosa**  
Managing Partner  
Hong Kong office  
Corporate/M&A

Hong Kong  
+852 21563490  
dderosa@gop.it

**Massimo Sterpi**  
Partner

Intellectual Property, TMT and  
Cybersecurity  
Rome  
+39 06 478751  
msterpi@gop.it

**Richard Grams**  
Counsel

Corporate/M&A  
Hong Kong  
+852 21563490  
rgrams@gop.it



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