



## **COPYRIGHT (AMENDMENT) BILL 2014**

### **Submissions**

The Law Society would like to express the following further view on the latest discussions about the Copyright (Amendment) Bill 2014 ("Bill"):-

1. As we urged in our submission of 23 October 2014, it is not in the interests of Hong Kong to procrastinate passing the Bill which is urgently required to bring us closer in line with international standards. We consider that the Bill has adequately addressed the controversial issues raised in 2012 by introducing an exception for parody, etc. and helps restore international expectations on copyright protection while introducing new exceptions to allow appropriate fair dealings.
2. We understand that the outstanding issues relate to UGC (User Generated Content) and 'contract override', both of which require serious and thorough evaluation upon proper consultation with all stakeholders while drawing on researches and experiences of other countries. There is however no urgency for these issues to be resolved now nor should they delay the passing of the Bill.
3. We understand the desire to prevent rights holders somehow excluding by contract those who may wish to take advantage of the new exceptions but, as the Administration has previously explained, practically speaking, those for whom the parody, caricature and pastiche exceptions are designed to benefit are not in fact likely to be governed by any contract. The public at large will fully benefit. On the other hand, freedom to contract is a fundamental common law principle which should not be lightly interfered with in the absence of compelling and properly thought out reasons.
4. We have studied the Administration's response to issues raised at the meetings of 20 January and 7 May 2015 of the Bills Committee on the Bill (LC Paper No. CB(4)1182/14-15(01)) on the issue of contract override. We basically agree with most of the conclusions as set out in paragraph 24 of the response that:-

- (a) There is no evidence that the current copyright exceptions have failed to achieve the benefits intended owing to contract override.
  - (b) The latest UK approach is new (since June 2014) and not without controversies. In this relation, we note that the UK Government was urged to monitor the impact from the point of implementation and respond effectively if it became clear that any negative potential was realized. In any case, the impact of the changes would be evaluated within 5 years and the evaluation results would be published by 2019.
  - (c) Inclusion of a restriction of contract override may give rise to more disputes and uncertainty than it is meant to avoid in cross-border contracts.
  - (d) The subject is complex.
5. The Administration considers that it would not be satisfactory to include contract override provisions in the new copyright exceptions proposed in the Bill as this might amount to a hierarchy of different exceptions. On the other hand, it considers that it would equally not be satisfactory to include a categoric contract override provision as this might amount to a fundamental change of the legal norms underpinning the incentive mechanism intended by the copyright regime. This highlights the complexity of the issue.
6. As the Administration's response revealed, different countries may adopt different approaches on copyright exceptions and the way they can be varied by contract. Overseas commentators and academics have expressed divergent views whether contract override is justified or not. Some try to distinguish between exceptions which have a public policy character, those which are based on the general interest or regulatory practices and those which are founded on market failure to determine their overridability by contract law. Studies have to be made into the interplay between contract and copyright, local and international impact, economic theories, legal rationale and practical implications. Hence, the issue is recognised as far from simple and should be properly reviewed and examined, in particular as to whether any contract override provisions should be made on the basis of a blanket approach or be considered in detail in respect of each exception, as well as under what conditions and to what extent any prohibition against contract override is necessary to achieve policy objectives.
7. As noted, freedom of contract plays a vital role in Hong Kong's free-market economy. In some jurisdictions, it is arguably a fundamental human right. According to the International Institute for Unification of Private Law ("Unidroit"), freedom of contract is a basic principle in the context of

International Commercial Contracts 2010 – *"The principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order."*

8. Hence, unless there is strong justification, the freedom of parties to negotiate their contracts should not be interfered with lightly.
9. As the UK *Hargreaves Review* advocates, policy decisions should be based on economic evidence. The Review 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. So far, there is no empirical study or data about the effects of disallowing contract override or about the differences between countries having imperative exceptions and countries where freedom of contract prevails.
10. Copyright users have often hoped for the adoption of a US style "fair use" open-ended exceptions to replace the current fair dealing exceptions in Hong Kong. Yet, the US copyright act does not prohibit contract override. In fact, freedom of contract in the US is paramount. Article 1(10) of the US Constitution forbids the States to pass legislation impairing the obligation of contract without the consent of Congress. Case law has also interpreted the 14th Amendment to the US Constitution as protecting freedom of contract.
11. We concur with the Administration's view that it would not be prudent to rush into legislating contract override provisions without a comprehensive review, thorough consultation with stakeholders and consideration of on-going developments in overseas jurisdictions.
12. Meanwhile, we repeat our previous submission that we are overdue in updating our copyright law and should do so without further delay.

**The Law Society of Hong Kong**  
**30 October 2015**

