

Copyright (Amendment) Bill 2022 Submission

1. Since the implementation of the Copyright Ordinance in 1997, the Law Society has been proposing and commenting on amendments to improve the copyright law of Hong Kong to tackle challenges of the ever-changing operation environment and developments in technology and international trends.

2. Although we believe the Bills Committee of the Legislative Council has already read the Law Society's Position Paper on Copyright (Amendment) Bill 2014 (29 December 2015) and Submissions on the Public Consultation Paper on Updating Hong Kong's Copyright Regime (22 February 2022), these two papers are attached for ease of reference.

3. It is unfortunate that our laws lag behind the development of technology. As early as November 1993, in its *Report on Reform of the Law Relating to Copyright*, when the Law Reform Commission of Hong Kong considered the future of broadcasting technology and its impact on copyright law, the Commission observed:

"If the last ten years are a pointer to the future, Hong Kong can expect to see a proliferation of technologies that further facilitate communications or provide avenues for education or entertainment. Unfortunately, copyright law cannot always keep pace. The law attempts to provide a balance between the owners of property in information (literature, film, etc), the providers of the technology, and the public in general. Finding a just and workable balance takes time. The results of our consultation, ..., pointed to a system that had worked reasonably well, but which was inadequate to accommodate rapid development in the field." (paragraph 11.21 thereof)

4. The above observation was of course before the computer, the Internet, and social media become indispensable in our daily and social lives. And now artificial intelligence (AI) has a fast growing impact on our everyday lives.

5. Going back in time, in the mid-1990s, when the Internet was relatively new but growing exponentially, the World Intellectual Property Organization (“WIPO”) and its member states began to discuss how to ensure that copyright law could be applied effectively to the new medium. That led to two WIPO Internet Treaties - the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”). Among other obligations, the WCT requires member states to recognize authors’ exclusive right to authorize *“any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”* The WPPT extends the right to performers and phonogram producers. Many member states implemented the right of communication into their copyright laws.

6. In 1998, the United States implemented the WIPO Internet Treaties via the Digital Millennium Copyright Act and represented that its copyright includes a “making available right” which covers all formats in which a work may be digitally communicated, such as downloads, stream and any other existing or future methods of online transmissions.

7. In 2001, Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society specifies a right of communication in Article 3(1) which requires *“Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”*

8. In the People’s Republic of China, it was considered that the first amendment of the Copyright Law in 2001 already included the right of communication via the right of broadcast, the right of network communication and an all- embracing provision covering all other rights of the copyright owner. That remained the same in the second amendment in 2010. In its recent third amendment effective as of 1 June 2021, the definitions of the right of broadcast and the right of network communication are revised. Commentators compliment that rather than relying on the all-embracing provision when an ambiguity arises, the revised definitions are self-sufficient to reflect the right of communication to the public under the WIPO Internet Treaties.

9. In 2004, the right of communication to the public was introduced into Singapore’s Copyright Act 1987 and this is retained and expanded in its revamped Copyright Act 2021.

10. Hong Kong is seriously and embarrassingly behind in that respect. Our 1997 Copyright Ordinance borrowed most of its sections from the UK Copyright, Designs and Patents Act 1988 which did not have the “communication to the public” language then (the UK amended and introduced “infringement by communication to the public” to its 1988 Act in 2003).

11. It is imperative that we must adopt a technology-neutral right of communication forthwith to catch up with what most other modern economies have adopted for 20 years. Besides the right of communication, most of what the Copyright (Amendment) Bill 2022 contains are first proposed in the Copyright Amendment Bill 2011 which began with a consultation in 2006 when the Government already saw the need to review the efficacy of our copyright regime in the digital environment. The Amendment Bill 2014 was a refinement after more than two years of further discussions with different stakeholders. The current Copyright (Amendment) Bill 2022 picks up from the Amendment Bill 2014 with some stylistic changes and corresponding changes made to accessible copies of work for persons with a print disability the provisions for which were introduced between the Amendment Bill 2014 and the current bill as a result of the Marrakesh Treaty. Additions are also made to provide for investigation, seizure, disposal and other powers for certain offences in relation to the circumvention of effective technological measures that protect copyright works from infringement which we believe are uncontroversial.

12. Hence what we hope to achieve now by passing the Copyright (Amendment) Bill 2022 is already more than 10 years old, and more than 15 years if one counts from the first relevant consultation in 2006. This is grossly unsatisfactory. In the 62 written submissions received (including one made by us) during the three-month copyright consultation period from November 2021 to February 2022, the majority of respondents agree that there is an imminent need to update our copyright regime and generally support using the 2014 Bill as the basis for amending the law. Like us, they call for an early passage of the amendment bill to keep Hong Kong’s copyright regime abreast with times and in line with international developments.

13. We strongly urge for the expeditious passing of the amendment bill to close the old issues so that we can move on to discuss more contemporary issues, such as:

- (1) Feasibility and merits of establishing a copyright registration system
- (2) Use of new technology, such as blockchain, to prove ownership and authenticity of copyright works and to provide proof or preserve evidence for commercial transactions and contentious disputes

- (3) Review of copyright ownership and protection issues relating to Artificial Intelligence (computer-generated) works and consideration of exceptions to copyright for text and data mining
- (4) Review of duration of copyright protection
- (5) Treatment of “orphan works”.

14. We also submit that there are other complex policy issues which require careful consideration, such as:

- (1) Review of the jurisdiction and powers of the Copyright Tribunal
- (2) Whether to maintain the current dual protection of copyright and registered design or to introduce unregistered design rights
- (3) Fair use vs fair dealing exceptions or a hybrid
- (4) Merits of introducing statutory damages for copyright infringement
- (5) Merits of a US copyright termination/rights reversion mechanism.

15. Copyright is one of three most common types of intellectual property rights together with patents and trade marks. Copyright is a key asset of our cultural and creative industries and has a vital role in realising the 14th Five-Year Plan for National Economic and Social Development of the People’s Republic of China and the Long-Range Objectives Through the Year 2035 to build Hong Kong SAR as the premier IP trading hub in Asia.

16. We urge proper and immediate attention be given to keep our copyright law timely and relevant.

**The Law Society of Hong Kong
10 August 2022**