

HONG KONG

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR place Hong Kong on the Watch List in 2016.¹

Executive Summary: Hong Kong's inability, over the period of almost a decade, to enact legislation to modernize its Copyright Ordinance to reflect the realities of the 21st century digital marketplace is not only an embarrassment; it is also an impediment to full access to this highly connected market for legitimate services providing access to creative works. U.S. engagement with Hong Kong should focus on ensuring that the territory's copyright law drift does not continue for a tenth consecutive year, and, even more disturbingly, that it does not reverse course into a legislative dismantlement of effective copyright protection.

PRIORITY ACTIONS REQUESTED IN 2016

- Notwithstanding some defects and limitations of the present bill, which we hope will be addressed shortly, enact Copyright (Amendment) Bill 2014 without further amendment.
- Then open a full review to further update Hong Kong's copyright law for the digital age.

LEGISLATIVE ISSUES

Almost a decade ago, authorities in the well-wired, tech-savvy Hong Kong Special Administrative Region (HKSAR) recognized that Hong Kong's Copyright Ordinance needed updating for the digital networked environment. In December 2006, an extensive public consultation was launched to identify what changes were needed. Further consultations, public hearings, and drafting exercises followed. An amendment bill was finally presented to the Legislative Council (LegCo) in 2011. But the legislation became mired in controversy over whether criminal copyright liability could arise from parodies, and further consideration was suspended. Following an additional public consultation exercise on the parody issue, new provisions on that topic were incorporated in a revised version that was presented to the LegCo once again in 2014. But despite strong support among legislators to finally update Hong Kong's outmoded law, the LegCo has become paralyzed by a guerilla campaign from anti-copyright interest groups. Hundreds of amendments have been offered; procedural gambits have been employed to delay consideration; and a filibuster has been mounted to try to prevent the majority from adopting the legislation. A strong push to complete enactment at the end of 2015 failed, and as of this writing the LegCo remains hamstrung.

Opponents are not simply seeking to tweak the parody amendments brought into the bill two years ago; they want to dismantle effective copyright protection in Hong Kong by pressing for broad exceptions to exclusive rights. The first harbinger of this broader agenda surfaced in the 2013 public consultations on parody, which some groups seized upon to propose an ill-defined exception to the exclusive rights of copyright owners, modeled on the user-generated content exception recently enacted in Canada. Hong Kong's Administration wisely disapproved this proposal, based on an analysis that cast grave doubt on whether the proposal would be consistent with Hong Kong's international obligations to confine exceptions and limitations to those that satisfy the familiar and globally accepted "three-step test."² But efforts to try to keep the process focused on the actual legislation before the LegCo have so far proven unavailing.

From the perspective of the copyright industries, the Copyright (Amendment) Bill 2014 is certainly far from perfect. Past IIPA filings identified some problems with the 2011 legislation, and most of these were carried forward

¹For more details on Hong Kong's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Hong Kong's Special 301 placement, see <http://www.iipa.com/pdf/2016SPEC301HISTORICALCHART.pdf>.

²See WTO TRIPS Agreement, Article 13.



into the 2014 version. But the overriding concern is that Hong Kong has simply been unable, over the past decade, to bring its laws into sync with realities of the digital networked age. Thus, the overriding priority must be to enact the Copyright (Amendment) Bill 2014 without any further changes. Only then should Hong Kong turn to a full-scale review of whether its copyright law needs further updates to ensure that the territory can properly protect copyright in the online space, and does not fall even further behind the rapid pace of technological and market change.

This is not simply a theoretical or abstract argument. The developments at the LegCo have much larger implications for the future of Hong Kong's creative economy. Online and mobile piracy is a serious and growing problem in Hong Kong. The territory's enforcement authority (Hong Kong Customs & Excise Department (HKC&E)), and its prosecutors and courts, have formed strong relationships with copyright owners, and their effort have produced remarkable success in reducing and marginalizing physical forms of piracy (such as the sale of illicit optical discs). But these authorities simply lack the legal tools to combat digital piracy as effectively. Enactment of the Copyright (Amendment) Bill 2014, which explicitly recognizes an exclusive "making available" right for on-demand dissemination of copyright works, and provides criminal remedies for violations of this right in appropriate cases, would help to fill this enforcement gap.

A growing number of legitimate services are already available to Hong Kong residents to enjoy digital delivery of music, movies, TV programs, and other products and services based on copyright.³ But these will not be able to compete so long as Hong Kong's online marketplace also presents consumers with a plethora of options for obtaining unauthorized access to creative content. These unlicensed options include well-established cyberlocker services and illegal streaming sites; peer-to-peer (P2P) services; and forum sites that offer links to unauthorized music and other content. A wide array of mobile apps stream music, movies and other content without authorization to the millions of smartphone owners in the territory.⁴ The operators of the platforms hosting these apps are either seemingly indifferent, or at best dilatory in responding to complaints from rights owners. The Hong Kong marketplace is also replete with unauthorized Media Boxes or Set Top Boxes (STBs) that undermine the market for legitimate pay-TV and streaming services, by facilitating multiple unlicensed pathways to the content such services provide.

All these developments have sped past Hong Kong's outdated copyright legal regime, leaving right holders and law enforcement alike with inadequate tools to combat online piracy, and providing insufficient incentives to service providers and other actors in the Internet marketplace to cooperate to the extent necessary to combat the problem. Consequently, the legitimate online and mobile services, while they have gained a foothold, are handicapped in their efforts to compete against pirates. Enactment of the pending legislation is an essential first step in changing this picture.

Once enactment is accomplished, right holder organizations are eager to participate in a public consultation to develop further needed improvements to Hong Kong's Law. Issues that should be considered there include (but are not limited to) extension of copyright term to conform to evolving global norms; providing a judicial website blocking remedy as part of injunctive relief for right holders seeking to address piracy from websites based outside Hong Kong's jurisdiction; specific measures combating P2P infringement; clarifying that safe harbors apply only to truly neutral Internet intermediaries; provision of additional damages and statutory damages; recalibrating the scope of the exclusive communication right⁵; providing a more efficient and cost-effective means of identifying serious online infringers; and further clarification on secondary liability and action against repeat offenders. But consideration of these complex issues must not be allowed to hold up prompt action on the current Copyright (Amendment) Bill. Until enactment of that legislation, without further changes, is achieved, Hong Kong should return to the USTR Watch List.

³For instance, 22 different licensed services are available for recorded music downloading, streaming, or both. <http://www.pro-music.org/legal-music-services-asia.php>

⁴Astonishingly, there are over 14.1 million 2.5G, 3G or 4G Hong Kong mobile customers in a territory of only 7.3 million residents. See http://www.ofca.gov.hk/mobile/en/media_focus/data_statistics/key_stat/index.html.

⁵Proposed new section 28A in the pending legislation includes a problematic carve-out from the scope of the communication right that could potentially constitute a breach of Hong Kong's international obligations under, e.g., the WTO TRIPS Agreement. IIPA urges the government to act promptly to clarify the scope of this provision to ensure effective protection consistent with its obligations.