

Issues in IT Law—Legal and Policy Challenges of P2P Networks

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Hong Kong Copyright Ordinance (Cap 528)

Michael D. Pendleton & Alice Lee,
Intellectual Property in Hong Kong
(LexisNexis 2008)

Historical Background

- U.K. Copyright, Designs & Patents Act 1988
- U.K. Copyright Act 1956 (under certain circumstances)
- Old H.K. Copyright Ordinance (Cap 39)
- Prevention of Copyright Piracy Ordinance (Cap 544) – optical discs and video recording equipment
- Organized and Serious Crimes Ordinance (Cap 455) – power of police and customs

Copyright Subject Matter

- Literary Works (s 4)
- Dramatic Works (s 4)
- Musical Works (s 4)
- Artistic Works (s 5)
- Sound Recordings (s 6)
- Films (s 7)
- Broadcasts (s 8)
- Cable Programmes (s 9)
- Published editions / compilations (s 10)



Copyrightability

- Originality
 - Independent Creation – the Work Owes Its origin to the Author
 - Creativity
- Fixation

*Feist Publications, Inc. v.
Rural Telephone Service
Co., 499 U.S. 340 (1991)*

United States

U.K. / Ireland

Originality /
Intellectual Creation

Skill, Labor and
Judgment

Copyright Protection
for Original, Creative
Databases

Sui generis Protection
for nonoriginal,
noncreative
Databases



Continental Europe

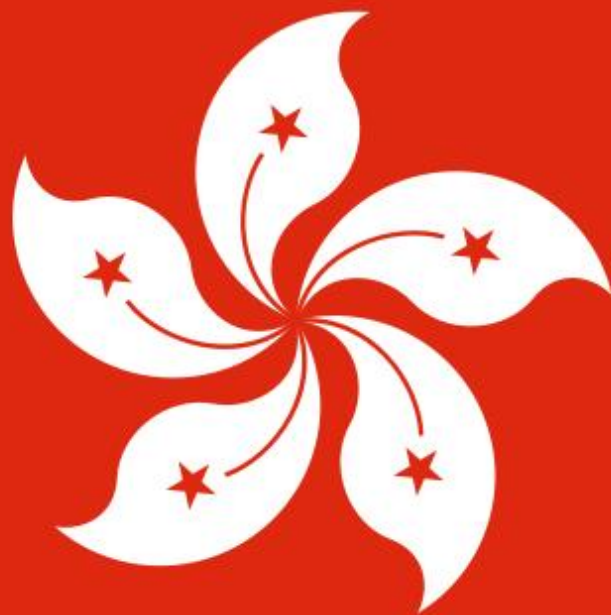
U.K. / Ireland

Intellectual Creation

Skill, Labor and
Judgment

Copyright Protection
for Databases

Copyright **and** *Sui
generis* Protection for
Databases



4. Literary, dramatic and musical works

...

"literary work" (文學作品) means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—

(a) a compilation of data or other material, in any form, which **by reason of the selection or arrangement of its contents constitutes an intellectual creation**, including but not limiting to a table;

Copyrightability

- Skill, Labor and Judgment
- Fixation

4. Literary, dramatic and musical works

....

(2) Copyright does not subsist in a literary, dramatic or musical work **unless and until it is recorded, in writing or otherwise**; and references in this Part to the time at which such a work is made are to the time at which it is so recorded.

Nature of Copyright

2. Copyright and copyright works

(1) Copyright is a **property right** which subsists in accordance with this Part in the following descriptions of work-

- (a) original literary, dramatic, musical or artistic works;
- (b) sound recordings, films, broadcasts or cable programmes; and
- (c) the typographical arrangement of published editions.

Richard M. Stallman, *Did You Say
"Intellectual Property"? It's a
Seductive Mirage* (2005)

(1) The term is an **unwise generalization**. The term is a **catch-all** that lumps together several disparate legal systems, including copyright, patents, trademarks, and others, which have very little in common.

(2) The term glosses over the difference between abstract ideas and physical objects, thereby perpetuating the misunderstanding that one can develop property entitlements in ideas and information.

Scope of Protection

22. The acts restricted by copyright in a work

(1) The owner of the copyright in a work has, in accordance with the following provisions of this Division, the exclusive right to do the following acts in Hong Kong—

- (a) to **copy** the work (see section 23);
- (b) to **issue copies** of the work **to the public** (see section 24);
- (c) to **rent** copies of the work to the public (see section 25);

- (d) to **make available** copies of the work **to the public** (see section 26);
 - (e) to **perform, show or play** the work **in public** (see section 27);
 - (f) to **broadcast** the work or **include it in a cable programme** service (see section 28);
 - (g) to **make an adaptation** of the work or do any of the above in relation to an adaptation (see section 29),
- and those acts are referred to in this Part as the "acts restricted by the copyright".

(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or **authorizes** another to do, any of the acts restricted by the copyright.

Moral Rights



Moral Rights

- Right of Attribution (*droit de paternité*)
- Right of Integrity (*droit au respect de l'oeuvre*)
- Right of Disclosure (*droit de divulgation*)
- Right of Withdrawal (*droit de retrait*)
- Right of Resale Royalties (*droit de suite*)

The Right to Destroy?



Moral Rights

- Right to be identified as author or director (s 89-91)
- Right to Object to Derogatory Treatment of Work (s 92-95)
- False Attribution of Work (s 96)
- Duration of Rights (s 97)
- Consent and waiver of rights (s 98)
- Applicability to Joint or Partial Works (s 99-100)

Performance Rights

(Part III – s 200-72)

Technological Protection Measures

(Part IV – s 273-77 /

Paracopyright /

Extrajudicial Measures)

Duration of Protection

17. Duration of copyright in literary, dramatic, musical or artistic works

....

(2) Copyright expires at the end of the period of 50 years from the end of the calendar year in which the author dies, subject as follows.

4. Literary, dramatic and musical works

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"literary work" (文學作品) means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—

(a) a compilation of data or other material, in any form, which by reason of the selection or arrangement of its contents constitutes an intellectual creation, including but not limiting to a table;

(b) a **computer program**; and

(c) preparatory design material for a computer program;

18. Duration of copyright in sound recordings

....

(2) Copyright expires—

(a) at the end of the period of 50 years from the end of the calendar year in which it is made; or

(b) if during that period it is released, 50 years from the end of the calendar year in which it is released, subject as follows.

(3) ... [I]n determining whether a sound recording has been released no account is to be taken of any unauthorized act.

19. Duration of copyright in **films**

....

(2) Copyright expires at the end of the period of **50 years from** the end of the calendar year in which the **death** occurs **of the last to die** of the following persons—

- (a) the principal **director**;
- (b) the author of the **screenplay**;
- (c) the author of the **dialogue**; or
- (d) the composer of **music specially created** for and used in the film

Infringement Analysis

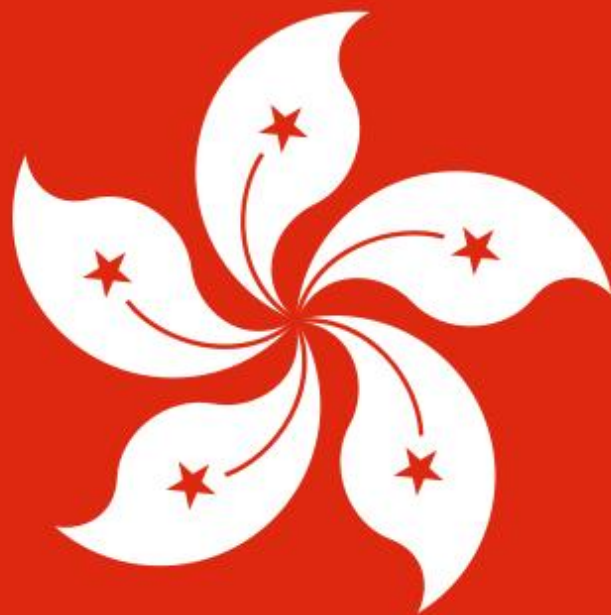


Direct Infringement

Substantial Similarity
+
Access

Secondary Infringement

- Contributory Infringement
(Knowledge + Material Contribution)
- Vicarious Infringement
(Control / Supervision + Financial Benefit)
- Inducement (*Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005))



Direct Infringement

Copying
+
Substantial

22. The acts restricted by copyright in a work

....

(3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it—

(a) in relation to the work as a whole or any substantial part of it; and

(b) either directly or indirectly, and it is immaterial whether any intervening acts themselves infringe copyright.

Secondary Infringement

30. Secondary infringement: **importing or exporting infringing copy**
31. Secondary infringement: **possessing or dealing** with infringing copy
32. Secondary infringement: **providing means for making** infringing copies
33. Secondary infringement: **permitting use of premises** for infringing performance
34. Secondary infringement: **provision of apparatus** for infringing performance, etc.

Limitations and Exceptions

Limitations v. Exceptions



106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569 (1994): “[F]air use is an
affirmative defense”

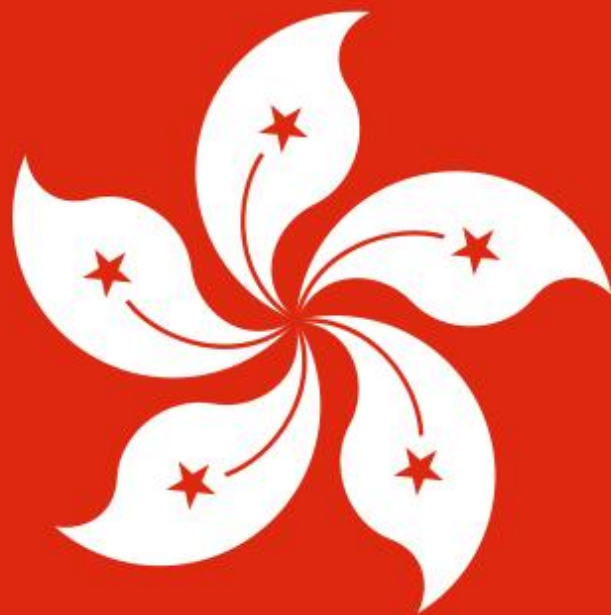
Fair Use / Fair Dealing

107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.



38. Research and private study

(1) Fair dealing with a work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) Copying by a person other than the researcher or student himself is not fair dealing if—

(a) in the case of a **librarian**, or a person acting on behalf of a librarian . . .

(b) in any other case, the person doing the copying **knows or has reason to believe** that it will result in copies of **substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.**

(3) In determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, **in particular**—

- (a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;
- (b) the nature of the work;
- (c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and
- (d) the effect of the dealing on the potential market for or value of the work.

39. Criticism, review and news reporting

(1) Fair dealing with a work for the purpose of **criticism or review**, of that or another work or of a performance of a work, **if it is accompanied by a sufficient acknowledgement**, does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) Fair dealing with a work for the purpose of reporting **current events**, if (subject to subsection (3)) it is **accompanied by a sufficient acknowledgement**, does not infringe any copyright in the work.

(3) **No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.**

41A. Fair dealing for purposes of giving or receiving instruction

(1) Fair dealing with a work by or on behalf of a teacher or by a pupil for the purposes of giving or receiving instruction in a specified course of study provided by an educational establishment does not infringe the copyright in the work or, in the case of a published edition, in the typographical arrangement.

....

54A. Fair dealing for purposes of public administration

(1) Fair dealing with a work by **the Government, the Executive Council, the Judiciary or any District Council** for the purposes of **efficient administration of urgent business** does not infringe the copyright in the work or, in the case of a published edition, in the typographical arrangement.

....

Exceptions for Educational Institutions

42. Anthologies for educational use
43. Performing, playing or showing work in course of activities of educational establishments
44. Recording by educational establishments of broadcasts and cable programmes
45. Reprographic copying made by educational establishments or pupils of passages from published works

Michael Pendleton & Alice Lee:

“Whether the court would have power to deem a particular form of copying, in certain circumstances, to be fair dealing although it does not come within the terms of the Ordinance?”

“Whether the court would have power to deem a particular form of copying, in certain circumstances, to be fair dealing although it does not come within the terms of the Ordinance?”

Beloff v Pressdram Ltd & Anor
[1973] RPC 765 (holding that a
defense of publication in the public
interest existed)

-> Nonstatutory fair dealing?