

# Hong Kong Media Law

A Guide for Journalists and Media Professionals

*Expanded Second Edition*

Doreen Weisenhaus

with contributions by Rick Glofcheski and Yan Mei Ning



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## **Reviews for the first edition of *Hong Kong Media Law: A Guide for Journalists and Media Professionals***

“This book deserves to be the first port of call for anyone seeking guidance on free speech and media law in Hong Kong . . . That the book fulfills a felt need is beyond doubt.”

—*The Commonwealth Lawyer*, London

“The book is truly the first of its kind in the recent past (and) a singularly important addition to the increasing body of country-specific media law books in Asia . . . *Hong Kong Media Law* covers all the key topics in the area of communication law . . . The scholarly merit of the book is substantial.”

—Kyu Ho Youm, *Communications Lawyer*, American Bar Association

“An accessible guide to media law in Hong Kong and China . . . particularly useful for correspondents who have recently arrived in Hong Kong or China and are trying to get their bearings . . . (and) there is a lot here of interest to non-journalists, whether they are citizens trying to understand the peculiarities of Hong Kong’s copyright laws, public figures confronting the paparazzi or just people who are curious about the mechanics of Hong Kong’s broadcast regulations.”

—Chris Dillon, *The Correspondent*, Foreign Correspondents Club Hong Kong

“Weisenhaus brings both a pragmatic and scholarly perspective to her subject . . . For scholars or legal practitioners interested in a concise summary of the law, *Hong Kong Media Law* is a useful resource. For journalists who plan to go to Beijing to cover the Olympics, it is a necessity.”

—Jane Kirtley, *Journalism and Mass Communication Quarterly*, US

“This is an important book that goes a long way to filling a serious vacuum as far as the Hong Kong media is concerned. If it helps educate Hong Kong journalists and editors enough for them to feel more confident in publishing articles about even the most litigious subjects without fear of losing the resulting court case, the book will also play its part in protecting press freedom in Hong Kong.”

—Danny Gittings, *Hong Kong Law Journal*

“A valuable resource for journalists and media professionals, to be read, kept and referred to.”

—Kenneth Leung, *Chinese Journal of Communication*, Hong Kong

“This hefty well-researched book fills an important gap in media law studies in the Asia-Pacific region . . . The material is authoritative and fresh.”

—Madanmohan Rao, *Media Asia*, Singapore

“Weisenhaus’ book highlights loopholes in Hong Kong’s legal system and its lack of protection for press freedom, compared to some Western democracies. For example, Hong Kong’s Code on Access to Information is not only not statutory, but is full of exemptions, allowing for Hong Kong’s government to be secretive.”

—*World Press Freedom Review*, International Press Institute

“What is interesting about *Hong Kong Media Law* is that it traces the way that Hong Kong legislature and courts no longer simply adopt UK legislation or precedents. The book looks at the question of the directions in which Hong Kong will go in the future.”

—The Hon. Judith Gibson, New South Wales District Court, Australia  
*Media and Arts Law Review*, Melbourne

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# Key Milestones and Developments for Press Freedom in Hong Kong

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**1985** The People's Republic of China and the United Kingdom ratify the Joint Declaration on the Question of Hong Kong, setting the stage for the eventual end of colonial rule and a transfer of Hong Kong to Chinese sovereignty in 1997.

**1987** The Control of Publications Consolidation Ordinance is repealed, bringing an end to harsh colonial rules on local print media.

The Control of Obscene and Indecent Articles Ordinance (COIAO) is enacted; it aims to reduce objectionable newsstand publications and access by juveniles to indecent material.

**1989** The Law Reform Commission (LRC) appoints a sub-committee on privacy to carry out a comprehensive review of law relating to privacy and to make recommendations for legislation protecting individual privacy rights.

**1991** The Bill of Rights Ordinance is enacted to establish various fundamental rights, enforceable by the courts, including protection for freedom of expression.

**1994** Hong Kong journalist Xi Yang, a reporter for the *Ming Pao* newspaper, is convicted in the PRC of disclosing state secrets and is sentenced to 12 years in prison. (He is released in 1997.)

The Court of Appeal applies the “newspaper rule”, a common law rule protecting sources in libel cases, to a Hong Kong case in rejecting a request for the names of the author and editors of an article in a pre-trial defamation action. *John Sham v Eastweek Publisher Ltd.* [1995] 1 HKC 264.

**1995** The Court of Appeal sets aside as excessive the first jury award for libel damages in Hong Kong of HK\$2.4 million against a magazine. *Cheung Ng Sheong Steven v Eastweek Publisher Ltd.* [1995] 3 HKC 601.

*Apple Daily* newspaper debuts in Hong Kong, bringing a market-driven style of journalism.

The Hong Kong government rejects calls for a Freedom of Information law and institutes an administrative Code on Access to Information.

The Personal Data (Privacy) Ordinance (PDPO) is passed. It protects an individual's personal data, but provides "news activity" exemptions for reporting.

Legislative provisions in the Interpretation and General Clauses Ordinance (IGCO) to govern the search and seizure of journalistic materials are enacted.

**1996** The Legislative Council amends the Prevention of Bribery Ordinance to offer greater protection to journalists. This comes after a highly controversial prosecution against *Ming Pao* for a 1994 article about ongoing investigations conducted by the Independent Commission Against Corruption (ICAC).

**1997** On 1 July, the PRC resumes authority for Hong Kong. The Basic Law goes into effect, extending Constitutional protection for freedom of speech, of the press and of publication.

**1998** The Court of Final Appeal, Hong Kong's highest court, overturns an Obscene Articles Tribunal's classification of a newspaper's photographs and articles as indecent and illegally distributed, saying that the tribunal is under a duty to give reasons and that the reasons given are inadequate. *Oriental Daily Publisher v Commissioner for Television and Entertainment Licensing* [1998] 4 HKC 505.

In what becomes known as the "Chan Kin Hong Incident", Hong Kong media extensively cover the suicide-homicide of a woman and her two children. A newspaper publishes a front-page photograph of the widower posing with prostitutes, but later apologizes for its role. The incident leads to calls for legislative proposals against media intrusion.

**1999** A media company is fined HK\$5 million and one of its editors is sentenced to four months in prison for contempt of court ("scandalizing the court") for publishing articles sharply criticizing two judges and for a paparazzi-style campaign against one of the judges. *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKLRD 293.

Consultation papers issued by the LRC's sub-committee on privacy recommend the establishment of a statutory press council and new privacy laws to regulate the media.

In investigating a reporter bribery case, authorities search a newspaper's premises and seize documents and journalistic materials. (A court challenge to the search warrants is later rejected. *Apple Daily v Commissioner of the Independent Commission Against Corruption* [2000] 1 HKC 295.)

- 2000** In a landmark defamation case, the Court of Final Appeal expands the defence of fair comment, affirms the Constitutional guarantee of freedom of speech and of expression and urges lower courts developing the common law “not to adopt a narrow approach”. *Cheng v Tse* [2000] 3 HKLRD 418.

The Court of Appeal holds that a photograph taken of an unidentified woman in the street without her consent and used for a magazine article criticizing her fashion sense was not a violation of data privacy law. *Eastweek v Privacy Commissioner* [2000] 1 HKC 692.

The Hong Kong Press Council, the first self-regulatory body for the print media, is established to handle public complaints.

The Broadcasting Ordinance is enacted, replacing the Television Ordinance.

- 2002** In the “Chater Garden Incident”, police handcuff and arrest two journalists after they refuse to enter and stay in a designated press area, leading the media to call for better access in covering protests.

*Eastweek* magazine publishes nude photographs of actress Carina Lau under duress taken a decade earlier when she was kidnapped, prompting community protests and questions over obscenity standards; the magazine’s owner shuts down the publication. The incident launches multiple legal proceedings.

The Hong Kong government introduces proposals for Article 23 laws on sedition, subversion, theft of state secrets, treason and secession.

The debut of *Metropolitan Daily*, Hong Kong’s first free newspaper, spurs the introduction of other free dailies, increasing the competition of the already active print market.

- 2003** On 1 July, more than 500,000 people, including many journalists, march in protest of the Article 23 legislation. The government withdraws its proposals.

- 2004** The ICAC raids seven newsrooms in an attempt to uncover sources for news stories that revealed the identity of a witness in the government witness protection programme. The Court of First Instance upholds a newspaper’s challenge of the search warrants. The Court of Appeal dismisses the government’s appeal, but states it would have allowed the appeal had it had the necessary jurisdiction. *So Wing Keung v Sing Tao Ltd & Another* [2005] 2 HKLRD 11. (A trial against lawyers accused of attempting to disclose the witness’ identity to reporters is held in 2006.)

The Law Reform Commission releases two reports recommending a statutory press commission and new civil privacy laws.

**2005** In the first Hong Kong decision to consider the UK's *Reynolds* privilege in a defamation case, a Court of First Instance rules in favour of a newspaper relying on the defence after being sued for an article in its readers' complaint column about unsatisfactory services provided by a local business. *Cutting de Heart v Sun News Ltd* [2005] 3 HKLRD 133.

In a major policy shift, the Hong Kong Judiciary expands public access to in-chamber hearings in civil proceedings in the High Court, District Court, Lands Tribunal and Family Court, providing greater access to journalists.

A Hong Kong man becomes the first person in the world convicted for distributing copyright-protected movies on the Internet using BitTorrent technology. *HKSAR v Chan Nai Ming* [2005] 4 HKLRD 142. (The Court of Final Appeal later confirms the conviction. *Chan Nai Ming v HKSAR* [2007] 2 HKLRD 486.)

**2006** The Court of First Instance orders the government to enact "corrective" legislation for its covert surveillance practices. The Interception of Communication and Surveillance Ordinance is passed, allowing covert surveillance by authorities on journalists, lawyers and other professions.

Published covert photographs of singer Gillian Chung undressing after a concert are classified as indecent. Chung files a breach of confidence suit against the magazine that published the photographs and obtains an injunction against further publication. The incident renews calls for more media regulation.

*South China Morning Post* reporter Magdalen Chow testifies under immunity in the trial of barrister Kevin Egan, who was convicted of attempting to disclose the identity of a participant in the witness protection programme. (The Court of Appeal later overturns Egan's conviction. *Secretary for Justice v Kevin Egan* (2008) CACC 248/2006.)

The Hong Kong government proposes the merger of the Broadcasting Authority and the Telecommunications Authority into a unified regulator, the Communications Authority.

The LRC's subcommittee on privacy issues a report — the last of its six reports on privacy — calling for new criminal laws against covert surveillance by government and private parties.

Hong Kong reporter Ching Cheong is convicted in the PRC on spying charges and is sentenced to five years in prison. (He is released in 2008 and returns to Hong Kong.)

In December, the PRC government announces the relaxation of some reporting restrictions against foreign, Hong Kong and Macau reporters in the run-up to the 2008 Olympics in Beijing.

- 2007** An investigation by the Ombudsman's office concludes that government officials breached the Code on Access to Information when they repeatedly denied a request by a university researcher for information on railway suicide incidents.

The Privacy Commissioner determines that a reporter's IP address, which a PRC subsidiary of Yahoo! Hong Kong turned over to mainland authorities, is not personal data. The PRC reporter, Shi Tao, was sentenced in 2005 to ten years in prison for emailing Communist Party instructions on Tiananmen Square anniversary news coverage to a foreign website. (The Administrative Appeals Board later agrees the IP address is not personal data. *Shi Tao v Privacy Commissioner for Personal Data* [2008] 3 HKLRD 332, AAB. Shi Tao is released from prison in 2013.)

- 2008** In January, a media frenzy erupts over the online publishing of intimate sexual photographs involving Hong Kong pop star Edison Chen and numerous female celebrities. The reproduction of the photos in mainstream media, police crackdowns and prosecutions trigger questions on freedom of expression and regulation of online pornography. By October, the government initiates its first round of public consultation for reviewing COIAO.

In the second Hong Kong case to consider the *Reynolds* privilege (now known as the public interest defence), a Court of First Instance finds the defence not proved and orders Asia Times Online to pay HK\$1.3 million to a Pakistani businessman for defaming him in an online article. *Abdul Razzak Yaqoob v Asia Times Online Ltd.* [2008] 4 HKLRD 911.

A Court of First Instance rules that the Broadcasting Authority's censure of public broadcaster RTHK's programme on same-sex couples who want legalized marriage was "an impermissible restriction on freedom of speech". *Cho Man Kit v Broadcasting Authority* (2008) HCAL 69/2007.

Hong Kong becomes the 50th jurisdiction to localize Creative Commons, a supplemental licensing scheme to facilitate the public distribution of copyright-protected works.

Post-Olympics, China extends the relaxed reporting rules for foreign journalists covering the 2008 Olympics, but not for Hong Kong and Macau reporters.

- 2009** China issues new reporting rules for Hong Kong and Macau journalists reporting on the mainland that are more restrictive than those for foreign journalists.

The Ombudsman's office substantiates a complaint by *Apple Daily* that had tried unsuccessfully to obtain Hong Kong government test results of food samples from mainland China after a deadly, tainted baby-formula scandal there.

Becoming the first journalist jailed under Hong Kong's obscenity law, an editor is sentenced to five months for the 2002 publication of the Carina Lau nude photographs.

Macau's legislature approves a National Security Law, its own version of Article 23 implementation, heightening fears that its action would prompt a second attempt by Hong Kong authorities.

- 2010** The Court of Final Appeal's first Chief Justice, the Hon. Andrew Li Kwok Nang, who served since 1997, steps down. He is widely viewed as having successfully established the CFA as a respected and moderate court, which issued the landmark *Cheng v Tse*. The Hon. Geoffrey Ma Tao-li, then Chief Judge of the High Court, is appointed to replace him.

After a year-long review, the Ombudsman's office concludes that the Hong Kong government has done little to increase public awareness of the 15-year-old Code on Access to Information or to train officers in how to respond to information requests.

The PRC amends and strengthens its state secrets law, particularly involving the Internet.

- 2011** In Hong Kong's first disability vilification claim, a court rejects a claim by a mental patient against *The Sun* newspaper for a satirical commentary about the plight of the mentally ill. *Tung Lai Lam v Oriental Press Group* [2011] 2 HKC 294.

"Jasmine Revolution"-style protests in mainland China prompt restrictions and detentions of foreign and Hong Kong journalists trying to cover the events.

The Hong Kong government proposes amendments to the Copyright Ordinance to deal with Internet and digital issues, including measures to add criminal sanctions for unauthorized public communication of copyrighted works, and to establish a "safe harbour" for ISPs to limit liability, provided they assist in combatting online piracy. Many Internet users raise concerns the bill would limit creative derivative works, calling it "the Article 23 of the Internet". (The bill is later withdrawn.)

A visit to Hong Kong by then-Vice Premier Li Keqiang prompts immense controversy over how local police handled security, including imposing restrictions on the media.

The Broadcasting Authority imposes its largest fine to date — HK\$300,000 — on Asia Television (ATV), one of two terrestrial stations in Hong Kong, for erroneously reporting that former Chinese leader Jiang Zemin had died.

The Constitutional and Mainland Affairs Bureau releases a consultation paper on stalking, inviting comments on such questions as whether to create a criminal offence or provide a specific newsgathering defence. (The bureau had announced earlier it would consider LRC reports on privacy reforms in stages, starting first with stalking.)

- 2012** Hong Kong courts issue two judgments concluding that website forum hosts are generally to be considered “subsidiary publishers”, and not primary publishers, of defamatory comments that appear in online forums, suggesting that ISPs might be eligible for the defence of innocent dissemination. *Oriental Press Group Ltd v Feaworks Solutions* [2012] 1 HKLRD 848; *Oriental Press Group Ltd v Inmediahk.net Ltd* [2012] 2 HKLRD 1004.

The Court of Final Appeal greatly reduces the libel damages awarded at trial in two decisions that clarified and revised some of the principles for damage awards, thus ensuring that they are likely to be more modest in the future. *Blakeney-Williams v Cathay Pacific Airways Ltd* (2012) 15 HKCFAR 261, and *Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd.* (2012) 15 HKCFAR 299.

The Legislative Council amends the PDPO, restricting the direct marketing and sale of personal data. A new criminal offence to prohibit unauthorized disclosure of personal data with the intention to gain or to cause loss or psychological harm to the data subject is particularly troubling for journalists.

The Privacy Commissioner finds against two magazines for contravening the PDPO in publishing photographs of celebrities in their homes taken covertly with telephoto lenses, rejecting the publications’ public-interest claims.

The Communications Authority is established as a unified regulatory body overseeing the telecommunications and broadcasting sectors.

The government conducts a second round of public consultation over COIAO.

The Court of Final Appeal quashes the convictions of several legislators and activists prosecuted for participating in a public forum broadcast without a licence by the activist group Citizens' Radio, which unsuccessfully challenged the constitutionality of the government's licensing scheme. *HKSAR v Wong Yuk Man & Others* [2012] HKCFA 68. (Defendants who operate Citizens' Radio were earlier convicted and fined.)

The PRC's Criminal Procedure Law is extensively amended with potential consequences for journalists who might be detained as they report on the Mainland.

- 2013** In January, the Ombudsman's office and the Law Reform Commission announce separate reviews into Hong Kong's access of information regime and the related government records management system. The two reviews are to include comparative analyses of FOI laws and record management and archival systems internationally.

After intense public criticism, including from journalists, the government withdraws a controversial legislative proposal to limit public access to personal data on company directors, such as home addresses and personal identity information.

The Court of Final Appeal confirms the availability of the innocent dissemination defence to an Internet Service Provider. *Oriental Press Group Ltd v Fevaworks Solutions Ltd*, [2013] 5 HKC 253.

In a third Hong Kong defamation case to consider the public interest defence, a court finds the defence not proved in an editorial in the *Ming Pao* newspaper and upholds a jury's fine of HK\$500,000. *Pui Kwun Kay v Ming Pao Holdings Ltd*, HCA (2013) 854/2009.

The ICAC makes its first request for a production order for journalistic material under s 84 of the IGCO.

The Communications Authority releases an investigation report on ATV, orders the resignation of its executive director for allowing an investor to improperly exercise control over the station and fines ATV HK\$1 million. A month later, the CA for the first time determines that a TV licensee (TVB) has violated anti-competition restrictions.

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# Overview

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Doreen Weisenhaus

## 1. Introduction

An anti-corruption agency raids seven newsrooms. The government considers far-reaching national security legislation with serious implications for journalists. Covert surveillance and other privacy laws impacting paparazzi and the media are proposed. An editor is jailed for contempt of court.

These events and others in Hong Kong in the first decade after the 1997 return of the former British colony to Chinese sovereignty demonstrated the volatility of media law developments in one of two Special Administrative Regions (SAR) of the People's Republic of China (PRC). Yet, in 2007, on the tenth anniversary of the handover, it was clear that Hong Kong still enjoyed freedom of expression and that its exceptionally large, diverse and rambunctious media operated in an environment considered one of the world's freest, the only one of its kind within the PRC.

By 2013, well into Hong Kong's second decade as an SAR, another round of attention-getting developments continue to show an ever-changing legal landscape for the media and freedom of expression. These include an online publication ordered to pay HK\$1.3 million in a defamation case, the first journalist jailed under obscenity law, a celebrity nude photo scandal raising questions about privacy and free speech rights and the prosecution of rogue radio broadcasters challenging the constitutionality of a government licensing scheme.

In Hong Kong, as in other common law jurisdictions, there is no single written set of rules for what comprises media law. Much depends on precedent, custom, equity, statutes and a constitution — and the range of issues can include freedom of expression, defamation, privacy, reporting restrictions, contempt of court, official secrets, access to information, protection of journalistic sources, obscenity, copyright, broadcast regulations and more.

After 1997, Hong Kong's judges no longer had to automatically apply British common law to issues that arose. They often still do, but they also draw from other jurisdictions as well as fashion their own interpretations, often looking to Hong Kong's own constitution, the Basic Law. A study of more than 40 constitutional rights cases decided by Hong Kong's highest court, the Court of Final Appeal (CFA), from 1999 to 2009 document a "robust, liberal and mainstream approach"

to protecting fundamental rights, including presumption of innocence, legal certainty and protection against arbitrary imprisonment, freedom to travel and freedom of expression and assembly.<sup>1</sup> Hong Kong's unique arrangement that allows judges from other common law jurisdictions to serve on the CFA ensures an international perspective and influence in shaping its jurisprudence.

This open and robust climate evolved during more than 150 years of British rule, which gave Hong Kong its independent legal system, a freewheeling capitalism that nurtured its teeming media market, and a healthy respect for personal freedom and expression. British rule, however, also bequeathed a legacy of harsh laws regarding defamation, official secrets, sedition and reporting on court proceedings that make it sometimes hard — and sometimes risky — for journalists to do their jobs.

In recent years, the UK has instituted legal reforms to enhance freedom of expression for many aspects of media law, including new legislation on defamation, a Freedom of Information act (FOI) and the repeal of sedition, criminal libel and scandalizing the court offences. Its libel reform in 2013,<sup>2</sup> in particular, makes it harder for parties to sue, strengthens available defences and is expected to end the UK's reputation as a magnet for "libel tourism". Other commonwealth countries also have modernized their laws to extend protections. They include New Zealand, which repealed its official secrets and sedition laws, enacted FOI legislation and added more safeguards to its obscenity regime.

Meanwhile, Hong Kong has mostly remained frozen in time with many antiquated media laws inherited from another era. In other words, the UK and other countries have moved on while Hong Kong lags behind in providing adequate legislative protection for freedom of expression and the press. It remains, for example, one of the few developed jurisdictions in the world without a FOI law to mandate public release of government-generated information and documents, a gap noted more recently in March 2013 by the United Nations Human Rights Committee monitoring Hong Kong's compliance with the International Covenant on Civil and Political Rights.<sup>3</sup> (For more details, see this book's Chapter 2 The Legal System, section 3.4 International treaties and agreements.)

Some fear though that if the Hong Kong government did try to change its laws, it might be tempted to step backward rather than forward and impose new restrictions on the media and free speech. Indeed, since 2002, the government has introduced several controversial bills and withdrawn them after encountering immense public opposition, including proposed national security laws as mandated by Article 23 of the Basic Law. It has, however, announced a renewed interest in pursuing additional privacy proposals after having amended

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1. Simon Young, "Constitutional Rights in Hong Kong's Court of Final Appeal", *Chinese (Taiwan) Yearbook of International Law and Affairs* [2011] v. 27 pp. 67–96. See also, Simon N. M. Young and Yash Ghai (eds.), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge: Cambridge University Press, 2013).

2. Enacted three years after a bill introduced by Lord Anthony Lester.

3. "Concluding Observations on the Third Periodic Report of Hong Kong, China", UN Human Rights Committee, adopted 26 March 2013 (CCPR/C/SR2974).

the Personal Data (Privacy) Ordinance in 2012, which added a worrisome new criminal offence prohibiting disclosure of personal data resulting in psychological harm, and has concluded a second consultation on obscenity law.

The political winds that blow in from the mainland also make journalists and others worry about the years ahead. They first began expressing concern about the influences the mainland would exert on journalistic attitudes and practice in Hong Kong in the early 1980s, when Chinese and British officials were negotiating and signing the deal that set the timetable for China's resumption of sovereignty. Those concerns about the impact of the handover on press freedoms heightened after the pro-democracy crackdown in Tiananmen Square and elsewhere in China in 1989.

In the years since the handover, those winds from the mainland have grown stronger, despite the "one country, two systems" principle that is supposed to govern relations between the mainland and Hong Kong. The turbulence has brought the PRC's repeated intervention in constitutional matters in the SAR,<sup>4</sup> the mainland conviction of a Hong Kong-based reporter on spying allegations, mistreatment of Hong Kong journalists reporting across the border, anxiety over pending national security laws expected to be introduced by Hong Kong's newest Chief Executive C. Y. Leung, who took office in 2012, and a rising perception that the PRC's central government is escalating its efforts to influence key institutions in the city, including the media. More than eight in ten Hong Kong journalists surveyed in 2012 say they think press freedom has eroded,<sup>5</sup> a conclusion echoed by Freedom House, a US-based non-government organization, which rates the SAR's press freedom status as "partly free".<sup>6</sup> Thus, concern persists both within and beyond Hong Kong over the degree of its press freedom and the eventual contour of its media-law landscape, partly because of uncertainty about how much of a role the mainland will have in shaping (if not controlling) it.

## 2. Hong Kong media's unique role

Despite the mounting concerns about the future, the Hong Kong media still play a uniquely important and powerful role. Their traditional government-watchdog role is made even more significant by the SAR's limited democracy. As of 2013, only half of Hong Kong's 70 legislators are elected by universal suffrage. Its Chief Executive is elected by a predominantly pro-government election committee, comprised of 1,200 individuals, with approval from the one-party mainland government in Beijing. Universal suffrage is anticipated in 2017 for the Chief Executive election and in 2020 for the Legislative Council elections.<sup>7</sup> Until that happens, the

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4. For details, see section 3.1.1 Relationship with the PRC, Chapter 2 The Legal System, of this book.

5. Survey results found in "New Leader Raises Fears: Challenges for Freedom of Expression in Hong Kong", Hong Kong Journalists Association, 2012 annual report.

6. Freedom of the Press 2013, <http://www.freedomhouse.org>.

7. In December 2013, the Hong Kong government launched a five-month election consultation to collect views on details of arrangements for the 2017 election of the Chief Executive, as well as

media continues to serve as a “parliament-in-print”,<sup>8</sup> which they have done since Hong Kong’s days as a British colony. They help preserve rule of law by keeping a vigilant eye on key institutions such as the executive government and the judiciary.

The media’s special watchdog role is made more complicated by a long history of partisanship often tied to political developments in mainland China. Over the years, Hong Kong has been a politically volatile refuge for Chinese, including many journalists, caught in one upheaval or another on the mainland — from those challenging the Qing dynasty in the late nineteenth century to those fleeing the Communist Party in 1949 and the excesses of the Cultural Revolution of the 1960s and early 1970s. And many newspapers reflected those partisan views with competing political factions operating their own publications in Hong Kong. But during the 1970s, more commercial, less politically connected newspapers began to proliferate. Today, while several Beijing-supported newspapers remain, most of the Chinese-language market is dominated by privately owned or publicly traded media companies, in a community more than 95 percent Chinese. Dozens of local daily newspapers, hundreds of magazines and a growing number of broadcasting or cable outlets with news departments serve a population of 7 million.<sup>9</sup> A number of newspapers still reflect political views, usually those of their owners.

For example, the *Apple Daily* newspaper, part of Next Media Ltd<sup>10</sup> founded in the 1990s by entrepreneur Jimmy Lai, is unabashedly pro-democratic and champions universal suffrage for Hong Kong. *Apple Daily* also brought to Hong Kong a more flamboyant kind of journalism featuring big, colourful pictures and graphics and bold headlines that were soon embraced by many other news organizations. As *Apple Daily* became one of the most-read newspapers, along with its highly popular sister publication *Next Magazine*, with their stories about celebrities, scandals, car crashes and morbid deaths, such coverage became more prevalent in the other newspapers and magazines and set a different agenda for many news organizations in their competition for readers and viewers. The advent of free daily newspapers, beginning with *Metropolitan Daily* in 2002, increased the competitive nature of the already active print market. The free dailies now reach more than three million readers.

What then also became more prevalent was community concern and criticism over the increasingly aggressive news coverage and camera-wielding paparazzi. Public discussions arose over issues of privacy, responsible reporting and journalistic standards. Each new perceived media excess brought more calls by some policymakers and legislators for increased regulation and new laws to rein in what

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for the forming of the Legislative Council in 2016, ahead of the expected 2020 elections.

8. Richard Cullen, “Freedom of the Press and the Rule of Law”, in Steve Tsang (ed.), *Independence and the Rule of Law in Hong Kong* (Hong Kong: Hong Kong University Press 2001), p. 158.

9. Hong Kong also is one of the largest centres for international media operations in Asia.

10. Next Media Ltd. also expanded into the Taiwan market in the 2000s. One innovation that has drawn international interest and controversy is the media company’s computer-animated dramatizations of current news stories, posted online at <http://www.nma.com>. Its 2009 animated video on Tiger Woods’ marital problems drew millions of viewers.

they considered irresponsible newsgathering practices. Many in the journalism profession argued that the answer was more and better self-regulation.

But as the stakes have risen in more politically volatile times, maturing media have also risen to meet the challenges. For example, the past decade has seen largely responsible and thorough coverage of the Severe Acute Respiratory Syndrome health crisis and the debate around the first attempt to pass Article 23 legislation, a controversy that saw 500,000 people march in protest in 2003, leading the government to withdraw its proposals and, some say, Hong Kong's first Chief Executive, Tung Chee-hwa, to resign.

More recently, the media have contributed extensive reporting on the PRC's melamine-tainted dairy scandal, forcing the Hong Kong government to release its food sample testing of mainland products; the candidates for the 2012 Legislative Council and Chief Executive elections, with almost daily revelations, including of conflicts of interest and illegal building structures on properties of candidates; the contentious debate over national education and a spending scandal involving a former chief of Hong Kong's anti-corruption agency. Some say Hong Kong journalists are even having an impact on developments on the mainland as evidenced by their reporting of the reaction to the jailing of former food safety worker-turned-milk-scandal activist Zhao Lianhai in 2010. As Cliff Buddle, a senior Hong Kong editor, observed:<sup>11</sup>

The support for Zhao came not just from the media, but across the political spectrum, including Hong Kong deputies to the National People's Congress. In a rare, if not unprecedented move, Xinhua responded publicly and directly to these Hong Kong concerns, defending the sentence. It is reasonable to believe that the subsequent release of Zhao on medical parole had much to do with the outrage his sentence had sparked in Hong Kong. In this respect, the Hong Kong media may find that by providing a platform for discussion of such cases, it can help shape events on the other side of the border.

### 3. Freedom of expression and of the press in Hong Kong

The legal guarantees for freedom of expression in Hong Kong are contained in the Basic Law and in the Bill of Rights Ordinance.<sup>12</sup> Article 27 of the Basic Law states:

Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration, and the right and freedom to form and join trade unions, and to strike.

Article 39 of the Basic Law mandates that provisions of the International Covenant on Civil and Political Rights (ICCPR), a 1966 United Nations treaty based on the Universal Declaration of Human Rights, are to be part of Hong Kong law. The ICCPR was ratified by the United Kingdom and extended to Hong

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11. Interview with Cliff Buddle, *South China Morning Post*, Hong Kong's leading English-language newspaper, conducted by this author, 19 January 2013.

12. For more discussion, see Po Jen Yap, "Freedom of Expression", in J. Chan and C. L. Lim (eds), *Law of the Hong Kong Constitution* (Hong Kong: Sweet and Maxwell 2011).

Kong in 1976. According to Article 39, Hong Kong is required to enact laws to give effect to the ICCPR; local ordinances must be consistent with it.<sup>13</sup>

The Hong Kong Bill of Rights Ordinance (BORO), enacted in 1991 in the aftermath of the Tiananmen Square crackdown, incorporated verbatim numerous articles in the ICCPR. The BORO's Article 16, where freedom of expression guarantees are described, is identical to ICCPR's Article 19, which provides:

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 2 . . . carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be only such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others; or
  - (b) For protection of national security or of public order, public health or morals.

This means that Hong Kong law can restrict press freedom but only where reasonably necessary to respect the rights or reputations of others and to protect national security, public order, public health or morals.

Article 27 of the Basic Law separates freedom of speech and of the press. What is the difference? Freedom of speech and the broader concept of freedom of expression (which can include non-speech activities such as demonstrating) are long established and relate more to the right of individuals to speak and express freely without government restraint — a right that promotes the free exchange of ideas necessary for self-rule and individual autonomy. In a leading Hong Kong case on freedom of expression, then Chief Justice Andrew Li stated:

Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticise governmental institutions and the conduct of public officials.<sup>14</sup>

But in that 1999 case, the Court of Final Appeal upheld the constitutionality of Hong Kong laws that forbade one form of expression — desecration of Hong Kong and PRC flags. It concluded that legitimate and necessary interests existed in bolstering protection of these symbols in the early period after Chinese resumption of sovereignty over its Special Administrative Region.<sup>15</sup>

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13. For more on Hong Kong's compliance with ICCPR, see Chapter 2 of this book.

14. *HKSAR v Ng Kung Siu* [1999] 2 HKCFAR 442, 464.

15. See Yap, note 12; Raymond Wacks, "Our Flagging Rights" (2000) 39(1) *Hong Kong Law Journal* 1; Johannes Chan, "Basic Law and Constitutional Review: The First Decade," (2007) 37 *Hong Kong Law Journal* 407.

The concept of freedom of the press is different from general free speech rights in that it can refer to protections for established media as they carry out their fundamental duties and functions.<sup>16</sup> One important issue to freedom of the press, for example, is protection of journalistic news sources. Other issues can arise in how journalists report the news and cover major institutions and in the type of medium they use, such as broadcasts, which are subject to additional restrictions.

#### 4. This book

In a practical context, this book describes key media law developments in Hong Kong and internationally affecting the profession of journalism. It examines the issues journalists face in the day-to-day activities of reporting, editing, publishing, broadcasting, posting on the Internet or using social media, but it is also useful for those outside the profession who are actively writing, blogging, tweeting and so on.

Here are brief summaries of each chapter:

**Chapter 2 (The Legal System):** Before learning about media law, it is helpful for journalists to first learn about the law in general, the courts and the roles people play in them, and other aspects of the legal system, including in the context of Hong Kong's increasingly complicated relationship with the People's Republic of China. For many journalists and those without legal training or background, the law can seem intimidating, but some principles can help make it more understandable and accessible.

**Chapter 3 (Defamation):** Probably no issue looms larger for working journalists than defamation, particularly in Hong Kong, with its British legal legacy that has been particularly harsh on media defendants. Since 1997, Hong Kong courts have continued to follow and apply UK case law principles, and have recognized new developments in the UK, such as the *Reynolds* public-interest defence and the *Godfrey v Demon* extension of the subordinate publisher defence to Internet service providers. At the same time, Hong Kong courts have developed some of their own jurisprudence, including, for example, in regard to the meaning of malice in the defence of fair comment (now known as honest comment), a reform that has been adopted elsewhere in the Commonwealth. The Internet and the need to find the right balance between free speech and protection of reputation continue to drive developments in defamation. The chapter provides an extensive overview of defamation, including definitions of defamation, examining when criticism crosses the line into defamation, who can sue or be sued, the roles malice, motive and mistake play into libel cases, available defences and how damages are assessed and a discussion of the UK's major libel reform.

**Chapter 4 (Court Reporting and Contempt of Court):** While Chapter 2 describes some general concepts about law, legal systems and the courts, this chapter delves more deeply into the issues facing Hong Kong media in their

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16. See Johannes Chan, "Freedom of the Press: The First Ten Years in the Hong Kong Special Administrative Region" (2007) 15(2) *Asia Pacific Law Review* 163.

coverage of court cases. The right to a fair trial versus the right of the press to cover a trial is one of the most important and enduring conflicts in any jurisdiction. Journalists must contend with reporting restrictions and the possibility of contempt of court liability should they run afoul of the restrictions. The use of the Internet, social media and other digital tools by today's journalists and the public raise new questions about what is permissible in the courtroom.

**Chapter 5 (Privacy):** The newsgathering practices of journalists, especially aggressive coverage of the private lives of individuals, in Hong Kong and worldwide, continue to come under intense criticism in an ongoing debate about privacy rights versus press freedom. While Hong Kong imposes minimal restrictions on the media regarding privacy intrusion, journalists should be aware that some aspects of privacy are protected through the Basic Law, local legislation such as the Personal Data (Privacy) Ordinance (Cap 486), amended in 2012, and civil actions. Over the years, other privacy laws have been proposed, but not enacted, to exert additional controls over the media. But recent developments, such as a new criminal offence prohibiting disclosure of personal data resulting in psychological harm and the government's renewed interest in considering additional legislation, might begin to alter the privacy picture. This chapter summarizes both current and proposed laws in Hong Kong, as well as developments in the UK, European Court of Human Rights and elsewhere.

**Chapter 6 (Access to Information):** This chapter focuses on laws and regulations that affect how certain government information and proceedings are required to be made available and open to the public and, by extension, journalists. It analyzes Hong Kong's limited administrative Code on Access to Information, comparing it with more expansive Freedom of Information laws available in other jurisdictions, and examines the impact of a secret government on the operation of a free press. The chapter also explains how the *absence* of other laws, such as archival laws to require the maintenance of public records and so-called sunshine laws to mandate open meetings for governmental bodies, further hampers the abilities of the public and the media to access government-held information.

**Chapter 7 (Official Secrets and Sedition):** While Chapter 6 focuses on access to government-generated information and the barriers that prevent much public access, this chapter centres on a specific category of prohibited government information known as "official secrets". In this post-Wikileaks era, what laws would guide the Hong Kong government? The chapter also examines the Article 23 national security proposals considered in Hong Kong in 2002–03 that would have greatly altered existing laws on official secrets and on sedition as well as have introduced new laws on subversion and secession. Can lessons be drawn from neighbouring SAR Macau's implementation of Article 23 in 2009 and from other countries' use — or repeal — of their national security laws?

**Chapter 8 (Other Restrictions on Newsgathering and Reporting):** This chapter explores additional restrictions on journalistic newsgathering and reporting. It

discusses whether journalists have any special rights of access — or face any restrictions — to places and events and how they should respond to police use of press-only areas at public demonstrations and events and examines the rise in tension between the police and media. It elaborates on restrictions on reporting on elections and ongoing criminal investigations and on bans against disability and racial vilifications. It also addresses protection of journalistic material and sources.

**Chapter 9 (Reporting on the Mainland):** When Hong Kong and foreign journalists based in Hong Kong travel to the mainland for reporting, they are often covering stories that PRC authorities consider sensitive. This chapter focuses on some key laws, regulations and rules that these journalists face in an increasingly hostile and sometimes violent reporting environment, including revised reporting restrictions, implemented after the 2008 Olympics, and amended state secrets laws, and what they should do if restrained from their reporting or detained on the mainland. It also examines developments in defamation, privacy and Open Government Information (OGI) laws and regulations.

**Chapter 10 (Copyright):** In the Internet and multimedia age, copyright issues have become more important to journalists across all media platforms. Journalists today need to understand the concepts of copyright and their implications, particularly as more countries focus on enforcement. Awareness of copyright is vital in two key regards. The first is in acknowledging the copyright of other people's work that might affect newsgathering, writing and news production. The second is in protecting a journalist's own work. This chapter also looks at special copyright issues involving the Internet, including linking, social media such as Facebook and Twitter, attempts by the Hong Kong government to regulate the digital environment and the alternative licensing scheme, Creative Commons.

**Chapter 11 (Obscenity and Indecency):** Hong Kong's obscenity law not only regulates adult magazines and audio-visual materials, but also polices the city's mainstream print media. Indeed, criminal prosecutions of Hong Kong newspapers and magazines arise mainly from the publication of indecent or obscene content. Like its counterparts in many parts of the world, Hong Kong's obscenity law has stirred controversy and caused uncertainty to the daily operations of the local press. The rising popularity of online content compounds the situation. This chapter analyzes the current statutory regime, cases and controversies, including the impact of the Edison Chen photo scandal that made news worldwide, and public consultations to revamp the law.

**Chapter 12 (Media Regulation in the Age of Convergence):** Hong Kong media regulation broadly follows that of Western countries. Media operate freely subject to general media laws such as defamation, contempt of court, copyright and obscenity. In general, except in emergencies, the government does not engage in prior restraint, censorship or control of journalists' activity. But significant differences exist in the government's treatment of different media, with print and online media, unlike broadcast media, largely left to self-regulation. Today's media

convergence, however, makes separate regimes for different media unwieldy since many print and broadcast media, for instance, have their own websites and online presence. This chapter outlines the existing regulation and self-regulation of print, broadcasting and online media in Hong Kong, with a focus on content regulation and some overview on media ownership and fair competition.

**Additional Resources:** This book also includes a glossary of legal terms, lists of cases and legislation referred to in the text, a chronology of key milestones and developments for press freedom, and five appendices — Excerpts of Key Statutes and Regulations (Appendix A), Searching for Public Records of Courts (Appendix B), Judicial Practice Directions: Hearings in Chambers in Civil Proceedings (Appendix C), the Code on Access to Information (Appendix D) and Useful Organizations, Online Publications and Websites, particularly helpful for timely updates on developments concerning the intersection between the law, journalism and freedom of expression, both in Hong Kong and mainland China (Appendix E).

## 5. Conclusion

This book summarizes and analyzes within local and international contexts the media laws, regulations, issues and developments for working journalists and other interested parties. As pointed out at the outset of this introduction, the media-law terrain is intricate. Assessing the degree to which press freedom is protected or threatened in the environment that exists today or which can be projected for the future is a complex undertaking. It is clear that an increasingly aggressive and secretive Hong Kong government keeps a tight rein on access to information and proceedings and that tensions and conflicts have escalated between it and the media. But so far, no new major laws restricting the press have been passed since the handover and no media organization has been shut down or blatantly censored for political reasons by the government. If such attempts are made in the future, the media might have a strong ally: the courts.

Time and again, in at least a dozen decisions over the past twenty years, the courts have ruled favourably for the press or for free speech, whether they are expanding the right to comment on a matter of public interest, accepting the public-interest defence for responsible journalism or upholding the right to take news photographs on the street.

As the Hon. Kemal Bokhary said to the Hong Kong Journalists Association in 2012 before his retirement as a permanent judge on the CFA:<sup>17</sup>

How do I reconcile a controlled media with a free one? Quite simply, I do not. They are irreconcilable. A controlled media is not a free one . . . Between the media and the judiciary there is also a great similarity — especially in Hong Kong. Free speech is the lifeblood of the media. Judicial independence is the

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17. Speech at 2012 annual dinner for Hong Kong Journalists Association. After his October 2012 retirement, Bokhary continues to serve as an occasional non-permanent judge on the Court of Final Appeal.

lifeblood of the judiciary. The media must never engage in self-censorship. If it comes in, it is the end of the media as we know it. For the judiciary, the equivalent of self-censorship is seeking an interpretation to avoid a reinterpretation. Beyond that similarity, there is symbiosis. The judiciary protects the media, and the media protects the judiciary.

Because of the economic and political pressures, including from the mainland, that some media owners or managers face or accept, willingly or unwillingly, many journalists acknowledge the reality of self-censorship<sup>18</sup> in some newsrooms even as they embrace Bokhary's message: free speech is the lifeblood of the media.

If efforts are made to stem this lifeblood, the greatest defence against them may be journalists themselves and their ability to raise public consciousness when press freedom is threatened. They have demonstrated this many times in recent years through protest marches, signature and advertisement campaigns and the education efforts of their professional organizations. These efforts have worked, and they may have to work again.

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18. The Hong Kong Journalists Association (HKJA) has conducted periodic surveys on self-censorship. A survey the HKJA conducted in 2012 showed that almost 80 percent of respondents thought that self-censorship had worsened since 2005 and that more than one in three reported that they or their supervisors had practised self-censorship in the previous twelve months. The most prevalent forms of self-censorship reported were downplaying issues and information unfavourable to advertisers (40.3 percent), to the PRC government (37 percent), or to media owners or their interests (34.5 percent). See also Anne Cheung, *Self-Censorship and the Struggle for Press Freedom in Hong Kong* (The Hague, Netherlands; New York: Kluwer International 2003).

# Copyright

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Doreen Weisenhaus

## FREQUENTLY ASKED QUESTIONS

1. What is copyright and how does it affect journalists? (See section 1)
2. What kinds of works are protected and for how long? To be protected, do works need to be registered? (See sections 1.2 and 2)
3. What constitutes infringement? (See section 5)
4. Can ideas, facts or news be copyrighted? (See section 1.2)
5. Can a journalist refer to a copyrighted work in news reporting, criticism or review? What is fair dealing? (See section 6)
6. What rights do journalists, both media employees and freelancers, have in protecting their own works? (See sections 3, 7 and 12)
7. What special copyright issues involving the Internet and social media do journalists need to know about? (See sections 1.1, 1.2, 5.1, 6.1.3, 8.1, 9.2, 11 and 12)
8. Are parodies permissible under copyright law? (See sections 6.1.3 and 11)
9. Are there any alternatives to traditional copyright regimes? (See section 10)

## 1. Introduction

Copyright is the exclusive legal right for a limited time period to reproduce, publish, adapt, distribute, perform, sell or transmit original works such as books, computer software, plays, drawings, films, musical compositions and so on. Copyright is part of a larger scheme to protect what is known as intellectual property, which also includes trademarks, patents and designs. In the age of the Internet and multimedia, copyright issues have become increasingly important to journalists in both traditional and new media as works appearing on the Internet are also protected. Journalists today need to understand the concepts of copyright and its implications, particularly as more countries are focusing on enforcement. Journalists should be aware of copyright in two regards: one, in acknowledging the copyrights of other people's works that might affect newsgathering, writing and news production; and two, in protecting a journalist's own works.

## 1.1 History/Background

Like much of the law in Hong Kong, copyright law here has its origins in the UK, having imported the latter's 1911 Copyright Act and later its 1956 Act. In preparation for the handover to Chinese sovereignty in 1997, Hong Kong was required to localize imported laws. It did so by passing Copyright Ordinance (Cap 528), which came into effect in June 1997 and remains the controlling law. The 1997 ordinance modelled a number of sections after the UK's Copyright, Designs and Patents Act 1988, adopted international standards and norms such as those espoused by the World Trade Organization and World Intellectual Property Organization and addressed new technology, including the then emerging Internet. The ordinance also expanded protection in Hong Kong to original works created anywhere in the world; in the past, such works needed a connection to Hong Kong. These changes made Hong Kong's copyright laws among the most modern of a common law jurisdiction.

Hong Kong has amended its ordinance several times. Criminal sanctions for the use of infringing copies in businesses and the workplace (known as "end-user piracy") were added in 2001. Several of those amendments, particularly relating to the educational use of some copyrighted material such as newspapers and other publications, were suspended at the time after public concern was raised over the amendments' potential impact on educational institutions. Remaining in effect were the amendments imposing criminal penalties over the use of infringing copies of computer software, movies, television dramas and music recordings.

In 2003, Hong Kong relaxed restrictions on parallel importation of computer software, which meant that certain copies of software made outside of Hong Kong could be imported into Hong Kong without obtaining further copyright permission. In 2004, the Copyright Ordinance was amended again to prohibit copy shops from making, selling or possessing illegal copies of books, magazines and other publications.

Additional amendments, enacted in 2007 and 2009, included, among other provisions, making frequent and significant copies of newspapers, magazines, periodicals and books a criminal offence with exemptions for educational establishments; shortening the criminal liability period for parallel imported copyright works, and expanding fair dealing for educational and public administration purposes. The amendments also made company directors or partners responsible for internal management criminally liable for copyright infringement committed by their companies, but that it would be a defence for employees to show they were not in a position to make or influence such decisions.

But government's attempts to introduce legislation to regulate copyright in the digital environment have been less successful. With the growing controversy and worldwide use of peer-to-peer file sharing and other issues involving the Internet, the Hong Kong government conducted a public consultation in 2006–2007 on legal liability for unauthorized uploading and downloading of copyright works and the role of online service providers (OSPs) to help combat Internet piracy. After years of discussions and debates with various stakeholders and the public, the

government introduced Copyright (Amendment) Bill 2011, which recommended a number of controversial measures that met considerable resistance and, in June 2012, the bill was removed from the legislative agenda without a vote. As of 2013, no new legislation has been introduced (see further discussion in sections 6.1.3 and 11 below).

## 1.2 Overview: What is copyright?

Copyright is a right belonging to the owner of an original work, which includes literary, musical, dramatic and artistic works (and published editions of these works); sound recordings; film, and broadcasts and cable programmes. Unlike trademarks, patents and designs, which need to be registered with the government to be protected, copyright is an automatic right that emerges when the original work is fixed in a tangible form and requires no registration. The quality of a work is not relevant in determining whether it is entitled to copyright protection. It does not have to be innovative or have artistic or literary value; the work just has to be an original expression, even a simple, bad one such as a short article with grammatical mistakes or a fuzzy snapshot. In short, a work acquires copyright protection upon creation when it is original, no matter the quality, and is in a fixed, physical form.

Facts, news or ideas cannot be protected by copyright; only the expression of them can, such as the precise words written down or a chart with particular information or certain headline fonts. For example, if a newspaper wrote about a news event, it cannot claim copyright over the news event and prevent others from writing about it. But if that newspaper's article and/or photograph about the event were duplicated or reproduced by a competitor that did not get copyright permission or licence, that act could be a copyright violation. Limited reproduction of copyright work is permitted in several exceptions, including for criticism, review and reporting on current events, and is explained below. While mere information or news is not protected under copyright law, copyright could exist in the compilation of news, with protection arising from the skill and labour used to make the compilation, rather than from the content itself. *Apple Daily Ltd v Oriental Press Group Ltd* [2011] 2 HKC 28, citing section 4(1) of the CO, which protects compilations. (See also section 2.1 of this chapter.)

But is there protection for "hot news" beyond copyright law? In a 1918 case, *International News Service v Associated Press*, 248 US 215, the US Supreme Court recognized the tort of "hot news misappropriation" in ruling against a news agency that had rewritten a competitor's news stories to use as its own; the Court held there was a quasi-property right in news while it was still timely. A federal appeals court in 1997 spelled out what was needed for such a claim, including that generating the time-sensitive information came at a cost and that the defendant was a direct competitor "free-riding" on the plaintiff's efforts. *National Basketball Association v Motorola Inc*, 105 F.3d 841 (2d Cir 1997). But in a closely watched case in 2011, the same appeals court rejected a claim of "hot news misappropriation" after several financial firms objected to a website aggregator posting their

timely stock recommendations, holding that copyright law pre-empted the claims. *Barclays Capital Inc v TheFlyontheWall.com Inc*, 650 F.3d 876 (2d Cir. 2011). While the doctrine is not dead in the US, it is clear that its use is limited. The doctrine has never been recognized in Hong Kong nor does it seem to be evident in other countries such as the UK or in Europe. Although it has been recognized in India (*M/s Marksman Marketing Private Ltd v Bharti Tele-Ventures Ltd* (Madras HC 2006)), the doctrine was rejected more recently in September 2013. *Akuate Internet Services Private Ltd v Star India Private Ltd* (Delhi HC 2013).

### 1.3 Sources of law

Article 140 of the Basic Law requires that Hong Kong have laws protecting the achievements, rights and interests of authors of artistic and literary creations. The current law in Hong Kong is the Copyright Ordinance (CO, Cap 528), which became effective June 1997. Hong Kong is bound to follow certain international treaties and agreements affecting copyright; these include the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms and The World Trade Organization — Agreement on Trade Related Aspects of Intellectual Property Rights.

## 2. What is protected?

Sections 4 to 10 of the CO set out specific categories of works that are protected. Works created in Hong Kong, as well as works created anywhere in the world, can be protected in Hong Kong. Sections 37 to 88 list permissible exemptions and defences.

### 2.1 Literary, dramatic and musical works

A literary work is described in section 4 of the CO as any work “written, spoken or sung”, provided the work exists in a physical form. The typical items covered of interest to journalists are books, magazine and newspaper articles, as well as computer programs and data compilations such as tables and charts (CO s 4(1)). Regular listings often compiled by magazines and newspapers for entertainment, television/movie schedules, races, restaurants and so on are also protected by copyright. It is arguable that news articles might be considered a compilation under copyright protection if “they contain a variety of information and materials that are indicative of efforts and skill being expended in researches, selection, collation and presentation”. *Apple Daily Ltd v Oriental Press Group Ltd* [2011] 2 HKC 28. A letter to the editor, an email and other written communication sent to a news organization are considered copyright material, but the author’s act of sending such work implies authorization for at least one use. A musical work refers to music only; the words of a song are considered literary works. A dramatic work includes

dance and mime. As with literary works, copyright for musical and dramatic works will exist only if they are written, recorded or in otherwise permanent form.

## 2.2 Artistic works

Artistic works, as defined in section 5 of the CO, includes photographs, sculpture, collage, works of architecture such as a building or model, paintings, drawings, diagrams, maps, charts, plans, engravings, etchings, lithographs and woodcuts.

## 2.3 Sound recordings and films

A sound recording, according to CO s 6, is:

- (a) a recording of sounds, from which the sounds may be reproduced; or (b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.

A film is defined in CO s 7(1) as “a recording on any medium from which a moving image may by any means be produced” and can include any recorded moving image whether it is on film, video or whatever technology can record moving images. Section 7(4) notes that a film will not have copyright if it copies from another film.

## 2.4 Broadcasts and cable programmes

Section 8 of the CO describes broadcasts as visual images and sounds transmitted wireless for the public to receive in Hong Kong or elsewhere. These broadcasts cover radio and terrestrial and satellite television. Section 9 on cable programmes refers to the sending of sounds, visual images and other information “otherwise than by wireless telegraphy at two or more places in Hong Kong or elsewhere”. This does not include video conferences, video telephones and videos-on-demand.

## 2.5 Published editions

Section 10 of the CO refers to the typographical arrangement of a published edition of a literary, dramatic or musical work. A typographical arrangement includes the layouts, headings, fonts and other aspects of how a published work is presented. And again, copyright will not be extended if the published edition infringes the typographical arrangement of someone else’s edition.

# 3. Who owns a copyright?

## 3.1 Author

The general rule, as set out in CO s 13, is that the author of a work is the first owner of any copyright in it. Thus, a writer or photographer is the first owner of a

copyright in his or her work. But there can be exceptions, for example, for works that are commissioned or done while on the job.

### 3.2 Employee's works

For works done during the course of employment (CO s 14), the general rule is that the employer owns the copyright, unless the employee has made a different agreement with the employer. In short, the employer has the right to works produced by the employee in the course of his or her employment unless the employer has agreed to give up this right. This holds for reporters, editors, artists, photographers and anyone else who works for newspapers, magazines, television and any other media employer. In 2005, *Oriental Daily News* sued two of its former reporters for alleging passing two photographs, taken by one of them, to rival newspaper, *Apple Daily*, for a story about food poisoning caused by contaminated seafood. The lawsuit said that *Oriental Daily News* had only used one photo but that both photos appeared in other newspapers and websites, including *Apple Daily*.<sup>1</sup>

If, however, the employer uses the work in a way that could not have been reasonably anticipated by both employer and employee at the time the work was produced, the employee is entitled to additional compensation. Using a reporter's newspaper article also on the newspaper's website would be considered foreseeable in today's world, but other commercial uses might not be. If the employee and employer cannot agree on an amount for compensation, then the employee can take the matter to the Hong Kong Copyright Tribunal. (For more details, see section 9.3 in this chapter.)

The copyright for works done outside the employment context that is unrelated to the employee's duties and responsibilities will generally belong to the employee. For example, if an employee is hired as a technology writer for a newspaper and writes a play in his off-duty hours, then the copyright for the play would belong to the employee, not the newspaper.

But be aware that a number of Hong Kong newsrooms have employment contracts that address copyright issues that might be more restrictive for employees. One media group, for example, claims copyright for any work done by an employee regardless of whether it was in connection with the job if it in any way affects or relates to the business of any company or division within the media group. A journalist who has signed an employment contract should review it.

### 3.3 Commissioned works

When a publication or other media commission an assignment from a freelance writer or photographer, copyright ownership depends on the agreement made between the parties (CO s 15). If no agreement has been made between the author/creator and the person or entity that commissioned the work, then the author/creator will be considered the first owner of the copyright. But regardless of an agreement, the media organization commissioning the assignment has

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1. Anita Lam, "Ex-reporters Sued over Copyright", *South China Morning Post*, 28 May 2005.

the exclusive right to use the article, photograph or other works in a reasonable manner and the assigning editor or other company representative can prevent others who might use the work “for any purpose against which he could reasonably take objection” (CO s 15(a) and (b)). In any agreement, the freelancer is advised to specify terms he or she finds acceptable, such as media (e.g. print but not broadcast) or distribution (e.g. Hong Kong only). (For more discussion, see the section 12, “Freelancers: Special issues and a checklist” in this chapter.)

### 3.4 Government documents

Unlike law in the US, the Hong Kong government owns the copyright for most documents it produces, even articles its officials might write for newspapers (CO s 182). Similar to what is required under UK law, anyone wanting to reproduce government material would have to seek copyright permission or be eligible for a waiver. Often, when the government has posted articles, documents or other materials on its website (<http://www.gov.hk>), it will also post details of its waiver with the conditions that need to be met.

The waiver typically states that the information within the website may be re-disseminated or reproduced, provided that the government agency that produced the materials is acknowledged as the source and that the reproduction is for non-commercial use. Any commercial use of that material needs written authorization from the agency and, if approved, might require a licence fee. Interestingly, the government also usually posts a disclaimer that it does not accept responsibility for any loss or damage resulting from the use of its information. Publications produced by the Legislative Council are also covered by copyright (CO s 184).

### 3.5 Special circumstances for authorship

Different medium can have different rules regarding authorships. Sound recordings can have several authors: the person who makes the recording, the person who performs it and the composer. A movie’s copyright is not owned by the director who makes the movie but, traditionally under British law applicable in Hong Kong until 1997, by the producer who finances it because of the economic interests underlying copyright. Since 1997, the copyright in a film is owned jointly by the producer and principal director (CO s 11 (2)(b)). For a photograph, it is the person who controlled the arrangements for the taking of the photo and not the person in the photo who owns the copyright, but if the photograph was commissioned, it belongs to the person or entity that commissioned it. If someone gives an interview, he might not own the copyright, but the person who recorded it or wrote it down might.

## 4. How long is a work protected?

In general, copyright continues for the life of the author/creator plus fifty years (CO s 17). Copyright for a broadcast programme extends fifty years from its

airing, a cable programme fifty years from inclusion in the cable service (CO s 21), a sound recording fifty years from its release or making (CO s 18) and a typographical arrangement of a printed edition twenty-five years from the first publishing (CO s 21). After a copyright has expired, a work becomes part of the public domain, which normally means that anyone can copy it.

## 5. What infringes a copyright?

### 5.1 Primary infringement

If you do not own the copyright in a work, you cannot copy, publish, adapt, distribute, post on the Internet, broadcast or place in cable service a work or rent copies to the public unless you obtain permission and/or a licence from the owner of the copyright or are using it under one of the permitted defences or exemptions (CO ss 22–29). How can you tell whether you have infringed a copyright?

### 5.2 A two-step analysis

To sort out this question, Jared Margolis, co-author of *Intellectual Property Rights: Hong Kong SAR and the People's Republic of China*,<sup>2</sup> suggests a two-step analysis. He recommends that first, you examine the work in question to see if it is even protected under the law and then determine whether infringement has occurred.

#### *Step 1: Is it a work covered under law?*

To be covered, the work must belong to a category listed in the Copyright Ordinance and must be an original, tangible expression. Is the work in question a literary, artistic, dramatic or musical work as defined by the ordinance? Is it a book, painting, play or musical composition, for example? Is it a film, sound recording, broadcast or cable programme? If yes (that the work belongs in one of these categories), is it original? As only original work is protected, you need to determine just how original this is. (Note that countries have varying requirements for originality for the work to qualify for copyright protection.) The author says you should:

... (E)xamine it to determine if it reaches the required threshold of originality. The manner of determination of the originality threshold varies somewhat according to the class of work involved. Very little originality is required to establish copyright subsistence (however, if there is only the bare minimum of originality, the scope of protection will be consequently limited).<sup>3</sup>

#### *Step 2: Is there infringement?*

After determining that the item is in a protected category and has sufficient originality, Margolis suggests then looking at both the original item and the one in question for a “feature by feature comparison”. More original aspects of the former will be entitled to greater protection.

2. Michael D. Pendleton, Peter Garland, and Jared R. Margolis, *Intellectual Property Rights: Hong Kong SAR and the People's Republic of China*, 2nd ed. (Hong Kong: Butterworth Asia 2003).

3. *Ibid.*

### 5.3 Infringement: Copying must be substantial

The general rule is that for a work to be infringed, a *substantial* part must be taken (CO s 22 (3)(a)). But what does substantial mean? It is not defined in the ordinance. But do not think that substantial refers only to quantity, the amount of what is taken. That, of course, will be relevant. But more important is the *quality* of what is taken (*Ladbroke (Football) v William Hill (Football)* [1964] 1 WLR 272). A typical example given is a musician who copies a quite short but memorable musical snippet from someone else's song. There are few court cases in Hong Kong on copyright infringement involving the media. One notable case is *Oriental Press Group Ltd v Apple Daily Ltd* [1999] 4 HKC 131. The *Apple Daily* newspaper reproduced a smaller version of the front page of a rival publication, *Oriental Sunday* magazine, which had exclusive coverage, including a photograph, of a visibly pregnant movie star. The reproduction was indeed substantial — an entire front cover, though smaller in size. *Apple Daily* had not sought *Oriental's* consent to run the photograph and layout and the court observed that it was unlikely that *Oriental* would have given a licence had it been asked to do so and ruled for *Oriental Sunday*.

Another relevant Hong Kong case is *Lam Tai Hing v Koo Chih Ling, Linda* [1993] 2 HKC 1, which centred on whether a medical questionnaire substantially copied another questionnaire. The court found that even though there were major differences between the questionnaires, infringement can incur if the part copied was an “important part of the work even if it was a smaller part than the balance which was not so copied”.

### 5.4 Secondary infringement

Secondary infringement, as described in sections 30 to 34 of the CO, happens with the exporting, importing and possessing of unauthorized copies or providing the means to make unauthorized copies, for other than private use.

## 6. Exemptions and defences

Sections 37 to 88 of the CO set out permitted acts that will not be considered infringement, provided that they not “conflict with a normal exploitation of a work by a copyright owner and unreasonably prejudice the legitimate interests of the copyright owner” (CO s 37(3)). The permitted acts are included on what is known as an “exhaustive” list, meaning that if something is not on the list, it is not allowed without obtaining copyright permission. This is an approach similar to that taken in Australia and Singapore. The US has a more liberal, non-exhaustive approach, which means that it will consider more possible permissible acts, even if not listed, provided they are reasonable.

## 6.1 Fair dealing

The most important defence for journalists is fair dealing. Hong Kong's Copyright Ordinance, like the laws of the US and UK, among others, recognizes the public interest in having exceptions for copyright, especially for journalists who need to cover news, disseminate information and offer opinions to the public. Fair dealing<sup>4</sup> permits the use of copyright material for the limited purposes of criticism, reviews and covering the news — as well as for research and private study and for education — as long as certain conditions are met.

### 6.1.1 Criticism, review and news

Of particular interest to journalists is the use of fair dealing for criticism, reviews and the reporting of current events. CO s 39 establishes that copying a portion of a copyright work for the purposes of criticism, reviews and reporting of current events can be permissible as long as proper acknowledgement is given. Acknowledgement, however, is not required for the reporting of current events by means of a sound recording, film, broadcast or cable programme. The law does not specify the exact usage that is permitted but will consider what is reasonable for the purposes of criticism, reviews and reporting news. So if you are reviewing a play or book and reproduce only the parts necessary to illustrate your comments, that use would likely be considered reasonable. Be careful when reproducing copyrighted photographs and images as their use must clearly relate to criticism, reviews or reporting and be proportionate to that purpose.

This defence is not meant to give a green light for a publication to usurp a scoop of a competing publication under the guise of reporting “news” by copying articles, headlines or photographs. In the case mentioned earlier, *Oriental Press Group v Apple Daily*, the court rejected an argument by *Apple Daily* that it was merely bringing news of interest to its readers when it reproduced the front page of rival *Oriental Sunday*, which had exclusive coverage of the pregnant movie star. While this case was not about fair dealing per se and dealt primarily with assessing damages, it showed that the courts had little tolerance for the reproduction of a competitor's material.

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4. Many common law countries feature fair dealing exemptions in their copyright laws including the UK, Canada and Australia. Fair dealing is different from the fair use exemption found in US copyright law, which does not restrict the exemption only to specific categories of protected works. Instead, 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, whether use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used and (4) the effect of the use upon the potential market for or value of the copyrighted work. Copyright Act 1976, 17 U.S.C. s 107.

### 6.1.2 Research, private study and educational establishments

Fair dealing also permits copying for research and private study. CO s 38 lists these factors to be considered as to whether fair dealing applies: (a) the purpose and nature of the dealing; (b) the nature of the work; and (c) the amount and substantiality of the portion dealt with in relation to the work as a whole. Copyright (Amendment) Ordinance 2007 expanded protection for educational establishments and students (CO s 41A), which permits, for example, scans and photocopies to a reasonable extent for teaching purposes, if there is no licensing scheme authorizing the copying (s 45). Many schools have entered into licence agreements with the Hong Kong Reprographic Rights Licensing Society and the Hong Kong Copyright Licensing Association. The amended Ordinance also addresses the issue of placing copyright works on an Intranet for teaching purposes, which requires the teaching establishment to adopt appropriate security measures (such as log-in username and password) and to ensure works are stored for a limited period of time, up to 12 months (s 41A(5)).

### 6.1.3 Parodies

Hong Kong copyright law does not provide an exemption or defence for parody (a literary or musical work that closely imitates another work for comic effect or ridicule) or pastiche (a work that imitates the style of another work or is a hodgepodge of selections from other works). Under current law, the creator of a parody would either have to get permission from copyright holders to use their works or demonstrate that the parody constitutes “criticism” of a work within the fair dealing context and provide proper acknowledgement.

The Internet has proven to be fertile ground for parodies and “mashups” of popular works. “To ease the concern of some netizens”, the Hong Kong government said it considered adding a parody exemption to the Copyright (Amendment) Bill 2011, but declined to do so, indicating the difficulties of constructing a legal definition of parody and concern for copyright owners.<sup>5</sup> It also referred to the UK’s several consultations since 2006 on possible changes to its copyright law, which likewise did not provide a parody exemption, stating, “the UK experience demonstrates that the issue on parody is by no means straightforward”.<sup>6</sup>

In December 2012, the UK government announced its plans to provide some legislative leeway for parody, so as to permit content creators more flexibility, in part, as acknowledgment of the “growing trend for user-generated, often non-commercial, parody content on YouTube and similar websites”.<sup>7</sup> As support for its decision, the UK government cited the European Union Copyright Directive<sup>8</sup>

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5. “Copyright Exception for Parody”, Commerce and Economic Development Bureau, Intellectual Property Department, November 2011, LC Paper No. CB(1)385/11–12(04).

6. *Ibid.*

7. “Modernising Copyright: A Modern, Robust and Flexible Framework”, HM Government, Intellectual Property Office, at: <http://www.ipo.gov.uk/response-2011-copyright-final.pdf>.

8. EU Copyright Directive (2001/29/EC).

allowing parody exception, and laws in Australia, Canada, France, Germany and the Netherlands permitting parodies. When Canada approved its Copyright Modernization Act in 2012, it provided protection for parodies in two ways: (1) by expanding fair dealing to cover parodies as well as satires, and (2) by creating a new exemption for non-commercial, user-generated content on blogs, video-sharing websites and the like that do not affect the market for the original material.<sup>9</sup> In 2013, the Hong Kong government conducted a consultation to consider options to deal with parody in copyright law, including clarifying existing provisions and/or introducing a criminal exemption or fair dealing exception.<sup>10</sup> (See also section 11 below)

## 6.2 Incidental inclusion

If a protected work is included in an incidental way, such as taking a photograph of someone walking in front of a billboard or building purely incidentally, then copyright will not be infringed (CO s 40). But a musical work, even a small portion, will not be regarded as “incidental” if inclusion is “deliberate” (s 40(3)).

## 6.3 Public records

Section 58 of the CO deals with the use of public records. This section clearly allows a reporter to write down or get a copy of public records without violating copyright. The section sets out that “material which is comprised in public records which are open to public inspection may be copied, and a copy may be supplied to any person without infringement of copyright”. Public records are defined as:

the records of any nature or description which have been made, received or acquired in the course of proceedings of the Legislative Council, judicial proceedings or executive transaction, together with exhibits and other material evidence which form part of or are annexed to or are otherwise related to any record, which are or are required to be in the custody of, or which may be transferred to or be acquired by, any department of the Government.

## 7. Moral rights

Moral rights represent the non-economic interests in copyright protection, of concern to many individual writers and creators (CO ss 89–100).

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9. More information can be found on the Canadian government website at: <http://balanced-copyright.gc.ca/eic/site/crp-prda.nsf/eng/home>.

10. The Hong Kong government received more than 2,400 submissions, including one from the Journalism and Media Studies Centre, University of Hong Kong, authored by Prof. Peter Yu, a leading US expert in international intellectual property and communications law. (“Digital Copyright and the Parody Exception: Accommodating the Needs and Interests of Internet Users”, 15 November 2013.) It was the third such submission by the JMSC in consultations for digital copyright reforms being considered by the government. See also LC Paper No. CB(1)516/13-14(03).

## 7.1 Paternity right

What if your name was left off something you created? Can you demand that you be identified as the author, otherwise known as a paternity right? Under CO s 89, the author of a literary work or a director of a film has this right. But for journalists in Hong Kong, this right is limited. CO s 91(5) says “the right does not apply in relation to any work made for the purpose of reporting current events” and CO s 91(6) says “the right does not apply in relation to the publication in a newspaper, magazine or similar periodical; or an encyclopaedia, dictionary, yearbook or other collective work of reference of a literary, dramatic, musical or artistic work made for the purposes of such publication”. In other words, you do not have the right to a byline on a story if you are writing about current news events or if your writing, regardless of content, is for a newspaper, magazine or reference text.

## 7.2 Integrity right

A related right — an integrity right — is the chance to object when your work is changed in a way that distorts, mutilates or otherwise harms your reputation, otherwise known as “derogatory treatment”. CO s 92 says that you have the right to challenge these edits and changes, that is, unless again you are a journalist in Hong Kong. The same restrictions apply for an integrity right as for a paternity right. If you are reporting about current events or if the work is published by a newspaper, magazine or similar periodical or in a reference book, you cannot object to changes in your work (CO s 93). You do, however, also have the right not to have a work “falsely attributed” to you (CO s 96).

## 8. Infringing copies in the workplace

What about how you use your computer at your place of employment? You may want to pay close attention to some of these issues as you can face possible criminal penalties for violations. The Copyright Ordinance has been amended several times (in 2001, 2007 and 2009) to toughen penalties for those who knowingly possess or use infringing copies of protected works in a business setting. The amended law made it a crime to make or use unauthorized copies of computer software, movies, musical recordings and TV dramas (CO s 118). Violators can face up to four years in prison and a HK\$50,000 fine (s 119). It is a defence for the person charged to prove that his employer provided the infringing copy for use in the course of his employment (s 118 (3) (A)). Unauthorized copies of newspapers, magazines, periodicals and books can give rise to both criminal penalties and civil liability (s 119B). A number of media companies have distributed notices to their employees warning them to comply with copyright law and have laid out specific guidelines to follow in the workplace. Be aware that some of the company guidelines are broader than what is prohibited by law. Please check with your company for their policies. Common areas are as follows.

## 8.1 Software

A user is generally allowed to make a back-up copy of software, assuming the original copy was properly obtained (CO s 60). Also, a user can make adaptations to software to make it compatible at work, provided the manufacturer has no restrictions (s 61). But again, check with office policy regarding software on company computers. One media company specifically spells out that its employees cannot copy or modify software in their office computers without company authorization, cannot install any software for personal use and cannot copy for personal use any software from the office computer. Some even prohibit the downloading of any software from the Internet for screensavers or other use onto the office computer.

## 8.2 Photocopies of newspapers, magazines, books, and other publications

Check with the legal department of your media company to see if they have licensing agreements with publishers and other producers of copyright work for books, magazines, newspapers and the like. Some companies have negotiated a collective licensing agreement with the Hong Kong Reprographic Rights Licensing Society that allows the making of copies of publications covered by the agreement, provided certain conditions are met such as a set percentage of works that may be copied.

Frequent and significant copying of these publications “resulting in a financial loss” to the copyright holder would constitute an offence (s 119B). To avoid liability under the ordinance, copying would need to stay under certain limits, sometimes referred to as a “safe harbour”. For newspapers, magazines and periodicals, the total number of “infringing pages” made for distribution or distributed within any 14-day period must not exceed 500. For books and academic journals, the total value of infringing copies made for distribution or distributed within any 180-day period must not exceed HK\$6,000 (CO Schedule 1AA). Statutory defences include: the user made a request for a licence but failed to receive a timely response; the user could not obtain commercially available copies and could not obtain a licence on reasonable commercial terms, and the user did not know that the copies he made or distributed infringed copyright (s 119B).

## 8.3 Electronic copies

Making electronic copies — the scanning or storing of information in the computer or faxing — of a protected work is also prohibited without copyright permission unless for private study or research. If doing research for a news story, the protected work can be accessed but should not reproduced unless it is fair dealing within the meaning of CO s 39, on which, however, there is very little case law.

## 9. Remedies

### 9.1 Civil

For general copyright infringement, the copyright owner can pursue civil remedies such as asking a court for an injunction to stop the unauthorized use of the work, an order to deliver the infringing copies and/or damages (CO ss 107, 109). In particularly egregious cases, the court may consider additional damages beyond normal damages (CO s 108).

For copyright infringement of moral rights — paternity and integrity — an action can be filed for breach of statutory duty owed to the author or director (CO s 114). For the integrity right — derogatory treatment of a work (CO s 92) — the court may require a disclaimer disassociating the author/creator from the altered work.

### 9.2 Criminal

A person faces a maximum fine of HK\$50,000 and up to four years in prison if he makes, imports, exports, possesses for trade or business or distributes an infringing copy of a protected work. A person who makes, sells, imports, exports or possesses for trade or business equipment to infringe copies faces a maximum fine of HK\$500,000 and up to eight years in prison (CO ss 118, 119). The Hong Kong Customs and Excise Department handles prosecution of these cases. In 2005, a Hong Kong man became the first person in the world convicted for distributing protected movies on the Internet using BitTorrent technology (CO s 118(1) (f)) (*HKSAR v Chan Nai Ming* [2005] 4 HKLRD 142). The Court of Final Appeal confirmed the conviction of Chan Nai Ming of attempting to commit an offence of distributing an infringing copy of a copyright work, namely three films. Using the BitTorrent technology, a number of individuals downloaded copies of films that were duplicates of infringing copies from Chan's computer, which acted as the initial "seeder". The two issues before the CFA were: (1) what constituted a "copy" capable of distribution under s 118(1) (f); and (2) whether Chan's conduct constituted illegal "distribution" under the law. The defendant argued that a copy could only exist as something stored in a physical tangible object and so a digital/electronic copy could not be distributed unless the storage device was itself physically transferred, which did not happen in this case. The CFA rejected the defendant's arguments and held that electronic copies distributed via the Internet could be infringing and that illegal distribution did not require a physical transfer nor active conduct by the defendant. By keeping his computer connected to the BitTorrent network, the defendant ensured that copies of the films would be transferred to downloaders, according to the court (*Chan Nai Ming v HKSAR* [2007] 2 HKLRD 486).

### 9.3 Copyright Tribunal

A Copyright Tribunal was established to handle copyright licensing issues (CO ss 169–176). Of particular interest to journalists who are employees of media companies is the tribunal’s jurisdiction (CO s 14) for “use of work outside reasonable contemplation” (see section 3.2 in this chapter, “Employee’s works”). The tribunal can determine the amount of compensation owed the employee if there is a dispute between the journalist and the employer.

Enquiries can be made to the Clerk to the Copyright Tribunal, 25/F, Wu Chung House, 213 Queen’s Road East, Wanchai, Hong Kong. Telephone: 852–2961–6813.

## 10. A non-traditional approach to copyright: Creative Commons

Founded in 2001 by then Stanford professor Larry Lessig as a non-traditional approach to copyright, Creative Commons, a non-profit organization, provides a simple, user-friendly template from which copyright holders can choose terms in their licences. These include: attribution (giving credit), non-commercial use (sharing for non-commercial purposes), no derivative works (no alterations or adaptations allowed) and share alike (any subsequent sharing of work must be subject to the same licence terms) or a combination. A Creative Commons licence is not a replacement for copyright but a standardized method for users to modify their own copyright terms.<sup>11</sup> In 2008, Hong Kong became the 50th jurisdiction to localize the Creative Commons licences.<sup>12</sup> As of 2011, more than 400 million works carried CC licences. For more information on the Hong Kong scheme, contact <http://hk.creativecommons.org>.

## 11. The Internet: Special issues

Copyright law applies to works on the Internet (CO s 26), but the medium also has its own unique aspects, issues and implications. For example, a work is considered fixed when it is on a computer memory and a work’s appearance on the World Wide Web is a reproduction. How to handle those reproductions in the copyright context is an issue the Hong Kong government, like other governments around the world, is grappling with. After years of debate and discussion that started with a public consultation launched in 2006, the government introduced the Copyright (Amendment) Bill 2011, which introduced a series of measures, including creating a technology-neutral exclusive right for copyright owners to communicate their works to the public through any mode of electronic transmission, with criminal sanctions against those who make unauthorized communication of copyright works to the public. It also proposed establishing a “safe harbour” for online service providers to limit their liability for copyright infringement if they complied with a Code of Practice specifying how to respond when notified of acts

11. <http://creativecommons.org>.

12. Hosted by the Journalism and Media Studies Centre at the University of Hong Kong (HKU), the public lead is Professor Ying Chan and legal leads are Associate Professors Alice Lee and Yahong Li at the Faculty of Law, HKU.

of online piracy. Many Internet users raised concerns that the law would further restrict parodies (see section 6.1.3) or other creative derivative works, with some calling the bill “the Article 23 of the Internet”, a reference to proposed national security laws that prompted huge protests before being withdrawn in 2003 (see Chapter 7 Official Secrets and Sedition). In June 2012, the government removed its proposed digital copyright amendments from the legislative agenda without a vote and said it would study a copyright exemption for parodies, among other possible changes, for the bill’s next version. (See also section 6.1.3.)

### 11.1 Linking

Another worry that Internet users had over the Copyright (Amendment) Bill was whether linking to other websites would expose them to liability under the proposed law. The government responded that as long as users did not control the content, they would not face liability, adding that, “a hyperlink is not a copyright work”.<sup>13</sup> A key feature of many websites is to provide easy linking to other websites. Hyperlinks refer to a website using a few words (usually underlined or in a different colour) or an image or icon that when clicked takes the viewer to a different website. In general, a website does not need permission to simply link to another website, but it can get into trouble if it uses material, even a small amount, or images from the second website to make the hyperlink. In 2004, the *Ming Pao* newspaper in Hong Kong threatened legal action against Google after the US search engine launched its Hong Kong news website, which used news summaries and some photos from a number of Chinese newspapers and provided hyperlinks to their websites, including *Ming Pao*’s. The newspaper agreed to drop any possible legal action after Google stopped using summaries from *Ming Pao* or even providing a link.

### 11.2 Deep linking/framing

What happens if a website in providing a link takes the viewer beyond the home page of another website to an inside page, otherwise known as “deep linking”?

As of 2013, there has not been any case law on this point in Hong Kong, although deep linking has remained quite prevalent on the Internet. Some experts though believe that deep linking can be troubling legally. Deep linking allows the viewer to bypass possible advertising and other material that the linked website might want visitors to see. And it can create a moral rights problem if the deep link goes to an inside page that does not identify the creator/author of the work.

Early court cases on this issue include ones from Scotland (*Shetland Times Ltd v Dr Jonathan Wills*, [1997] SLT 669) and the US (*Ticketmaster Corp v Microsoft Corp*, No 97–3055DDP (CD Cal 1997)), in which the parties settled with the agreement to link but not deep link. But in 2000, another case established that deep linking,

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13. “Online Copyright Claims Rejected”, Hong Kong Information Services Department, 24 April 2012, [http://www.news.gov.hk/en/categories/finance/html/2012/04/20120424\\_190120.shtml](http://www.news.gov.hk/en/categories/finance/html/2012/04/20120424_190120.shtml).

at least in the US, was permissible (*Ticketmaster v Tickets.com* 99-CV-07654 (CD Ca)), although a court in 2006 disallowed an unauthorized link to a webcast (*Live Nation Motor Sports Inc v Davis* WL79311 (N.D. Tex 2006)). In 2003, Germany's high court held that deep linking did not violate copyright (*Holtzbrinck v Paperboy*, I ZR 259/00), while other European courts have ruled differently. Many advocates say the Web's inherent nature of information sharing indicates an implied licence to link to specific pages, but to be sure, it might be prudent to just link to the homepage or obtain permission for the deep link. Be aware that some websites are posting notices that permission must be obtained for links, but courts have not ruled on the enforceability of these notices.

Likewise, there have not been any Hong Kong cases involving framing — the placing on one website some elements, often visual, from a second, unrelated website, but these cases seem to be clearer examples of copyright infringement. In a US case, the website Total News provided links to news sites that when clicked caused content from those news sites to appear on Total News's site. The case was settled, as many of these cases are, with Total News agreeing to stop framing (*Washington Post v Total News Inc.* 97 Civ 1190 SDNY 1997).

In 2003 and 2007, a US federal appeals court approved the use of “thumbnails” (reduced image of graphics) to deep link to other websites, finding the use “transformative”; *Kelly v Arriba Soft Corp.*, 336 F.3rd 811 (9th Cir. 2003); *Perfect 10 v Amazon.com.*, 487 F.3rd 701 (9th Cir. 2007).

### 11.3 Derivative liability

Suppose your website provides a link to another website that has content in violation of copyright or other illegal content? You might be held liable as well if it is determined you knew or had reason to know your link encouraged infringement by directing users to the infringing website. Make sure you know what is on the other side of your link.

### 11.4 Bloggers and social media

Non-commercial users such as bloggers, who keep web diaries of thoughts, observations and links to other websites, are also subject to copyright laws. If a blogger provides links to other websites and/or use quotes from them, adding some commentary would better ensure that the links and quotes could be considered fair dealing. Likewise, users of social media such as Facebook, Twitter and YouTube are not immune from copyright laws, although there has been no case law involving social media and copyright in Hong Kong. In the UK, for example, tweets that reproduce even part of a sentence from a copyright work might face potential liability for copyright violation.<sup>14</sup> News media trolling Facebook, Twitter and other social media sites for images of newsworthy events need to remember that just

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14. Observers say that recent European Court of Justice cases, which the UK is obligated to follow, “have suggested that rather than look for skill, judgment or labour in putting words together, there must be an assessment of whether the author has exercised creative choices . . . in arranging

because photographs and videos are posted does not mean they are in the public domain. Twitter's terms of service indicate that users are merely granting a licence for the website to use the photos or videos.

### 11.5 Protecting own works on Internet

What if you discover an article you have written or a photograph you have taken has been posted on a website without your permission or knowledge when you did not want it distributed in that manner? Hong Kong's CO was one of the first laws to say that a copyright owner can prevent his or her works from being distributed without permission on the Internet (CO s 26(2)). If you find a website that has wrongfully taken your article and passed it off as someone else's, you also have some remedies although enforcement can be problematic. The Hong Kong Intellectual Property Department recommends requesting the Internet Service Provider (ISP) hosting the offending website to remove the infringing material.

If the website is in the US, the department advises contacting the American Society of Journalists and Authors ([www.asja.org](http://www.asja.org)) for a copy of the "takedown" guidelines under the US Digital Millennium Copyright Act 1998. To find details of the ISP, including who to contact about your complaint, the department suggests using Network Solutions ([www.networksolutions.com](http://www.networksolutions.com)), a large registrar of domain names, and sending the ISP the following information:

- your physical or electronic signature;
- identification of the copyright works claimed to be infringed (or a representative list of such works);
- identification of the material claimed to be infringing (e.g. filenames on the server) together with sufficient information to allow the ISP to locate them;
- sufficient information to allow the ISP to contact the complainant;
- a statement that you believe in good faith that the identified material is not authorized by you;
- a statement that the information in the notification is accurate under penalty of perjury and that you are authorized to act on your own behalf as the infringed party.

While Hong Kong copyright law does not provide "takedown" instructions, the department says providing a similar request and information to the local ISP "is still a good option".

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words, images or sounds." Luke Scanlon, "Twitter and the Law: Ten Legal Risks", *The Guardian*, 10 August 2012.

## 12. Freelancers: Special issues and a checklist

Freelancers in particular should be vigilant about safeguarding their rights. In addition to general copyright considerations discussed elsewhere in this chapter, other special matters affect freelancers. They often confront copyright issues on a piece-by-piece basis with media companies with varying copyright policies and practices. These issues include:

### *Proposals/Query letters*

As previously mentioned, ideas, facts, concepts and general topics are not protected by copyright, so your proposal or query letter about a proposed article can be at risk. A publisher or media company might like the idea you present, but not you as the author, and assign your proposal to someone else.

Some writers groups such as the US-based Authors Guild<sup>15</sup> suggest that before you submit a proposal, you might send a preliminary letter alerting the publisher that you would like to present an idea (on X topic) and that if they use the idea, even without giving you the assignment, they will provide reasonable compensation and appropriate credit. If they agree to consider your proposal under those conditions, you will send it. Another method, the guild recommends, is to send a preliminary letter with the proposal itself in a smaller, separate envelope inside; if the publisher's representatives open the second envelope, they are agreeing to conditions specified in the letter. Such precautions are not typical for Hong Kong and might be of little practical use. On the other hand, if you submitted a completed article on speculation to a publication, which then used parts or all of your work without your consent, you would have a stronger claim because actual original expression is protected. In general, however, your best bet for preserving your ideas is to establish ongoing relationships with reputable media outlets.

### *Agreements/Contracts*

When a publication or other media company commissions an assignment from you, copyright ownership depends on the agreement you make with it (see section 3.3 in this chapter, "Commissioned works"). If no agreement has been made between you and the media outlet that commissioned the work, then you will be considered the first owner of the copyright.

If you do sign an agreement for an assignment, be sure to be clear which rights you as a freelancer are granting to the media company and which ones you are retaining or obtaining. For example, if you grant first publication rights, it means you are giving the publication the right to be the first to publish that particular work. "One-time rights" means you are selling for one-time use but not necessarily the first one. You might want to control the terms for exclusivity (that you can sell to other publications simultaneously), number of uses (how many times a publication can print the article), duration (rights expire after a certain time), languages

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15. Kay Murray and Tad Crawford, *The Writer's Legal Guide: An Authors Guild Desk Reference* (New York: Allworth Press; Authors Guild 2013), 4th ed.

(e.g. English-only but not Chinese), distribution (e.g. Hong Kong only), electronic rights and so on.<sup>16</sup>

If authorship and the right to review changes are important to you, make sure those terms are included in the agreement. You are not entitled to a byline or to object to changes in your text if your assignment is writing about current news events or if your writing, regardless of content, is for a newspaper, magazine, encyclopaedia, reference text, or other collective works of reference (CO ss 91, 92).

A typical freelance contract for a Hong Kong newspaper or magazine might require the freelancer to grant the right to publish the work for the first time in print and online, to publish exclusively in Hong Kong, to store as part of its database and archives in all formats (print, digital and electronic) and to promote your works to third parties for republication, reprint and reproduction (for this latter, they would normally share any royalties received).

A written contract before production of freelance work can clarify issues you consider important. In 2003, a freelance journalist lost a HK\$50,000 claim against the Hong Kong government for brochures she produced for InvestHK, the government's investment-promotion agency. Merle Linda Wolin and InvestHK had a verbal agreement in which she was paid to design, provide content and produce seven brochures. After the government printed an eighth brochure using elements from the other brochures without permission, Wolin signed a deal for which she received HK\$30,000 to assign copyright to InvestHK. She later discovered that a ninth brochure had been printed without disclosure at the time of the deal. In Small Claims Tribunal, the agency conceded it did not tell Wolin about the ninth brochure, but said it thought the agreement had transferred copyright retroactively. The tribunal rejected Wolin's request for additional payment.

### ***Reasonable use***

Without a contract, a publisher has no right to make other use of your works beyond the presumed one-time use. But regardless of an agreement, the media company that commissioned the assignment has the exclusive right to use your works in a reasonable manner and the assigning editor or other company representative can prevent others who might use the work "for any purpose against which he could reasonably take objection" (CO s 15(a) and (b)).

### ***Internet***

In addition to controlling whether a print media organization can use your works online, you also want to protect from third parties using your work on the Internet without seeking copyright permission (see section 11.5 "Protecting own works on Internet" in this chapter.)

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16. Other freelance contract terms that are not copyright-related include fees, expenses, due date, payment terms and cancellation fees. For further discussion and sample freelance contracts/letters, suggestions are offered by such writers groups as the Authors Guild in the US (<http://www.authorsguild.org>), the UK-based Creators' Rights Alliance (<http://www.london-freelance.org>), the Professional Writers Association of Canada (<http://www.writers.ca>) and the International Federation of Journalists (<http://www.ifj.org>).

### **13. For more information**

For inquiries on Hong Kong copyright law, contact the Intellectual Property Department, Hong Kong SAR, 24/F and 25/F, Wu Chung House, 213 Queen's Road East, Wanchai, Hong Kong. 852-2961-6901. [Enquiry@ipd.gov.hk](mailto:Enquiry@ipd.gov.hk).

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Media in Hong Kong are available to the public in the forms of: television and radio, newspapers, magazines and the Internet. They serve the local community by providing necessary information and entertainment. Contents. 1 Overview. 2 Law. 2.1 Media authorities. 2.2 Media regulation. 3 Media. 3.1 Television. 3.2 Radio. “The greatly expanded new edition of Hong Kong Media Law by Doreen Weisenhaus is of great importance, and not only to Hong Kong and mainland China. It alerts us to the threats to free speech from political censorship and the chilling effects of archaic law. “In this second edition of her ground-breaking book, Hong Kong Media Law, Doreen Weisenhaus raises the bar again. In lucid and succinct language rooted in first-class scholarship, she updates the considerable change that has taken place and may take place. “Now more than ever, Hong Kong stands astride vastly different geopolitical worlds. Jo Hong Kong Media Law, Expanded 2d Edition. Photo credit:Alex Hofford. The expanded second edition of Hong Kong Media Law aims to help anyone who uses any publishing device or platform to safely navigate the shifting terrain of media law. With its in-depth research and analyses of key developments in local and international contexts “ in such areas as defamation, privacy, contempt of court, access to information, national security, copyright, obscenity and media regulation “ it also is an authoritative resource for lawyers, judges, regulators and scholars.â The expanded second edition of Hong Kong Media Law aims to help anyone who uses any publishing device or platform to safely navigate the shifting terrain of media law. Buy it now!