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# Introduction for Journalists in Hong Kong

The law of copyright is the reporter's and broadcaster's rice-bowl. The freelance writer would have a tough time earning a living if every publisher he or she submitted articles to just published his or her work without offering to pay for it. And the news-media world would be a strange place if every paper and news service could copy and publish each other's reports verbatim as their own.

OK, things are pretty cut-throat out there.

But what stands between media competition and outright mayhem? The law of copyright.

This publication is designed to help you understand a journalist's basic rights and obligations under Hong Kong's copyright law. Unfortunately, the author cannot hold this out as legal advice: it is only a general guide to the law. If you need to know how the law applies in a particular situation, please obtain advice from a lawyer.

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## Copyright

Copyright is part of the overall structure of law which protects creative effort: the law of 'intellectual property'. The law protects intellectual property rights by dividing them into categories of monopolies. Roughly speaking, intellectual property law works like this –

- it defines rights by ring-fencing the monopolies granted,
  - it defines **permitted acts** by creating certain legal exceptions to the monopolies in the public interest (in America, these are called 'fair dealing exceptions').
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- it defines **remedies** which set out the way the right owner or the government can enforce rights by civil or criminal proceedings, and
- it sets out ways that rights can be acquired, for example through registration, and how rights can be assigned or licensed by one party to another.

So for example -

- the owner of a registered trademark can attach his mark to his goods or services and he can stop anyone else from attaching the mark to their goods or services;
- the owner of a patent can manufacture products incorporating his patented invention, and can exclude anyone else from using that invention; and
- the owner of a copyright can copy, publish, perform or import his works and can stop anyone else from doing so.

This system allows creators and subsequent owners of rights to gain economic benefit from charging other people royalties or a lump-sum for using the marks, products or works over which they have obtained their legal monopoly.

It's always a good idea to try and understand copyright in terms of **both** rights **and** responsibilities. Intellectual

property law is usually designed to strike a balance between rights and responsibilities. The best way to answer the question 'do I have the right to do this?' is to consider 'would it be fair for someone to do this to me?'

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Who?  
What?  
When?  
Where?  
How long?

**C**opyright protects the expression of ideas. It does not protect the underlying ideas themselves. What does that mean? Well, your recipe for a Chinese dish is an 'idea'. You can write it down, or record a sound or video tape explaining the recipe or draw a set of diagrams or take some photographs explaining how to prepare the dish. When you have done that, copyright law protects your written explanation, or sound or video recording, or your drawings or photographs: no-one is

allowed to copy them or publish or broadcast them unless you give permission. But people who follow your instructions, learn the ideas behind them, teach them to other people or even open a restaurant specializing in serving your special dish, would not be infringing your copyright.

The written expression of an idea is called a 'work' in copyright law. Here are examples of 'works' which can be protected in Hong Kong -

- literary works
- drama
- music (the composer's rights)
- artistic graphics and sculpture
- photographs
- computer software
- sound recordings (a person who makes a sound recording has separate rights from the composer and performer)
- films
- broadcasts (a broadcaster can have separate rights from the author, performer or recording studio)
- cable programmes
- typographical lay-outs of published editions of works

Furthermore, performers of live performances have a separate right to

prevent unauthorised exploitation of their performances.

Copyright protects works which are original but regardless of the 'quality'. A lousily-written story about a car crash in Sai Kung gets the same protection as a Pulitzer Prize-winner. An out-of-focus photograph of your granny gets the same protection as a sharp one of a visiting head of state. Copyright protection does not stop because an article or picture is obtained in an unethical or intrusive way: those are completely separate issues.

As you can see from this list, people who assemble works (say a cinema film) from, for example, a script/screenplay (literary work), actors' performances, musical soundtrack (musical score/ lyrics), sound recordings and video recordings can claim a separate right from those of the contributing talents. So 'multimedia' is nothing new to copyright law. And when a film is included in a broadcast and broadcasts are subsequently re-organized for cablecasting, new rights arise at each stage.

This leads me to a very important point: rights in what on the surface seems a single 'work' can in fact amount to a very

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complex network of rights originating from a number of countries round the world at different times. The proper legal management of copyright in a multimedia work like a film is a very complex and time-consuming process.

Now we come to the exclusive rights that copyright law gives to the creator of the works listed in the previous paragraphs. These are known in copyright law as 'restricted acts'. They include -

- copying;
- issuing copies to the public (publishing);
- renting computer programmes or sound recordings to the public;
- making copies of works available on the INTERNET;
- performing works in public;
- broadcasting works by wireless or cable; and
- adapting (e.g. translating a work or adapting a two-dimensional plan to a three-dimensional object.)

If a work is used in one of the ways described above without the creator's permission, it is an 'infringing' copy, performance or broadcast. There are also some things you are not allowed to do with an infringing copy of a work: you may not knowingly-

- import to Hong Kong
- export from Hong Kong
- possess for trade or business purposes
- sell
- distribute

an infringing copy or recording of a work. Acts like these are known as 'secondary infringement'. Some of these acts can result in criminal prosecution.

The monopoly that copyright law gives to the creator does not last forever: the 'golden number' for copyright protection is fifty years. But that fifty years operates differently depending on the nature of the work.

- In the case of literary, dramatic, musical or artistic works and broadly speaking, for films as well, copyright protection lasts for fifty years from the end of the calendar year in which the author died. So if a child genius composes a piano sonata at the age of ten and dies aged 90, the total period of copyright protection could be 80 years plus 50, equals 130 years. After the death of the creator, the copyright passes to his heirs. So don't imagine that because Picasso is dead, his works are no longer protected.
- A sound recording is protected for 50 years from the time it is made, or if

during that period it is released, 50 years from its release.

- A performer's performance is protected for 50 years from the time the performance takes place or, if during the said 50-year period, a recording of the performance is released, the protection lasts for 50 years from its release.

Note another important point here: **copyright does not get registered. It arises naturally from the moment a 'work' is first reduced to a permanent form.** Use of the '©' mark is not a sign of registration: it puts the reader on notice to respect the copyright-owner's rights.

What about works of creators from outside Hong Kong? Although you could argue about the legal detail, the simplest approach is to assume that *the outline in the previous paragraphs applies equally to works originating outside Hong Kong as well as from within Hong Kong.* The reason is (a) that Hong Kong is bound by a group of international treaties to respect copyright in works of creators from other places, and most of the world is covered by these treaties; and (b) Hong Kong's copyright law recognizes and protects copyright in works from all around the world anyway.

## Journalists: a Privileged Class?

**A**s a journalist carrying out your professional duties you enjoy a number of special legal rights. That is because the law recognizes that without special provision, copyright could interfere with free expression and open reporting and comment on current affairs.

The special position of the press is preserved by the concept of 'fair dealing' in copyright works. 'Fair dealing' is an American term-of-art. It means that against the general principles of copyright law, certain situations are recognized where the monopoly rights of copyright owners have to be limited for the greater public interest. One of these public interest areas is free coverage and comment on current events.

It is important to realize one important thing about 'fair dealing'. That is the word 'fair'. 'Fair' means 'fair to the creator' and 'fair to the public'. The underlying

principle is that you are only entitled to do certain things reasonably necessary for meeting the public interest in obtaining coverage and comment on current issues.

This immediately raises the question 'How much can I copy or broadcast from a copyright work?' The answer is not black-and-white. Factors which are relevant include :

- how much do you need to quote to make your point? and
- are you quoting to the extent that the creators' legitimate economic and other interests are compromised?

For example, you can't broadcast the whole of the film 'Titanic' just to illustrate the point that a lot of people are watching it in the cinema! The unauthorized broadcast of a whole film clearly damages the rights of the owners of the films' rights substantially.

Incidentally, the title of a work alone cannot be protected by copyright. So you *are free to quote titles of films, musical pieces or other works without restriction.*

The special 'fair dealing' rights granted to journalists are for two purposes: to allow for -

- reporting of current events; and
- to allow for published criticism and review.

In either case, **other than in the case of reporting of current events by sound recording, film, broadcast or cable programs, any 'fair dealing' with copyright works for reporting or criticism must be accompanied by sufficient acknowledgment.**

Both the law and journalistic ethics frown upon taking unfair advantage of these special rights in order to attack the underlying economic rights of the original creator. They are not there to allow newspaper proprietors to make an extra buck in a cut-throat, competitive environment.

Apart from economic rights, creators of original literary, dramatic, musical or artistic works and the directors of films have 'moral rights'. That is, they have the rights -

- to be correctly identified as the creator or director of the work;
- to prevent their works from being distorted or mutilated in such a way as to damage the creator's or director's

- honour or reputation; and
- to prevent a work or film from being falsely attributed to him as author or director.

The first two of these moral rights do not apply in relation to any work made for the purpose of reporting current affairs.

This leads to the question of how journalists can treat the works of other journalists, broadcasts and publications.

Firstly, news itself is an idea. You can re-cast any information in your own words and cover any news with your own film footage or photographs. The original authors of a 'scoop' or an 'exclusive' have no right to control the news: they can only protect the way they have expressed it. (It may, however, be possible to have a contract with someone for an interview

and require under the law of contract that the interview should not be granted to any competing media.)

If your publication or broadcasting organization subscribes to a news service, then you are entitled to report the releases you get from them word-for-word. However, the contract between the news service and your organization may specify that the name of the news service be properly acknowledged in your report. If so, you are obliged to respect such requirements under the law of contract.

A photograph published in a newspaper or sound and film footage in a broadcast is protected by copyright. It will only be in very limited circumstances that a photograph or broadcast footage (and not the scene recorded *in* them) could be news in its own right.

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## Rights of personality

**R**egardless of what ethical rights the individual may have to privacy, the law of copyright does not give any person the right to control his own image or an image of his property (unless the property is a copyright

work) or to descriptions of him or his actions.

However, that only covers photographs or recordings of the person that you or your organization has made. Every

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photograph of a person is protected by copyright, and that copyright belongs to **somebody**. If the person in a photograph took the photograph, then that person owns the copyright in it and he or she can then prevent others from publishing it. The position is the same if the person in the photograph commissioned the taking of the photograph and agreed with the photographer that the commissioner should own the copyright in it. *Subject to any agreement to the contrary, the right to publish or prevent publication of a photograph of a public figure belongs exclusively to the person who owns the copyright in the photograph. The person in the photograph does not, by this fact alone, have any right in this respect.*

Of course the situation changes if the image or the description is defamatory. For example, the use of photographic editing to produce the head of a person on the body of an animal could result in the person *in* the photograph having a right to prevent publication under libel law.

A word of caution here: although a person in a photograph may not have the right to prevent publication in copyright law, he may have rights in other areas of law. For example, a performer who is photographed during a performance for which the photographer bought a ticket may have a right to prevent unauthorized photography under the contract conditions governing entry to the performance. Likewise, the law may forbid photography in certain circumstances (e.g. court proceedings).

The inability of a person *in Hong Kong* featured in a photograph or film clip to prevent publication may not be mirrored outside Hong Kong. Among others, China and the USA both afford limited 'personality rights' to the subjects of films, sound recordings and photographs. Those media organizations which publish on the INTERNET, where material can be viewed worldwide, should consider the implications of this carefully.

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# As a journalist, what are your rights in respect of your own works?

**Y**our own output as a journalist, whether in prose, photographs, film, sound or INTERNET publications, enjoy copyright protection. But you may not always be the person who directly enjoys the benefit of that protection.

If you are in normal employment with a media organization, then it is most likely that all the rights to your output belong to your employer if the work is produced in the course of your employment. If you are a freelance journalist working under contract, your contract should specify who enjoys the rights to your output; but if it does not, then it is arguable that the rights to your works, if the paper agrees to take them, probably still belong to you. To avoid doubt, it is in your interest to include an express term in your contract.

In general, the right to the copyright in an employee's work belongs to the employer. But that position can be modified by the contract between the

employer and the employee. (Of course, the individual journalist may not have much bargaining power: it is up to both parties to agree according to the market conditions.)

If you are a freelance journalist and you sell your output to various media, not on a fixed basis, then it is worthwhile to give thought to the terms you demand. There is no substitute for clarity in the terms of your publication agreement. You can stipulate which of the rights you are prepared to assign or license (e.g. printed publication but not broadcasting or INTERNET publication), the medium of publication (e.g. wireless but not cable), or the geographical distribution (e.g. Hong Kong only.) Naturally, the more restrictions you place, the less you may be offered for your work.

In a previous paragraph, I mentioned 'moral rights'. These rights include the right to be identified as author or director.

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To protect your right of identification, you have to declare that you assert your right at the time that you assign the rights in your work. You do that by declaring in the assignment contract that you assert your right to be identified as the author of the work, or otherwise by providing a statement to that effect in writing to a potential user. It may be to your disadvantage if you delay in making such a written statement. It is however not necessary for you to assert your right in order to be in a position to prevent your works from being distorted or mutilated or other works from being falsely attributed to you. Remember, however, that your right to your by-line in copyright law only applies where your work is not a report of news or current affairs.

If you are authoring for the INTERNET World Wide Web, there are some additional practical matters to consider. Your work will be protected by copyright law in Hong Kong; but other places may not have such up-to-date legislation, so you may not get protection everywhere. Even if you do have legal protection for your work, enforcing it may be another matter. Effective enforcement action in another legal jurisdiction could be expensive, and it may take so long to

obtain an injunction to prevent infringement that it hardly seems worthwhile any more. If you really believe that you have very valuable material, I really suggest that you do not choose the INTERNET as the first medium of publication.

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## Some other things to think about

**I** need to wrap up a few other issues. The first is that you may well use a computer to prepare your material, and the computer will be running commercial software. If the software is pirated or illegally copied from your office or friends, you could be in for big trouble. Commercial organizations which allow infringing software to be used for their operations get sued for millions of dollars, and it may be possible to bring a criminal charge against a journalist or newspaper publisher who possesses infringing software for trade or business. In any case, we hope that you will accept that the creator of computer software is

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entitled to the same economic rights and courtesies as you are.

The media sometimes arrange competitions or otherwise publish contributions from the public. If it is a matter of printing a 'letter to the editor' there is little question that the writer intended his letter to be published and there the newspaper can claim they had an 'implied licence' for the copyright. But contributions such as competition entries may not always be so clear. The safest approach is that when you solicit contributions or competition entries from the public, make it clear in advance that you intend to publish any of them that you see fit.

I have not yet written anything here about trade marks. In general, reporting news stories about trade marks or commenting on them is not likely to infringe the trade mark right that I described at the beginning of this article. That said, however, a trade mark could contain a graphic element which is protected by copyright. It is worth bearing this in mind when reporting on trade mark issues, and making sure that your approach is consistent with the latitude for 'fair dealing' provided under

copyright law. Incidentally, you do not help yourself by stating 'registered trade mark' when illustrating a trade mark or name. Doing that does not provide you with any additional protection, and in fact could get you into trouble if it turned out that the mark had not been registered in Hong Kong. (Falsely claiming that a mark is registered is an offence here.)

Including trade marks in INTERNET web pages is risky unless you get permission in advance. Some readers might conclude that the mark is being used to promote your goods or services and this could amount to a trademark infringement.

A certain degree of care is needed when linking INTERNET web sites together with hyperlinks. You have the rights on the design and lay-out of your web site, and others have the rights on theirs. A problem might arise if you link someone's site to yours. I suggest that you link to other sites only with proper attribution, and that you get the agreement of the target site's webmaster in advance. Of course, the 'fair dealing' provisions apply, so that to link in the context of news reporting or genuine review, and with proper attribution, should be unobjectionable.

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# Conclusions

Copyright is an indispensable tool to the news publishing industry, whether printed, broadcast or networked. In Hong Kong, we have taken care to ensure that the need of the news media to report and comment on events is not hampered by copyright law.

More detailed information on Hong Kong intellectual property laws can be found on the Intellectual Property Department's INTERNET web page at "<http://www.info.gov.hk/ipd/>". You can draw on this material to help you prepare cover stories about intellectual property protection both in Hong Kong and elsewhere.

Intellectual Property Department

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