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## Copyrights

### How Political Mistrust Killed Hong Kong's Copyright Bill

*By Dr. Danny Friedmann, research associate, Faculty of Law, Chinese University of Hong Kong. Friedmann is the founder of the IP Dragon blog at <http://www.ipdragon.org/>*

In Hong Kong a proposed intellectual property bill was never expected to arouse any real excitement, let alone public controversy. However, since the pro-democracy protests in 2014, which has politically awoken a new generation, society in this Special Administrative Region in China seems so divided that the debate over the Copyright Amendment Bill became a new frontline in the discussion over Hong Kong's political future. The bill died away after more than 16 months, or as some members of the Hong Kong government claimed, eight years of preparation.

Supporters of the bill, including the government, pro-Beijing groups and some right holders organizations touted it as a necessary update to outdated legislation that could ensure Hong Kong's international competitiveness. The bill would have added protections not contemplated when the current law was finalized, such as provisions outlawing unauthorized video streams.

## Political Concerns.

Concerns about copyright law being used to stifle political speech motivated opposition to the bill. Pro-democracy groups (the pan-democrats) and civil society groups such as Progressive Lawyers and Keyboard Frontline vehemently protested, claiming the bill could be used to quiet criticism of the government. They also managed to frame the bill as the "Article 23 of the Internet", referring to the failed proposed national security law which was dropped after massive protests in 2003.

The politicization led to considerable misinformation on both sides. For example, an editorial in The South China Morning Post, one of Hong Kong's largest English-language papers, warned those opposing the bill on political speech grounds that failing to pass the proposed law would mean that "draconian provisions in the existing law will continue to apply."

However, the current copyright law is far from draconian. It already includes fair dealing tests to exempt from copyright infringement uses for the purposes of "criticism, review and news reporting," and "research, private studies, education and public administration." Therefore, one can argue that the use of a copyrighted work for the purpose of parody already falls within the category of criticism.

On top of this, Hong Kong courts already apply the fair dealing factors, which more or less equal the fair use factors used in the U.S. Thus, the courts pose the following questions: is the work used in a commercial way, is the work more factual or creative; was the work already published or not; and the amount and substantiality of the taking; and is there commercial competition with the original work.

Some opponents of the bill were also misinformed. Despite the impression one would get from some protesters, the Copyright Amendment Bill actually would have expanded the exemptions to copyright infringement with more explicit categories: “parody, satire, caricature” and “comments on current events, and quotation.”

One opposition group, the Keyboard Frontline, advocated another category to exempt predominantly non-commercial user-generated content from copyright infringement, referring to Canada as the example where this provision is implemented. One can argue that this would make not much difference for Hong Kong, because here the non-commercial use already falls within the fair dealing factors. Besides, in practice, user-generated content is created on social media where contractual relations play a dominant role. The demand of Keyboard Frontline to have a prohibition against contract override, instances where contracts are used to restrict copyright exceptions, is reasonable, but in practice it depends to a high degree on how it is enforced by the courts.

Keyboard Frontline also argued for changes that appear to have little relation to political criticism. One request was for an exception for the live-streaming video game play. It seems that this is a category that is marginally relevant to the right to freedom of expression and it is in the game publisher’s interest to give permission to users to share live-streaming video of their game play anyway, as to advertise the attractiveness of the game.

## Chronicle of a Death Foretold.

Due to filibustering, the Hong Kong government became quite frustrated that it was unable to pass the bill even after 16 months and 24 meetings. All its pleadings fell on deaf ears. Secretary of Commerce and Economic Development Gregory So warned that if the bill was not passed by March 4, he would withdraw the legislation.

The government made one last attempt. It placed advertisements in some local newspapers, such as the Oriental Daily, urging the legislators to pass the bill, and blaming the pan-democrats for the many delays. The appeal failed, this time with pan-democrat legislator Raymond Chan blocking the bill.

So vented his anger in an interview with public broadcaster RTHK. He accused pan-democrats of “murdering” the bill and said: “Remember these people. Remember them one by one. It’s them who are the culprits.”

The reason for the new bill was to update the copyright law to be more in line with other jurisdictions and to make it ready for the digital era. However, the indefinite shelving of the bill does not seem to make a big difference for the freedom of expression nor for the protection of right holders. The courts in Hong Kong have interpreted fundamental rights, such as the freedom of expression, in a generous way. And the Hong Kong Customs and Excise already takes enforcement actions against unauthorized streaming in creative ways.

Besides, nobody is stopping the user from asking the copyright holder for the permission to his work. Otherwise one can always transform the work into a new work.

Hopefully the legislative procedure in Hong Kong will become less politicized, so that provisions of a bill, such as the Copyright Amendment Bill, will be judged based on the incentives they provide to the creation of original and derivative works, and not based on who originated the bill.

*Text of the proposed bill is available at: <http://src.bna.com/dmG>.*