

VIVIEN CHAN & Co.

YOUR GREATER CHINA LAWYERS

HONG KONG | BEIJING

NEWSLETTER

issue 12 . 2018

IP UPDATE



Anna Mae Koo PARTNER

MA (Law) (Hons), University of Cambridge (Prince Philip Scholar)

- Asialaw Rising Star Lawyer in Intellectual Property 2018
- Techstars Mentor 2015
- IP Rising Star (Euromoney Women in Business Law Awards) 2013
- Litigation Committee Member, International Bar Association
- Anti-Counterfeiting Committee (2018), Internet Committee (2014-2016), INTA



Ken Hung

ASSOCIATE

BBA (Law), University of Hong Kong
LLB, University of Hong Kong

An Overview of Media Laws in Hong Kong

I. ONLINE DEFAMATION – FREEDOM OF “JURISDICTION”?

In general, for online defamation, the relevant jurisdiction is the place where the recipient of the defamation material accesses or downloads the material, as opposed to the place where the material was inputted into the computer or uploaded onto the Internet. However, material published online is nowadays easily accessible by viewers around the globe, and people may expect that they have a freedom in choosing the jurisdiction (e.g. their hometown) to bring an action. Accordingly, since the offending material can be accessed or downloaded in multiple locations, and hence actions may be brought in multiple jurisdictions, the need to resolve if one jurisdiction is the appropriate forum is not uncommon. We have two recent cases in Hong Kong discussing this issue.

In *Earn Crown Investment Ltd & another v China Free Press Inc & others (unrep.)*, the defendants, based in the Mainland China, were the operators of Boxun News, an online Internet newspaper which was one of the most popular sites covering political news and human rights infringements in the Mainland China. On 15 and 16 March 2015, an article titled “Emperor Group colluded with corrupt government official Liu Zhi Hua to illegally obtain land” was published on Boxun News, and the plaintiffs (based in Hong Kong, where the 1st plaintiff is a Hong Kong listed company) commenced

defamation proceedings against the defendants in Hong Kong. The issue was whether Hong Kong was the natural and appropriate forum for this defamation case.

The plaintiffs' evidence showed that on average, 2.88% of the monthly traffic to the website was originated from Hong Kong. However, the Court considered that there was insufficient evidence to suggest that the said traffic necessarily related to the article in question. Furthermore, the Court took into account various factors including Boxun News website's popularity in the Mainland China, the alleged defamatory material being published in simplified Chinese, the subject matter of the article being a dispute between parties based in the Mainland contesting a plot of land in the Mainland China, and the laws allegedly having been breached were not Hong Kong laws. The Court then held that Hong Kong was not the “natural and appropriate” forum for this case. It could be seen that it may indeed be difficult to establish that a particular article has been published in Hong Kong, and/or any person in Hong Kong had actually accessed the article in question.

On the other hand, in *Oriental Press Group Ltd v Google Inc.*, the plaintiffs (publishers of daily Chinese newspapers circulated

in Hong Kong) are suing the defendant for, amongst others, linking the search keyword “白粉報” (translation: “white powder newspaper”, “white powder” commonly understood to be a reference to heroin) to the plaintiffs.

This case has yet to be substantively determined, but the issue on whether the plaintiffs should be granted leave to serve the proceedings on the defendant out of Hong Kong has gone up to the Court of Appeal.

The question before the Court of Appeal was whether there has been substantial publication in Hong Kong, so as to make Hong Kong the appropriate forum for the case. The Court of Appeal upheld the ruling of the Court of First Instance and found for the plaintiffs. The Court took into account the evidence adduced by the plaintiffs, which was an estimate of the number of persons who might have read the defamatory words, as generated by a tool provided and operated by the defendant, namely “Google AdWords”. The tool was capable of showing the monthly average of the number of searches conducted on the Google search engine for any particular keyword in any specified location, and the Court accepted that 2,000 hits of the defamatory words in question within a period of 6.5 months in Hong Kong constituted prima facie substantial publication. The Court of Appeal also commented that if the defendant wished to mount a case that the search was conducted by the same group of people associated with the plaintiffs, then it should present the evidence.

It is evident from these recent cases that the Courts in Hong Kong are adopting a pragmatic approach in defamation cases. While it is theoretically true that an online publication may be viewed and is accessible from Hong Kong, the mere fact of possibility of publication in Hong Kong is not sufficient in convincing the Courts that Hong Kong is an appropriate forum. Evidence beyond suggestion of a mere possibility, and evidence pointing to the publication of the subject article, will be required, and sufficient preparation in this respect should be done.

II. ONLINE PUBLISHERS – DIFFERENTIATED TREATMENT IN LEGAL PROTECTION IN DEFAMATION?

A defence to a claim of defamation that is commonly relied upon by journalists is the defence of qualified privilege. This defence will apply if it can be shown that the journalist has a

legal, moral or social duty to make the statement, and that the statement was made fairly and not maliciously. In Hong Kong, such defence is codified under section 14 of the *Defamation Ordinance (Cap. 21)* in which it is stated that “the publication in a newspaper or the broadcasting of any such report or other matter as is mentioned in the Schedule shall be privileged”. However, with “newspaper” and “broadcasting” expressly defined in the Ordinance as printed newspapers and broadcasters with licenses granted under the *Telecommunications Ordinance (Cap 106)*, only the traditional broadcast and print publishers fall within the ambit of the defence of qualified privilege as defined in Section 14 of the *Defamation Ordinance*.

As a result, online publishers and other “modern” form of journalists may have to rely upon the common law defence, known as *Reynolds* defence. This defence was first set out in the English case *Reynolds v Times Newspaper*. Similar to section 14 of the *Defamation Ordinance*, the *Reynolds* defence applies where a would-be defamatory statement is made in the context of a report that is published in a fair, disinterested and neutral manner on a matter of public interest. It must be noted that in the UK, the *Reynolds* defence was codified into section 4 of the Defamation Act 2013, which created the statutory defence of “publication on a matter of public interest”, while Hong Kong has yet to introduce similar statutory defence.

The common law *Reynolds* defence, in sharp contrast to section 14 of the *Defamation Ordinance*, is not limited to traditional broadcast or print publishers. Moreover, in the Privy Council case *Seaga v Harper*, it was established that the defence may be extended beyond the press to anyone publishing material of public interest. The House of Lords (per Lord Nicholls) in *Reynolds* set out a list of ten criteria against which the Court should assess a journalist's *Reynolds* defence. Crucial factors include the seriousness of the allegation, whether the publisher has taken steps to verify the information, whether the article contained the gist of the plaintiff's side of the story, and whether comment was sought from the plaintiff.

In view of the growing relevance of online publishers and bloggers, it remains to be seen how the *Reynolds* defence may be extended and/or adapted to protect publishers of online material. On one hand, the common law as an ever-changing instrument should recognize the prevalence

of digital media as a platform for reporting and social discourse, and accord the equivalent protection to its predecessor, namely the traditional print media. On the other hand, the law must also recognize the danger of malicious individuals hiding behind a veil of anonymity to launch attacks on the reputation of others. It would also be a welcome development if codification of the *Reynolds* defence can be seen in Hong Kong in the near future.

III. AMENDMENTS TO THE COPYRIGHT LAW IN HONG KONG

In addition to protection against defamation claims, protection against copyright infringement is equally important to the media in safeguarding their freedom of expression and creation. In recent years, the Government of Hong Kong has been working on updating Hong Kong's copyright regime, which is mainly codified in the *Copyright Ordinance (Cap. 528)*. On 18 June 2014, the Government introduced the Copyright (Amendment) Bill 2014 (the "2014 Bill") into the Legislative Council. However, huge controversy has arisen since the introduction of the 2014 Bill and it was subsequently withdrawn. It is yet to be known if further amendments may be made, and when the Bill may be re-introduced again.

One of the most important amendments proposed by the 2014 Bill is the addition of new fair dealing exceptions. Under the existing *Copyright Ordinance*, certain specified acts are permitted in relation to copyright works, including acts for the purposes of research, private study, education, criticism, review and news reporting. The principal condition for such usage is that the usage must constitute fair dealing. The 2014 Bill proposes introducing three additional fair dealing exceptions to facilitate users to use copyright works without obtaining authorization from copyright owners, or attracting any civil or criminal liability.

The proposed exceptions include use of the copyright works for the purposes of:-

1. Parody, satire, caricature and pastiche

These four terms are not expressly defined in the 2014 Bill. Instead, definitions in the Concise Oxford English Dictionary (12th Edition, 2012) are referred to in describing various works that include an element of imitation or incorporate certain elements of an underlying copyright work for the purposes of creating comic or critical effects.

2. Commenting on current events

This new exception is intended to expand the scope of the existing fair dealings exception for the purposes of news reporting under section 39 of the *Copyright Ordinance* by increasing the scope of protection to Internet users using copyright works to comment on current political or social affairs.

3. Quotation

This exception would cover common uses of copyright excerpts to help provide information and illustrate arguments, so as to engage in communication. Possible examples may include quoting various copyright works such as literary or artistic works, films and sound recordings, for use on personal blogs and social media websites.

While the fair dealing exceptions in the 2014 Bill afford better protection to the online publishers and Internet users than the current regime, it is arguable that the scope is insufficiently wide to cover all common derivative works. In particular, it is likely that some forms of "secondary creation" will fall outside the scope of "parody, satire, caricature and pastiche". Therefore, when the amendments would finally come into operation, and how the courts would then interpret the amended ordinance in construing the exceptions, remain to be seen.