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**Online Platform Liability for Intellectual Property Rights Infringement in Hong Kong: A Critical Analysis of the Legal Framework and Future Challenges**

1. **Introduction**

The regulation of online platforms has grown increasingly intricate, especially as their influence over commerce and information increases. In Hong Kong, the legal framework governing platform liability for intellectual property (IP) rights infringements and unfair competition has evolved significantly, reflecting both international trends and local particularities. This article critically examines Hong Kong’s approach to platform responsibility, analyzing the delicate balance between safe harbour protections, proactive obligations, and the imperative to uphold fundamental rights.

1. **Historical Perspective and Definitions**
   1. **Defining Platforms in Hong Kong**

In Hong Kong, the term “online service provider” (OSP) is broadly defined under the statutory regime introduced by Division IIIA of the Copyright Ordinance (Cap. 528, sections 88A to 88J). The definition of an “online service provider” encompasses entities offering internet access, information location tools, and online storage, capturing both traditional e-commerce platforms and newer entities such as NFT and digital content platforms. This expansive definition ensures broad applicability of the safe harbour provisions while excluding services limited to intranet delivery.

The legislative approach reflects Hong Kong’s commitment to the advancement of technology, ensuring that the legal framework can adapt to emerging technologies without requiring constant legislative updates. This broad definitional scope has proven particularly valuable as platform business models have diversified and evolved, as Hong Kong moves toward integrating exceptions for legitimate technologies such as text and data mining (TDM) and AI training within the safe harbour structure, aiming to not only maintain legal certainty but also foster technological growth[[1]](#footnote-1).

* 1. **Safe Harbour Framework and Conditions**

Eligibility for safe harbour protection depends on compliance with four statutory conditions under section 88B of the Copyright Ordinance. The OSP must have: (i) taken reasonable steps to limit or stop infringement as soon as practicable after receiving notice, becoming aware of infringement, or becoming aware of circumstances leading inevitably to the conclusion that infringement occurred; (ii) not received any financial benefit directly attributable to the infringement; (iii) accommodated and not interfered with standard technical measures used by copyright owners; and (d) designated an agent to receive infringement notices with publicly accessible contact details.

Significantly, the law expressly clarifies that failure to meet safe harbour requirements does not preclude the OSP from asserting other legal defences in infringement proceedings. This reflects a measured approach that balances protection for OSPs with remedies for rights holders, while maintaining the availability of common law defences.

1. **International Context and Comparative Analysis**

Hong Kong’s legislative framework draws substantially on developments in overseas jurisdictions, embedding comparable safe harbour principles found in Australia, Singapore, the United Kingdom, and the United States[[2]](#footnote-2). The framework incorporates detailed notice-and-takedown and counter-notice procedures, along with penalties for false statements, designed to encourage responsible conduct by both rights holders and users.

The Code of Practice, while voluntary and lacking subsidiary legislative force, provides practical guidance for OSPs in implementing the statutory requirements[[3]](#footnote-3). This two-tier approach—combining binding statutory obligations with flexible practical guidance—allows for adaptive implementation of the relevant statutory requirements while maintaining legal certainty.

1. **Legal Basis for Liability and Responsibility**
   1. **Types of Platforms and Coverage**

The statutory framework applies to all entities that fall within the statutory definition of an OSP, from major e-commerce platforms to cloud storage providers, subject to compliance with the prescribed conditions. This inclusive approach ensures comprehensive coverage while maintaining proportionate obligations based on the platform’s role and capabilities.

* 1. **Civil and Criminal Liability Framework**

While the law provides for compensatory damages in cases where OSPs fail statutory requirements, there are no criminal sanctions specifically targeting OSPs for user acts. Criminal liability is limited to making false statements in statutory notices under section 88F of the Copyright Ordinance. This approach to criminal liability recognizes the intermediary nature of platform services, while maintaining accountability for deliberate and direct misconduct.

**4.2.1. Direct and Accessorial Liability Principles**

Direct liability, or primary liability, arises when the OSP itself infringes IP rights. By contrast, accessorial liability requires the OSP’s substantial knowing participation in the infringing act. Hong Kong courts have consistently rejected broad imposition of platform liability absent intent or active collaboration in unlawful conduct, following established joint tortfeasorship principles.

To establish an OSP’s secondary liability under Hong Kong law, the following elements are required: (1) proof of common design where the defendant acts to further commission of the tort; or (2) evidence of procurement, inducement, or incitement of the primary infringement. Even for strict liability torts like trademark infringement, accessory liability requires knowledge of the essential facts making the conduct wrongful. These principles are laid down in the landmark case *Mary Kay Inc. and Others. v. Zhejiang Tmall Network Co., Ltd and Other* [2021] HKCFI 1403.

In essence, the dispute in *Mary Kay* concerned Mary Kay products being sold on Tmall by unauthorized sellers. Crucially, these products had their production lot codes obliterated through scratching to prevent tracing back to the original DSRs. Mary Kay placed trap orders to establish evidence of sales and initially presented the case as an ordinary IP infringement action without disclosing two critical facts: first, that the products were genuine goods originating from Mary Kay itself, raising acute issues regarding the exhaustion of rights defence; and second, that the platform operators were merely neutral marketplace operators rather than direct sellers.

The Court of First Instance of the High Court of Hong Kong took this opportunity and made several significant rulings that clarify Hong Kong law on platform liability. On the issue of joint tortfeasorship, the court held that the mere provision of an online platform does not create joint tortfeasor liability. Joint liability requires proof of two distinct elements: (1) the defendant must have acted in a way that furthered the commission of the tort by the primary infringer; and (2) the defendant must have done so in pursuance of a common design to do or secure the doing of acts constituting the tort.

The court found no evidence that Alibaba authorized or encouraged infringement by individual sellers, nor that platform policies facilitated unlawful activity. Importantly, the court held that platform operators are under no legal duty to prevent infringement and that the mere fact of financial benefit from seller activities is insufficient to establish liability. The robust notice-and-takedown procedures implemented by the platforms counted significantly in their favour.

Notably, the *Mary Kay* decision came out before the implementation of the safe harbour provisions in the Copyright Ordinance. The Ordinance in a sense codifies and clarifies the extent of OSPs liability in these cirucmstances.

**4.2.2. Content Monitoring and Privileges**

No mandatory obligation exists for platforms to actively monitor or pre-screen content for possible IP infringements. Section 56(5)(a) of the Copyright Ordinance specifically absolves service providers of such monitoring duties, except where consistent with standard technical measures. This reflects the “Good Samaritan” principle: platforms that voluntarily implement monitoring measures do not lose their safe harbour protection, since the law—in line with the Good Samaritan concept—offers exemption from liability for positive actions to assist, without imposing an affirmative obligation to intervene[[4]](#footnote-4).

Currently, there are no statutory restrictions or specific requirements in Hong Kong regulating algorithmic content monitoring or automated measures that impact user experience. The law neither compels nor constrains automated measures, leaving platform practices to self-regulation, contractual terms, or industry technical standards. This regulatory restraint allows for innovation while avoiding prescriptive requirements that might quickly become obsolete.[[11]](#fn11)

**4.2.3. Reporting Mechanisms and Procedures**

While platforms are not mandated to create reporting mechanisms for IP infringements beyond statutory requirements, the procedures detailed in the Code of Practice and sections 88C-E establish clear frameworks for reporting. Notices of alleged infringement must be in prescribed form, authenticated by the complainant, and sent to the designated OSP agent. Notices that fail to meet these criteria are deemed defective and need not be processed.

The statutory framework provides that defective notices cannot be used to establish the OSP’s awareness of infringement, and persons providing false information in notices face both criminal and civil liability. This creates strong incentives for accurate reporting while protecting platforms from frivolous or defective takedown requests.

However, the Code is silent on the timeframe in which OSPs under the “notice and takedown” system must remove or disable access to the allegedly infringing material or activity. Instead, they are asked to do so “as soon as practicable” upon receiving a valid Notice. Such flexibility is in line with the “notice and takedown” systems in other jurisdictions, such as the United States and the European Union. While there is no jurisprudence pertaining to this issue directly in Hong Kong, *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 might provide useful insight on what should be a reasonable time for the OSPs to take actions. In that case, the Hong Kong Court held that the provider of an online discussion forum was not liable for defamatory statements which were removed around 3.5 hours after being notified by the claimant. On the other hand, the provider was held liable for other statements which were removed more than 8 months after being notified by the claimant.

**4.2.4. Remedies and Consequences**

Where an OSP fails to comply with safe harbour requirements, it may face liability for damages or other remedies commensurate with the loss caused by continued infringement. However, as a matter of practice, platforms typically protect themselves through indemnification clauses with customers, seeking reimbursement for losses related to user infringing activities.

**4.2.5. Pre-Removal Requirements and Appeal Mechanisms**

There is no requirement for court orders prior to content removal. However, the established counter-notice system allows users to challenge content removal and seek reinstatement, embedding procedural fairness into the framework. This balance recognizes the need for swift action against infringement while protecting legitimate user interests.

1. **Fundamental Rights and Balancing Interests**
   1. **Constitutional Framework for Rights Protection**

Hong Kong’s fundamental rights framework operates through a complex interaction between the Basic Law and the Hong Kong Bill of Rights Ordinance (BORO). Article 39 of the Basic Law provides that the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong shall remain in force, creating an entrenched constitutional safeguard. The BORO incorporates the ICCPR into domestic law, providing enforceable rights and freedoms for Hong Kong residents.

* 1. **The Double Proportionality Test**

Hong Kong’s approach to balancing competing fundamental rights applies what is known as the “double proportionality test”[[5]](#footnote-5). This four-stage analysis requires that any restriction on non-absolute rights: (1) serve a legitimate aim; (2) have a rational connection between the aim and restriction; (3) be no more than necessary to achieve the legitimate aim; and (4) ensure that benefits of achieving the aim are not disproportionate to the encroachment on the fundamental right.

This test provides a structured framework for courts to balance competing interests, including intellectual property rights, freedom of expression, and procedural fairness. In the platform liability context, this framework would likely apply to assess whether takedown procedures or monitoring requirements appropriately balance IP protection against freedom of expression.

Although no explicit statutory balancing mechanism exists specifically for platform cases, the system’s reliance on notice-and-counter-notice procedures indirectly upholds rights to freedom of expression and procedural justice. The absence of general monitoring duties and the requirement for specific, authenticated notices help protect against over-broad content removal that might chill legitimate speech.

Hong Kong courts have not yet developed extensive jurisprudence on conflicts between IP enforcement and fundamental rights in platform contexts. However, the general constitutional principles governing balancing of rights would likely apply, requiring any platform regulation to meet proportionality standards while respecting both IP rights and expressive freedoms.

1. **Recent Developments and Future Directions**
   1. **Artificial Intelligence and Copyright Reform**

Hong Kong is actively addressing emerging challenges posed by artificial intelligence to copyright law. Following a two-month public consultation from July to September 2024, the government is developing comprehensive reforms to the Copyright Ordinance. The proposed amendments include a new “text and data mining” (TDM) exception covering both conventional data mining and AI model training for commercial and non-commercial purposes[[6]](#footnote-6).

The consultation revealed significant stakeholder divisions, with creative industries generally opposing the TDM exception and the software industry supporting it. Key concerns include protecting copyright holders’ ability to exploit their works while fostering AI development. The proposed framework includes safeguards such as requiring lawful access and allowing copyright owners to “opt out” of the exception

As such, the government’s proposed text and data mining (TDM) exception raises fundamental questions: should AI developers be permitted to use copyrighted works for training generative models, and if so, under what parameters?

Safe harbour provisions are central to this debate. If platforms hosting training datasets are recognised as service providers, they may invoke safe harbour protection when transmitting or storing works used in TDM, provided that lawful access and takedown compliance are preserved. Yet rights holders caution that such use could undermine copyright incentives. The balancing, once again, is best analysed through double proportionality: (1) the legitimate aim is AI innovation and maintaining Hong Kong’s competitiveness as a technology hub; (2) the rational connection lies in permitting limited, lawful access to large datasets; (3) Necessity is satisfied if less restrictive alternatives (e.g., compulsory licensing schemes) are unavailable or impracticable; (4) Proportionality in the strict sense requires that the societal benefits of AI innovation outweigh the incremental loss to copyright holders, mitigated by opt‑out mechanisms.

This reasoning framework ensures that safe harbour expansions in the AI context remain consistent with constitutional principles while respecting international practice. At present, however, the precise way these new TDM provisions will interact with existing safe harbour protections remains unsettled. Further legislative or judicial guidance will be essential to harmonise the statutory framework and ensure legal clarity going forward.

* 1. **International Harmonization and Best Practices**

Hong Kong continues monitoring international developments, including World Intellectual Property Organization research and practices in other major jurisdictions. Recent consultations in the UK on AI and copyright, along with EU Digital Services Act developments, inform Hong Kong’s policy considerations. This international awareness ensures Hong Kong’s framework remains compatible with global best practices while addressing local needs.

The government’s approach emphasizes maintaining Hong Kong’s position as a regional intellectual property trading center and international innovation hub while supporting the development of cultural and creative industries. This multi-faceted strategy recognizes the interconnected nature of IP protection, technological innovation, and economic development.

1. **Comparative Analysis and International Context**
   1. **Relationship to Other Jurisdictions**

Hong Kong’s approach to platform liability demonstrates both convergence with and divergence from international models. The safe harbour framework closely follows US Digital Millennium Copyright Act principles and EU E-Commerce Directive approaches, while the judicial interpretation of joint tortfeasorship reflects common law traditions shared with the UK and Australia.

The *Mary Kay* decision’s reliance on the English *L’Oreal SA v eBay International AG* [2009] RPC 21 precedent illustrates Hong Kong courts’ willingness to draw on comparative jurisprudence while adapting principles to local circumstances. This approach maintains coherence with broader common law development while ensuring Hong Kong law addresses specific regional challenges.

* 1. **Implications for Cross-Border Commerce**

The jurisdictional aspects of platform liability cases have significant implications for international e-commerce. Hong Kong’s court in *Mary Kay* demonstrated skepticism towards forum shopping while maintaining openness to genuine connections with Hong Kong. This balanced approach supports Hong Kong’s role as an international commercial center while preventing abuse of its legal system.

The emphasis on genuine targeting of Hong Kong consumers, rather than mere accessibility of platforms, provides clarity for international businesses operating in the region. This principle helps define the boundaries of Hong Kong court jurisdiction in an increasingly interconnected digital economy.

1. **Conclusion**

Hong Kong’s legal regime for online platform responsibility in intellectual property and unfair competition cases represents a sophisticated balance between competing interests and values. The framework’s strengths lie in its procedural fairness, clear statutory guidance, and judicial restraint in assigning secondary liability without proof of active participation in wrongdoing. The *Mary Kay* decision provides crucial clarity on joint tortfeasorship principles while reinforcing the importance of genuine rather than manufactured connections to Hong Kong jurisdiction.

The current legal freamwork successfully avoids imposing general monitoring duties that could chill innovation and legitimate expression while maintaining meaningful protections for intellectual property rights through targeted notice-and-takedown procedures. The upcoming reforms addressing artificial intelligence and data mining demonstrate Hong Kong’s commitment to maintaining a current and responsive legal framework.

However, as online commerce becomes increasingly sophisticated and AI-driven content moderation more prevalent, continued vigilance will be essential. The challenge lies in preserving the current framework’s balanced approach while adapting to new technologies and business models. Future reforms must ensure that exceptions for legitimate activities like criticism, parody, and fair dealing remain meaningful even as automated systems become more sophisticated.

The Hong Kong model offers valuable lessons for other jurisdictions seeking to balance innovation, intellectual property protection, and fundamental rights in the digital economy. Its emphasis on procedural safeguards, technological neutrality, and principled judicial interpretation provides a foundation for addressing emerging challenges while maintaining legal certainty and respect for competing interests. As the digital landscape continues to evolve, Hong Kong’s adaptive yet principled approach positions it well to remain a leading jurisdiction for resolving complex platform liability issues in the Asia-Pacific region and beyond.

1. Legislative Council: Administration’s paper on Enhancement of the Copyright Ordinance Regarding Protection for Artificial Intelligence Technology Development – Outcomes of Public Consultation and Proposed Way Forward, pp.7-8. [↑](#footnote-ref-1)
2. Legislative Council Brief: Copyright Ordinance (Chapter 528) Copyright (Amendment) Bill 2022 [pp.8-9] [↑](#footnote-ref-2)
3. Copyright Protection in The Digital Environment Code of Practice (published pursuant to section 88J of the Copyright Ordinance (Cap. 528)) (“Code of Practice”) [↑](#footnote-ref-3)
4. Bartholomew, M (2009), Contributory Infringers and Good Samaritans, Akron Intellectual Property Journal, Vol. 3, p. 1. [↑](#footnote-ref-4)
5. Hon Cheung PJ (2019) Conflict of fundamental rights and the double proportionality test, available at <https://www.hkcfa.hk/filemanager/engagement/sc/upload/91/Common%20Law%20Lecture%20(Final%20Version).pdf>. Accessed 20 September 2025. [↑](#footnote-ref-5)
6. Legislative Council Panel on Commerce, Industry, Innovation and Technology Enhancement of the Copyright Ordinance regarding Protection for Artificial Intelligence Technology Development – Outcomes of Public Consultation and Proposed Way Forward. [↑](#footnote-ref-6)