

**For discussion on
17 December 2013**

Legislative Council Panel on Commerce and Industry

**Public Consultation on
Treatment of Parody under the Copyright Regime**

The Government carried out a public consultation exercise from 11 July to 15 November 2013 to explore how our copyright regime should give due regard to present day circumstances and take care of parody as appropriate, to strike a balance between the legitimate interests of copyright owners and users and the general public, and to serve the best interest of Hong Kong. This paper reports the outcome and provides our observations.

PROCESS

2. To publicise the consultation exercise, we have run a dedicated webpage hosting the consultation paper, press releases, FAQs and other materials. We also placed advertisements on the print media, the Internet and on the radio, and gave a number of media interviews.

3. During the consultation, we engaged the general public and stakeholders through different channels and forums and encouraged them to take part in the discussion and express their views. We organised two public forums on 17 August and 22 September. Various engagement sessions targeted at copyright owners and copyright users were held. We also attended events organised by different stakeholders. For details, please refer to **Appendix I**.

4. In addition, we briefed the Legislative Council's (LegCo) Panel on Commerce and Industry at its meeting on 16 July, and attended another meeting on 4 November to listen to views from deputations.

5. Apart from views collected above, we received altogether 2 455 written submissions through the post, email, fax, Home Affairs Bureau's Public Affairs Forum (www.forum.gov.hk) and LegCo.

6. All submissions have been uploaded onto the government's website www.cedb.gov.hk/citb and www.ipd.gov.hk.¹ A summary of views is provided at **Appendix II**.

OVERVIEW

Background

7. In the consultation paper, we have put in context all relevant issues including the efforts to update the copyright regime since 2006, the current legal situation in Hong Kong regarding parody, situations in overseas jurisdictions, arguments for and against parody, and the guiding principles that Hong Kong needs to observe in considering any changes to the current copyright regime, namely –

- (a) a fair balance between protecting the legitimate interests of copyright owners and other public interests, such as reasonable use of copyright works and freedom of expression, should be maintained;
- (b) any criminal exemption or copyright exception to be introduced must be fully compliant with our international obligations such as Article 61 of the Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization (WTO)² and the “three-step test” requirement under Article 13 of TRIPS Agreement³

¹ Observing the rule of confidentiality, we have removed senders' identity at their express request, as well as contact information such as email address where provided.

² Article 61 of the TRIPS Agreement provides that “*Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.*”

³ Article 13 of the TRIPS Agreement provides that “*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.*” To comply with the “three-step test”, the Government must ensure that the exception (a) is confined to “special cases”, (b) does not conflict with a normal exploitation of the work, and (c) does not unreasonably prejudice the legitimate interests of the copyright owner.

respectively; and

- (c) any proposed amendment to the Copyright Ordinance must be sufficiently clear and certain so as to afford a reasonable degree of legal certainty.

We have set out three options for change to invite views.

Summary of views

- 8. See section A of Appendix II.

Our observations

9. We note a significant and voluminous view from users that champions complete freedom of expression and “secondary creations”, with some going to the extreme of calling for a total withdrawal of the exercise as they view the proposed options as restricting civil liberties. Over the consultation process, we have made painstaking efforts to explain the consultation objective and avoid any misunderstanding. Parody which does not constitute copyright infringement under the existing law⁴ will remain lawful in the future. On the contrary, the three options provide different legal basis, including by clarification of the existing law or provision of new exemptions, to make it clear that in appropriate circumstances parodies will not attract criminal, and even civil liabilities. Parodists will enjoy clearer and greater protection under the law.

10. We also note, on the other hand, a strong opinion among many copyright owners that underlines the importance of a robust copyright protection regime that would incentivise creativity and advance our economic interest, the need for an update of the copyright regime in the digital environment without further delay. In addition, many copyright owners recall no past criminal or civil case in Hong Kong against parody and see no need to specifically provide an exemption for “true” parody

⁴ The distribution of parody under any of the following circumstances does not constitute copyright infringement -

- (a) the copyright owner has agreed or acquiesced
- (b) the copyright protection in the underlying work has expired
- (c) only the ideas of the underlying work have been incorporated
- (d) only an insubstantial part of the underlying work has been reproduced
- (e) one of the permitted acts under the existing Copyright Ordinance (such as for the purposes of research, private study, education, criticism, review and news reporting) applies.

which should not substitute the underlying copyright work.

11. While there are rather polarised views expressed in the exercise, there also appears to be a common belief that what one side champions should not hurt the legitimate interests of the other. Parodists and users engaged in “secondary creations” believe that their personal, not-for-profit works should not conflict with the commercial interest of copyright owners; copyright owners believe that their push for legislative efforts to curb online copyright piracy are not targeting daily non-commercial activities of Internet users and indicate their preparedness to change the law to accommodate genuine parody without unintended consequences of unchecked piracy.

12. This common position is reflected in a general agreement with the guiding principles set out in the exercise that underlines the need for striking a fair balance between different interests and complying with the international obligations of Hong Kong. Of course, the difficult question remains as to how to draw a proper line in legislative language.

SCOPE OF SPECIAL TREATMENT

Background

13. The consultation was set out to address an issue that arose during the scrutiny of the Copyright (Amendment) Bill 2011 and to give due regard to the present day circumstances in which members of the public may easily express their views and commentary on current events by altering existing copyright works and disseminate them through the Internet. An important feature of this genre is the inclusion of an element of imitation or incorporation of certain elements of an underlying copyright work, creating comic or critical effects in general.

14. Referencing developments in overseas jurisdictions, the consultation paper incorporates four specific terms, viz. parody, satire, caricature and pastiche, as the subject matter for examining if special copyright treatment is warranted. For the sake of convenience, we use parody as a general reference to cover all the four terms to facilitate the ensuing consultation (a practice that we will continue unless otherwise stated), and look to views as to what term or combination of terms should

go into the legislation if justified, and whether to include statutory definitions (which no overseas jurisdictions have attempted).

Summary of views

15. See section B of Appendix II.

Our observations

16. We have observed that while users generally appreciate that the intended scope for consultation is indeed very broad, there is a clear appeal among many that consideration of special copyright treatment should be much broader. Some believe that parody could not cover many of the “secondary creations” generated by Internet users (e.g. remixes, mash-ups, cut-ups, doujinshi, kuso, translations, adaptations, rewriting lyrics for songs, etc); some go further to suggest that certain common Internet activities today that use copyright works, although not necessarily covered by “secondary creations”, should also be given special treatment (e.g. image capture and sharing for social use, real-time streaming of video game playing, the online posting of private song singing, etc). Many rally their appeal to special treatment around the concept of user generated content (UGC) as they consider this provides the widest coverage. (See paragraph 46 below.)

17. On the other hand, we recognise copyright owners’ general opposition to consideration of matters outside the intended consultation scope, as they believe that the current copyright regime with licensing as the centrepiece together with various statutory exceptions is operating well to deal with these matters and causing no problems in practice in Hong Kong and elsewhere. Many indeed consider parody as the only matter worthy of some special treatment and harbour reservations in extending the coverage to satire, caricature and pastiche. Overall they firmly reject consideration of the idea of UGC in this round of consultation, believing that the concept is vague and ill-defined, the Canadian precedent is bad and non-compliant with the TRIPS Agreement and any special treatment might just inadvertently undermine the very fabric of the copyright regime⁵.

⁵ See section F of Appendix II for summary of views on UGC.

18. During the consultation, we have explained that “secondary creation” is not a term commonly used in copyright jurisprudence and it is difficult to ascertain its actual coverage. For instance, there are views suggesting that “secondary creation” should include translations and adaptations. However, translation and adaptation, both being derivative works, are clearly protected under international copyright treaties and copyright laws in various jurisdictions. In particular, the owner of the copyright in a work has the exclusive right to make a translation or an adaptation of the same. Although there may be original elements in the later work itself, this factor alone may not be adequate for considering special copyright treatment.

19. That said, we do not consider it appropriate to categorically exclude many matters raised by users over the consultation only because they might not have been a particular subject of concern during the bill scrutiny stage in 2011-12, especially given the rapid changes in user behaviours on the web. We will need to see if any genuine issue has been brought up and a way can be found to address it in the current exercise, taking into account the public interest involved. One caveat is that the copyright regime has always been evolving over time to meet the changing needs of society, as evidenced in past developments in overseas jurisdictions and international treaties. It may not be appropriate nor pragmatic to seek to resolve all the outstanding issues in one sweeping exercise.

20. Regarding the need for statutory definitions of the terms of parody, satire, caricature and pastiche if they are to be included in future legislation, we observe that while there have been some earlier views in favour for the sake of certainty, a solid stream of opinion has emerged over consultation that defining the terms may pose significant difficulties and may unnecessarily restrain the court in statutory interpretation to arrive at a fair result balancing different interests.

OPTION 1 – CLARIFICATION OF CRIMINAL LIABILITY

Background

21. Section 118(1) of the Copyright Ordinance provides for a number of offences in relation to the making of and dealing in infringing copies of a copyright work. Offences set out in subsections (1)(a) to (1)(f) target at acts containing a certain commercial element. On the other hand, the offence set out in subsection (1)(g) targets at acts done to such an extent as to affect prejudicially the copyright owner, as it is recognised that acts without any commercial element may still have an adverse impact on copyright owners as acts with commercial elements⁶.

22. In view of the proposed introduction of a communication right, and to allay netizens' concerns regarding the impact of the new criminal liability on the free flow of information across the Internet and to provide greater legal certainty, we proposed in the Copyright (Amendment) Bill 2011 to clarify what amounts to "*such an extent as to affect prejudicially the copyright owners*"⁷. Option 1 reflects the consensus of the Bills Committee in refining the clarification proposal, by underlining in the legislation the consideration of whether the infringing acts have caused "*more than trivial economic prejudice*" to the copyright owners and introducing a non-exhaustive list of relevant factors as guidance to the Court in determining the magnitude of economic prejudice -

⁶ Section 118(1)(g) of Copyright Ordinance (Cap. 528) stipulates that :

*"A person commits an offence if he, without the licence of the copyright owner of a copyright work -
.....
(g) distributes an infringing copy of the work (otherwise than for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works) to such an extent as to affect prejudicially the copyright owner."*

The Copyright (Amendment) Bill 2011 sought to introduce a technology-neutral communication right. The proposed criminal sanction against unauthorised communication of a copyright work to the public in the Bill mirrors the existing offences under section 118(1) of Copyright Ordinance. The proposed section 118(8B) reads:

*"A person commits an offence if the person -
.....
(b) without the licence of the copyright owner of a copyright work, communicates the work to the public (otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward) to such an extent as to affect prejudicially the copyright owner."*

⁷ In both section 118(1)(g) and the proposed section 118(8)(b). See footnote 6.

- (a) the nature of the work, including its commercial value (if any);
- (b) the mode and scale of distribution/communication; and
- (c) whether the infringing copy so distributed/communicated amounts to a substitution for the work.

Summary of Views

23. See section C of Appendix II.

Our observations

24. From our engagements with the Internet users, we observe a general rejection of Option 1 by Internet users as many believe that clarification of criminal liability is not adequate without clear-cut exemption of specific works and with retention of possible civil liability. There is also prevalent discontent about the uncertain meaning of “*more than trivial economic prejudice*”⁸ which would leave the criminal net wide and result in a chilling effect on freedom of expression.

25. On the other hand, a significant portion of copyright owners support Option 1 as sufficient in balancing copyright protection and freedom of expression. They see its benefit in enhancing legal certainty by clarifying the scope of criminal liability, recalling no lack of creation and circulation of parodies on the Internet without any criminal allegation or prosecution all along⁹.

26. That said, it seems neither side has any major problem with one particular factor on the non-exhaustive list of relevant factors (paragraph 22). Users do not believe that their works would amount to a substitution for the underlying copyright works, while owners always emphasise that they are only after piracy that would cause such a result.

⁸ Alleged to be “vague”, “subjective”, “too low”, “unseen in other overseas jurisdictions or international treaties”, etc.

⁹ The Bar Association and Law Society also consider that any risk of litigation against common parodies we see is small under the current regime.

27. We wish to underline one important merit of Option 1, that it is intended to clarify the threshold for criminal enforcement for all subject matters alleged to be infringing copyright, not confined to parody and UGC (however defined). As originally incorporated in the Copyright (Amendment) Bill 2011, it better reflects the policy intent to combat commercial-scale copyright infringement. It can serve an important function of putting beyond doubt that many common Internet activities for private and non-commercial purposes are indeed outside the criminal net, and thus promotes credibility and respectability of the copyright regime.

28. Importantly we also wish to clarify that the three Options proposed in the Consultation Paper are not necessarily mutually exclusive to each other, a point perhaps not brought out over the consultation as fully as it should be. We maintain an open mind towards individual options or a combination of options as they may be able to address different aspects of the problems we face in a complementary manner.

OPTION 2 – CRIMINAL EXEMPTION

Background

29. Another option we identified for possible special copyright treatment is criminal exemption¹⁰, which focuses on two issues, the subject matter for exemption and the qualifying conditions. For consultation purposes, the subject matter is the genres of parody, satire, caricature and pastiche, and the qualifying condition is “*if the distribution does not cause more than trivial economic prejudice to the copyright owner*”. This option was formulated in view of a clear body of opinion expressed during the bill scrutiny in 2011-12 that criminal prosecution is most inappropriate in dealing with parody and any infringement allegation should be best left to civil proceedings if warranted and justified.

¹⁰ From the existing “distribution” and the proposed “communication” offences committed otherwise than for the purpose of or in the course of trade or business which consists of dealing in infringing copies of copyright works. See footnote 6 above.

Summary of Views

30. See section D of Appendix II.

Our observations

31. Users generally welcome a criminal exemption, apparently for the legal certainty and safeguard it should provide. But it is also clear that many do not consider criminal exemption alone as adequate (given the burden of civil litigations), advocate widening the subject matter for exemption to cover all “secondary creations” and even common Internet activities as long as they are not for profit, and reject the qualifying condition “*does not cause more than trivial economic prejudice*” as too vague and too high a threshold to be helpful. Some emphasise the minimal international standards requiring criminal sanction of wilful commercial scale piracy¹¹.

32. On the other hand, views from many copyright owners are divergent. While many consider that a criminal exemption for “true” parody is not strictly necessary¹², a significant number of respondents, in particular those from the publishing industry, are agreeable to a criminal exemption for non-commercial parodies (in the strict sense i.e. those commenting on the original works), but not satires, caricatures and pastiches¹³. There is however a concern that a criminal exemption may inadvertently create a loophole for large-scale piracy. Some even question if a criminal exemption might violate our international obligations.

33. We take the scope of criminal jurisdiction in our copyright regime seriously. Criminal enforcement certainly deters infringement activities but too draconian a measure might well dampen creativity which the copyright regime is designed to promote in the first place. We must be mindful of the right use of scarce public resources to focus on reprehensible behaviour entailing societal harm; unjustified diversion of criminal enforcement efforts hurts not only users and society at large but also copyright owners themselves. The dichotomy of the civil and

¹¹ See footnote 2 above.

¹² See paragraph 10 above.

¹³ See also paragraph 47 below on the proposal of the Hong Kong Copyright Concern Groups.

criminal jurisdictions is a feature in the copyright regime that should give us good room to manoeuvre in striking a proper balance of interests and honouring our international obligations.

34. Notably it has all along been our policy intent not to cast the criminal net too wide to cover the mere provision of hyperlinks, which has indeed been carved out from the communication right proposed in the Copyright (Amendment) Bill 2011¹⁴. Every effort has been made during the bill scrutiny and over the recent consultation to get this message across.

OPTION 3 – FAIR DEALING EXCEPTION

Background

35. Protection of copyright is not absolute. The Copyright Ordinance contains over 60 sections¹⁵ specifying acts which may be done in relation to copyright works notwithstanding the subsistence of copyright, and thus attracting no civil or criminal liability. Option 3 proposes adding to this list of permitted acts a fair dealing for the purpose of parody. It also invites consideration of crafting the exception scope to cover possibly a more specific formulation such as “commentary on/criticism/review of current events” and providing a list of non-exhaustive factors among all the circumstances of the case that the court shall take into account in determining whether a dealing is fair –

- (a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;
- (b) the nature of the work;
- (c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and

¹⁴ The Bill proposed a new section 28A(5) as follows: “A person does not communicate a work to the public if the person does not determine the content of the communication.”

¹⁵ In Division II of Part II.

- (d) the effect of the dealing on the potential market for or value of the work¹⁶.

Summary of views

36. See section E of Appendix II.

Our observations

37. There is solid support for this option among users (as well as online service providers and other respondents) as it is considered the exemption from both civil and criminal liabilities will better safeguard freedom of expression and contribute to overall development of society. But again there is a claim that this option alone is not adequate – see other options below. Some advocate a wider scope of coverage to include “secondary creations” that are transformative in nature or use, or all UGC. However, there are also views that only parody involving social or public interest should be exempted from both civil and criminal liabilities¹⁷.

38. On the other hand, there is limited support for this option among copyright owners as they see that such an exception for parody would unfairly take away their rights to control copyright works and to pursue civil claims against copyright infringement in serious cases. Nevertheless, some indicate no objection if the scope is carefully drafted to cover parody only (or parody concerning political, current or social issues only) and exclude satire, caricature and pastiche.

39. We note the inherent sensitivities of Option 3, as it may exempt the subject matter from both civil and criminal liabilities so long as its dealing with the underlying copyright work is considered fair by the court, and thus to a certain extent limit copyright owners’ control over their copyright

¹⁶ Such a list is provided in the fair dealing provisions for research and private study (section 38) and the fair dealing provisions for giving and receiving instructions (section 41A).

¹⁷ This is shared by the Hong Kong Bar Association which suggests introducing a fair dealing exception for “commenting on current affairs” to strike the correct balance between protecting freedom of expression and the legitimate rights and interests of copyright owners. It considers that an exception for parody and/or satire (irrespective of purpose) may give rise to difficulties of definition and understanding and would have the undesired effect of exempting activities which do not have sufficient public interest justification. On the other hand, the Law Society of Hong Kong supports a fair dealing exception for parody (which should include satire, caricature and pastiche without any further statutory definition). It emphasises that the introduction of any copyright exceptions must strike the balance between competing rights by complying with the three-step test.

works. But from the users' perspective, Option 3 offers greater protection and flexibility. Commercial parodies are not necessarily 'unfair', although some respondents including the Law Society as well as many copyright owners consider that parodies for financial gain should not be allowed to "free ride" and should not be considered fair.

40. In our view, one key feature of a fair dealing exception in the copyright regime is, over an alleged infringement dispute, the requirement on the court to assess whether the dealing is fair in all the circumstances of a case. The statutory inclusion of a non-exhaustive list of relevant factors for assessment would help the court analyse individual cases which usually are very fact sensitive, balance different interests and arrive at a fair result¹⁸.

41. We also note that the reliance on the court to carry out a fairness analysis is a common approach adopted by overseas jurisdictions in crafting a copyright exception. The consultation paper has noted such a course being followed by Australia, Canada and the United Kingdom in the area of parody, and by the United States in applying the fair use doctrine on parody. In dealing with other areas of copyright exceptions (such as for education, libraries and archives and news reporting), there has been a long history among common law jurisdictions (including Australia, Canada and the UK, apart from Hong Kong) to resort to a fairness assessment by the court. There should be a healthy body of overseas jurisprudence that may help users and owners apply a new fair dealing exception with greater certainty and our courts to consider any future dispute.

42. That said, the difficult question remains as to how to draw up the scope of any new fair dealing exception with cogent reasons in support. In particular, the first step of the three-step test confining exceptions to "certain special cases" must be passed before further analysis.

¹⁸ In contrast, a copyright exception may also be crafted to subject it to certain qualifying conditions, the application of which may perhaps carry greater certainty. But in more complicated areas where the proper balance is not that straightforward, it might be difficult to agree upon the conditions at the outset in view of many competing interests, and such an approach might be mechanical and inadvertently lead to unintended and undesirable results. A fairness assessment by the court could have better merits.

OTHER OPTIONS

Background

43. The consultation paper sets out three options, which are not mutually exclusive, to address the issue of parody. We welcome views on these three options and any new ideas.

Summary of views

44. See section F of Appendix II.

Our observations

45. We noted that there are two major new ideas with proposed drafting suggestions coming out from the consultation process¹⁹.

46. The Copyright and Derivative Works Alliance, which is active on the Internet championing “secondary creations”, advocates (in addition to taking on Option 3) introducing a copyright exception for non-profit making UGC or UGC not in the course of trade as to be embodied in a new section 39B of the Copyright Ordinance, principally based on section 29.21 of the Canadian Copyright Act²⁰. In response to a Panel Member’s request, we provide at **Appendix III** an initial assessment of the idea with reference to the Canadian provision and three-step test enshrined in the TRIPS Agreement (footnote 3 above). Main features of the proposal from the Copyright and Derivative Works Alliance as compared with the Canadian provision are also set out in the Appendix.

¹⁹ Apart from these two concrete ideas, some users propose to expand the scope of parody to cover all works related to doujinshi created by interest groups or fans groups that generate a small or trivial income, and some advocate adopting the US fair use approach for our copyright regime, which is an open-ended exception which allows greater flexibility. We will consider the former suggestion and see if any genuine issue has been brought up and a way can be found to address it in the current exercise. Regarding the fair use suggestion, the idea was a subject for public consultation in 2004. We concluded that the fair dealing approach offers more certainty as the permitted acts are clearly set out with appropriate conditions. The fair dealing approach is also commonly found in major common law jurisdictions such as the UK, Canada and Australia. A shift to fair use would represent a fundamental revamp of our copyright regime and must be carefully considered, and is beyond the scope of the current exercise.

²⁰ We understand that the idea actually originates from a proposal by Professor Peter K Yu, who also made a submission on behalf of the Journalism of Media Studies Centre, University of Hong Kong, which contains drafting suggestions along similar lines, among other things. Professor K Yu is Kern Family Chair in Intellectual Property Law, Drake University Law School in the United States.

47. The Hong Kong Copyright Concern Groups representing key stakeholders of the copyright industry in Hong Kong seems to be in favour of introducing a criminal exception for parody (without any fair dealing exception), as to be embodied in a new section 118(2AA) of the Copyright Ordinance, which would focus on whether “*the use of the original copyright work is solely for non-commercial purposes and the parody is not a substitute of the original underlying work*”, and whether “*the use has the potential to cause an unreasonable loss of income to the copyright owner and whether the purpose and character of the unlicensed use is of parody nature.*”

48. Regarding the proposed UGC exception, our main consideration would be pursuant to its possible scope of coverage beyond parody, the perceived problem it seeks to address and the possible consequences of such an exception, intended or unintended. We will also need to consider the serious concerns expressed by copyright owners, especially regarding Internet intermediaries which might, without paying copyright owners for a licence, be so authorised to disseminate UGC (uploaded by users for private and social purposes with no profit motives) on the Internet widely with commercial gain (notably through ads)²¹.

49. Regarding the criminal exemption proposed by copyright owners, we are seeking clarification of the specific legal effect it intends, especially whether it is a clear exemption from criminal liability based on some qualifying conditions or a clarification of the existing threshold of criminal liability based on a number of new factors for the court to consider. We are also interested in understanding more the rationale behind the proposal, notably the exclusion of satire, caricature and pastiche, and how the proposal may provide a pragmatic way forward to address the concerns of many Internet users.

²¹ The distinction between commercial and non-commercial is not that straightforward in this day and age when monetisation of social interactions and the sharing of information among circles of friends, acquaintances, fans and netizens generally is so commonplace on the Internet.

MORAL RIGHTS

Background

50. Under our copyright regime, moral rights allow the authors of literary, dramatic, musical and artistic works, and the directors of films to preserve their relationship with the creation of their works. Our Copyright Ordinance offers protection to three kinds of moral rights, namely (a) the right to be identified as author or director, (b) the right to object to derogatory treatment of a work, and (c) the right not to have a work falsely attributed to him as author or director. The first two rights are recognised by the Berne Convention which is applicable to Hong Kong. Only civil liabilities will be attached to violations of these rights, and to our best knowledge, there is no local court decision on infringement.

Summary of views

51. See section G of Appendix II.

Our observations

52. Among copyright owners who express their view on this subject, all consider that moral rights should be maintained regardless of any special treatment of parody. They believe that such rights encourage creativity and innovation as creators and performers may publish their works without fear that their works or performances will be abused or mutilated after they are made available to the public. Moral rights also offer the most fundamental respect to creators and performers.

53. On the other hand, not many users comment on the subject and the views expressed are divergent. Some support the maintenance of moral rights of directors and original authors. However, there are also views that moral rights need not be retained regardless of any special treatment given to parody. And some ask for a corresponding exception to moral rights of attribution alongside an exception for parody.

54. We note that many overseas countries such as Australia and Canada have maintained moral rights regardless of a copyright exception for parody. The UK Government has also indicated that moral rights would be maintained when they consulted the public on a copyright

exception for parody, caricature and pastiche. We will carefully consider overseas examples and the views collected.

OTHER ISSUES

55. Although parody is the subject of our consultation exercise, some stakeholders have also raised other issues related to package of proposals contained in the Copyright (Amendment) Bill 2011. We would address a couple of more prominent ones in the ensuing paragraphs.

Communication Right

Background

56. At present, the Copyright Ordinance gives copyright owners certain exclusive rights including the right to make a copyright work available to the public on the Internet, to broadcast a work or to include a work in a cable programme. With advances in technology, new modes of electronic transmission have been emerging. The current scope of statutory protection may not be adequate to cope with such rapid changes. Following three rounds of consultations since 2006, we proposed in the Copyright (Amendment) Bill 2011 to introduce a new exclusive right for copyright owners to communicate their works to the public through any mode of electronic transmission, and correspondingly to provide for new offences against unauthorised communication of copyright works in the course of trade or business or to such an extent as to affect prejudicially the copyright owners²².

Summary of views

57. See section H(1) of Appendix II.

Our observations

58. From our engagement with the users, we observe a general concern about possible implications of the proposed communication right and corresponding sanctions (especially criminal sanction) for common

²² See footnote 6 above.

social activities on the Internet involving use of copyright works. One pertinent view is that the current copyright regime harbours some grey area in enforcement over Internet and thus allows parody, “secondary creations” and other UGC to flourish. The introduction of the new communication right will close the enforcement gap and encourage copyright owners to take actions against such common online activities. There must be appropriate relaxation in the copyright regime to maintain the right balance.

59. On the other hand, copyright owners see the introduction of the communication right as the mainstay of the legislative package of the Copyright (Amendment) Bill 2011, which would enable Hong Kong to bring its copyright regime on par with international developments and follow a long line of jurisdictions (including Australia (2001), the UK (2003), Singapore (2005), New Zealand (2008) and Canada (2012)). Without such protection, the copyright industry has been suffering from rampant online piracy and is pulled back from making the right investment to take advantage of the online economy.

60. We have made every effort to explain that maintaining a right balance of different interests is the very purpose of the current consultation exercise which looks at ways to relax the use of copyright works in reasonable circumstances, and to correct any misconception of the proposals (such as the misconceived criminal liability of sharing a hyperlink as discussed in paragraph 34 above). It is important to reiterate that in proposing offence provisions for unauthorised communication of copyright works, we are seeking to adopt the same threshold as used in the existing offence provisions for distributing infringing copies, which already include both physical and electronic copies. Any copyright exceptions (both current ones²³ and any future ones resulting from this exercise where appropriate) will apply in respect of alleged distribution of infringing copies and unauthorised communication of copyright works equally.

²³ As contained in over 60 sections in Division II of Part II of the Copyright Ordinance.

Safe Harbour

Background

61. To provide incentives for OSPs to cooperate with copyright owners in combating online piracy, and to provide sufficient protection for their acts, we proposed in the Copyright (Amendment) Bill 2011 to introduce the safe harbour provision to limit OSPs' liability for copyright infringement occurring on their service platforms provided that they meet certain prescribed conditions, including taking reasonable steps to limit or stop a copyright infringement when being notified.

62. The safe harbour provision will be underpinned by a voluntary Code of Practice which sets out suggested practical guidelines and procedures for OSPs to follow when notified of infringing activities on their network or service platform. An OSP who complies with the Code of Practice will be treated as having met one of the qualifying conditions for the safe harbour, i.e. taking of reasonable steps to limit or stop the copyright infringement as soon as practicable.

Summary of views

63. See section H(2) of Appendix II.

Our observations

64. We observe general support for the safe harbour provisions among OSPs, and some of them including the Internet Professional Association and the Online Service Providers Alliance urge for early introduction so as to protect them from potential civil liability caused by infringing activities on their platforms. Some indicate concerns that compliance with the Code of Practice would incur extra operational costs, or that the notice and takedown system would be abused.

65. On the other hand, some users expressed concerns about possible privacy implications as to whether the personal information of subscribers will be passed to complainants without their consent. Another concern expressed by some users is that the notice and takedown mechanism might be susceptible to abuse that might circumvent any future special copyright treatment for parodies. Some suggest that OSPs should not take down

materials before a court ruling confirming copyright infringement. Further public consultation is requested by some.

66. As a matter of fact, the safe harbour provisions are the result of extensive consultations since 2006. The Government further consulted the public on drawing up the Code of Practice in August 2011 and January 2012. To address similar concerns from OSPs and users during that time and to avoid abuse, we have amended the Code of Practice and included the following key features into the latest version—

- (a) a subscriber may choose to request the OSP not to disclose his personal data when sending a copy of the subscriber's counter notice to the complainant (disclosure of personal information is subject to court scrutiny); and
- (b) both the complainants and subscribers will be required to provide more information to substantiate their infringement claims and counter claims respectively. The complainant must confirm that he is the copyright owner of the copyright work concerned, or is authorised to act on behalf of the copyright owner. A subscriber or a complainant who submits false statements is liable to both civil and criminal sanctions.

67. Some users suggest that the Government should adopt a notice and notice system²⁴ instead of a notice and takedown system. We note that the notice and takedown mechanism remains the prevalent approach adopted by overseas jurisdictions. We believe that the amendments incorporated in the latest version of the Code of Practice should provide a good basis to move forward. We will continue to listen to views from stakeholders and see what we can do further.

²⁴ Under the notice and notice system, OSPs will not be required to take down materials alleged to be infringing. Instead, they will be required to forward complaint notices to those alleged of infringement.

WAY FORWARD

68. We are carefully examining the wide-ranging views collected in detail, and continuing to engage stakeholders to exchange thoughts on how best to consolidate and reconcile ideas and craft legislative proposals that would address pertinent issues brought out over the consultation to serve the best interest of Hong Kong. The guiding principles as identified at the outset would remain the cornerstone of the exercise.

69. Subject to progress of such work, we plan to take a view on the way forward and prepare the necessary amendments in earnest. We also aim to conclude our painstaking efforts started since 2006 to update our copyright regime in the digital environment, taking into account latest views of stakeholders collected in this consultation exercise.

Commerce and Economic Development Bureau
Commerce, Industry and Tourism Branch
December 2013

Public Engagement during the Consultation Period

Events	Date
Events organised by the Government	
1.	Public Forum August 17, 2013
2.	Public Forum September 22, 2013
Events that the Government attended	
1.	Public forum “How Should Hong Kong Copyright Law Handle Parodies and Secondary Creations?” by the Journalism and Media Studies Centre of the University of Hong Kong August 30, 2013
2.	Seminar organised by Internet Professional Association, Online Service Providers Alliance and the International Federation of Creativity and Technology Ltd September 12, 2013
3.	Seminar organised by the Honourable Charles Mok September 14, 2013
4.	Seminar for Composers and Authors Society of Hong Kong Ltd September 16, 2013
5.	Seminar for Hong Kong Arts Administrators Association October 7, 2013
6.	Seminar organised by 小孩子 (creator of secondary works) October 12, 2013
7.	Seminar organised by Internet Society Hong Kong and the Honourable Charles Mok October 31, 2013
8.	Seminar organised by the Honourable MA Fung-kwok November 2, 2013
9.	Seminar organised by the Copyright and Derivative Works Alliance November 3, 2013

Summary Note

During the Consultation period (and shortly thereafter), the Administration received a total of 2 455 written submissions from different stakeholders including individuals, netizen groups, companies, organisations, etc. For ease of reference, their views are summarised under four groupings, namely, (1) Users; (2) Copyright Owners; (3) Online Service Providers (OSPs); and (4) Others.

There are a total of 2 387 submissions from users and netizen groups such as the Copyright and Derivative Works Alliance and a couple of other Facebook groups. Amongst all these submissions, 2 125 are originated or generated from a number of online templates¹.

There are 43 submissions from copyright owners' organisations and companies, representing a wide spectrum of creative industries, including music, film and video, comics and animation, multimedia services, licensing bodies, publishers associations, composers and authors society, international motion picture association, and Hong Kong Copyright Concern Group.

As to the "OSPs", there are seven submissions from various associations and alliances such as the Hong Kong Internet Service Providers Association, Internet Professional Association, Online Service Providers Alliance, Asia Internet Coalition (which was formed by major search engines and social media platforms such as Google, Yahoo, Facebook, LinkedIn, eBay, and Salesforce) and Hong Kong In-media.

18 submissions are put under the "Others" grouping, the stakeholders of which include professional bodies (such as the Hong Kong Bar Association, the Law Society of Hong Kong, and the Institute of Hong Kong Trade Mark Practitioners), academics, political parties and non-government organisations (such as Amnesty International).

¹ See e.g. <http://slot.miario.com/machines/74629>

Public Consultation on Treatment of Parody under the Copyright Regime
Summary of Views Received

A. Overview		
	Organisations / Individuals	Views / Concerns
A.1	Copyright owners	<ul style="list-style-type: none"> ● There was a general consensus on the need to protect copyright to provide incentive for creation. Many respondents advocated a speedy resumption of the Copyright (Amendments) Bill 2011 (“the Bill”) for updating the Copyright Ordinance. ● A majority of respondents emphasised that any proposed change to the law to cater for parody (or related works) should be in full compliance with our international obligations, such as Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (“TRIPS Agreement”) as well as the “three-step test” set out in both the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) and the TRIPS Agreement. ● Most respondents believed that there was insufficient evidence to justify or necessitate any special treatment for parody to strike a balance between copyright protection and freedom of expression. ● Some respondents were concerned that a parody exception might result in possible abuses and involve practical problems in its implementation. For instance, it may cause confusion or uncertainty as to what is and what is not a parody, weaken the protection of moral right and violate Hong Kong’s international obligations. ● Some respondents submitted that it would be a mistake to contemplate any sort of blanket exemption

A. Overview		
		<p>from liability for "parody", "satire", "caricature" or "pastiche".</p> <ul style="list-style-type: none"> ● Most respondents noted that the predominant concern of parodists was that they might be prosecuted by the Government to suppress political dissents and suggested that efforts should be focused on removing such fear. Many pointed out that parodists had never been sued or prosecuted in Hong Kong which illustrated that the fear of parodists was unfounded. ● Many respondents suggested that the existing copyright regime had provided adequate room for parody, such as through the provision of numerous copyright exceptions in the Copyright Ordinance and the operation of various licensing schemes. ● Some respondents strongly disagreed that copyright impeded freedom of expression, in particular with respect to the derivative work/adaptation right and argued that on the contrary, copyright was compatible with free speech principles and was in fact the "engine of free expression". ● Many respondents from the publishing industry agreed that parody contributed to a free society and plays a part in enabling continuing evolution of culture. Some respondents also commented that parody was a way of expression and a good means of learning. ● Some respondents opined that it was a matter of basic respect that creators should be consulted before their works are taken for parody use. ● Amongst the options, providing a criminal exemption to parody (without covering satire, caricature and pastiche) appeared to be the most popular option followed by Option 1. Some respondents supported a variant of Option 3. ● None of the respondents supported an exception for user-generated content ("UGC").
A.2	Users	<p><i>General comments</i></p> <ul style="list-style-type: none"> ● There were views opposing all of the proposals in the Consultation Paper and calling for an extension, postponement, abandonment or withdrawal of the Consultation or the Bill. Some respondents expressed negative sentiment about the Government Bill and named the Bill as "Internet Article 23".

A. Overview

- Many considered that this was not a suitable time to introduce the Bill nor was it a subject matter of urgency. They cited the lack of universal suffrage as a reason.
- There were also calls for the maintenance of the status quo. Some respondents considered that there was no need to amend the current laws to cater for parodies or address any loss caused to the copyright owners as the current laws had already provided sufficient protection to copyright owners.
- Some respondents considered that the Consultation remained ambiguous in respect of the definition, scope and applicability of the options and the proposed exemptions. One respondent considered that the three options were leniently drafted to conceal the danger that laid within.
- Some respondents submitted there should be no restriction to secondary creation or creativity, including the freedom to share. Activities on the Internet should not be regulated. Some respondents noted that no other countries had imposed restrictions on parody and, instead, some countries had provided an exemption for parodies.
- Some respondents regarded the Bill as an attempt to criminalise secondary creation, which was unwarranted when civil remedies were sufficient to compensate copyright owners, and that no new criminal or civil liabilities should be introduced for secondary creation.
- Some considered that none of the options could adequately protect secondary creation for personal use from criminal sanctions, which was intended to tackle large and commercial scale piracy. The burden of proof should not be shifted to the defendants.
- Some respondents were concerned that the Government would take legal action against the parodists without the consent or complaint from the copyright owners, resulting in white terror. If copyright owners considered themselves aggrieved by secondary creation, they should be the ones to enforce their rights in courts. There were concerns as to how the enforcement authority would exercise its power against parodists.
- Some respondents noted that copyright laws were meant to protect the original authors to ensure the sustainability of creative industry. They considered that any uses of copyright work not causing harm to the authors should be exempted from liabilities.
- Some respondents considered that neither civil nor criminal liabilities should be exempted if such

A. Overview

work is used for commercial purposes. On the other hand, some respondents considered that an allowance should be given to parodists to receive a small income from their works and the level of total profit should be used as a benchmark to assess its commerciality.

- There was a suggestion that copyright laws only protected copyright owners and were no longer able to protect the authors and therefore should be abolished.
- Some respondents suggested that the Government should clarify the loopholes of the current laws, for example, the difficulty in preventing piracy committed through certain new modes of communication and explain that the Government would not by-pass copyright owners in criminal prosecution. One respondent observed that the general perception towards the Bill was negative and showed certain misunderstandings in the scope and effect of the amendments and considered that any effort to re-introduce the Bill should come with strong publicity.

Restriction of freedom of speech, expression and creativity

- Some respondents commented that the protection of freedom of speech, expression and creativity conferred by the Basic Law as well as international treaties on human rights should be the guiding principles in formulating copyright policy and parody exception. These rights were core values worth protecting over economic benefits and should only be subject to reasonable restrictions. The three options were considered by some respondents as ineffective in protecting such freedom.
- Some respondents considered that parodies or secondary creation represented major and effective tools for citizens to voice out their dissatisfaction against the Government. While the Bill might further strengthen protection to copyright owners, there were concerns that the Bill (and some consider the current Copyright Ordinance too) might potentially threaten the freedom of speech, expression and creativity, and be used as a means to suppress dissenting voices. Parodists should not be asked to impose self-censorship on their works. The remedy for “derogatory treatment” was also perceived as a means to restrict freedom of expression.
- There were calls for a blanket protection of rights to secondary creation, for example, in the form of full exemption of civil and criminal liabilities, or for personal, non-commercial or non-defamatory use of copyright work, considering it of paramount importance in leading to true freedom of speech, expression and creativity. Any civil or criminal liabilities would scare off parodists from

A. Overview

continuing their works. Some described that secondary creation only survived in the gaps of the existing law, which would eventually be filtered out by the Bill.

- Some respondents thought that, while most Western countries adhered to the “international obligations” on copyright, their governments did a better job in protecting human rights. It was also suggested that any selective adherence to international obligations as the Government thought fit was unfair.
- Some considered that copyright was not merely economic or commercial in nature. Its formulation should take into account the rights of users, and had cultural, arts and social perspectives.

Values of secondary creation

- Some respondents advocated secondary creation and pointed out that different forms of secondary creation had long existed and had been recognised as art forms throughout the history, such as poetry and appropriation art. Learning and imitating past ideas were indispensable steps in developing artistic ability and creativity. Some respondents considered parodies as new works which derived from the existing works but with an apparent intention to attribute, pay tribute and transform the original work. There was a view that, upon transformation, the secondary creation targeted at a different market from the original work and should be exempted from both criminal and civil liabilities even if the uses were commercial, as long as it did not substitute the original work.
- In addition to their political roles, some respondents also considered works of secondary creation as products of creativity and a part of local culture. The comical effect also brought entertainment to the public. They should not be unreasonably inhibited.
- Some respondents commented that cases of actual loss caused by secondary creation were rare. One respondent noted that there had all along been a reasonable balance between parodists and copyright owners and they were at peace with each other, and considered that if this balance was disturbed by the Bill, there would be an adverse effect on the creative industry.
- Instead of blaming secondary creation as a cause to the dwindling creative industry, some respondents believed that it actually helped nurture talents for the industry. The “damage” of secondary creation had been exaggerated, while the benefits they brought to the original work and the contribution of parodists had been neglected. One respondent also noted that any synergy

A. Overview		
		<p>resulting from secondary creation was lost if all participants were required to obtain licences and consent from the copyright owners.</p> <ul style="list-style-type: none"> ● There were views that secondary creation did not necessarily bring harm to copyright owners but promoted their works by drawing public's attention to the original works. Parodists did not have an intention to generate profit from their works nor disrespect the copyright of the original author. One respondent noted that works of secondary creation and copyright works are in principle not in conflict with each other. Another commented that secondary creation was fundamentally different from piracy and, in fact, it was a form of recognition for the underlying work to be selected as the subject of secondary creation. ● Some considered that the protection of secondary creation among members of the public was not in conflict with international obligations. Some respondents appealed to the international trend in encouraging the use of secondary creation to enhance the popularity of the original work and considered that the Government should adopt an encouraging attitude towards secondary creation. Some respondents suggested the use of creative commons licence as a solution to copyright disputes. ● One respondent commented that caricature and pastiche should be exempted not because they were part of parodies, but because they were recognised as art forms. ● On the other hand, some respondents held the contrary view that the trend in secondary creation is exasperating as it departs from attribution to apparent copying, which was detrimental to the original authors. The public should be encouraged to create but not merely imitate. ● One respondent submitted that works of secondary creation might severely harm the reputation of the targeted person. This should not be allowed even if secondary creation was exempted. However, another respondent commented that such damage in reputation should not be dealt with by the laws of copyright, but the laws of defamation.
A.3	Online service providers	<ul style="list-style-type: none"> ● In general, the respondents agreed on the need to protect the interests of copyright owners. In particular, there was a general consensus that large-scale commercial piracy should be severely punished. ● Some respondents considered it important to adopt an approach that would promote / safeguard

A. Overview

creativity and freedom of expression / speech for both entertainment and commentary purposes and cater for technological developments in the digital era.

- One of the respondents submitted that apart from the economic aspects, there were also social and cultural dimensions to copyright that are recognised and safeguarded internationally. One should take into account such dimensions in considering amendments to the Copyright Ordinance.
- One of the respondents acknowledged that parodies were not new to our society. However, technological advances had made it easier for people to express views and comments on current events by altering existing works and disseminating them online.
- One of the respondents submitted that a derivative work based on an existing work that was relevant and appropriate could be a useful tool to express the public's opinion on social issues. Restrictions on the same would result in loss to the society.
- One of the respondents noted that a parody exception would support free flow of information and further bolster Hong Kong's position as a key place to do business. At the same time, a healthy environment for entertainment and commentary would be cultivated.
- Some of the respondents considered it important to adopt an approach that would maximize the room for creation of parodies / secondary creations and lower the risks faced by their authors.
- One of the respondents noted that the options did not offer adequate protection to those involved in secondary creation.
- One of the respondents disagreed that a parody exception created uncertainty and increased opportunities for abuse by blurring the line between parody and outright copyright infringement. Nor was there any support for the notion that the exception would adversely affect copyright owners' revenues from licensing parodies, lower their return on investment and thereby dampen their creativity.
- One of the respondents submitted that the relevant provisions should be clear and easily understood to avoid confusion among the public, which might in turn have an adverse effect on creativity.

A. Overview

A.4	Others	<ul style="list-style-type: none">● Many respondents commented that there was a need to strike a right balance between competing rights including copyright protection and freedom of expression and any proposed changes must comply with Hong Kong’s international obligations including the “three-step test”.● Some respondents opined that the principles of human rights in the Universal Declaration of Human Rights ratified by the General Assembly of the United Nations should be regarded as of paramount importance in considering amendments to the copyright laws. Artistic and creative expression should be allowed to flourish in an atmosphere free of persecution and parody should not be restrained. In light of these principles, they were of the view that the current legislation already gave adequate and reasonable protection in any infringement of copyright.● One respondent² suggested that the existing copyright law was satisfactory and it was neither necessary nor urgent to create an exception for parody. Further, it opined that the protection of free speech was almost always not affected by copyright protection as copyright only protected the expression of ideas but not ideas themselves. It highlighted that a copyright exception for parody would only be a defence to copyright infringement and had no effect upon other areas of laws such as defamation or criminal incitement.● One respondent commented that there was a need to amend Hong Kong’s copyright law as it was outdated and there was a need to provide better protection to copyright owners and to maintain Hong Kong’s competitiveness in the aspect of creative technological developments. It opined that as there were cases in the US where parodies involving commercial elements might cause economic loss to copyright owners, the issue of parody should be handled with care.● One respondent commented that the present copyright regime favoured copyright owners than users and consumers and it was difficult for users to identify the copyright owners and obtain licences to conduct activities such as secondary creation. It was suggested that social and cultural issues should also be taken into account in assessing the overall social benefit when amending the Copyright Ordinance and that only large scale, organised and commercial copyright piracy instead of secondary creation should be prosecuted.
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² The Law Society of Hong Kong

A. Overview

- One respondent commented that none of the three options alone could adequately address the needs, interests and concerns of internet users. It was submitted that a global trend had emerged towards providing more access to copyright works and introducing more limitations and exceptions and countries around the world no longer subscribe to the view that stronger intellectual property protection would always be better regardless of the country's internal needs, interests, conditions and priorities.
- One respondent commented that copyright exceptions promoted creativity and should not be viewed as “evil” by collecting societies and to a certain extent, they also benefited from a regime with more relaxed copyright protection.
- One respondent supported all three options to be incorporated into the Copyright Ordinance on the basis that they add legal certainty to what was currently a grey area in law, which was particularly important for developers of online content and online users who worked collaboratively to create works or users of 3D printing or additive manufacturing technology who might create works that could fall under the ambit of “parody”.

B. Scope of special treatment		
	Organisations / Individuals	Views / Concerns
B.1	Copyright owners	<ul style="list-style-type: none"> ● Some respondents commented that the scope of “parody” (including “satire”, “caricature” and “pastiche”) was so broad that would overlap with the normal licensing activities, including copying, adaptation and synchronisation. Some respondents believed that any special treatment for parody should be limited to parodies which comment on the underlying work. ● One respondent submitted that there were important distinctions between terms such as parody, pastiche, satire and caricature, which needed to be taken into account when considering the impact on copyright owners' interests, those terms should not be used interchangeably for the purposes of this Consultation. ● Some respondents commented that the concept of “secondary creation” should not mingle with the issue of parody.
B.2	Users	<ul style="list-style-type: none"> ● While some respondents agreed that the scope should cover parody, satire, caricature and pastiche, others considered that it did not cover all works and carriers of secondary creation. Some respondents noted that it did not reflect the mainstream view in the discussion of the Bill. Another considered that defining the terms on the basis of comical and political intention would unfairly rule out many other forms of “serious” secondary creations. It was considered that confining the Consultation to only the four types of secondary creation reflected that (a) the Government did not recognise the values of creativity in secondary creation; and (b) it was a step to pigeonhole future cases for easy criminal sanction. ● There were also calls for exemptions on specific activities: <ul style="list-style-type: none"> - translation; - adaptation ;

B. Scope of special treatment

- sharing of secondary creation;
- filling in alternate lyrics for a piece of music;
- Vocaloid;
- real-time streaming of video game playing;
- online posting of private song singing;
- capturing TV/Movie frames and captioning movies; and
- doujinshi.

Definitions

- Some respondents disagreed with the Government’s view that the term “secondary creation” “is not a term commonly used in copyright jurisprudence” and “may blur the line between infringing and non-infringing works, create uncertainty and increase opportunities for abuse”. They commented that the Government was disconnected with the academia, and note that the term was a professional terminology clearly defined in the academia.
- Some respondents agreed that no statutory definitions should be provided for the terms. Interpretation should be left to the court with reference to decisions of other common law jurisdictions. Attempting to define the terms might limit the scope of secondary creation, which was well understood in society and clearly distinguishable from piracy. It was also suggested that setting definitions for artistic concepts were infeasible. On the contrary, some respondents considered that a clear definition should be provided.
- Some respondents considered that definitions of the “parodies” remained unclear under this Consultation, the public might fall into the trap of uncertain legal consequences and the room for suppressing dissenting voices was enlarged.
- Some respondents took the view that it was impractical to ask parodists to evaluate every time beforehand if their secondary creation fell into exempted categories according to the definitions

B. Scope of special treatment		
		<p>and/or qualifying conditions.</p> <ul style="list-style-type: none"> ● One respondent considered that categorising “pastiche” as “parodies” would blur the line of copying.
B.3	Online service providers	<ul style="list-style-type: none"> ● Some of the respondents considered that the relevant provisions should expressly refer to parody, satire, caricature and pastiche to minimise uncertainty as to whether they were covered by the copyright exception. ● Some of the respondents submitted that it was not necessary or possible to introduce legal definitions for parody, satire, caricature and pastiche, especially in view of the frequent changes in technology and nature of these kinds of works. ● One of the respondents commented that in the majority of cases, it should be easy to differentiate parody or related works from outright infringements. ● One of the respondents noted that the general public was concerned with political prosecution under the guise of copyright infringement. Hence the Government should focus on providing special treatment to satire (in particular political satire). ● One of the respondents noted that over 1,000 netizens had expressed their views on the Consultation on hkgolden.com. In particular, they generally considered that a fair dealing exception should be granted in relation to derivative works involving social or public interest (e.g. commentary on Government policies, officials, public figures etc.).
B.4	Others	<ul style="list-style-type: none"> ● Most of the respondents³ were of the view that the scope of the protection should include parody, satire, caricature and pastiche. ● A majority of the respondents⁴ were of the view that it was not necessary to provide statutory definitions to terms such as “parody”, “satire”, “caricature” and “pastiche” which was the common

³ Including the Law Society of Hong Kong

⁴ Including the Amnesty International (Hong Kong), the Law Society of Hong Kong and the Journalism and Media Studies Centre of the University of Hong Kong

B. Scope of special treatment

practice in other jurisdictions and definitions might turn out restricting the scope of protection. One of them suggested that Hong Kong might consider providing examples of parody in the legislation for reference and leave to the Court's discretion to determine on a case-by-case basis.

- While some respondents were of the view that the protection should not be restricted to for the purpose of commenting on/criticising/reviewing of current affairs, social economic or political issues or a certain class or types of works only, one respondent⁵ expressed its preference for introducing a fair dealing exception for “commenting on current affairs” instead of parody, satire, caricature and/or pastiche as it might be difficult to define or understand the terms “parody”, “satire”, “caricature” and “pastiche”, and the types of use of copyright works contemplated by the Government in the Consultation Paper might not actually fall within the definitions of the same. It also submitted that there was no sufficient public interest justification to create an exception specifically for parody and/or satire (irrespective of purpose).
- One respondent suggested that the exemption should apply to parody and satire but further consideration should be given to “pastiche” which might be relevant to UGC, derivative artworks and “artistic works” used in a commercial context.
- One respondent suggested that overseas scholars should be invited to provide an independent and objective analysis on how to define “parody”.
- One respondent commented that terms such as “parody”, “more than trivial economic prejudice”, “fair dealing”, etc. should be given a clearer definition.
- One respondent commented that the issue of “parody” and “secondary creation” should be dealt with separately since the definition of “secondary creation” was comparatively vague and might involve adaptation, translation, etc. which were legal rights owned by copyright owners.

⁵ The Hong Kong Bar Association

C. Option 1 – Clarification of criminal liability		
	Organisations / Individuals	Views / Concerns
C.1	Copyright owners	<ul style="list-style-type: none"> • This was a fairly popular option among the respondents and many respondents including the Copyright Concern Group supported this option. No respondent opposed this option. • Some respondents considered that this proposal was the best option as it fulfilled the requirements of international conventions and provided parodists with greater room for creation as well as protecting the legitimate interests of copyright owners. • Those who supported this option commented that the proposal clarified the scope of criminal liability and provided legal certainty, which might alleviate public concerns about criminal liability for non-commercial dissemination of parody works. • Some respondents supported introducing relevant factors for the court to determine the magnitude of economic prejudice or what acts constituted “more than trivial” economic prejudice and clarify the existing provisions on criminal offences for “prejudicial distribution” and the proposed “prejudicial communication”.
C.2	Users	<ul style="list-style-type: none"> • Some respondents considered the wording “whether more than trivial economic prejudice is caused to the copyright owner” ambiguous in its scope or definition, subjective and unseen in other jurisdictions or international treaties. Various respondents considered that this threshold leaned in favour of the copyright owners and was too low or too strict. It was incapable of protecting parodists and would increase the workload of the court without offering any certainty to copyright owners. One respondent noted that it failed to distinguish acts of mere copyright infringement from piracy on a commercial scale. On the other hand, one respondent took the view that there should be criminal liability if the secondary creation had caused economic damage of any degree. • Some respondents considered that a clarification of the existing laws did not specify what types of works were exempted and did not confer sufficient protection to parodists. The threshold of

C. Option 1 – Clarification of criminal liability

		<p>criminal and civil liabilities was in fact unchanged. Some perceived this option as a replay of the Bill. The pressure of civil litigation, or merely its threat, was dire enough to cause an effect of self-censorship and stifle secondary creation. Some further submitted that once criminal liability was established, the chance of success in corresponding civil action would be very high.</p> <ul style="list-style-type: none"> ● Some respondents considered that this option provided a channel for copyright owners to file complaints to the Customs and Excise Department (C&ED), asking the C&ED to take action on behalf of them which encouraged wasting of public resources. ● Some considered that there was a need to further define or quantify how much was “more than trivial”. The current test was uncertain as courts might take into account various factors in determining “more than trivial economic prejudice”. Various respondents suggested adopting the term “commercial scale” as used in Article 61 of TRIPS Agreement, “substantial economic damage” or “significant loss” instead. If the Government opted for this option, “communication” should not replace “distribution”. ● Some respondent advocated the deletion of the proposed sections 118(8B) and 118(8C). ● One respondent stated that this option was detrimental to the creative industry. Another respondent considered that the law should clearly stipulate that there would be no criminal liability if the respective markets of the parody work and the original work did not overlap. ● One respondent noted that a clarification of criminal liabilities was not necessary, which was there to tackle piracy (rather than parody) in the first place. Another respondent suggested that a mere clarification gave no confidence to the public. One respondent noted that whether the work eventually amounted to a substitution of the original work was usually out of the hand of the parodists.
C.3	Online service providers	<ul style="list-style-type: none"> ● Some respondents considered that criminal laws should not apply to parodies / derivative works / secondary creations. They should be limited to large scale, intentional, commercial instances of “outright copyright infringement”.

C. Option 1 – Clarification of criminal liability		
		<ul style="list-style-type: none"> ● Some respondents noted that the results of a survey on hkgolden.com revealed that this option was the least preferred one among the three options set out in the Consultation Paper. ● One of the respondents noted that there are parodies that incorporate portions of previous copyrighted works in transformative, creative ways that do not harm the economic interests of the original, and provide new cultural or social insights. This option (i.e. remaining the status quo) was not the most desirable, as some parodies might be considered infringing and subject to possible criminal prosecution unless they fell within existing exceptions. ● One of the respondents opposed this option as it might cause anxiety among users, lead to self-censorship and adversely affect the freedom of creation and expression. ● One of the respondents noted that over 1,000 netizens had expressed their views on the Consultation on hkgolden.com. In particular, they generally considered that criminal liability should be determined by the initial cause of the act in question (e.g. whether it involves commercial activity) instead of the consequences of economic loss.
C.4	Others	<ul style="list-style-type: none"> ● Some respondents supported the formulation of this option as outlined in the Consultation Paper. ● Some respondents were of the view that the “more than trivial economic prejudice” threshold was not comprehensive as it only considered the economic implications of a parody work instead of whether the work was for a commercial purpose or not and the extent of the threshold was not clear and would cause uncertainties. Some respondents suggested that additional factors, such as the motive and use of the creation, the extent of modification and/ or modes of distribution should also be taken into account. One respondent⁶ commented that the word “substantial” should be used instead of “more than trivial” economic prejudice to provide an important reminder that section 118 was enacted to combat large-scale copyright piracy. ● One respondent submitted that although this option was not the best to solve the parody issue, the proposed “more than trivial” economic prejudice test could provide guidance to other

⁶ The Journalism and Media Studies Centre of the University of Hong Kong

C. Option 1 – Clarification of criminal liability

non-commercial, small-scale distribution cases.

- Some respondents opposed this option as they were of the view that the threshold of “more than trivial economic prejudice” for attracting criminal liability was too low and this option did not provide an overall exemption for civil and criminal liability in relation to parody and secondary creation. Some respondents were of the view that this threshold would lead to self-censorship by users and would affect the freedom of creation and expression.
- One respondent commented that under this option, enforcement agencies would have the right to conduct criminal investigations before seeking evidence and support from copyright owners, which might lead to selective prosecution and affect political discussions in public.

D. Option 2 – Criminal exemption		
	Organisations / Individuals	Views / Concerns
D.1	Copyright owners	<ul style="list-style-type: none"> • Many respondents from the publishing industry supported this option. Many respondents commented that as the perceived harm was the danger of Government’s repression over political parody, the introduction of a criminal exemption for parody was the least disruptive option. • Most of the supporters considered that the exemption should be for parody only without extending to satire, caricature and pastiche and commented that extending the meaning of “parody” to cover acts of satire, caricature and pastiche would likely have the effect of unnecessarily broadening the exemption beyond the special case. • While some respondents supported the wording/formulation proposed in the Consultation Paper, many respondents⁷ suggested that the wording of the formulation should be revised to focus on the parody itself rather than the distributor or communicator by replacing the words "...distribution of an infringing copy of a work for the purpose of parody" with "...distribution of an infringing copy of a work MADE for the purpose of parody". They also suggested that the exemption should be clearly defined and narrowly tailored to adequately protect against unfair use such as those uses which caused more than trivial economic prejudice or damage to the reputation of original works. • Many respondents suggested that the courts should be given a reasonable degree of discretion in determining whether the distribution of parody should be exempted from criminal liability by evaluating all relevant factors and circumstances of the case. • Some respondents suggested that the parody must be for non-commercial purposes. One respondent specifically mentioned that “monetisation” of videos on online platforms should be considered as commercial exploitation and not to be covered by any exemption.

⁷ Including Hong Kong and International Publishers' Alliance

D. Option 2 – Criminal exemption

- Some respondents from the music industry did not support this option.
- Some respondents considered that no criminal exemption should be granted to parodies as the existing Copyright Ordinance had provided some exceptions or permitted acts and a true parody which complied with the “three-step test” would rarely substitute the original work and would not attract criminal liability. One respondent commented that criminal sanction of our present Copyright Ordinance dealt with commercial dealing of infringing copies of copyrighted works and was legally impossible to target against people who used copyrighted materials within the ambit of fair dealing such as education or even parody as long as it satisfied Schweppes test.
- Some respondents were of the view that the proposed exemption may not ease parodists’ worries which predominantly stem from the fear that the Government can prosecute them without the authorization of copyright owners and suggested that the Government should focus on this point and clarify the misconception.
- One respondent submitted that although chances are rare for criminal prosecution to be brought against copyright infringement on the ground of parody, there is no reason why criminal remedies be singled out if a parody were to supplant the legitimate market of a work. It was argued that criminal exemption for parody will swipe the fundamental requirement of dealing of a work to be fair, which is likely to fail the “three-step” test as it is too wide in scope and does not require the dealing of the work to be fair.
- One respondent was of the view that should this option be pursued, the Government was reminded that it must consider (a) what are covered by the exemption; (b) should it cover infringing copy communicated for the purpose of “parody” etc. or a combination of these terms; and (c) what should be the qualifying conditions for the exemption.
- One respondent submitted that there was nothing inherent about parody alone that should justify a specific criminal exemption and argued that a criminal exemption for parody would likely fail the “three-step test”.
- One respondent considered that the proposed exemption would cause numerous arguments on how parody should be defined, how the issues of moral rights should be resolved, how trivial economic prejudice was to be considered and how copyright ownership in respect of the parody should be

D. Option 2 – Criminal exemption		
		<p>determined.</p> <ul style="list-style-type: none"> ● One respondent noted that some neighbouring Asian countries had introduced the right of communication many years ago without granting a parody exemption.
D.2	Users	<ul style="list-style-type: none"> ● While acknowledging and agreeing that there should be an exemption of criminal liabilities, some respondents worried that there continued to be civil liabilities. In view of the pressure and costs arising from legal proceedings or the threats alone, the presence of civil liabilities was damaging to freedom of speech and expression. On the other hand, whilst similarly considering that secondary creation should be exempted from criminal liabilities, some respondents stated that copyright owners or the original authors were entitled to pursue loss caused to them through civil claims. ● By applying the same wording “more than trivial economic prejudice” as in Option 1, some respondents considered this option unclear, uncertain and unadvisable. There was a view that the situation might be even worse than that under Option 1 given that the factors for the court to determine “whether any distribution/communication of the work to the public is made to an extent as to affect prejudicially the copyright owner” and “whether more than trivial economic prejudice is caused” did not appear in this option. ● Some respondents thought that the threshold to criminal liabilities of “prejudicial distribution” was unchanged under this option. The court continued to consider factors such as whether the loss was “more than trivial economic prejudice”. ● Some considered that the conditions for exemption were too stringent and the exemption did not cover civil liabilities. Although there had yet been any civil case against parodists, some respondents attributed this fact to the uncertainty of wording in the current legislation (such as the definition of “distribution”). When such uncertainty was removed by the Bill, there was a real chance that copyright owners would commence legal action against parodists. ● Some respondents considered that the criminal exemption should cover all non-commercial or non-profitable acts of secondary creation with sufficient acknowledgement. One respondent noted that, in view of the freedom of speech and expression, secondary creation should not be considered

D. Option 2 – Criminal exemption		
		<p>as a criminal act even if they harmed the economic rights of the copyright owners.</p> <ul style="list-style-type: none"> ● Some respondents perceived this option to be in favour of copyright owners. On the other hand, another noted that the existing copyright law was capable of handling disputes of secondary creation. Exploring the scope of the criminal exemption would only complicate the matter and create new loopholes. ● One respondent stated that one would attract criminal liability only by reason of economic loss caused to copyright owners due to the overlapping of the market of the original work and its substitution effect.
D.3	Online service providers	<ul style="list-style-type: none"> ● Some respondents considered that criminal laws should not apply to parodies / derivative works / secondary creations. They should be limited to large scale, intentional, commercial instances of “outright copyright infringement”. ● Some respondents noted that the results of a survey on hkgolden.com revealed that while the netizens did not consider any of the three options set out in the Consultation Paper to be ideal, this option was the most favourable one among such options. ● One of the respondents noted that this option was more favourable than Option 1 but opposed it nevertheless as it left room for abuse by way of civil claims. This could lead to monopolies and adversely affect freedom of creation and expression. ● One of the respondents noted that over 1,000 netizens have expressed their views on the Consultation on hkgolden.com. In particular, they generally consider that criminal liability should be determined by the initial cause of the act in question (e.g. whether it involved commercial activity) instead of the consequences of economic loss. ● One of the respondents considered that none of the proposed options was the most ideal. To address the controversial issues that the general public was concerned with (i.e. political prosecution under the disguise of copyright infringement), it was proposed that an exemption for satire, and in particular, satire that concerned “political and public figures” or that was for non-commercial

D. Option 2 – Criminal exemption		
		purpose should be introduced.
D.4	Others	<ul style="list-style-type: none"> ● Some respondents supported this option and they were of the view that the criminal exemption should cover all subject matters (e.g. political and social situations, parody on individuals or groups, etc.) without prejudicing the principle of fair balance between the legitimate interests of copyright owners and other public interests. ● Some respondents opposed this option. Many of them were of the view that only exempting criminal liability was not sufficient and suggested that civil liability should also be exempted. ● One respondent commented that only exempting criminal liability might lead to copyright owners abusing the civil litigation process and create a monopoly by restricting distribution of works and hence affecting freedom of creation and expression. ● One respondent commented that adopting this option would require introducing further conditions and providing statutory definitions to “parody” and “satire”. As it would be difficult to reach a public consensus on these issues and other jurisdictions (e.g. Australia, US, Canada, UK, etc.) did not have such similar provisions for HK’s reference, it would increase the difficulty in the legislative process. ● One respondent commented that if only criminal liability in relation to parodies that did not cause more than trivial economic prejudice was exempted, many highly effectively parodies that serve public interest would remain criminalised. The criminal threshold should be restricted to those parody works which “amount to a substitution for the original works”.

E. Option 3 – Fair dealing exception		
	Organisations / Individuals	Views / Concerns
E.1	Copyright owners	<ul style="list-style-type: none"> • Many respondents commented that an exception for parody was not necessary to achieve the balance between protection of intellectual property rights and freedom of expression. For instance, it was suggested that sections 38, 39 and 41A of the existing Ordinance could protect parodists to certain extent and music publishers had well established efficient systems to grant synchronisation licenses to cater for requests for parodic uses or adaptation of works. Some respondents considered that there was no justification for lessening copyright owners’ rights at this point in time, when the fears of the public could be allayed simply by eliminating the likelihood of criminal prosecution for fair and honest parodies. • Some respondents were concerned that a parody exception might result in possible abuses and involve practical problems in its implementation. For instance, it might cause confusion or uncertainty as to what was and what was not a parody, weaken the protection of moral right and violate Hong Kong’s international obligations. • Some respondents commented that a fair dealing exception for parody might limit copyright owners’ control over their works and their rights to pursue civil proceedings against parodists for copyright infringement. • Some respondents pointed out that if Hong Kong would include parody as part of fair dealing regime in our copyright law, it must comply with its international obligations and ensure that criminal sanction against piracy must remain as effective and efficient as before. • Some respondents supported Option 3 although the views were split in terms of the scope and qualifying conditions. One respondent welcomed the Government’s proposal to introduce a fair dealing exception for parody (covering satire, caricature and pastiche) to exempt civil and criminal liability but did not support that proposed qualifying condition (causing no “more than trivial economic prejudice” to copyright owners). • Some respondents had no objection to a variant of the option for a carefully drafted exception for

E. Option 3 – Fair dealing exception

parodies (excluding satires, pastiches and caricatures to the extent that they did not comment on the underlying works) subject to certain qualifying conditions to strike a balance between the interests of users and rights holders.

- Some respondents submitted that providing a statutory definition for parody would be ideal to create legal certainty and provide useful guidance to the court as well as to copyright owners and users. It was suggested that the definition should make it clear that parody referred to commenting on the underlying work (and not making an unrelated comment on something else) with deliberate exaggeration for comic effect. It was argued that while taking expression from a work in order to make a parody of that work might be justified since it was difficult to parody a work without using some of its expression, that justification was absent when the only purpose in using a work was to express comments on current events, social, economic or political issues that had nothing to do with the work that was being used.
- One respondent submitted that if a fair dealing exception for parody is to be introduced, the parody should:
 - comment on the original underlying work;
 - have humorous or critical intent;
 - acknowledge directly or indirectly the source of the original work;
 - be created/ distributed for non-commercial purpose;
 - cause no adverse effect on the market of the original underlying work or cause no more than trivial economic prejudice to the copyright owner;
 - incorporate only as much of the underlying works as is necessary;
 - be an original work in itself;
 - be sufficiently distinguishable from the underlying work so that there would be no risk of confusion; and
 - is not a straightforward lift of the underlying work.

E. Option 3 – Fair dealing exception		
		<ul style="list-style-type: none"> • One respondent submitted that the introduction of a parody exception would not drive economic growth while at the same time not causing disadvantage to copyright owners of the original works. • One respondent submitted that the alleged difficulties in the licensing process were not insurmountable. It was suggested that efforts should be made to facilitate and realise such approval process rather than to unfairly deprive the right-owners' legitimate control of their intellectual property. • One respondent submitted that in a U.K. fair dealing defence case based on the argument of freedom of expression, the U.K. Court of Appeal held that the freedom of expression was not the right to take someone else's copyrighted expression and copy it. • One respondent specifically pointed out that "monetisation" of videos on YouTube should be considered commercial exploitation and should not be exempted from both civil and criminal liabilities. • One respondent pointed out that the fact that there had never been a legal case against parodies in Hong Kong suggested that Hong Kong copyright owners did respect the right of free expression of parodists and they were now expecting the same from parodists as well and that the content industry did respect the right of a copyright owner of an original work by obtaining the relevant licence from it before adapting or transforming the original work into a new work or better known as a derivative work. • One submission pointed out that when a parody was made of parts of different copyright works together with parts of new creation by the parodist, the parodist would likely to claim copyright in his new creation. It was commented that the proposed exemption would allow parodists to combine their own creation with other copyrighted material without setting out how to share the copyright in the new work. • One submission from the music industry explained that licensing for adaptation and reproduction of copyright material (commonly known as "synchronisation") required the consent of the songwriters by respecting songwriters' will on how they would like their songs be exploited.
E.2	Users	<ul style="list-style-type: none"> • Some respondents supported this option on the basis that it could provide full exemption of secondary creation from both criminal and civil liabilities. An exemption of both civil and criminal liabilities was considered to be fundamental to the protection of freedom of speech, expression and

E. Option 3 – Fair dealing exception

creativity.

- Some respondents also commented that, although this option was preferable to Options 1 and 2, it was still flawed. The scope of exception was unclear or not wide enough to cover all common means and purposes of secondary creation. Some respondents commented that the current exception was too narrow and failed to protect secondary creation. There was still a chance of being sued.
- Some respondents considered that, as the doctrine of “fair use” was not adopted, only limited categories of works would be exempted under this option. For example, (a) displaying artworks in public exhibitions; (b) filling in alternate lyrics for a piece of music; (c) capturing and captioning screen grabs, though endowed with new cultural meaning, might not be considered an act of fair dealing. It was suggested that in response to the said restrictions of fair dealing, the Government should (a) expand the current scope to cover all UGC (see below for further discussion) and secondary creation; (b) adopt the doctrine of fair use; or (c) seek reference from other common law jurisdictions.
- Some respondents considered that, under the existing Ordinance, there was only an exception for fair dealing for the purpose of reporting current events. Some respondents suggested that the word “parody” could refer to the work itself, as well as the method or purpose of creation. Noting that fair dealing usually exempted the subject-matter but not the purpose for which it was made, it was hoped that the exemption under this option would include “fair dealing for the purpose of parody”. There was a serious discrepancy between the Chinese and English versions of the proposed section 39A: “Fair dealing with a work for the purposes of parody does not infringe any copyright in work” and “為[戲仿作品]而公平處理某一作品，不屬侵犯該作品的任何版權”.
- Some respondents worried that judges, who were not from the design profession, would not rule in favour of freedom of creativity.
- Some respondents considered it difficult to define “fair dealing”. One respondent commented that education and private study should be included as factors for considering whether a dealing was fair. On the other hand, one respondent commented that the court could be entrusted to determine whether a treatment of copyright work was fair dealing / complied with Article 13 of TRIPS

E. Option 3 – Fair dealing exception		
		<p>Agreement even if no specific factors were provided in the legislation.</p> <ul style="list-style-type: none"> ● One respondent noted that all transformative and orthogonal uses or dealings should fall within the copyright exception. There was no need to consider whether the work was transformative in substance. The application of the original work in a new way should suffice. ● One respondent considered that commercial and profitable secondary creation should enjoy the benefit under the fair dealing exception. ● One respondent advocated that, instead of being a defence under the fair dealing exception, the right of parody should be protected in writing.
E.3	Online service providers	<ul style="list-style-type: none"> ● Some respondents noted that the results of a survey on hkgolden.com revealed that while the netizens did not consider any of the three options set out in the Consultation Paper to be ideal, this option was more favourable than Option 1. ● Some of the respondents considered that this option was more favourable than the other two options and supported the creation of a copyright exception for parodies. This option encouraged creativity, protected the relevant author’s economic interests and was in line with international development. However, a Canadian style UGC exception should also be introduced to cater for secondary creations that did not fall under the categories of parody, satire, caricature and pastiche. ● One of the respondents supported a parody exception that took into account internationally accepted factors. It considered that the exception should not be disallowed if the parodist receives financial benefit as parodies rarely harm the market for the original and this may affect works that were created for non-profit purposes but which later become popular. ● Some of the respondents considered that the relevant provisions should expressly refer to parody, satire, caricature and pastiche to minimise uncertainty as to whether they were covered by the copyright exception. ● One of the respondents noted that over 1,000 netizens had expressed their views on the Consultation on hkgolden.com. In particular, they generally considered that a fair dealing exception should be granted in relation to derivative works involving social or public interest (e.g. commentary on

E. Option 3 – Fair dealing exception		
		<p>Government policies, officials, public figures etc.).</p> <ul style="list-style-type: none"> ● One of the respondents submitted that the exception should apply to all classes and types of copyright works to avoid confusion and uncertainty. ● One of the respondents submitted that a copyright exception should be created to support the creation of non-commercial parodies that did not prejudice the interests of copyright owners. In view of this and the importance to safeguard freedom of speech, the widest scope of protection should be provided to parodists. Thus all options and proposals that were not mutually exclusive should be adopted as conditions of the copyright exception. ● One of the respondents considered that the requirements under Options 1 and 3 and the UGC exception proposed by the Concern Group of Rights of Derivative Works were not mutually exclusive and could be included as alternate conditions for the copyright exception. ● One of the respondents noted that the non-exhaustive factors for determining fairness would allow the court to undertake a balancing exercise in light of the general public interest. ● One of the respondents believed that the fair dealing approach was more appropriate than the fair use approach. Benefits of the fair dealing approach included more certainty and less chances of litigation. ● One of the respondents welcomed the introduction of a parody exception but advocated the introduction of a US style open-ended flexible exception in the next round of reform. This would allow Hong Kong to keep up with the rapid technological developments and benefit from the same.
E.4	Others	<ul style="list-style-type: none"> ● Most respondents preferred this option with modification to the first 2 options. For example, some respondents advocated that this option should be modified to protect secondary creation and non-profit-making/non-commercial UGCs as well. ● One respondent⁸ supported the introduction of a fair dealing exception for parody (including satire, caricature and pastiche). It opined that "free riding" by the parodist for commercial purposes should

⁸ The Law Society of Hong Kong

E. Option 3 – Fair dealing exception

not be permitted and, at the very least, the parody should contain added, independent creative content. It commented that while all classes and types of copyright works should be covered by the exception, a sufficient acknowledgement should be required. It preferred not to include a list of “fairness” factors which the court should be well-equipped to determine such matters in light of all the surrounding circumstances. Unpublished works should not be excluded and, in each case, the fairness of the dealing in question should determine whether the exception should apply.

- One respondent⁹ submitted that the issue was best addressed by introducing a fair dealing exception for “commenting on current affairs”, which it believed to strike the correct balance between protecting the public’s freedom of expression and the legitimate rights and interests of copyright owners. It suggested that analogous to the existing fair dealing exception for reporting current events, the proposed exception was conditional upon the making of a sufficient acknowledgement, unless the commenting on current events were by means of a sound recording, film, broadcast or cable programme. The exemption could be incorporated into the Ordinance by amending the existing sections 39(2) and (3). It submitted that an exception for parody and/or satire (irrespective of purpose) might give rise to difficulties of definition and understanding and would have the undesired effect of exempting activities which did not have sufficient public interest justification.
- One respondent commented that although this option might change the status quo and balance between copyright owners and users, it was fairer than the first 2 options since it determined whether there was copyright infringement through the actual usage of a work and would provide better protection to non-commercial users. One respondent commented that the current fair dealing exceptions are insufficient to address concerns of the public and create uncertainty for copyright owners and parodists. It was suggested that freedom of speech and social and commercial innovation had to be balanced with the need to protect against the use or appropriation of copyright works that caused harm to the original copyright owner (economic or otherwise), or resulted in unjust enrichment for the creator of a derivative work.
- One respondent commented that to avoid abuse of the exception and to ensure Hong Kong’s compliance with its international obligations relating to copyright protection, qualifying conditions such as “non-commercial use”, “not to replace the market of the original work”, “without causing

⁹ The Hong Kong Bar Association

E. Option 3 – Fair dealing exception

‘more than trivial’ economic prejudice to the copyright owners” should be included in this option.

- One respondent suggested that this fair dealing provision should be interpreted in a more lenient manner.
- One respondent commented that while this option could offer better protection to freedom of creation, it was important to ensure that the interests of different stakeholders were protected and balanced to avoid the abuse of the exemption when determining the scope of the exemption.
- One respondent commented that the current section 38 of the Copyright Ordinance already provided a non-exhaustive list of factors to consider whether a dealing was fair and suggested adding in “economic prejudice” as well. It also suggested that the law should clarify that “the degree to which the use of a parody work competes with the exploitation of the copyright work by the owner causing potential economic harm to the copyright owner” was only one of the factors to consider fairness and competition in the same market or economic harm should not be determinative of whether a dealing was fair.
- One respondent suggested using “economic loss” to parties (in particular copyright owners) to determine which level of infringement a parody work belonged to and that it was more objective to use the rights of copyright owners as a starting point to determine the severity of infringement.

F. Other options		
	Organisations / Individuals	Views / Concerns
F.1	Copyright owners	<ul style="list-style-type: none"> • Some respondents noted that some creators welcomed free parody uses of their works. It was suggested that an official and open platform could be set up for copyright owners who were willing to open their works for free parody purposes. This platform might not be limited to melodies and lyrics but might also cover different types of copyright works. • Some respondents¹⁰ suggested providing a “for-the-avoidance-of-doubt” provision to exclude true parodist from being criminally prosecuted. It had been suggested that the existing section 118(1)(g) and the proposed section 118(8B)(1) of the Copyright Ordinance should be clarified that they did not apply to an infringing copy of work for the purpose of parody if the use of the original copyright work was solely for non-commercial purposes and the parody was not a substitute of the original underlying work. It was suggested that the factors to be highlighted to the court should be “whether it causes or has the potential to cause unreasonable loss of income to the copyright owner” and “whether the purpose and character of the use is of parody nature”. • None of the respondents supported an exception for UGC and many respondents expressed strong disapproval of the 4th option proposed by users. • Many respondents submitted that the scope of UGC was too wide which was outside the scope of the Consultation and should not be introduced at this stage so as to provide copyright owners with an opportunity to establish voluntary, cross-industry agreements that could resolve the issue in a well-balanced and user-friendly way without unjustifiably restricting the exclusive rights of authors and copyright owners. One respondent suggested that if UGC might be added into the Consultation, a number of other copyright reform proposals which were crucial to the development of the creative industries in Hong Kong should also be included. • Many respondents commented that the actual scope and interpretation of various terms in the Canadian UGC exception provisions were still uncertain. Some respondents pointed out that some

¹⁰ Including the Hong Kong Copyright Concern Group

F. Other options

scholars had suggested that the Canadian UGC provisions might be in breach of the adaption right of the authors and the “three-step test” and it remained to be seen how Canadian court would interpret the working of UGC provisions in the context of international obligations. Some respondents also raised that there would be other complications with an UGC exception (e.g. ownership of copyright in the UGC, impact on moral rights). Many respondents suggested that the 4th option would not give clarity to the satisfaction of netizens as users and copyright owners would eventually have to seek judicial interpretation of these terms from courts in view of the uncertainties embedded in the UGC exception.

- Some respondents criticised that the Canadian UGC exception and/ or the 4th option would provide an unjustifiable safe harbour to intermediaries which disseminated UGC commercially. There were concerns that the proposed UGC exception would create a loophole in the law whereby online platforms would be able to exploit and generate substantial profits from seemingly non-commercial UGC posted on commercial platforms. Many respondents believed that intermediaries should at least share profits with the copyright owners for their commercial dissemination of UGCs.
- Some respondents were of the view that the proposed exception for UGC could not be considered a "special case" as it would, in effect, introduce a blanket permission to reproduce, adapt or create derivative works from copyright works.
- Some respondents pointed out that there were numerous examples of "mash-up" works in Hong Kong which copied or adapted certain musical works, sound recordings or posters in order to attack or smear an artist or a musical work. They noted that such "mash-up" works were offensive and prejudicial to the reputation of the author or artist, and would constitute derogatory treatment and expressed concerns that the proposed UGC exception failed to address how the authors' and performers' right of integrity could be protected.
- Many respondents considered that a fair dealing exception for UGC based on the Canadian approach was premature as the Canadian UGC exception only came into force in June 2012. It was unclear what exactly the scope of "non-commercial purposes" or a "substantial adverse effect, financial or otherwise" was.
- Some respondents submitted that Hong Kong needed to re-examine the role of users, copyright owners, safe harbour provisions for OSPs when considering introducing the UGC exception, which

F. Other options		
		<p>should be a topic for the next round of public consultation.</p> <ul style="list-style-type: none"> • One respondent submitted that there should not be any safe harbour provisions for OSPs when dealing with UGC and no exception for UGC should be introduced without conducting a public consultation on the role of OSPs, the impact of UGC on the creative industries and its impact on Hong Kong’s economical, political, social and cultural policies.
F.2	Users	<p><i>Combination of different options</i></p> <ul style="list-style-type: none"> • Some respondents preferred the parallel introduction of the first, second and/or third options. Many respondents supported the parallel introduction of the third option and the UGC proposal. <p><i>The UGC proposal</i></p> <ul style="list-style-type: none"> • There were calls for the introduction of a “fourth option”, i.e. an exemption of UGC for personal and non-commercial purposes, with reference to the Canadian exemption for UGC (“the UGC proposal”) in addition to the third option so as to fully exempt secondary creation.¹¹ Some respondents were of the view that Canada’s Copyright Act provided fuller protection to creators of UGC for non-commercial purpose on top of its fair dealing exception for parody and satire. • Some respondents recommended that the scope of UGC should be adopted or, in addition to parody, satire, caricature and pastiche, the scope should be expanded to include UGC. It was noted that the UGC proposal was able to confer standalone and comprehensive exemption of civil and criminal liabilities. So long as the UGC was for personal and non-commercial/non-profitable use, the UGC was not (entirely) copyright piracy and would not substitute the market of the original work or otherwise adversely affect the underlying work. The users would be exempted from civil and criminal liabilities. • Some respondents considered that the UGC proposal was more preferable than the three options listed in the Consultation Paper. It was considered that the current options were unable to cover all modes of communication and types of secondary creation, including transformative use and dealing. On the contrary, the UGC proposal was able to provide exemption with reference to the purpose of

¹¹ This was advocated by the Copyright and Derivative Works Alliance and the Concern Group of Rights of Derivative Works.

F. Other options

the users. The proposal was easy to understand, clear and would protect freedom of speech and expression. Some respondents referred to the UGC proposal as their bottom line.

- Some respondents considered that the adoption of the UGC proposal was an act that followed the international trend, proposed by the European Union and Ireland and legislated in Canada. Some respondents took the view that the UGC proposal did not contravene the “three-step test” in the TRIPS Agreement or other international obligations, which was concerned with trade and businesses. They argued that the UGC proposal would pass the “first step” by limiting it to special cases, as the exception was only for non-commercial UGC made by individuals. Further, it “does not conflict with the normal exploitation of the underlying work, and did not unreasonably prejudice the legitimate interests of the copyright owner” which would pass the “second and third steps” as the exception required the UGC not to be used in the course of business or trade and not to substitute the market of the original work. In addition, they considered that the laws for the UGC exception had been passed in Canada after careful consideration. Some respondent considered that the UGC proposal was stricter than the “fair use” doctrine and noted that there had not been any complaints against these proposals on the international level.
- As opposed to the “three-step test” set out in the TRIPS Agreement, some respondents proposed a “cultural three-step test”. The “cultural three-step test” focused on whether a piece of new legislation would restrict existing freedom of creativity and cultural development. The respondents suggested that the UGC proposal would satisfy the “cultural three-step test”.
- Some respondents also considered that the exception provided by the UGC proposal did not weaken the power to fight piracy and submitted that, there was no reason for the Hong Kong copyright industry to object to this proposal. It was noted that the proposal’s emphasis on non-commerciality best fitted the interests of all parties, in particular, this significantly eased the concerns over the potential economic damage done to copyright owners.
- Some respondent also called for an exemption for intermediaries to use, disseminate or communicate UGC. This was advocated to strengthen freedom of expression and communication by ensuring a proper platform for delivery of works of secondary creation.

The doujin proposal

F. Other options		
		<ul style="list-style-type: none"> ● Some respondents were dissatisfied that the three options did not accommodate doujin culture and made a “doujin proposal”. Based on the UGC proposal or the fair dealing exception, the doujin proposal sought to extend the umbrella of exemption to derivative / doujin works created by interest groups or fans groups. Derivative / doujin / adapted works created based on the original work and involved rewritten story developments or outcomes should be exempted by taking into account of the following factors: <ul style="list-style-type: none"> - whether the work was intended to pass off or substitute the original work; - whether the work was intended to cause damage to the legitimate interests of the original author; - whether the work, or the venue and means of distribution of the same, was intended to be used in conflict with the normal exploitation of the original work; - whether the venue and means of distribution would substitute all or a substantial part of the market of the original work; - the intended venue and means of distribution; and - the degree of transformation of the work. ● Some respondents further asked the exception to cover works that generated a small or trivial income, in order to accommodate the doujin activities which might inevitably involve sale of doujin products. They were of the view that this kind of small income should not be considered as trade or business substituting the market of the original work. Some respondents strongly opposed the copyright industry’s “fifth option” which only covered political satire. Some respondents considered it unreasonable to request parodists, in order to determine whether their works qualify for exemption, to go through an excessive list of criteria before the process of creation.
F.3	Online service providers	<ul style="list-style-type: none"> ● One of the respondents noted that the options were not mutually exclusive. To allow the provision of the widest scope of protection to parodists, all options and proposals that were not mutually

F. Other options		
		<p>exclusive should be adopted as conditions of the copyright exception.</p> <ul style="list-style-type: none"> • Some of the respondents advocated the introduction of a Canadian style UGC exception on top of Option 3. This could address future issues involved in the creation of secondary creations arising from technological developments. Under this proposal, there would be no civil or criminal liability for a person who creates non-commercial UGC. • One of the respondents considered that the requirements under Options 1 and 3 and the UGC exception proposed by the Concern Group of Rights of Derivative Works were not mutually exclusive and could be included as alternate conditions for the copyright exception.
F.4	Others	<ul style="list-style-type: none"> • Some respondents¹² supported adopting a 4th option to provide a copyright exception for non-commercial UGC. They were of the view that such an exception could promote overall creativity in Hong Kong and also offer better protection for freedom of speech and expression. • On the other hand, some respondents raised their concerns about the UGC exemption as proposed by some members of the public. They submitted that although the Canadian UGC exception could be of reference to Hong Kong, the definition of UGC, the conditions attached to the exemption and its actual scope and application in the Canadian law were not clear. Since there was no case tested in courts yet, it was uncertain as to what extent users might be protected. The exception would also have to be governed by the existing principles and framework of “fair dealing”. • One respondent commented that to cater for future possible means and ways of expressions, a less specific and more neutral exemption should be adopted and the Government should be responsible to counter-propose a provision to overcome the “three-step test” if it was of the view that the UGC exemption might not pass the test. • One respondent commented that the Government could consider the Canadian UGC exception provided that the UGC does not cause actual prejudice to the original work. • One respondent commented that it did not support UGC exemption at this stage since the definition of UGC and the conditions attached to this exemption were not clear, and beyond the scope of the

¹² Including Amnesty International (Hong Kong), Hong Kong Civil Liberties Union and The Journalism and Media Studies Centre of the University of Hong Kong

F. Other options

parody consultation. In addition, if the scope of the exemption was not based on the contents of the work but simply to be determined by the purpose or mode of distribution, more extensive discussions were necessary. It was also hard to estimate the effect of UGCs on to the markets of original works and the economy, e.g. the degree of originality versus the degree of copying and the corresponding effect on other online activities, etc.

- One respondent¹³ recommended the adoption of all three options outlined in the Consultation Paper in combination with a 4th option, namely, an exception for predominantly non-commercial UGC (PNCUGC), which was modeled on the Canadian UGC exemption but replaced the word "solely" with "predominantly". It further suggested if this proposed option tilted the balance of the copyright regime to internet users, a reciprocal licence that allowed the copyright owner to use the parody work for non-commercial purposes might be included. If the exception was further expanded to cover commercial UGCs, a profit-sharing arrangement could also be introduced. If there were concerns on compliance with the "three-step test" in relation to this proposal, a special exception for the fair dealing of a copyright work for the purposes of creating PNCUGC, making a transformative use of a copyright work, or both might be introduced instead. In addition, factors for determining "fairness" in sections 38 and 41A of the Ordinance and the "three-step test" itself might also be added into this proposal.

¹³ The Journalism and Media Studies Centre of the University of Hong Kong

G. Moral rights		
	Organisations / Individuals	Views / Concerns
G.1	Copyright owners	<ul style="list-style-type: none"> • Among those respondents which commented on the issue, all opined that moral rights should be maintained notwithstanding any special treatment for parody. • Many respondents considered that it was vital to maintain moral rights, in particular those rights related to preserving the integrity of an original work as it offered the most fundamental respect to creators and performers. It was submitted that such right encouraged creativity and innovation as creators and performers might publish their works without fear that their works or performances would be abused or mutilated after they were made available to the public. • Some respondents considered that acknowledging the source of the work would be the first step in recognising the author's right of freedom of expression. • Some respondents were of the view that it was important to encourage a legitimate creative culture based on mutual respect and thus it was appropriate to retain the attribution right in its present form. It was also suggested that acknowledgement would assist copyright owners in locating and monitoring parody works online. • Some respondents submitted that parodies should at least implicitly acknowledge the underlying work or make sufficient acknowledgment or qualification if it is reasonable in the circumstances to do so. • One respondent submitted that human rights also protected the authorship of the original writer and under no circumstances should there be any change of the existing moral rights.
G.2	Users	<ul style="list-style-type: none"> • There were comparatively fewer comments from the respondents on the issue of whether moral rights should be maintained in view of the new exceptions. Their views were diverse. • Some respondents considered that the moral rights of directors and authors should be retained. One respondent commented on the necessity to retain the moral rights given that they were granted under international treaties. Others considered that there was no need to retain the same regardless of the

G. Moral rights		
		<p>treatment.</p> <ul style="list-style-type: none"> • One respondent opined that moral rights of attribution and false attribution should be exempted but moral rights of integrity should be maintained. • One respondent considered that the requirement to acknowledge the original work was unfavourable to many new forms of secondary creation.
G.3	Online service providers	<ul style="list-style-type: none"> • One of the respondents submitted that moral rights claims should be maintained but limited to situations where the injury to one's honour or reputation stemmed from sources other than parody. Such situations were best evaluated on a case-by-case basis.
G.4	Others	<ul style="list-style-type: none"> • Some respondents submitted that moral rights of authors should be respected and not to be eliminated as it was consistent with the existing law. However, they were of the view that parodists should be exempted for breach of moral rights (e.g. the right to be identified as the author/director of the copyright work and the right to object to derogatory treatment of that work) in reasonable circumstances to avoid any moral rights acknowledgement requirement rendering the parody work less effective for its purposes or affect the freedom of expression due to the uncertainty of the meaning of "derogatory treatment". On the other hand, one respondent opined that no exception to moral rights should be introduced. • Some respondents submitted that the question of whether moral rights had been infringed should be assessed as part of the enquiry as to whether the dealing is "fair".

H. Other issues		
(1) Communication right		
	Organisations / Individuals	Views / Concerns
H(1).1	Copyright owners	<ul style="list-style-type: none"> • Some respondents supported reform of the copyright regime in Hong Kong to encourage creativity and freedom of expression whilst safeguarding publishers' and authors' economic rights. • Some respondents commented that the majority of the public's concern over the introduction of the Bill was directed towards the failure to include a parody exemption in the face of strengthening rights of copyright owners. • Some respondents submitted that the existing copyright law of Hong Kong obviously lagging behind other countries and urged the Government to pass the Bill as soon as possible to strengthen copyright protection in the digital environment. • Some respondents submitted that effective copyright protection was the cornerstone for the sustainable developments of Hong Kong's creative industries. • One respondent noted that some neighbouring Asian countries had introduced the right of communication many years ago without granting a parody exemption.
H(1).2	Users	<ul style="list-style-type: none"> • There were calls for clarification that the sharing of hyperlinks and content on the Internet or via social media or live streaming would constitute “prejudicial distribution” and copyright infringement. • Some of the respondents submitted that in some cases the user could not control whether the content was communicated to the public or not. They considered that the proposed amendment in relation to communication rights increased the risk of criminal and civil liabilities and suppresses secondary

H. Other issues		
(1) Communication right		
		<p>creation.</p> <ul style="list-style-type: none"> • One respondent considered that the proposed amendment should reflect the original legislative intent to combat piracy.
H(1).3	Online service providers	<ul style="list-style-type: none"> • One of the respondents welcomed the clarification that a person did not initiate communication of a work to the public if he does not determine the content of the communication. • One respondent proposed amendments to the Bill to expressly confirm that users would not incur liability for sharing links on social media sites.
H(1).4	Others	<ul style="list-style-type: none"> • Some respondents submitted that the Government should clarify in the law whether the mere act of posting or sharing a hyperlink would constitute “communication of a work to the public”.

H. Other issues		
(2) Safe harbour		
	Organisations / Individuals	Views / Concerns
H(2).1	Copyright owners	<ul style="list-style-type: none"> Some respondents submitted that in view of the fast moving cloud computing age, the current Consultation should be concluded swiftly and move onto other real concerns expressed by the community at large, such as the lack of "safe harbour provisions" for the IT industry.
H(2).2	Users	<ul style="list-style-type: none"> Some respondents considered that the safe harbour provisions and the notice and takedown mechanism in effect required OSPs to remove allegedly infringing materials in the absence of a court order. The notice and takedown mechanism failed to balance the interests between copyright owners and users and was prone to abuse. For instance: <ul style="list-style-type: none"> The mechanism might be used to circumvent any future exemption of parodies or UGC; and The subscriber's information might be provided to the complainant while the complainant's information was not made known to the subscriber. Some respondents proposed the use of the notice and notice system in complement with a comprehensive copyright exemption for secondary creation (e.g. under the UGC proposal), so that any disputed content was not removed until the complainant commenced legal action. Some respondents called for a separate consultation on the safe harbour provisions, amendments to or the withdrawal of the Code of Practice.
H(2).3	Online service providers	<ul style="list-style-type: none"> Among the respondents who provided comments on the safe harbour provisions under the Bill, most of them supported the creation of a safe harbour which protected the interests of OSPs. Some of the respondents had concerns about the implementation of the safe harbour mechanism

H. Other issues

(2) Safe harbour

in practice. They expressed concerns that the Consultation did not cover the safe harbour provisions / the Code of Practice and urged the Government to consult on the same.

- Some of the respondents submitted that the Code of Practice should be agreed / reviewed by the industry on a regular basis and reflect self-governance.
- Some of the respondents were concerned about potential abuse of the mechanism despite sections 88E and F of the Bill and the significant costs incurred by OSPs as a result. To minimise abuse, one of the respondents suggested imposing charges on the filing of notices. Another respondent proposed to expand the coverage of sections 88E and F of the Bill to cover the reckless submission of non-compliant notices.
- One of the respondents expressed concerns about the significant costs incurred by OSPs as result of a large volume of notices and proposed to impose charges on the filing of notices and counter notices.
- One of the respondents noted that the notice and takedown procedure was much more complicated than that adopted in other jurisdictions. The procedure also included retention requirements. This imposed extra costs on the OSPs which should be recoverable from the copyright owners.
- One of the respondents submitted that the notice and takedown system did not strike a balance between the rights of copyright owners and Internet users. It objected to the proposal for OSPs to takedown materials in the absence of Court orders i.e. simply based on mere allegations of infringement.
- One of the respondents considered that the proposed mechanism was not in line with its goal to safeguard freedom of speech and expression and refrain from monitoring or filtering the contents uploaded by its users.
- One of the respondents was concerned that parodies that qualified under a future exception might be removed as a result of application of the notice and takedown procedure.

H. Other issues		
(2) Safe harbour		
		<ul style="list-style-type: none"> ● One of the respondents considered that the complainant should be required to provide the URL and relevant particulars. It did not agree that OSPs should block access to materials given that the materials at the destination could be subsequently changed or removed by the uploader. ● One of the respondents requested for a clear definition for “reasonable time”. ● One of the respondents commented that the mechanism should not allow complainants to obtain the personal information of subscribers. Such information should be passed to the High Court if appropriate. ● One of the respondents suggested that C&ED / IPD should handle the complaint notices instead. ● One of the respondents commented that the safe harbour provisions and the Code of Practice could help to improve the copyright regime, provide guidance to OSPs and are in line with overseas development. ● One of the respondents urged the Government to implement the safe harbour provisions and Code of Practice as soon as possible.
H(2).4	Others	<ul style="list-style-type: none"> ● Some respondents submitted that even if the third option or the exemption for UGC was incorporated into the laws, the “safe harbour” regime contained deficiencies which might lead to removal of secondary creation by OSPs without considering whether such work was exempted. It was submitted that any removal should be made pursuant to court orders only and therefore the Code of Practice in consultation should be amended accordingly. ● Some respondents submitted that the Code of Practice relating to OSPs should be further consulted in light of the parody consultation.

H. Other issues		
(3) Licensing platform		
	Organisations / Individuals	Views / Concerns
H(3).1	Copyright owners	<ul style="list-style-type: none"> Some respondents suggested that there should be an official platform to facilitate licensing between copyright owners who were willing to open their works and parodists.
H(3).2	Users	<ul style="list-style-type: none"> Some respondents were dissatisfied with the commercial copyright organisations and copyright licensing bodies. They considered that these bodies operated in a non-transparent, unregulated and arbitrary manner. It was impossible for parodists to deal with these bodies or copyright owners at arm's length. They also noted that some authors had been forced to join these bodies and were unwillingly represented. They also accused the Government of taking sides with these bodies. Some respondents advocated the general regulation of the copyright industry and in particular the copyright licensing bodies, to enhance the transparency, uniformity and clarity of the charging system. One respondent commented that the level of fees to be paid for non-commercial uses should not be calculated on the same basis as commercial uses by conventional media. One respondent considered that in view of the difficulty in obtaining consent to use copyright works at reasonable cost, within a reasonable period of time and with reasonable ease, liability should be imposed on copyright owners who respond to requests for personal and non-commercial use in an unreasonable manner. Some respondents considered that commercial copyright organisations had monopolised the copyright regime. The current proposed legislation was lopsided to cater for the interests of these organisations and severely restricts the public's freedom of creativity. Some respondents were dissatisfied with the presumption that users were potential copyright infringers while copyright owners were the victims. Some respondents noted that, internationally, copyright owners and online service providers ("OSPs") generally gave acquiescence or were amicable

H. Other issues		
(3) Licensing platform		
		towards non-commercial uses of works of secondary creation. However, commercial copyright organisations in Hong Kong had accused parodists of infringement even though consent from the original author had been obtained.
H(3).3	Online service providers	<ul style="list-style-type: none"> One of the respondents considered that the current copyright regime was biased towards copyright owners. Copyright ownership and licensing related regimes were complicated and non-transparent. It further observed that it was very difficult for users to obtain licences to create secondary creations such as parodies etc. The licences might also contain unreasonable restrictions affecting such creation.
H(3).4	Others	<ul style="list-style-type: none"> One of the respondents submitted that use of licensing platforms such as “Creative Commons” should be encouraged and the Government should review on how to improve the implied licensing system for the benefits of users of copyrighted contents in the online environment. One of the respondents suggested that the Government should consider public opinions such as establishing a public centre for handling copyright similar to that advocated by the Hargreaves Report, the public could register their secondary creation and provide a safe harbour for parody. This could also protect the rights of copyright owners at the same time.

H. Other issues		
(4) Others		
	Organisations / Individuals	Views / Concerns
H(4).1	Copyright owners	N/A
H(4).2	Users	<p><i>Scope of consultation</i></p> <ul style="list-style-type: none"> • Some respondents considered the Consultation unsatisfactory as it only addressed the subject of parodies. Without the full picture, it was difficult to appreciate the real effect of the Bill. • Some respondents observed that there were many outstanding issues from the Bill, such as questions concerning the safe harbour provisions and communication rights etc.. There was a need to consult on the whole Bill or other new proposals, such as the UGC proposal. <p><i>Other issues</i></p> <ul style="list-style-type: none"> • Some respondents commented that concepts such as “substantial copying”, “potential market value”, and “degree of transformative use” were abstract and subject to dispute. • Some respondents called for the adoption of the doctrine of “fair use” while others queried the reason behind using fair dealing rather than fair use. • Some respondents disagreed with the Government’s use of some terms, for example, referring to derivative work as “secondary creation”, and secondary creation to “infringing work” instead of “work in dispute”. • One respondent commented that the penalty for parodies was disproportionate. Others considered that prosecution policies should distinguish acts of piracy or copyright infringement according to the gravity of such acts, from non-commercial and small scale distribution, (which was the least severe), to intentional and commercial distribution (being the most severe).

H. Other issues		
(4) Others		
		<ul style="list-style-type: none"> ● One respondent queried how acquiescence regarding the use of copyright works could apply in the online environment where materials were abundant. Another respondent noted the difficulties in locating the authors at times. Some suggested setting a time limit for the copyright owner to reply, and thereafter he would be taken to have acquiesced use of the copyright work pursuant to the request and be barred from enforcing his rights. ● One respondent noted that there existed a real difficulty in differentiating the persons involved in distribution or communication of secondary creation from those involved in the creation of such works. There were worries that everyone will be pre-emptively arrested for the purpose of investigation. ● One respondent submitted that there should be a regular consultation every two years after the Bill is passed.
H(4).3	Online service providers	<ul style="list-style-type: none"> ● One of the respondents advocated the introduction of a US style open-ended flexible exception in the next round of reform. This would allow Hong Kong to keep up with the rapid technological developments and benefit from the same. ● One of the respondents considered that the Government should adopt a bottom up approach in consultations and use more online channels e.g. social media, online poll etc..
H(4).4	Others	<ul style="list-style-type: none"> ● Some respondents submitted that the Government should strengthen public education on protection of intellectual property rights in the online environment and respect for intellectual property rights in general. ● Some respondents suggested clarifying in the law whether sharing and re-posting of hyperlinks containing possible infringing materials would constitute an infringement under the Copyright Ordinance. ● One respondent suggested the Government should consider amending section 39(3) of the Ordinance with reference to its UK counterpart (section 30(3) of UK Copyright, Designs and

H. Other issues

(4) Others

Patents Act 1988).

- One respondent submitted that since the fair use doctrine was not adopted in Hong Kong, neither of the three options rendered protection to secondary creations.
- One respondent commented that the Government should also have public consultations on “secondary creation”. As recognised in United Nations reports on human rights, the special qualities of the internet should be considered when reviewing the measures and rules governing traditional media, which might not be applicable in the internet environment. Secondary creation itself was a creation and could stimulate creativity and encourage public participation and discussion on different issues and involvement in cultural activities and restricting secondary creation would mean restricting freedom of expression and therefore any restrictions must abide by principles laid down in the United Nation’s ICCPR Clause 19.
- One respondent commented that the exact scope of “secondary creation” should be clarified since it is not a term normally used in the context of copyright law.
- One respondent submitted that the Government should consider the issue of a parody exception under the trade mark laws.
- One respondent¹⁴ also expressed the following comments/ suggestions:
 - Law- and policymakers should use their best efforts to avoid foreseeable conflicts between amendments to the Copyright Ordinance and the Basic Law and Hong Kong Bill of Rights.
 - Hong Kong should think ahead about whether to shift from a fair dealing regime in its copyright laws to a fair use regime given the change in global trend to adopt the latter as it could better accommodate the needs and interests of internet users, Hong Kong could also become more competitive in the IT area and attract internet-related foreign investments and to develop its creative environment.

¹⁴ The Journalism and Media Studies Centre of the University of Hong Kong

H. Other issues

(4) Others

- A broad exception for works that was qualified only by the condition of whether it constituted a substitution of the underlying work should be adopted so that socially-productive parodies, satires, caricatures and pastiches would be protected.
- Issues concerning Government copyright works had raised complications in the past as wider dissemination of such works was important, considering that taxpayers' money could have been better utilised if such works were more widely available to the public to use or to develop secondary creations. Moreover, the infringement of the copyright in Government works might lead to law enforcement agencies taking actions against alleged infringers direct. Allowing Government works to be widely accessible through the current digital copyright reform would benefit all parties – copyright owners, internet users, OSPs and other for-profit and not-for-profit organisations.
- Copyright regime was not designed to enable copyright owners to capture whatever benefits they could obtain.
- As it was difficult to identify copyright owners in real life situations, wider copyright exceptions promoted greater flexibility in the use of copyright works by users and also assisted in resolving the problems created by orphan works.
- Providing exceptions from civil and criminal liability alone would not suffice unless there were additional safeguards against the misuse or abuse of copyright claims.

**Preliminary Assessment of the
Canadian UGC exception and the proposed 4th Option**

1. In 2012, Canada introduced a copyright exception for User-Generated Content (UGC) into its Copyright Modernization Act (Bill C-11), which permits users to incorporate existing copyrighted material in the creation of new works, such as making a home video of friends and family members dancing to a popular song and posting it online, or creating a "mash-up" of video clips, so long as:
 - the new work is solely done for non-commercial purposes;
 - the existing material was legitimately acquired; and
 - the new work is not a substitute for the original material, and does not have a substantial adverse impact on the existing and potential markets for the original material, or on the reputation of the author of the underlying work.¹
2. Canada is the only country which has enacted the UGC exception into its copyright law. In the absence of similar international precedents, the Canadian UGC exception has attracted considerable discussions and comments on its compatibility with international copyright treaties, in particular, whether it complies with the three-step tests under the Berne Convention ("Berne") and the Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS)².

The Three-Step Test

3. To comply with the "three-step test" under Berne and TRIPS, any copyright exception must (a) be confined to "special cases", (b) not conflict with a normal exploitation of the work, and (c) not unreasonably prejudice the legitimate interests of the author/copyright owner.³

Preliminary assessment on compliance of the Canadian UGC exception with the three-step tests under TRIPS (Art 13) and Berne (Art 9(2))

"Certain special cases" (the first step)

4. According to the WTO Panel Report (WT/DS160/R), "special" means that an exception or limitation must be clearly defined and should be narrow in scope and has an

¹ Please see the official website of the Government of Canada at http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01237.html.

² Article 9(2) of the Berne Convention and Article 13 of the TRIPS require members to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author/rights holder.

³ There are subtle differences between the third steps under TRIPS and Berne. "Interests" in the context of the third step under Berne refer to those of the "author" (i.e. not of the "right holder" as under TRIPS) which includes non- pecuniary interests such as moral rights.

exceptional or distinctive objective. There are concerns that the use of an existing work in the creation of a new work in which copyright subsists solely for non-commercial purposes as provided by section 29.21(1)(a) of the Canadian UGC exception may not be regarded as “clearly defined”. In particular, the dividing line “for non-commercial purposes” may be too vague. Further, the scope may not be considered “narrow” given the large number of potential users. The “for non-commercial purposes” requirement may not suggest “an exceptional or distinctive objective”. In view of the above, it is arguable as to whether this exception complies with the first step.

5. We note that the former Assistant Director General of WIPO, Dr. Mihaly Ficsor has expressed the view that the Canadian UGC exception does not meet the 1st step of the three-step test as it is not a “special case”. In particular, he noted that the mere reason that a derivative work was created and made available and that therefore it should be free in order to guarantee the freedom of expression was hardly an acceptable reason alone since articles 12 and 14(1) of Berne provided for an exclusive right of adaptation which “by definition” covered the creation of derivative works. Dr. Ficsor considered that much more substantive criteria would be necessary to reduce the scope and nature of the UGC exception to a “special case”.⁴

“Not conflict with a normal exploitation of the work” (the second step)

6. Regarding the 2nd step of the three-step test under TRIPS and Berne, at first glance it appears that they can be satisfied by the qualifying conditions for the Canadian UGC exception which specifies that the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work, including that the new work or other subject matter is not a substitute for the existing one. Nevertheless, Dr. Ficsor considered that the Canadian UGC exception overlooked the requirement that the three-step test was applied having regard to the overall effects on the actual or potential markets for a work. He noted that the exception did not consider the overall actual or potential impacts on the market for a work when the acts were multiplied, or take into account the effect on the actual or potential market for derivative works of the existing work. As such, Dr. Ficsor expressed reservations on whether the Canadian UGC exception complied with the 2nd step of the three-step test.

“Not unreasonably prejudice the legitimate interests of the copyright owner/author” (the third step)

7. There are subtle differences between the 3rd steps under TRIPS and Berne respectively. “Interests” in the context of the 3rd step of the three-step test under Berne refer to those of the “author” (but not of the “right holder” as under TRIPS) and would cover those of both a pecuniary and non-pecuniary kind. The discussion in paragraph 6 on “not conflicting with a normal exploitation of the work” is relevant to the consideration of whether the Canadian UGC exception complies with the 3rd step under TRIPS as it will have a direct bearing on whether the UGC exception will unreasonably prejudice the legitimate interests of the copyright owner.

⁴ Please see paragraph 51 of Comments on the UGC provisions in the Canadian Bill C-32: potential dangers for unintended consequences in the light of the international norms on copyright and related rights by Dr. Mihaly Ficsor (November 2012). (http://www.copyrightseesaw.net/archive/?sw_10_item=31)

8. In respect of the 3rd step under Berne, Dr. Ficsor noted that “interests” would include the moral rights of the author as well as the author’s legitimate interests in controlling the adaptations and future uses of his or her work. The Canadian UGC exception seems to have removed the safeguard guaranteed for the respect of the moral right of integrity by the indirect control through the exercise of the relevant economic rights⁵, and this may have a bearing on the overall assessment of whether the legitimate interests of the author are unreasonably prejudiced. According to Dr. Ficsor, the opening of the door to any kinds of free alterations of protected works might inevitably involve uncontrolled alterations that might violate the integrity of the works concerned. Dr. Ficsor also commented that the exception did not protect the reasonable interests of authors in being able to authorize the creation and dissemination of adaptations which they might find objectionable on literary, artistic, moral, political, or other grounds, or the juxtaposition of their works or adapted works with other works or new works, or causes which they might find objectionable on any number of grounds.⁶ Hence it was his view that the Canadian UGC exception would not pass the 3rd step of the three-step test under Berne.
9. Apart from Dr Ficsor, there have been extensive discussions in Canada about the UGC exception. In October 2013, a renowned law school in Canada⁷ hosted a symposium on the UGC exception. Mr. Barry Sookman, who is one of Canada’s foremost authorities in the area of information technology and intellectual property law and Professor Joost Blom of the UBC Faculty of Law both delivered presentations at the final panel session on the international context of the Canadian UGC. Both speakers suggested the UGC exception will face limits and restrictions at the international level.
10. Focusing his talk on whether or not the Canadian UGC exception complies with international obligations, in particular under Berne and TRIPS, Mr. Sookman mentioned that by creating “an unprecedented breath” of new exceptions in its Copyright Modernization Act, Canada could run afoul of its international obligations. He argued that the UGC exception, which applies to all works and subject matters so long as it is used in a non-commercial context, did not qualify as a “special case”, nor was it “certain”.⁸ Moreover, in addressing economic impact of the UGC on rights holders, it uses the terminology “does not have a substantial adverse effect” rather than “does not conflict with the normal exploitation of the work” which may have created a higher burden for rights holders than that expressed under Berne and TRIPS.
11. Prof. Blom further raised an issue which could be problematic to Canadian users when relying on the UGC exception. Given that there is no corresponding UGC exception to

⁵ Please see paragraphs 62 to 63 of Comments on the UGC provisions in the Canadian Bill C-32: potential dangers for unintended consequences in the light of the international norms on copyright and related rights by Dr. Mihaly Ficsor (November 2012). Footnote 4 above.

⁶ Please see paragraphs 62 to 63 of Comments on the UGC provisions in the Canadian Bill C-32: potential dangers for unintended consequences in the light of the international norms on copyright and related rights by Dr. Mihaly Ficsor (November 2012). Footnote 4 above.

⁷ Osgoode Hall Law School of Canada.

⁸ Please see <http://www.iposgoode.ca/2013/10/international-aspects-of-the-new-user-generated-content-exception-in-the-copyright-act/>

copyright infringement in other jurisdictions, a broad UGC exception in Canada could only provide limited protection to users when the UGC work is disseminated on the Internet as the UGC exception would be ineffective against proceedings for copyright infringement brought outside Canada. As such, Canadian users may be exposed to the risks of potential copyright infringement when they communicate the UGC on the Internet.

12. On the other hand, there are academic views that the Canadian UGC exception complies with the three-step test as the issue had come up during the legislative process. Professor Peter Yu of the United States suggested that after multi-year deliberations of the bills, Canadian law- and policymakers were confident that the significant qualifying conditions of the exception, such as “the identification of the source, the legality of the work or the copy used, and the absence of a substantial adverse effect on the exploitation of the original work”, would ensure that the Canadian UGC provision passed the three-step test.⁹
13. In his article, Prof. Peter Yu further pointed out that many commentators were of the view that the Canadian UGC exception provided a much more limited exception than the fair use provision in the United States, which allowed for the transformative use of copyright works for commercial purposes. It was suggested that if the US “fair use” provision passed the three-step test, a narrow form of the US fair use provision, such as the Canadian UGC exception, would not fail that same test.

Preliminary assessment on compliance of the proposed 4th Option for non-profit making UGC with the three-step tests under TRIPS (Art 13) and Berne (Art 9(2))

The 4th option

“Certain special cases”

14. The proposed 4th option appears to be based on the Canadian exception. (Please see a comparison table of the respective provisions in Annex A) However, it is likely to cover an even wider scope as it does not only cover a new work where copyright subsists, but also extends to a work of joint authorship and a work with transformative purposes. The requirement of originality is much lower as a “work with transformative purposes” may not necessarily have any transformative element in the work itself. It may simply use the underlying work for an entirely different purpose, such as capturing an original picture as a profile photo in posting message in discussion forum. Essentially, the proposed UGC exception may cover any and all user-generated content. Given that the scope of the exception is so wide, it will be difficult to argue that it is only confined to special cases that serve “an exceptional or distinctive objective”. It is therefore arguable as to whether this exception would comply with the first step.

⁹ Please see p.27 of Professor Peter Yu’s article on “Digital Copyright and the Parody Exception in Hong Kong: Accommodating the Needs and Interests of Internet Users”, as a submission on behalf of the Journalism of Media Studies Centre, University of Hong Kong in the consultation exercise. Professor Yu is Kern Family Chair in Intellectual Property Law, Drake University Law School in the United States.

“Not conflict with a normal exploitation of the work”

15. Further, it is noted that as opposed to the Canadian UGC provision, the proposed 4th option limits substantial adverse economic effect to “market or exploitation” of copyright works as one of the qualifying conditions, which does not appear to be in line with the three-step test in relation to the “normal exploitation of work” as decided by the WTO Panel Report (WT/DS160/R). The Panel construed the meaning of the phrase “not to conflict with a normal exploitation of the work” as *“uses, that are in principle covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that the right holders normally extract economic value from that right to the work and thereby deprives them of significant or tangible commercial gains.”* “Normal exploitation” includes not only current modes of exploitation, but also other forms which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance. In no way does the Panel decision exclude “potential market” from the ambit of “normal exploitation” of copyright works. Hence, it is doubtful as to whether the proposed 4th option would comply with the 2nd step under TRIPS and Berne.

“Not unreasonably prejudice the legitimate interests of the copyright owner/author”

16. Considering that the proposed 4th Option may conflict with a normal exploitation of the underlying work, it may cause unreasonable prejudice to the legitimate interest of the author or copyright owner rendering it non-compliant with the third step under TRIPS.
17. Given that the Canadian UGC exception (which already has more stringent qualifying conditions than the proposed 4th option) has raised controversies as commented by renowned intellectual property scholars such as Dr. Ficsor and Mr. Sookman above, in particular, the three-step test in relation to the 1st step of “certain special cases”, it is questionable whether the proposed 4th option (which has a much wider scope and may potentially be applicable to the broadest possible category of adaptations and derivative works) is in conformity with international standards.

Latest International Developments

18. In October 2013, a Copyright Review Committee in Ireland submitted a report entitled “Modernising Copyright” to the Minister for Jobs, Enterprise and Innovation. Among other things, it recommends introducing a new copyright exception for non-commercial UGC along similar lines of the Canadian model, believing that it is teleologically comprehended within Article 5(2)(b) EUCD [the European Union Copyright Directive], which provides for “reproductions on any medium” for private use and for noncommercial ends.
19. In May 2013, the Australian Law Reform Commission issued a Discussion Paper entitled “Copyright and the Digital Economy”. Among other things, it rejects a standalone transformative use exception, after studying the Canadian UGC model and identifying many problems associated with it. Notably, it may not provide adequate protection for the owner of the underlying copyright from the possible effects on that owner’s interests of dissemination of the new work by the internet intermediary. The Commission observes that “[l]imiting any transformative use exception to non-commercial purposes is problematic because the boundary between non-commercial and commercial purposes is

not clear given ‘a digital environment that monetises social relations, friendships and social interactions’.” On 29 November 2013, the Commission submitted its final report to the Attorney General, a public release of which is pending, as the Australian government now has 15 parliamentary sitting days within which to table the report.

20. On 5 December 2013, the European Union launched a public consultation as part of its on-going efforts to review and modernize EU copyright rules. UGC is one of the many subjects under review. There are questions raised with regard to fundamental rights such as the freedom of expression and the right to property. It is noted that during previous rounds of discussions, no consensus was reached among stakeholders on either the problems to be addressed or even the definition of UGC. The document invites views as to experiences of different stakeholders (users, owners and online service providers) and the best way to respond to this phenomenon.

Comparison of the Canadian UGC exception with the proposed 4th Option

<p>Canadian UGC exception (Section 29.21, Canadian Copyright Act)</p>	<p>The proposed 4th option (Proposed to introduce a new section 39B under the existing Copyright Ordinance)</p>	<p>Initial Observations</p>
<p>Non-commercial User-generated Content</p> <p>(1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual— or, with the individual’s authorization, a member of their household— to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if</p> <p>(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;</p> <p>(b) the source — and, if given in the source, the</p>	<p>Non-profit making User-generated Contents or User-generated Contents not in the course of business (the 4th Option)</p> <p>(1) It is not an infringement of copyright for an individual to use an existing work or copy of one, which has been published or otherwise made available to the public, in a new work, a work of joint authorship or a work with transformative purposes, in which copyright subsists, and for the individual to use the work or to authorize an intermediary to disseminate it, if:-</p> <p>(a) at the time of the use of, or the</p>	<ul style="list-style-type: none"> • The Canadian provision refers to “the creation of a new work or other subject-matter in which copyright subsists”, while in the proposed 4th option, there is no reference to the “<i>creation of</i>” a new work but include “<i>a work of joint authorship or a work with transformative purposes</i>” • The formulation of the proposed 4th Option appears to cover much wider scope of works than the Canadian UGC as a “work with transformative purposes” may not have

<p align="center">Canadian UGC exception (Section 29.21, Canadian Copyright Act)</p>	<p align="center">The proposed 4th option (Proposed to introduce a new section 39B under the existing Copyright Ordinance)</p>	<p align="center">Initial Observations</p>
<p>name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;</p> <p>(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and</p> <p>(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.</p> <p>(2)The following definitions apply in subsection (1).</p> <p><i>“Intermediary” means a person or entity who regularly provides space or means for works or</i></p>	<p>authorization to disseminate, the new work or work of joint authorship, is done mainly for the non-profit making purpose or not in the course of business;</p> <p>(b) the individual had reasonable grounds to believe that the existing work or copy of it, as the case may be, was not infringing copyright. The court in deciding if the individual had reasonable ground under this subsection, it may consider if the name of the author, performer, maker or broadcaster — of the existing work or copy of it are mentioned, if it is reasonable in the circumstances to do so;</p> <p>(c) the use of, or the authorization to disseminate the new work does not have a substantial adverse financial effect on the</p>	<p>any transformative element in the work itself but simply uses the underlying work for an entirely different purpose, such as capturing an original picture as a profile photo in posting or responding messages in discussion forum. Although the 4th option specifies that copyright must subsist in the new work, the threshold of originality is much lower than that of the Canadian provisions.</p> <ul style="list-style-type: none"> • Different from the Canadian provision, the proposed 4th option does not require acknowledgement of the source of the underlying work as one of the qualifying conditions for

<p align="center">Canadian UGC exception (Section 29.21, Canadian Copyright Act)</p>	<p align="center">The proposed 4th option (Proposed to introduce a new section 39B under the existing Copyright Ordinance)</p>	<p align="center">Initial Observations</p>
<p><i>other subject-matter to be enjoyed by the public.</i></p> <p><i>“Use” means to do anything that by this Act the owners of the copyright has the sole right to do, other than the right to authorize anything.</i></p>	<p>exploitation or market for the existing work to the extent that the work substitutes for the existing work</p> <p>(2) For the purposes of subsection (1)</p> <p><i>“intermediary” means a person who regularly provides space or means for works to be enjoyed by the public; and</i></p> <p><i>“use” means to exercise the right of the owner of the copyright in an existing work under section 22(1).”</i></p>	<p>invoking the exception. It simply states that the court may take into account whether acknowledgement has been made if it is reasonable in the circumstances to do so when deciding whether the individual had reasonable grounds to believe that the existing work or copy of it, was not infringing copyright. Such a formulation is relatively lax as compared with the Canadian provision in s.29.21(b).</p> <ul style="list-style-type: none"> • Further, the proposed 4th option only requires that the act does not have a <i>substantial adverse financial effect</i> on the exploitation or market of the <i>existing work to the</i>

<p align="center">Canadian UGC exception (Section 29.21, Canadian Copyright Act)</p>	<p align="center">The proposed 4th option (Proposed to introduce a new section 39B under the existing Copyright Ordinance)</p>	<p align="center">Initial Observations</p>
		<p><i>extent that the work substitutes for the existing work while the Canadian provision requires that the act must not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or on the existing or potential market for the existing work including that the new work is not a substitute for the existing one. It is noted that the qualifying condition (c) of the proposed 4th option is much loose than the Canadian provision in that:</i></p> <ul style="list-style-type: none"> • (i) it limits the adverse effect to financial aspect only;

<p align="center">Canadian UGC exception (Section 29.21, Canadian Copyright Act)</p>	<p align="center">The proposed 4th option (Proposed to introduce a new section 39B under the existing Copyright Ordinance)</p>	<p align="center">Initial Observations</p>
		<p>(ii) it does not take into account of the potential market and potential exploitation of the underlying work; and</p> <p>(iii) it elevates copyright owners' burden in proving the magnitude of adverse financial effect to the extent that it substitutes the existing work, while in the Canadian provision, substitution effect is only one of the factors for considering the adverse effect on the existing work.</p>