

**立法會**  
**Legislative Council**

LC Paper No. CB(4)977/13-14(01)

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**Bills Committee on Copyright (Amendment) Bill 2014**

**Background brief**

**Purpose**

This paper provides a summary of views and concerns expressed by Members of the Bills Committee on the Copyright (Amendment) Bill 2011 and the deliberations of the Panel on Commerce and Industry ("the Panel") on the Administration's proposals for the treatment of parody<sup>1</sup> under the copyright regime in previous discussions.

**Background**

2. To make the copyright protection regime more forward-looking to keep pace with technological developments, the Administration, following extensive consultations since 2006, introduced the Copyright (Amendment) 2011 Bill (the "2011 Bill") into the Legislative Council ("LegCo") in June 2011 to update the Copyright Ordinance (Cap. 528). The 2011 Bill seeks to –

- (a) provide for the rights of the owner of the copyright in a work, and the rights of a performer in a performance, relating to the communication of the work or performance to the public;

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<sup>1</sup> The Oxford Advanced Learners' Dictionary defines "parody" as "a piece of writing, music, acting, etc. that deliberately copies the style of somebody/something in order to be amusing". Webster's Dictionary defines parody as "a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule". Most recently, parody, among such terms as re-mix, mash-up works and derivative works, are loosely and collectively referred to by the society to describe certain materials that sometimes adapt existing copyright works for amusement, criticism or satire.

- (b) provide for limitations on the liability of an online service provider ("OSP") relating to online materials;
- (c) make further provision with respect to the acts that may be done without infringing copyright or performers' rights; and
- (d) provide for additional factors to which the court may have regard in considering whether additional damages should be awarded in an action for infringement of copyright or performers' rights.

3. During the scrutiny of the 2011 Bill, members of the Bills Committee had raised concerns about, among other things, the making of parody for dissemination on the Internet. After thorough scrutiny, the Bills Committee supported the resumption of the Second Reading debate on the Bill with suitable amendments. The Administration undertook to separately consult the public on the treatment of parody under the copyright regime. The Bill however did not resume Second Reading Debate and lapsed upon expiry of the previous term of LegCo in July 2012<sup>2</sup>.

#### Public consultation on the treatment of parody

4. In the light of the wide spread concerns over the treatment of parody during the deliberation of the 2011 Bill, the Administration conducted a public consultation exercise from July to November 2013 to explore how parody should be taken care of as appropriate under the copyright regime having due regard to present day circumstances. The Administration has identified in the consultation paper three options for special treatment of parody as follows:

- (a) Option 1 - Clarification: This option clarifies the provisions for criminal sanction under the Copyright Ordinance (regarding both the existing "distribution offence" and the proposed "communication offence") 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 relevant factors as guidance to the court in determining the magnitude of economic prejudice.
- (b) Option 2 - Criminal exemption: This option introduces a criminal exemption to specifically exclude parody from the existing "distribution" and the proposed "communication" offences. The

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<sup>2</sup> In anticipation of over 1 000 Committee Stage amendments that would be proposed to the Bill, the Administration subsequently withdrew its notice for resuming the Second Reading debate on the Bill at the Council Meeting of 9 May 2012.

dissemination of parody, so long as it meets the qualifying conditions specified in the relevant provisions, will not attract any criminal liability under those provisions.

- (c) Option 3 - Fair dealing exception: This option introduces a fair dealing exception for parody based on the experience or approach in Australia, Canada and the UK. Under this option, distribution and communication of parody will not attract any civil nor criminal liability if the qualifying conditions of the exception are met.

5. After considering the views received, overseas experiences and the guiding principles identified for the consultation exercise, the Administration proposed a number of copyright exceptions for parody and related uses, and combined the new proposals with the legislative proposals under the 2011 Bill to form the Copyright (Amendment) Bill 2014.

### **The Copyright (Amendment) Bill 2014 ("the 2014 Bill")**

- 6. The 2014 Bill seeks to amend the Copyright Ordinance to provide for –
  - (a) the rights to communicate a work or performance to the public by a copyright owner or performer;
  - (b) limiting an OSP's liability;
  - (c) acts that may be done without infringing copyright or performers' rights; and
  - (d) additional factors in considering whether additional damages should be awarded in an action for infringement.

7. According to the Administration, the 2014 Bill combines the proposals contained in the 2011 Bill (with the Administration's proposed CSAs discussed at the 2011 Bills Committee) and the new proposals for the treatment of parody and related matters. The major areas of changes in respect of communication right, criminal liability, copyright exceptions, safe harbour and civil liability are set out in paragraphs 9 to 19 of the Legal Service Division Report (LC Paper No. LS63/13-14).

## **Deliberations of the Bills Committee on the 2011 Bill**

8. The Bills Committee generally supported the legislative intent of the 2011 Bill to update the Copyright Ordinance so as to ensure that it would endure the test of rapid advances in technology, encourage co-operation between copyright owners and OSPs in the fight against online infringement, and facilitate new modes of uses of copyright materials such as e-learning. In the course of deliberation, members raised concerns in relation to, among others, the proposed introduction of the right of communication for copyright owners, the making of parody for dissemination on the Internet and the "safe harbour" provisions for OSPs.

9. On the proposed introduction of the right of communication for copyright owners, some members expressed concerns about whether the sharing of a work accompanied by one's comments or otherwise on the Internet without the authorization of the copyright owner would constitute copyright infringement under the 2011 Bill. Concern was also raised as to whether the sharing of hyperlink through social networking channels might be regarded as communication of copyright work to the public which was supposed to be an exclusive right of copyright owners under the 2011 Bill. As regards the criminal provisions, some members opined that the Administration should make it clear in the 2011 Bill that the policy objective of the criminal sanctions was to target large-scale and profit-making copyright piracy. The Administration should also consider whether additional provisions could be brought in to give greater clarity to what constitutes "to such an extent as to affect prejudicially the copyright owner". Some members suggested that the 2011 Bill should specify that only those who engage in the communication of copyright works which cause direct and concrete economic prejudice to the copyright owners would attract criminal liability.

10. In respect of the treatment of parody, the Bills Committee noted that the 2011 Bill contained no provisions targeting parody. Some copyright users expressed the view that parodies not involving large scale copyright piracy and profit-making should be exempted from the criminal liability so as to protect the freedom of expression. Some members suggested that the Administration should consider granting exemption to parodies making use of Government publicity and promotion materials.

11. As regards the introduction of "safe harbour" provisions, some members expressed concern on whether the "Notice and Takedown" system could be abused for the purpose of political censorship. Some members were of the view that the prescribed condition that OSPs must fulfill to qualify for the "safe harbour" under the 2011 Bill was relatively lenient in comparison with the

overseas standard. As the implementation of the safe harbour provisions was underpinned by a non-statutory Code of Practice ("CoP") rather than a code prescribed by way of subsidiary legislation, some members were concerned whether LegCo's scrutiny power would be undermined. The Administration advised that as opposed to prescribing the guidelines by way of subsidiary legislation, a non-statutory CoP allowed the Administration to introduce revisions in a more timely fashion. To address members' concerns, the Administration undertook to consult the Panel on any future amendments to the CoP.

### **Deliberations of the Panel on Commerce and Industry on the treatment of parody under the copyright regime**

12. The Panel was briefed on the outcome of the Administration's consultation exercise on the treatment of parody under the copyright regime and was consulted on the proposed directions for taking the matter forward at its meetings on 17 December 2013 and 18 March 2014 respectively. A public hearing was held on 4 November 2013 to receive views from deputations/individuals on the matter. In gist, while members and deputations/individuals had diverse views on the scope of special treatment under the copyright regime, there was a common consensus that a fair balance should be struck between protecting the legitimate interests of copyright owners and other public interests, such as reasonable use of copyright works and freedom of expression. Most members were of the view that a robust copyright regime would incentivise creativity and advance social and economic interests. The Panel supported in principle an early update of the copyright regime to keep pace with international standards and technological developments. Major views and concerns expressed by Panel members and deputations on the subject were summarized in the ensuing paragraphs.

#### Subject and grounds for special treatment

13. Some members enquired about the rationale on adopting the term "parody" in the consultation paper instead of "secondary creation" which was commonly used by netizens in Hong Kong. The Administration explained that the term "secondary creation" was not a term commonly used in copyright jurisprudence and might entail a much larger scope than parody. Having considered the approaches adopted in overseas jurisdictions, it was decided that parody should be the subject of the consultation.

14. Considering that it would be difficult to define whether the copyright infringing acts had caused "more than trivial" economic prejudice to the

copyright owners, some members requested the Administration to consider using public interests, non-commercial use of parodies and the "fair comment" principle as the grounds for exempting parodists from criminal and civil liabilities as long as these works were not produced intentionally for profit-making purposes.

#### Scope of special treatment

15. The Panel noted that copyright owners welcomed the Administration's proposal for not providing copyright exception for non-profit making User-generated Content ("UGC") or UGC not in the course of trade in the current round of exercise. Some members cast doubt on whether the proposed copyright exception for UGC championed by netizens would comply with Hong Kong's international obligations under international copyright treaties. While agreeing that adequate room should be provided for secondary creation, some members expressed reservation over users' request for the right to and exception for secondary creation.

16. Some members, on the other hand, opined that the scope of the special treatment under the copyright law should be as wide as possible to give netizens peace of mind from fear of prosecution without undermining the legitimate interests of copyright owners. As the Administration's proposals did not provide any copyright exception for non-profit making UGC or UGC not disseminated in the course of trade, nor exemption for secondary creations, some members considered that these proposals were unable to allay users' concerns about the impact of criminal and civil liabilities on freedom of expression and creations as well as the free flow of information across the Internet. There was a view that the Administration should not dismiss any possible exception for UGC simply on the grounds that it could not satisfy the "three-step test" of international copyright treaties, and that the Administration should consider providing special treatment for UGC under the copyright regime as appropriate in order to strive for a common consensus between copyright owners and users in taking the matter of parody forward. Given the rapid development of information and technology and the rapid changes in users' behaviours in the digital world, some members called on the Administration to further review the scope of special treatment in the light of changing circumstances in the future.

17. The Administration advised that it had taken a pragmatic approach to address users' concerns by focusing on the treatment of various common activities on the Internet which might constitute infringement under the Copyright Ordinance. The Administration was of the view that with the enlarged scope of special treatment, its proposals would be able to accommodate

most of the common activities on the Internet that had public policy grounds to justify special treatment, thereby enhancing users' freedom of expression and encouraging reasonable use of copyright works without undermining the legitimate interests of copyright owners.

### Law enforcement

18. Some members raised concern on how the copyright law could be enforced in the internet world if the infringing act did not occur in Hong Kong. Members urged the Administration to clearly set out the procedures of enforcement action to allay netizens' worries over selective prosecution by the government on copyright infringement cases. The Administration advised that law enforcement action would be undertaken by enforcement agents of the place where the infringing act took place. Hong Kong was governed by the rule of law and it would be impossible for the government to prosecute on copyright offences without involving the copyright owners.

### **Latest position**

19. At the House Committee meeting on 20 June 2014, a Bills Committee was formed to scrutinize the 2014 Bill.

### **Relevant papers**

20. A list of relevant papers is in the **Appendix**.

Council Business Division 4  
Legislative Council Secretariat  
16 July 2014

## Appendix

### Bills Committee on Copyright (Amendment) Bill 2014

#### List of relevant papers

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
5/7/2011	Bills Committee on Copyright (Amendment) Bill 2011	Legislative Council Brief  Legal Service Division Report  Background brief	CITB 07/09/17  <a href="http://www.legco.gov.hk/yr10-11/english/bills/brief/b35_brf.pdf">http://www.legco.gov.hk/yr10-11/english/bills/brief/b35_brf.pdf</a>  LS80/10-11  <a href="http://www.legco.gov.hk/yr10-11/english/hc/papers/hc0617ls-80-e.pdf">http://www.legco.gov.hk/yr10-11/english/hc/papers/hc0617ls-80-e.pdf</a>  CB(1)2623/10-11(01)  <a href="http://www.legco.gov.hk/yr10-11/english/bc/bc10/papers/bc100705cb1-2623-1-e.pdf">http://www.legco.gov.hk/yr10-11/english/bc/bc10/papers/bc100705cb1-2623-1-e.pdf</a>
20/4/2012	House Committee	Report of the Bills Committee on Copyright (Amendment) Bill 2011  Minutes of meeting	CB(1)1610/11-12  <a href="http://www.legco.gov.hk/yr11-12/english/hc/papers/hc0420cb1-1610-e.pdf">http://www.legco.gov.hk/yr11-12/english/hc/papers/hc0420cb1-1610-e.pdf</a>  CB(2)1810/11-12  <a href="http://www.legco.gov.hk/yr11-12/english/hc/minutes/hc20120420.pdf">http://www.legco.gov.hk/yr11-12/english/hc/minutes/hc20120420.pdf</a>
27/4/2012	House Committee	Minutes of meeting	CB(2)1860/11-12  <a href="http://www.legco.gov.hk/yr11-12/english/hc/minutes/hc20120427.pdf">http://www.legco.gov.hk/yr11-12/english/hc/minutes/hc20120427.pdf</a>



Date of meeting	Meeting	Minutes/Paper	LC Paper No.
16/7/2013	Panel on Commerce and Industry	<p>Administration's paper</p> <p>Background brief</p> <p>Minutes of meeting</p>	<p>CB(1)1508/12-13(03)</p> <p><a href="http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-3-e.pdf">http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-3-e.pdf</a></p> <p>CB(1)1508/12-13(04)</p> <p><a href="http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-4-e.pdf">http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-4-e.pdf</a></p> <p>CB(1)1797/12-13</p> <p><a href="http://www.legco.gov.hk/yr12-13/english/panels/ci/minutes/ci20130716.pdf">http://www.legco.gov.hk/yr12-13/english/panels/ci/minutes/ci20130716.pdf</a></p>
4/11/2013	Panel on Commerce and Industry	<p>Administration's paper</p> <p>Updated background brief</p>	<p>CB(1)179/13-14(01)</p> <p><a href="http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1104cb1-179-1-e.pdf">http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1104cb1-179-1-e.pdf</a></p> <p>CB(1)179/13-14(02)</p> <p><a href="http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1104cb1-179-2-e.pdf">http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1104cb1-179-2-e.pdf</a></p>
17/12/2013	Panel on Commerce and Industry	<p>Administration's paper</p> <p>Updated background brief</p>	<p>CB(1)516/13-14(03)</p> <p><a href="http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1217cb1-516-3-e.pdf">http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1217cb1-516-3-e.pdf</a></p> <p>CB(1)516/13-14(04)</p> <p><a href="http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1217cb1-516-4-e.pdf">http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1217cb1-516-4-e.pdf</a></p>

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
		Minutes of meeting	CB(1)883/13-14 <a href="http://www.legco.gov.hk/yr13-14/english/panels/ci/minutes/ci20131217.pdf">http://www.legco.gov.hk/yr13-14/english/panels/ci/minutes/ci20131217.pdf</a>
18/3/2014	Panel on Commerce and Industry	Administration's paper  Updated background brief  Minutes of meeting	CB(1)1072/13-14(05) <a href="http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci0318cb1-1072-5-e.pdf">http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci0318cb1-1072-5-e.pdf</a>  CB(1)1072/13-14(06) <a href="http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci0318cb1-1072-6-e.pdf">http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci0318cb1-1072-6-e.pdf</a>  CB(1)1418/13-14 <a href="http://www.legco.gov.hk/yr13-14/english/panels/ci/minutes/ci20140318.pdf">http://www.legco.gov.hk/yr13-14/english/panels/ci/minutes/ci20140318.pdf</a>
11/6/2014	--	Legislative Council Brief	CITB 07/09/17 <a href="http://www.legco.gov.hk/yr13-14/english/bills/brief/b201406131_brf.pdf">http://www.legco.gov.hk/yr13-14/english/bills/brief/b201406131_brf.pdf</a>
20/6/2014	House Committee	Legal Service Division Report	LS63/13-14 <a href="http://www.legco.gov.hk/yr13-14/english/hc/papers/hc0620ls-63-e.pdf">http://www.legco.gov.hk/yr13-14/english/hc/papers/hc0620ls-63-e.pdf</a>