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Briefing on Copyright (Amendment) Bill 2014
Bills Committee
October 2014



Basic Principles

- **Promote creativity**
- **Private property right protected by law**
 - selling, buying, licensing
 - authors, copyright owners, licencees
- **Copyright protection not absolute**
 - durations
 - permitted acts
 - public interest
- **Reasonable balance between different interests**

Basic Principles (2)

- **Territorial application of copyright**
- **International treaties, e.g.**
 - Berne Convention (1979)
 - The Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)
 - The World Intellectual Property Organization's (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty (1996)
- **Mainstreams development of major overseas jurisdictions**
 - US (1998)
 - EU (2001)
 - Australia (2001)
 - UK (2003)
 - Singapore (2005)
 - New Zealand (2008)
 - Canada (2012)
- **Regular update of local copyright regime**
 - Enacted in 1997 Amended in 2001,2003,2007 & 2009
 - Public consultation launched in 2006, amendment bill introduced in 2011



Major legislative proposals of the 2014 Bill

Five key areas-

(A) Communication Right

(B) Copyright Exceptions

(C) Criminal Liability

(D) Civil Liability

(E) Safe Harbour



(A) Communication Right

- The Copyright Ordinance confers a number of exclusive rights to copyright owners, which include-
 - to copy the work
 - to issue and make available copies of the work to the public
 - to perform, show or play the work in public
 - to broadcast the work or include it in a cable programme service
 - to make adaptation of the work
- With advances in technology, new modes of electronic transmission such as streaming have been emerging. The current scope of statutory protection may not be adequate to cope with such rapid changes, possibly allowing an infringer to evade liability on technicality.
- The Bill proposes to introduce a new exclusive right for copyright owners to communicate their works to the public through any mode of electronic transmission.



(B) Copyright Exceptions

- The existing Copyright Ordinance has over 60 sections specifying a number of permitted acts (such as for the purposes of research, private study, education, criticism, review and reporting current events), allowing the reasonable use of copyright works of others without constituting copyright infringement.
- The Bill proposes the introduction of a new communication right, and at the same time contains some copyright exceptions to maintain the right balance between copyright protection and use of copyright works. This facilitates users to use copyright works under appropriate circumstances, without obtaining authorisation from copyright owners and attracting any civil or criminal liability.

(B) Copyright Exceptions (2)

- The 2014 Bill incorporates the following exceptions as proposed in the 2011 Bill-
 - for education sector in communicating copyright works when giving instructions (especially for distance learning), and facilitating libraries, archives and museums in their daily operations and in preserving valuable works
 - for OSPs to cache data which technically involves copying. Such caching is transient or incidental in nature and technically required for the process of data transmission to function efficiently
 - for media shifting of sound recordings, which refers to the making of an additional copy of a copyright work from one media or format into another, usually for the purpose of listening to the work in a more convenient manner.



(B) Copyright Exceptions (3)

- The 2014 Bill proposes new fair dealing exceptions to cover-
 - use for the purposes of parody, satire, caricature and pastiche
 - use for the purpose of commenting on current events
 - quotation



(B) Copyright Exceptions (4)

What are the reasons for providing copyright exceptions to use for the purposes of parody, satire, caricature and pastiche ?

- the scope is clear and confined, consisting of well recognised literary or artistic practices
- they are common means for the public to express views or comment on current events, and may promote freedom of expression
- they may encourage creativity, nurture new talents and even entertainment business, and therefore contribute to the overall economic and cultural development of society
- they are commonly critical or transformative in nature and should unlikely compete with or substitute the original works
- make reference to Australia, Canada, UK and EU



(B) Copyright Exceptions (5)

What is “quotation”? What is its scope of application?

- “Quotation” refers to extracts of copyright works
- Can be used in formal works like academic and scholarly texts or informal works like blogs and social media websites (e.g. image capture)
- Used for the purposes of providing information, illustrating arguments and facilitating dialogue and communication

(B) Copyright Exceptions (6)

Why the exception of “commenting on current affairs” is added when the exception of “reporting current affairs” has already existed?

- The public interest in freedom of expression together with other public interests have been taken care of under the fair dealing exception for “reporting current events”.
- As commenting on current events is akin to “reporting current events”, it should be given the same treatment under the Ordinance.



(B) Copyright Exceptions (7)

- The provisions for the 3 proposed exceptions state clearly that in determining whether any dealing with a work is fair dealing, the court must take into account all the circumstances of the case and, in particular-
 - 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
 - the nature of the work
 - the amount and substantiality of the portion dealt with in relation to the work as a whole
 - the effect of the dealing on the potential market for or value of the work
- The factors for fairness assessment are also applicable to those fair dealing exceptions under existing Copyright Ordinance.
- The factors are formulated based on the statutory provisions on “fair use/dealing” of US and Australia as well as the relevant case law of other common law jurisdictions (like UK).



(B) Copyright Exceptions (8)

- In preparing the copyright exceptions, the Government has considered the views collected in the consultation, the developments of overseas jurisdictions and the “3-step test” under Article 13 of the TRIPS Agreement which stipulates that the exception-
 - is confined to “special cases”
 - must not conflict with a normal exploitation of the work
 - must not unreasonably prejudice the legitimate interests of the copyright owner

(C) Criminal Liability

- Under existing Copyright Ordinance, distribution of infringing copies is a criminal offence-
 - for the purpose of or in the course of any trade or business or
 - to such an extent as to affect prejudicially the copyright owners (“prejudicial distribution”)
- To propose criminal sanctions against infringing communication under the following circumstances-
 - for the purpose of or in the course of any trade or business or
 - to such an extent as to affect prejudicially the copyright owners (“prejudicial communication”)



(C) Criminal Liability (2)

- Regarding the criminal threshold for existing ‘prejudicial distribution’ and the proposed “prejudicial communication”, some netizens worry that it may leave the criminal net wide and result in legal uncertainty having a chilling effect on freedom of expression.
- The Copyright (Amendment) Bill 2014 will not adopt the phrase “more than trivial economic prejudice”. Instead it highlights the important factors that the court has to consider in order to assess possible criminal liability.

(C) Criminal Liability (3)

- Proposed section 118(8C) –

In determining whether any communication of the work to the public is made to such an extent as to affect prejudicially copyright owner, the court –

- may take into account all the circumstances of the cases
 - in particular, may take into account whether economic prejudice is caused to the copyright owner as a consequence of the distribution, having regard to whether the infringing copy so distributed amounts to a substitution for the work
- This proposal helps to clarify the legislative intent to combat large-scale piracy, and is accepted by copyright owners and netizens.



(C) Criminal Liability (4)

- Some netizens worry that the act of sharing a hyperlink would attract criminal liability after introduction of the communication offence.
- If the “link” in question merely provides those who click on it a means to access materials on another website, and the person who shares the link does not distribute an infringing copy of the copyright work (e.g. by uploading an infringing song to a website for others to download), the mere act of sharing a link will not constitute copyright infringement.
- The most fundamental element of copyright offences is that the relevant acts have been conducted without the consent of the copyright owner and thereby constitute copyright infringement. If the copyright owner does not object or pursue the matter, there is no basis for the government to bypass copyright owner and take prosecution action.



(D) Civil Liability

- Copyright infringement attracts civil liability which is actionable by owners. The general principle behind is to right the wrong that has been done to a claimant, who must bear the burden of proof of the wrongdoing and the harm done.
- In practice, in a great many trivial cases in which copyright might have been infringed technically, the economic or other interest involved might not be sufficient for an owner to take out civil proceedings. Frivolous or vexatious civil claims would not be entertained by the court, too.

(D) Civil Liability (2)

- Currently, in upholding a claim, the court may award additional damages having regard to the following circumstances-
 - the flagrancy of the infringement
 - any benefit accruing to the defendant by reason of the infringement
 - the completeness, accuracy and reliability of the defendant's business accounts and records, award such additional damages as the justice of the case may require
- In view of the digital environment, two more factors are proposed, as what had been proposed in the 2011 Bill, for the court to consider in assessing damages-
 - the unreasonable conduct of an infringer after having been informed of the infringement
 - the likelihood of widespread circulation of infringing copies as a result of the infringement

(E) Safe Harbour

- The major role of Online Service Providers (OSPs) is to provide a platform for subscribers to upload their works. OSPs cannot tell whether the platform is being used for infringing activities. So we make reference to the practices of overseas countries (like UK, Australia, New Zealand, Singapore and US) and introduce the safe harbour provisions to limit the liability of OSPs.
- Should the OSPs meet certain prescribed conditions, including taking reasonable steps to limit or stop a copyright infringement when being notified, the liability for copyright infringement on their service platforms caused by subscribers will be limited.
- The provisions will be underpinned by a voluntary Code of Practice which sets out practical guidelines and procedures for OSPs to follow after notification.

(E) Safe Harbour (2)

- The current version of the Code of Practice (released in March 2012) has taken into account comments received over two rounds of consultation in August 2011 and January 2012 and has been reviewed by the previous Bills Committee.
- We hope that the proposed safe harbour can balance the interests of copyright owners, users and intermediaries and provide an effective and efficient mechanism outside court to settle allegation of copyright infringement. For example-
 - OSPs are not required to actively police their service platforms for infringing activities in order to qualify for the safe harbour protection
 - A subscriber may choose to request the OSP not to disclose his or her personal data when it sends a copy of his or her counter notice to the complainant (disclosure of personal information is subject to court scrutiny)

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(E) Safe Harbour (3)

- On receipt of a counter notice, an OSP shall take reasonable steps to reinstate the material it has taken down (unless the complainant has informed it in writing that proceedings have been commenced in Hong Kong seeking a court order in connection with the alleged infringing activity)
- Both the complainant and subscriber are required to provide adequate and specific information to substantiate their allegation of copyright infringement and counter notice. Submission of false statements is liable to both civil and criminal sanctions (a fine at level 2 and imprisonment for 2 years)
- OSPs, copyright owners and users may follow the detailed guidance in the Code of Practice to be issued in the future



Conclusion

- The following circumstances do not constitute copyright infringement under the existing law–
 - (1) the copyright owner has agreed or acquiesced
 - (2) the copyright protection in the underlying work has expired
 - (3) only the ideas of the underlying work have been incorporated
 - (4) only an insubstantial part of the underlying work has been reproduced
 - (5) 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
- The introduction of the “communication right” and corresponding criminal sanction will not change the above legal situation, nor will it inhibit freedom of expression.
- On the contrary, freedom of expression can be ensured with the introduction of the new copyright exceptions and clarification of the threshold of criminal liability.
- The safe harbour will be beneficial to copyright owners, users and OSPs.



-THANK YOU-