

Bills Committee on the Copyright (Amendment) Bill 2014

Application of fair dealing provisions

Introduction

At the meeting on 14 October 2014, Members requested the Administration to explain the fair dealing provisions in the Copyright (Amendment) Bill 2014 (“the Bill”) in relation to the re-posting of non-commercial video clips of outdated news on the Internet. This paper provides the information as requested.

Existing and proposed fair dealing provisions

2. The existing Copyright Ordinance (Cap. 528) provides for a number of copyright exceptions in respect of fair dealings of works for the following purposes -

- (a) research and private studies (section 38)
- (b) criticism, review and news reporting (section 39)
- (c) education (section 41A)
- (d) public administration (section 54A)

3. To tie in with the introduction of the communication right and to maintain the balance between copyright protection and reasonable use of copyright, we propose in the Bill to expand the existing scope of fair dealings to exempt criminal and civil liabilities for the following purposes in appropriate circumstances –

- (a) parody, satire, caricature and pastiche (new section 39A);
- (b) commenting on current events (revised section 39); and
- (c) quotation (revised section 39).¹

4. As the scenario in question appears to be most related to “commenting on current events” and “quotation”, this paper focuses on the application of these two fair dealing provisions. This however does not exclude the possibility

¹ We also propose in the Bill new copyright exceptions for (i) temporary reproduction of copyright works by Online Service Providers, which is technically required for the digital transmission process to function efficiently, (ii) media shifting of sound recordings and (iii) giving educational instructions (especially for distance learning) and facilitating daily operations of libraries, archives and museums.

of relying on other existing or new copyright exceptions such as those for the purposes of criticism, review and parody.

Fair dealing

5. Regarding the existing fair dealing provisions referred to in paragraph 2(a), (c) and (d) above, the existing sections 38(3), 41A(2) and 54A(2) stipulate that –

“In determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case, and, in particular-

- (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*
- (d) the effect of the dealing on the potential market for or value of the work.”*

6. Regarding the existing fair dealing provisions referred to in paragraph 2(b) above, the Bill proposes to revise section 39 to include a sub-section to the same effect and to provide for new fair dealings for the purposes of commenting on current events and quotation.² We have elaborated on the fairness assessment vide LC Paper No. CB(4)11/14-15(02).

Commenting on current events

7. Section 39 has already provided for a fair dealing exception for the purpose of news reporting i.e. “reporting current events” (paragraph 2(b) above). The coverage, however, might not be adequate in present day circumstances. Many Internet users now use copyright works for commenting on current events such as expressing views on or engaging in discussions about political or social issues. We accept that in some cases the use of copyright works for such a purpose does not necessarily rely on parody and similar genres, and in some cases there may be strong justifications for facilitating freedom of expression in

² The new section 39A which provides for fair dealings for the purposes of parody, satire, caricature and pastiche will also include a sub-section to the same effect.

such a context³. We consider that the same treatment should be given to “reporting on current events” and “commenting on current events” under the Copyright Ordinance.

8. The existing Copyright Ordinance does not provide a legal definition of “current events”. The expression, as established by English jurisprudence, should be construed liberally. “Current events” are not confined to events of recent happenings⁴. The same approach may be applied to the new fair dealing exception for “commenting on current events”. Regarding the re-posting of non-commercial video clips of outdated news on the Internet, even though the news *per se* is outdated, the event covered may still be qualified as a current event if its ramifications is still of current or continued interest to the public.⁵ Such re-posting may thus be exempted from both civil and criminal liabilities if it is for the purposes of commenting on events of current interest to the public and the dealing is fair for the particular purpose. The assessment of whether the dealing is fair is fact sensitive depending on all the circumstances of individual cases and the weighing of all fairness factors.

Quotation

9. Apart from for the purposes of commenting on current events, there are cases that the use of quotations from copyright works are justified. Users may use extracts in formal works, such as academic and scholarly texts, as well as in more informal works, such as blogs and social media, to help illustrate arguments and engage in comment and debate. The Bill thus proposes a new fair dealing exception to cover use of a quotation the extent of which is no more than is required by the specific purpose for which it is used. This would cover reasonable uses of copyright works such as films, sound recordings, broadcasts

³ After all, this was the primary concern of the public during the scrutiny of the 2011 Bill. During the consultation exercise on parody, the Hong Kong Bar Association submitted that the provision of an exception to infringing acts is based on a balancing of rights and interests of copyright owners and the public interest. The public interest in the freedom of expression together with other public interests have been taken care of under the fair dealing exception for “reporting current events” under section 39(2) of the Copyright Ordinance. As commenting on current events is analogous or akin to “reporting current events”, it can and should be given the same treatment under the Ordinance. It therefore advocated that a fair dealing exception for “commenting on current events” should be introduced by way of amending the existing fair dealing provision in section 39(2).

⁴ Copinger and Skone James on Copyright (16th edn., 2011) observes that –

- (a) current events are not confined to specific or very recent happenings, particularly where the ramifications of the event continue to be a matter of public debate and concern;
- (b) the exception is not confined to the reporting of current events in a general news programme and includes, for example, the reporting of sports events in a sports news bulletin; and
- (c) the work itself need not be “current”, provided that it is used properly to report current events.

⁵ *Ashdown v Telegraph Group Ltd* [2002] Ch, 149 (Court of Appeal); *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch.143 (Court of Appeal)

and photographs as well as traditional text which are without any alterations or parodic or like elements if it is to facilitate expression of opinions or discussions in the online and traditional environment. As such, the re-posting of video clips of news may be able to rely on this new copyright exception if the dealing is assessed to be fair and all the qualifying conditions are met⁶.

Presentation

10. Members are invited to note the information provided in this paper.

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⁶ Other qualifying conditions are (i) the work from which the quotation is made must have been released or communicated to the public; (ii) the extent of the quotation is no more than is required by the specific purpose for which it is used; and (iii) sufficient acknowledgment has to be made to the quotation if it is reasonably practicable to do so.