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**Paper for the House Committee Meeting
on 20 June 2014**

**Legal Service Division Report on
Copyright (Amendment) Bill 2014**

I. SUMMARY

- 1. The Bill**

The Bill seeks to amend the Copyright Ordinance (Cap. 528) to provide for –

 - (a) the rights to communicate a work or performance to the public by a copyright owner or performer;
 - (b) limiting an online service provider'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.

It combines the proposals contained in the Copyright (Amendment) Bill 2011 (the 2011 Bill) (with the Administration's proposed Committee stage amendments discussed at the then Bills Committee) and the new proposals for the treatment of parody and related matters.
- 2. Public Consultation**

According to the Administration, the legislative proposals contained in the 2011 Bill were drawn up after three rounds of consultation since 2006. From July to November 2013, the Administration conducted a further public consultation exercise specifically on parody, and engaged the general public and stakeholders through different channels and forums.
- 3. Consultation with LegCo Panel**

As advised by the Clerk to the Panel on Commerce and Industry (the Panel), the Panel was briefed on the consultation outcome on the treatment of parody and the way forward on 17 December 2013 and 18 March 2014 respectively. A special meeting was held on 4 November 2013 to receive views, from deputations on the matter. Despite the divergent views, the Panel supports an early update of the copyright regime.
- 4. Conclusion**

The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the important policy issues involved, and the concerns expressed by members of the Panel on the legislative proposals, Members may wish to set up a Bills Committee to study the Bill in detail.

II. REPORT

The date of First Reading of the Copyright (Amendment) Bill 2014 (the 2014 Bill) is 18 June 2014. Members may refer to the LegCo Brief (File Ref.: CITB 07/09/17) issued by the Commerce and Economic Development Bureau (CEDB) on 11 June 2014 for further information.

Object of the Bill

2. The 2014 Bill seeks to amend the Copyright Ordinance (Cap. 528) to provide for –

- (a) the rights to communicate a work or performance to the public by a copyright owner or performer;
- (b) limiting an online service provider'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.

Background

Existing Copyright Ordinance

3. The existing Cap. 528 provides for exclusive rights to copyright owners to disseminate their work through certain specific modes of transmission including the right to broadcast a copyright work, the right to include the work in a cable programme and the right to make it available to the public by wire or wireless means including on the Internet. Such rights are provided in Cap. 528 by way of various "restricted acts", and copyright is infringed by any person who, not being the owner of the copyright or his licensee, does any of the acts restricted by Cap. 528 in Hong Kong. When making a civil claim for copyright infringement, a copyright owner has to prove that the infringement was committed through one or more of the specified modes of transmission.

4. With advances in information technology and the prevalence of high-speed Internet connectivity, new modes of content uses and transmissions have emerged which give copyright owners a wider choice of avenues to disseminate their copyright works. The copyright regime needs to be updated to enhance copyright protection in a digital environment.

Copyright (Amendment) Bill 2011

5. The Copyright (Amendment) Bill 2011 (the 2011 Bill), which sought to amend Cap. 528 in the light of the views received in the public consultation exercise¹, was presented to the Legislative Council (LegCo) for First Reading on 15 June 2011. A Bills Committee (the 2011 Bills Committee) was formed to scrutinize the 2011 Bill. It transpired during the course of scrutiny that the 2011 Bill contained no provisions targeting parody (better known by the public as "secondary creation"). In view of the public concerns about the possible criminal liability for making parodies, the Administration moved Committee stage amendments² (CSAs) to the 2011 Bill by giving specific examples of the circumstances that the court would take into account in determining whether a person would be liable for an offence under section 118(1)(g)³ of Cap. 528. After scrutiny, the Bills Committee supported the resumption of the Second Reading debate with CSAs and requested the Administration to separately consult the public on the treatment of parody in the copyright regime in Hong Kong.

6. Members considered the 2011 Bill at the House Committee meeting on 20 April 2012, and did not raise any objection to the resumption of the Second Reading debate. The Administration then gave notice to resume the Second Reading debate of the 2011 Bill on 17 April 2012. However, that notice was withdrawn following a House Committee's request made in view of the impact of filibustering of the proceeding on another bill.

Copyright (Amendment) Bill 2014

7. The Administration had conducted a public consultation exercise⁴ from July to November 2013 to explore how parody and similar works should be taken care of as appropriate under the copyright regime in Hong Kong with due regard to present day circumstances. A total of 2 455 submissions were received⁵. Having taken into account the divergent views collected, the relevant overseas experiences, and the three

¹ From December 2006 to April 2007 (i.e. prior to presenting the Copyright (Amendment) Bill 2011 (the 2011 Bill) to the LegCo), the Administration conducted a public consultation exercise on "Copyright Protection in the Digital Environment" to seek public views on how best the existing copyright regime should be strengthened in the digital era. Please see paragraph 3 of LC Paper No. CB(1)1211/07-08(03) for the main issues covered in the public consultation exercise. Having regard to the views received on the preliminary proposals in 2008, the Administration issued a set of refined proposals in late 2009 and consulted the Panel on Commerce and Industry regarding the changes. The Panel members did not object to the proposals, which formed the basis of the 2011 Bill.

² Please see the Report of the Bills Committee on Copyright (Amendment) Bill 2011 for the Committee stage amendments proposed to be moved on section 118(2AA) and (8C) of the Copyright Ordinance (LC Paper No. CB(1)1610/11-12, at pages 10 and 12 of Appendix IV to the Report).

³ Section 118 of the Copyright Ordinance (Cap. 528) deals with criminal offences for making or dealing with infringing articles, etc. Section 118(1)(g) provides for the situation where a person commits an offence if he, without the licence of the copyright owner of a copyright work 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.

⁴ The relevant consultation paper entitled "Treatment of Parody under the Copyright Regime" is at Annex B. Paragraphs 8 to 10 of the paper stated the issue and arguments. Paragraphs 11 to 16 of the paper stated the current legal position in Hong Kong. Paragraphs 17 to 25 of the paper stated the situations in other jurisdictions. Paragraph 26 of the paper stated the guiding principles. Paragraphs 27 to 36 of the paper stated the questions and the options for change.

⁵ Paragraph 4 of the LegCo Brief. A summary of the views received in the public consultation on the treatment of parody under the copyright regime is at Annex C.

guiding principles⁶ introduced at the outset of the consultation exercise in 2006, the Administration presents the 2014 Bill to Legislative Council.

Provisions of the Bill

8. 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 are set out below.

A. Communication right (original proposal in the 2011 Bill)

9. The 2011 Bill proposed to introduce a new exclusive right for copyright owners to communicate their works to the public through any mode of electronic transmission.

10. The 2014 Bill proposes the introduction of a new communication right, and contains appropriate copyright relaxations to maintain the right balance among stakeholders. New sections 22(1)(fa) and 28A are proposed for an exclusive right of the owner of the copyright in a work to communicate the work to the public (clauses 9(3) and 13). The communication of a work to the public is an act restricted by the copyright in the work and is the electronic communication of the work to the public, including –

- (a) the broadcasting of the work;
- (b) the inclusion of the work in a cable programme service; and
- (c) the making available of the work to the public.

B. Criminal liability (original proposal in the 2011 Bill combined with new proposal)

11. The 2014 Bill adds a new subsection (8B) to section 118 of Cap. 528 to impose criminal liability on a person who infringes copyright in a work by communicating the work to the public either for profit or reward or to an extent prejudicially affecting the copyright owner (clause 57(8)). Also, a new subsection (3) is added to section 119 of Cap. 528 to provide for the maximum penalty for contravention of the new section 118(8B) (clause 58), i.e. a fine at level 5 (i.e. \$50,000) in respect of each copyright work and imprisonment for four years.

C. Revised and new copyright exceptions (original proposal in the 2011 Bill combined with new proposal)

12. There are over 60 sections in Division III of Part II of Cap. 528 specifying a number of permitted acts which may be done in relation to copyright works

⁶ Three guiding principles reflecting the consensus forged between copyright owners and users over the public consultation are stated in paragraph 5(a) to (c) of the LegCo Brief.

notwithstanding the subsistence of copyright (such as for the purposes of research, private study, education, criticism, review and reporting current events), which attract neither civil nor criminal liability for unauthorized use. The 2014 Bill, just as the 2011 Bill, proposes to revise existing exceptions by providing that the new communication right will as appropriate be subject to the permitted acts provided for in Division III of Part II.

13. According to the Administration, the 2014 Bill proposes new copyright exceptions for the education sector, libraries, museums and archives, for temporary reproduction of copyright works by online service providers (OSP), and for media shifting. The new exceptions are proposed –

- (a) to provide greater flexibility to the education sector in communicating copyright works when giving instructions (especially for distance learning), and to facilitate libraries, archives and museums in their daily operations and in preserving valuable works (clauses 25 to 27, 29 and 32 to 36);
- (b) for OSP to cache data, which technically involves copying a restricted act under Cap. 528 and may technically constitute copyright infringement (clause 42); and
- (c) for media shifting limited to sound recordings (clause 48). Media shifting refers to the making of an additional copy of a copyright work from one media or format into another, usually for the purpose of viewing or listening to the work in a more convenient manner. As copying a copyright work is a restricted act in Cap. 528, media shifting may technically constitute copyright infringement.

14. The 2014 Bill also proposes new fair dealing exceptions (new proposal not found in the 2011 Bill) to cover –

- (a) fair dealing with a copyright work for the purpose of parody, satire, caricature and pastiche (clauses 19 and 76)⁷;
- (b) fair dealing with a performance or fixation for the purpose of commenting on current event (clauses 18 and 75); and

⁷ According to the Administration, they have used "parody" as a general reference to cover all the four terms in the 2013 consultation exercise.

The Concise Oxford English Dictionary (12th Edition, 2012) defines the four terms respectively as follows –

Parody: 1 an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect. 2 a travesty.

Satire: 1 the use of humour, irony, exaggeration, or ridicule to expose and criticise people's stupidity or vices. 2 a play, novel, etc. using satire.→(in Latin literature) a literary miscellany, especially a poem ridiculing prevalent vices or follies.

Caricature: a depiction of a person in which distinguishing characteristics are exaggerated for comic or grotesque effect.

Pastiche: an artistic work in a style that imitates that of another work, artist or period.

- (c) the use of a quotation from a copyright work for the purpose of criticism, review or otherwise (clauses 18 and 75).

15. According to the Administration, a wide range of day to day Internet activities would be covered by the scope of the new copyright exceptions provided for under the 2014 Bill, so long as they are for the purpose of parody, satire, caricature, pastiche, commenting on current events, or quotation, but the following activities are given as examples that may fall outside the scope of the new exceptions –

- (a) the online posting of earnest performance of copyright works, for example, song singing with or without rewriting the lyrics based on the original melodies, which may be more akin to a mere expression of feelings or showing of talent; and
- (b) the unauthorized posting of translation and adaptation works, which may contain certain originality elements or even be transformative in effect.

If the works mentioned in paragraphs (a) and (b) above are devoid of any parodic or like elements or any quotation purposes, nor are they related to any current events, the postings could, in the view of the Administration, hardly provide sufficient public policy grounds to justify special treatment.

16. During the public consultation, the public urged the Administration to consider adding a copyright exception to Cap. 528 to exclude non-profit making use of user generated content (UGC) or UGC not disseminated in the course of trade from both civil and criminal liabilities for copyright infringement. For reasons set out in paragraph 19 of the LegCo Brief, the Administration has expressed reservation in adopting a generic concept of UGC as a subject matter for copyright exception in this round of update.

D. Safe harbour (original proposal in the 2011 Bill)

17. According to the Administration, the 2011 Bill sought to introduce safe harbour provisions to limit OSP's liability for copyright infringement on their service platforms caused by subscribers, provided that they meet certain prescribed conditions. The provisions will be underpinned by a voluntary Code of Practice which sets out practical guidelines and procedures for OSP to follow after notification.

18. The 2014 Bill proposes to add a new Division IIIA to Part II of Cap. 528 to provide for limitations on the liability of an OSP relating to an alleged infringement of copyright in a work that has occurred on the OSP's service platform (clause 50). In particular –

- (a) subject to the specified conditions in the new section 88B, a service provider is not liable for damages in respect of copyright infringement that has occurred on the OSP's service platform;

- (b) procedures are provided for in the new section 88C for giving a notice to an OSP in respect of an alleged infringement of copyright, requesting the OSP to remove the material to which the alleged infringement relates, or disable access to the material or activity to which the alleged infringement relates;
- (c) the actions that an OSP may take after the OSP becomes aware that an infringement of copyright has occurred on the OSP's service platform; or becomes aware of the facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred is provided for in the new section 88D;
- (d) the procedures for giving a counter notice to dispute the alleged infringement are provided for in the new section 88E;
- (e) criminal liability is imposed on a person who knowingly or recklessly makes any false statement in a notice of alleged infringement or counter notice (new section 88F);
- (f) civil liability of a person who makes any false statement in a notice of alleged infringement or counter notice is provided for in the new section 88G;
- (g) subject to certain conditions specified in the new section 88H, an OSP is not liable for any claim in respect of the OSP's removing the material to which an alleged infringement relates, disabling access to the material or activity to which an alleged infringement relates, reinstating the material, or ceasing disabling access;
- (h) a rebuttable presumption that an OSP has complied with the conditions specified in the new section 88I is provided for in that section; and
- (i) Secretary for Commerce and Economic Development (SCED) is empowered to publish a code of practice for providing practical guidance to OSP in respect of the new Division IIIA (new section 88J).

E. Civil liability (Original proposal in the 2011 Bill)

19. The 2014 Bill, as in the 2011 Bill, proposes to introduce two additional factors in section 108(2) of Cap. 528 for the court's assessment of damages, namely the unreasonable conduct of an infringer after having been informed of the infringement, and the likelihood of widespread circulation of infringing copies as a result of the infringement (clause 55).

Commencement

20. The 2014 Bill, if enacted, would come into operation on a day to be appointed by SCED by notice published in the Gazette.

Public Consultation

21. According to the Administration, the legislative proposals contained in the 2011 Bill were drawn up after three rounds of consultation since 2006. From July to November 2013, the Administration conducted a further public consultation exercise specifically on parody, and engaged the general public and stakeholders through different channels and forums.

Consultation with LegCo Panel

22. As advised by the Clerk to the Panel on Commerce and Industry, the Panel was briefed on the outcome of the Administration's consultation 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. While members and deputations/individuals have divergent views on the scope of special treatment under the copyright regime, there is 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 are of the view that a robust copyright regime would incentivise creativity and advance social and economic interests. The Panel supports in principle an early update of the copyright regime to keep pace with international standards and technological developments.

Conclusion

23. The Legal Service Division is scrutinizing the legal and drafting aspects of the 2014 Bill. In view of the important policy issues involved, and the concerns expressed by members of the Panel on Commerce and Industry on the legislative proposals, Members may wish to set up a Bills Committee to study the 2014 Bill in detail.

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