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Panel on Commerce and Industry

Meeting on 18 March 2014

Updated background brief on public consultation on treatment of parody under the copyright regime

Purpose

This paper provides background information on the public consultation on treatment of parody¹ under the copyright regime. It also provides a summary of views and concerns expressed by members of the Panel on Commerce and Industry ("the Panel") and deputations on the subject 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, has introduced the Copyright (Amendment) Bill 2011 (the Bill) into the Legislative Council (LegCo) in June 2011 to update the Copyright Ordinance (Cap. 528). A Bills Committee was formed at the House Committee meeting on 17 June 2011 to study the Bill.

3. During the scrutiny of the Bill, members of the Bills Committee had raised concerns about, among other things, the making of parody for dissemination on the Internet. Whilst members noted that the Bill contained

¹ 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.

no provisions targeting parody, some members considered 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. There was a view that the Administration should consider granting exemption to parodies making use of Government publicity and promotion materials. The issue of parody had also drawn widespread concern in the community. Some copyright users and netizens were concerned that the proposed communication right would adversely affect freedom of expression and that non-profit-making parody might inadvertently amount to a copyright infringement or constitute a criminal offence caught by the criminal net.

4. 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 2012².

Public consultation on the treatment of parody

5. On 11 July 2013, the Administration launched a three-month public consultation exercise on the "Treatment of Parody under the Copyright Regime". To complement the work of the Panel, the consultation exercise was subsequently extended for one more month up to 15 November 2013. The consultation exercise aims to build consensus on the subject of parody to map out the way forward for the package of legislative amendments that has been scrutinized by the Bills Committee.

6. 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.

² 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.

- (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 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.

Discussion of the Panel on Commerce and Industry on the public consultation on the treatment of parody

7. At the Panel meeting on 16 July 2013, members were briefed on the consultation issues and the three possible options regarding the treatment of parody. A special Panel meeting was held on 4 November 2013 to receive views from deputations on the treatment of parody under the copyright regime. Members were subsequently briefed on the outcome of the consultation exercise at the Panel meeting on 17 December 2013. Members generally agreed that the proposed special treatment of parody should aim at striking a fair balance between protecting the legitimate interests of copyright owners to nurture innovation and creativity on the one hand and safeguarding other public interests, such as reasonable use of copyright works and freedom of expression on the other hand. Views and concerns expressed by members and deputations at the meetings were summarized in the ensuing paragraphs.

Scope and grounds for special treatment

8. Some members were of the view that "secondary creation" was not a common term used in copyright jurisprudence. They doubted whether the proposed 4th Option put forward by netizens, which was principally based on the Canadian copyright exception for non-commercial user-generated content (UGC) ("the Canadian model"³), would comply with Hong Kong's international

³ 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.

obligations under international copyright treaties, such as Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization and the three-step tests under the TRIPS Agreement and the Berne Convention⁴. Concern was raised about the impact on Hong Kong in the event that the proposed 4th Option was adopted but found incompatible with the international obligations of Hong Kong. While agreeing that adequate room should be provided for secondary creation, some members expressed reservation over Internet users' request for the right to and exception for secondary creation.

9. On the other hand, some members 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. Given that the use of secondary creation by users to express their views on the Internet platform had become a common trend, some members were of the view that such a behaviour should be appropriately accommodated under the legal framework. The Administration was urged to actively consider the 4th Option to provide copyright exception for non-profit making UGC or UGC not in the course of trade, as well as merging Options 2 and 3 to introduce both criminal and civil exemptions for parody. Considering that each of the three options proposed by the Administration and the 4th Option proposed by Internet users had their own merits, members enquired whether it was technically feasible to draw up a proposal incorporating the merits of individual options so as to provide netizens with greater protection.

10. As 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 under the context of the law of defamation as the grounds for exempting parodist from criminal and civil liabilities as long as these works were not produced intentionally for profit-making purposes. There was also a view that the Administration should not use non-compliance with international obligations and the absence of precedent cases as the excuse not to actively defining "secondary creation" and providing copyright exception for secondary creation even though no other common law jurisdictions had ever done so.

11. The Administration advised that the three options proposed in the Consultation Paper were not necessarily mutually exclusive to each other and it maintained an open mind towards individual options or a combination of options as well as any other options put forward by stakeholders. The

⁴ Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement 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.

Administration also advised that the question of whether the proposed 4th Option, given its wider scope and potential applications to the broadest possible category of adaptations and derivative works, would comply with international standards was still subject to further study and discussion.

Need for expediting the updating of the copyright regime

12. Some members expressed grave concern that Hong Kong's copyright regime had lagged behind technological development and would face continuous international pressure on this front until its copyright regime was brought up to international standards. They also cautioned the Administration that an out-dated copyright law would undermine the Administration's efforts in developing Hong Kong into an intellectual property trading hub in the region. Pointing out that a 100% agreement among all stakeholders with different interests and conflicting views would not be possible, some members urged the Administration to put forward the relevant legislative proposals to the LegCo as soon as practicable so as to align Hong Kong's copyright regime with international standards.

13. Whilst acknowledging that there was a genuine need for Hong Kong to update its copyright regime to catch up with the international trend by making reference to international practices, some members were keen to ensure that the freedom of expression through the use of parody would not be compromised upon the implementation of any arrangements under the proposed options. They called on the Administration to further engage various stakeholders to strive for the greatest consensus between copyright owners and netizens in mapping out the way forward to serve the best interest of Hong Kong.

14. The Administration responded that it aimed to conclude the efforts started since 2006 to update Hong Kong's copyright regime in the digital environment, taking into account latest views of stakeholders collected during the consultation exercise. It also advised that the updating of copyright law in the light of prevailing circumstances to meet the changing needs of society required on-going effort, and it might not be appropriate nor pragmatic for the Administration to seek to resolve all the outstanding issues in one sweeping exercise. The Administration would continue to engage relevant stakeholders with a view to narrowing their differences. In particular, due efforts would be made to clarify with users on how specific acts on the internet platforms could be catered for under the existing and the proposed legal framework to allay their concerns. The Administration undertook to report to the Panel again in a few months' time on the progress of discussion as well as the way forward.

Law enforcement

15. 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.

Views of deputations

16. In addition to taking on Option 3, some deputations from the users' side called for the introduction of the 4th Option to provide exemption for UGC for personal and non-commercial purposes so as to fully exempt secondary creation. They considered that these two Options could complement each other and provided the widest protection for secondary creation and other common activities (e.g. image capture and sharing for social use, real-time streaming of video game playing, the online posting of private song singing, etc) on the Internet involving the use of copyright works. They queried whether the new concept of "more than trivial" economic prejudice put forward by the Administration was in compliance with the three-step tests under the TRIPS Agreement and the Berne Convention. The Administration was urged to come up with a counter proposal to provide exception for UGC should the 4th Option was considered to be incompatible with the three-step tests under the aforesaid international treaties.

17. Deputations belonging to copyright owners' side were of the view that the granting of any exception should be in compliance with Hong Kong's international obligations. Pointing out that the Canadian model might not be compatible with the three-step tests under the TRIPS Agreement and the Berne Convention as the details of its operation and application remained unclear, some copyright owners considered it more appropriate to consider providing a copyright exception for UGC in the next round of consultation. Some copyright right owners held the view that no criminal exemption should be granted to parodies as the existing Copyright Ordinance had provided for exceptions or permitted acts to accommodate true parodies. Instead, the Administration could consider providing a "for-the-avoidance-of-doubt" provision under the existing Copyright Ordinance to exclude true parodists from being criminally prosecuted. There was also a view that authors' moral rights⁵ should be maintained notwithstanding any special treatment for parody under the copyright regime.

⁵ Under the 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. Sections 89(1), 92(1) and 96(1) of the Copyright Ordinance (Cap. 528) afford 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.

18. The wide-ranging views expressed by various stakeholders and deputations during the public consultation on the treatment of parody under the copyright regime were summarized in Appendix II to LC Paper No. CB(1)516/13-14(03).

Latest position

19. The Administration will brief the Panel on the Government's proposed directions for taking the matter of parody forward, with a view to formulating legislative proposals for the current round of update of the copyright regime started in 2006.

Relevant papers

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

Council Business Division 1
Legislative Council Secretariat
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Public consultation on treatment of parody under the copyright regime

List of relevant papers

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
20/4/2012	House Committee	Report of the Bills Committee on Copyright (Amendment) Bill 2011	CB(1)1610/11-12 http://www.legco.gov.hk/yr11-12/english/hc/papers/hc0420cb1-1610-e.pdf
		Minutes of meeting	CB(2) 1810/11-12 http://www.legco.gov.hk/yr11-12/english/hc/minutes/hc20120420.pdf
27/4/2012	House Committee	Minutes of meeting	CB(2) 1860/11-12 http://www.legco.gov.hk/yr11-12/english/hc/minutes/hc20120427.pdf
16/7/2013	Panel on Commerce and Industry	Administration's paper	CB(1)1508/12-13(03) http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-3-e.pdf
		Background brief	CB(1)1508/12-13(04) http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-4-e.pdf
		Minutes of meeting	CB(1)1797/12-13 http://www.legco.gov.hk/yr12-13/english/panels/ci/minutes/ci20130716.pdf

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
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>http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1104cb1-179-1-e.pdf</p> <p>CB(1)179/13-14(02)</p> <p>http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1104cb1-179-2-e.pdf</p>
17/12/2013	Panel on Commerce and Industry	<p>Administration's paper</p> <p>Updated background brief</p> <p>Minutes of meeting</p>	<p>CB(1)516/13-14(03)</p> <p>http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1217cb1-516-3-e.pdf</p> <p>CB(1)516/13-14(04)</p> <p>http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1217cb1-516-4-e.pdf</p> <p>CB(1)883/13-14</p> <p>http://www.legco.gov.hk/yr13-14/english/panels/ci/minutes/ci20131217.pdf</p>