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Panel on Commerce and Industry

Special meeting on 4 November 2013

**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 on the subject in previous discussions.

Background

2. 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. To make the copyright protection regime more forward-looking to keep pace with technological developments, the Administration issued a consultation document in December 2006 to seek public views on how best to strengthen copyright protection in the digital environment. Having regard to the views received, the Administration released in April 2008 a package of preliminary proposals for further public engagement.

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.

3. Taking into account the views that had been received, and the latest developments in overseas jurisdictions, the Administration issued the refined proposals in November 2009 for further consultation. The Administration subsequently introduced the Copyright (Amendment) Bill 2011 (the Bill) into the Legislative Council (LegCo) on 15 June 2011. The Bill sought to introduce, among other things, a technology-neutral communication right to better protect copyright works in the digital environment. The Bill also sought to foster cooperation between copyright owners and online service providers to combat online copyright infringement, and facilitate new modes of uses of copyright works such as e-learning and media shifting. A Bills Committee was formed at the House Committee (HC) meeting held on 17 June 2011 to study the Bill.

Deliberations of the Bills Committee on Copyright (Amendment) Bill 2011

4. In the course of deliberation, 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 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 considered that the proposed communication right would adversely affect freedom of expression and non-profit-making parody might inadvertently amount to a copyright infringement or constitute a criminal offence caught by the criminal net.

5. The Administration advised that where the making of parody for dissemination on the Internet was not for profit and did not prejudicially affect the copyright owners, such conduct would not constitute a criminal offence under the existing Copyright Ordinance and would remain so under the Bill. The suggestion of providing a specific copyright exemption for parody was not covered in the public consultations for the formulation of the Bill. The Administration was of the view that any legislative proposal to introduce a new exception for parody was liable to substantially change the existing balance of interests between copyright owners and users, thus requiring thorough consideration and extensive public consultation. At the Bills Committee's request, the Administration undertook to conduct a public consultation on copyright exception for parody after the passage of the Bill.

6. The Bills Committee submitted its report to HC on 20 April 2012 supporting the resumption of the Second Reading debate on the Bill on 9 May 2012. Members subsequently agreed at the HC Meeting on 27 April 2012 that the Administration should be requested to defer the resumption of the Second Reading debate on the Bill by three to four weeks in anticipation of over 1 000 Committee Stage amendments that would be proposed to the Bill. The HC Chairman wrote to the Administration on 27 April 2012 conveying Members' request, and the Administration subsequently withdrew its notice for resuming the Second Reading debate on the Bill at the Council meeting of 9 May 2012. The Bill did not resume Second Reading debate and lapsed following the end of the previous term of LegCo.

Public consultation on the treatment of parody

7. On 11 July 2013, the Administration launched a three-month public consultation exercise on the "Treatment of Parody under the Copyright Regime". 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.

8. 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 options 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

9. 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. 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 present consultation

10. 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 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. The Administration advised that it was open-minded towards the proposed options and would welcome members of the public to put forth other proposals for consideration as long as they could strike a balance between the legitimate interests of copyright owners and users and were in compliance with Hong Kong's international obligations in respect of copyright protection.

11. Some members opined that the proposed treatment of parody should aim at striking a fair balance between the protection of copyright and freedom of expression. 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, 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. The Administration was urged to widely engage members of the public in the consultation, and to proactively invite relevant stakeholder organizations to give their views on the subject. The Administration advised that it would launch a series of public forums and stakeholders engagements to gauge public views

12. Members also 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

13. The Administration issued a press release on 10 October 2013 announcing the extension of the public consultation period on the "Treatment of Parody under the Copyright Regime" for one month until 15 November 2013 to complement the work of the Panel. A special meeting of the Panel has been scheduled for 4 November 2013 to receive views from deputations on the subject.

Relevant papers

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

Council Business Division 1
Legislative Council Secretariat
31 October 2013

Public consultation on treatment of parody under the copyright regime

List of relevant papers

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
15/4/2008	Panel on Commerce and Industry	Administration's paper	CB(1)1211/07-08(03) http://www.legco.gov.hk/yr07-08/english/panels/ci/papers/ci0415cb1-1211-3-e.pdf
		Background brief	CB(1)1211/07-08(04) http://www.legco.gov.hk/yr07-08/english/panels/ci/papers/ci0415cb1-1211-4-e.pdf
		Minutes of meeting	CB(1)1534/07-08 http://www.legco.gov.hk/yr07-08/english/panels/ci/minutes/ci080415.pdf
17/11/2009	Panel on Commerce and Industry	Administration's paper	CB(1)341/09-10(08) http://www.legco.gov.hk/yr09-10/english/panels/ci/papers/ci1117cb1-341-8-e.pdf
		Updated background brief	CB(1)341/09-10(09) http://www.legco.gov.hk/yr09-10/english/panels/ci/papers/ci1117cb1-341-9-e.pdf
		Minutes of meeting	CB(1)781/09-10 http://www.legco.gov.hk/yr09-10/english/panels/ci/minutes/ci20091117.pdf

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
19/1/2010	Panel on Commerce and Industry	Updated background brief Minutes of meeting	CB(1)865/09-10(29) http://www.legco.gov.hk/yr09-10/english/panels/ci/papers/ci0119cb1-865-29-e.pdf CB(1)1570/09-10 http://www.legco.gov.hk/yr09-10/english/panels/ci/minutes/ci20100119.pdf
20/4/2012	House Committee	Report of the Bills Committee on Copyright (Amendment) Bill 2011 Minutes of meeting	CB(1)1610/11-12 http://www.legco.gov.hk/yr11-12/english/hc/papers/hc0420cb1-1610-e.pdf 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 Background brief Minutes of meeting	CB(1)1508/12-13(03) http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-3-e.pdf CB(1)150812-13(04) http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-4-e.pdf CB(1)1797/12-13 http://www.legco.gov.hk/yr12-13/english/panels/ci/minutes/ci20130716.pdf