



### **Joint Response to the public consultation on treatment of parody under copyright regime by local ICT Associations**

On 11 July 2013, the Government launched a three-month public consultation exercise on the treatment of “parody” (broadly defined in the consultation papers) under the copyright regime in Hong Kong. The stated aim of this recent consultation is to investigate whether to exempt parody from copyright infringement, and if so, to what degree.

To cope with the rapid development of the knowledge-based economy, the Government believes that it would serve the best interest of Hong Kong if it keeps the SAR’s copyright regime under regular review to ensure that the fair balance between legitimate interests of copyright owners and the general public is maintained. The Copyright (Amendment) Bill 2011 (“**the Bill**”) was introduced into the Legislative Council (“**LegCo**”) in June 2011 to update the Copyright Ordinance (Cap. 528) (“**CO**”) after extensive consultations since 2006.

Initially, ‘parody’ was not a subject that the Bill had paid particular attention to, but the subject had become a widespread concern upon discussion of the Bill in LegCo. Users of the internet has voiced concerns that the proposed exemption would affect the freedom of speech in Hong Kong, and that the Government may prosecute non-profit-making parodist for copyright infringement. In response to this concern, the Government clarified the wording in the Bill, so as to reflect its policy intent that the Bill is aimed at large-scale copyright piracy. The Bill was passed with support of the LegCo Bills Committee after detailed examination; however due to other matters that LegCo has to undertake before its

end of term, the Bill did not resume Second Reading Debate and lapsed upon expiry of the previous term of LegCo.

#### **A. Public opinion of the three options as proposed in the Consultation Paper**

The Government has proposed three possible options of how the copyright regime should deal appropriately with parody, namely, (1) clarification of existing provisions for criminal sanction under the Copyright Ordinance (Cap. 528); (2) introduction of a criminal exemption for parody; and (3) introduction of a fair dealing exception for parody.

A survey about public response to the copyright consultation had been conducted at the online discussion board of HKGolden.com. In which, 56.1% of the 647 respondents reject all three options, while Option 2 and Option 3, which are the most welcomed, take up merely 17.59% and 16.05% respectively.

The lack of popularity of the proposed options by the Government indicates that Hong Kong Internet users consider the three options to be not ideal; and, that a better option is needed. It should also be noted that Option 2 and Option 3 are preferred to Option 1. It reflects the public concern over whether criminal and civil liability would be attracted under certain conditions, and whether the fairness of dealing is determined by legislature or the courts. These should be taken into consideration if a fourth option is to be introduced.

#### **B. Concepts of parody as stated in the Consultation Paper**

The Consultation Paper asserted that a key feature of parody is the inclusion of an element of imitation or incorporation of certain elements of an underlying copyright work. Popular forms of this genre examples include, but not limited to, combining existing news photos or movie posters with pictures of political figures, providing new lyrics to popular songs, as well as editing a short clip from a TV drama or movie to relate to current events.

It should be noted that the Government did not acknowledge the use of the term “secondary creation” as often seen in media or other publications, as it is not commonly used in copyright jurisprudence, and that it may entail a much larger scope than parody.

It should also be noted that the Government in the Consultation Paper acknowledged that a variety of terms such as “parody”, “satire”, “caricature” and “pastiche” are used to describe this genre in statutes as well as case law. The Government submitted that for the sake of consistency and convenience, the collective term “parody” would be used as a general reference to this genre.

### **C. Arguments in favour of providing special treatment for parody as stated in the Consultation Paper**

The Government has listed out several arguments to support providing special treatment for parody in the copyright regime. First, it may be that parody causes little or no economic damage to copyright as it is not a substitute to the original work. In fact, there may be a chance that the parody makes the original work even more popular than ever before. Furthermore, it encourages creativity as well as promotes the entertainment business in Hong Kong. Lastly, parody serves as a tool for expression of views and enhances freedom of expression.

### **D. Arguments in favour of not providing special treatment for parody as stated in the Consultation Paper**

The Government has also listed out several arguments not to provide special treatment for parody in the copyright regime. First, the present copyright regime already strikes fair balance between the interest of copyright owners as well as the general public. Also, a special treatment of parody would create uncertainty to the law as well as lowering copyright owners’ returns and dampen creativity in general. Lastly, special treatment of parody would conflict with moral rights of creators.

### **E. Current law in Hong Kong**

Civil liability would normally be incurred in case of copyright infringement.

However, not all parodies involve copyright infringement. Whereas for incorporating an idea, reproducing an insubstantial part of the underlying work, as well as incorporating a substantial part of the underlying work with consent from the copyright owner, including such as by way of an appropriate Creative Commons licence, these actions are lawful.

There are also exemptions for copyright infringement as provided by the CO, such the fair dealing of copyright works for the purposes of education, research and private study, criticism and review (regarding the subject copyright works or other works), and news reporting, subject to qualifying conditions. Thus, parodies that are created for such purposes may fall within the ambit of the permitted acts in appropriate circumstances.

In certain circumstances, criminal liability may also be incurred. Pursuant to section 118(1)(g) of the CO, one would be criminally liable provided that he or she 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.

Furthermore pursuant to section 119 of the CO, a person who commits an offence under section 118(1) of the CO is liable on conviction on indictment to a fine at level 5 in respect of each infringing copy and to imprisonment for 4 years.

However, in reality, criminal liability is rare as copyright owner is unlikely to be prejudicially affected by the distribution of the parody copy, as the parodies target at different audience from that of the underlying work. In addition, the courts have jurisdiction to regulate the balance between freedom of expression and legitimate interest of copyright owners in light of general public interest.

#### **E. Government's three options for change as suggested in the Consultation Paper**

##### ***i. Option 1: clarifying relevant existing provisions in the CO***

Under Option 1, the threshold for civil liability for copyright infringement will not be changed. On the other hand, the provisions for criminal liability under the CO will be clarified by a 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.

***ii. Option 2: introducing a criminal exemption***

Under Option 2, the new provisions will specifically exclude parody from the existing “distribution” and the proposed “communication” offences shall not apply to parodies, as long as the distribution in question meets the qualifying condition, for example as suggested in the Consultation Paper “the distribution does not cause more than trivial economic prejudice to the copyright owner”.

***iii. Option 3: fair dealing exception***

Under Option 3, the distribution of parody will not infringe copyright and hence will not attract any civil or criminal liability, so long as the act is considered as fair dealing. The new legislation may be drafted based on the existing fair dealing provisions in sections 38 and 41A of the CO, specifying, for example, the purpose and nature of the dealing, nature of original work, amount and substantiality of portion dealt with etc. as something the court should consider, in addition to the circumstances of the case.

**F. Our Comments to the Consultation Paper**

In response to the three options suggested, we are of the view that Option 3 would be the better one among them. The reasons are apparent.

Firstly, subject to meeting of the qualifying conditions, both criminal and civil liability would not be attracted.

Secondly, most common law jurisdiction, including Australia and Canada, has a fair dealing provision with regard to copyright law; and that the United Kingdom seems to be following suit. It appears that the international trend for the development of copyright jurisdiction is towards this direction. We believe that it is justified to opt for the fair dealing approach over the fair use approach as adopted in the US jurisdiction. Not only more certainty is ensured and the chance of litigation would be reduced, but also it leaves important public policy decisions to be made by legislature instead of the courts; and that it would seem to be a far more effective, more democratic and more principled way. Also, in light of international experience rejecting the adoption of fair use, it would be imprudent for Hong Kong to do so.

Thirdly, non-exhaustive factors for determining fairness as currently set out in section 38 and section 41A of the CO would apply to the proposed parody exception. This allows the court to undertake a balancing exercise in light of the general public interest.

None of the proposed options is the most ideal. In light of this, we would propose an enhanced option of Option 3, namely Option 3+.

#### **G. Our proposed new option to the Consultation Paper – Option 3+**

The Government's Consultation Paper whether to provide special treatment to "parody" is not ideal and there is room for improvement.

##### ***i. Special treatment should only apply to the category "satire" specifically***

First and foremost, it is misleading to use "parody" as a collective term to identify "parody", "satire", "caricature", and "pastiche". Definitions and concepts of "identify "parody", "satire", "caricature", and "pastiche" are similar and can overlap. Even though the Government hope to seek view from stakeholders on the appropriate definition of "parody" for the purpose of the Bill, it should provide a general direction for stakeholders to follow.

The Government has included a list of Oxford Dictionary definitions for the four aforementioned terms in its Consultation Paper. After extracting and analysing the key features of the definitions from both Oxford and Cambridge Dictionaries, we realised that only the category of “satire” contains the key feature of ‘political context’<sup>1</sup>. We believe that this key feature is the crucial point where the Government may want to address. Thus, we believe that the better way forward for the Government is to focus our consultation for special treatment to the category “satire”, in particular “political satire”.

**ii. Satire exemption should address specifically to satire concerning ‘political and public figures’**

<sup>1</sup> Please see the table below for the definitions and the extracted key features: -

<b>Parody</b>	<b>Oxford Dictionary Definition:</b> an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect	<b>Key Features :</b> <ul style="list-style-type: none"> <li>Concerns production/ work</li> <li>Intentional imitation</li> <li>Exaggeration</li> <li>Comic effect/ humour</li> </ul>
	<b>Cambridge Dictionary Definition:</b> writing, music, art, speech, etc. that intentionally copies the style of someone famous or copies a particular situation, making the features or qualities of the original more noticeable in a way that is humorous	
<b>Satire</b>	<b>Oxford Dictionary Definition:</b> the use of humour, irony, exaggeration, or ridicule to expose and criticise people’s stupidity or vices, particularly in the context of contemporary politics and other topical issues	<b>Key Features :</b> <ul style="list-style-type: none"> <li>Concerns people</li> <li>Comic effect/ humour</li> <li>Criticize stupidity</li> <li>Mostly in political context</li> </ul>
	<b>Cambridge Dictionary Definition:</b> a way of criticizing people or ideas in a humorous way, or a piece of writing or play that uses this style	
<b>Caricature</b>	<b>Oxford Dictionary Definition:</b> a depiction of a person in which distinguishing characteristics are exaggerated for comic or grotesque effect	<b>Key Features :</b> <ul style="list-style-type: none"> <li>Concerns people</li> <li>Exaggeration</li> <li>Comic effect/ humour</li> </ul>
	<b>Cambridge Dictionary Definition:</b> a drawing or written or spoken description of someone that usually makes them look silly by making part of their appearance or character more noticeable than it really is	
<b>Pastiche</b>	<b>Oxford Dictionary Definition:</b> an artistic work in a style that imitates that of another work, artist or period	<b>Key Features :</b> <ul style="list-style-type: none"> <li>Concerns production/ work</li> <li>Intentional imitation</li> </ul>
	<b>Cambridge Dictionary Definition:</b> a piece of art, music, literature, etc. which intentionally copies the style of someone else’s work or is intentionally in various styles	

The proposed options in the Consultation Paper did not really address the controversial issue that the general public are concerned with. The key issue at stake is that the general public fears that Hong Kong would enter into an era of ‘White Terror’ and that Government would abuse the CO and make political prosecutions with an excuse of copyright infringement contrary to the CO with regard to parody of certain images, music or videos.

This fear of political prosecution is not without justification – for example, in recent times there are voices in the society that the Government is abusing the Public Order Ordinance (“**POO**”) to prosecute protestors for unlawful assembly during public demonstrations; even though the original legislative intent for enacting the POO is to address triad problems in Hong Kong.

We propose that the satire exemption should address specifically to satire concerning ‘political and public figures’. The scope of ‘political and public figures’ is very wide, and it may be hard to come to a community consensus. We propose that the English common law approach to public figures can be adopted in the legislation: a person would be regarded as a public figure if he or she deals with a matter that would concern the public interest, or that he or she might expect a less protection of privacy and be expected a higher standards of conduct.

It should be noted that there is currently no “political satire” as an exemption in the copyright regime of Australia, New Zealand, Canada, as well as the United Kingdom.

However, it should be pointed out that in the European Court of Human Rights case *Vereinigung Bildender Künstler v Austria*<sup>2</sup>, the joint dissenting opinion of Spielmann J and Jebens J seem to be hostile to the usage of “political satire”. In that case, it was held that Article 10 of Convention for the Protection of Human Rights and Fundamental Freedoms was violated by certain paintings satirizing and mocking some political figures.

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<sup>2</sup> 68354/01 [2007] ECHR 79

Speilmann J and Jebens J explained why “political satire” should not be regarded as a specific category for exemption by quoting Eric Barendt, a commentator –

“Political satire should not be protected when it amounts only to insulting speech directed against an individual. If, say, a magazine feature attributes words to a celebrity, or uses a computerized image to portray her naked, it should make no difference that the feature was intended as a parody of an interview she had given. It should be regarded as a verbal assault on the individual's right to dignity, rather than a contribution to political or artistic debate protected under the free speech (or freedom of the arts) clauses of the Constitution.”<sup>3</sup>

The dissenting judges are of the view that a person's human dignity must be respected, regardless of whether the person is a well-known figure or not.

In the United States, in the case of *Falwell v Flynt*<sup>4</sup>, the court states that the exemption of “political satire” only applies in a ‘freedom of expression and speech’ context, particularly concerning libel and/or slander of public figures. Thus, regarding to copyright regime, the United States seems not to have recognized “political satire” as exemption yet.

### ***iii. Satire exemption should also apply to ‘non-commercial purpose’***

It should be explicitly provided in the legislation that the exemption for satire should also apply to ‘non-commercial purpose’.

The main aim of a political satirist is to produce a humorous, ironic or sarcastic examination of the political arena in an attempt to expose absurdity and hypocrisy of a particular politician, with the aim of bringing laughter and/or to generate a resonance among the general public, but not with an intention to make profits from his production. Thus, given the satirist’s good faith behind his production, it may not be fair and just for him to incur civil and/or criminal liability.

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<sup>3</sup> *ibid*, Paragraph 11 of the Joint Dissenting Opinion of Judges Spielmann and Jebens

<sup>4</sup> 805 F.2d 484, 487 (4th Cir. 1986)

‘Non-commercial purpose’ to be exempted will be reasonable, fair, and appropriate. As mentioned above, most, if not all, political parodies are produced for entertainment reasons only. On the other hand, I agree that it is reasonable for a person to be liable for copyright infringement if he or she produces a parody product with a commercial purpose.

It should be noted that there is currently no ‘non-commercial purpose’ as an exemption in the copyright regime of Australia, New Zealand, Canada, the United Kingdom as well as the United States.

#### ***iv. Recap***

In light of the proposed exemption (Option 3+), provided that the political satire is concerned with a political or public figure or that it is used non-commercially, one would not commit a copyright infringement offence contrary to section 118(1)(g) of the CO, even if he or she distributes the 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.

#### **H. The role of “Safe Harbour Provision” in our copyright regime**

The Government did not address whether to include “Safe Harbour Provisions” (“SHPs”) for Internet Service Providers (“ISPs”) and Online Service Providers (“OSPs”) in the current consultation exercise. ISPs and OSPs have always stressed that they are merely ‘innocent middlemen’ and that they should not bear the responsibility of policing and controlling online infringement. The Information and Communications Technology (“ICT”) sector has voiced concerns that SHPs have already existed for the benefit of ISPs and OSPs in many overseas jurisdictions.

In order to provide incentives for ISPs and OSPs to work hand-in-hand with copyright owners in tackling online piracy, and to provide sufficient protection for their acts, we support the view to enact SHPs to protect the interests of ISPs and OSPs. I believe that in

addition to the special treatment for satire as mentioned above, the interests of ISPs and OSPs can be further protected by having SHPs. The SHPs would aim to give ISPs and OSPs the assurance that compliance with certain prescribed conditions would prevent them from incurring liability for infringing copyright.

In respond to concerns among community and in particular the ICT sector, a SHP was drafted and proposed in the Bill (**“the proposed SHP”**), which is to be underpinned by a voluntary Code of Practice which sets out suggested practical guidelines and procedures for ISPs and OSPs to follow when being notified of infringing activities on their service platforms.

Produced by the Commerce and Economic Development Bureau pursuant to the proposed SHP, the “Second Draft of Code of Practice covering Copyright Protection in the Digital Environment” (**“Second Draft”**) was published in January 2012. The Second Draft provides that if a service provider takes steps to limit or stop an alleged infringement by duly complying with that Code, it will be treated by virtue of the proposed SHP in CO as having taken reasonable steps to limit or stop the infringement in question.

The proposed SHP and the Second Draft would provide a right direction for the development of the copyright regime, and would provide appropriate guidance to service providers to limit or stop copyright infringement on their service platform. These developments would further improvise on the copyright regime of the Hong Kong jurisdiction, and move in line with the trend of development of the international jurisdictions. However, it must be noted the Code of Practice should be adopted by industry instead of the government to reflect the self-governance of the industry.

#### **I. Comments on the methods of consultation methods**

Some of the ICT representatives opined that the government should adopt bottom-up instead of top-down approach when consulting the public. It is expected to increase the interactivity between the government and citizens in the e-engagement era. Otherwise, the government is unable to engage the public and get their support for new policy. Our ICT professionals expect our government should use more online channels such as social media, online poll etc. to consult the public and clarify those misunderstandings or key concepts

even during the consultation period. This can keep the momentum and encourage more contributive opinions. ICT professionals do expect the government can fine-tune their proposals so as to gain public consent.

## **J. Conclusion**

It is high time that our copyright regime should be improvised to cope with the fast technological developments in this digital era. With the advent of new technologies and inventions, more and more people are gaining access to the information highway. At the same time, Hong Kong is prided for its freedom of expression. It is submitted that an exemption from copyright infringement for political satire concerning political and public figures and for non-commercial use should be provided in the Copyright Ordinance lest our precious freedom will not be further eroded. In addition, we believe that the Government should implement the proposed Safe Harbour Provision and the Code of Practice as soon as possible. With assurance of shelter from any liability subject to any prescribed condition, not only every citizen's freedom to access information can be protected, but also the precious freedom of expression can be ensured.

Joint submitted by :

Internet Professional Association

Online Service Providers Alliance

The Chamber of H.K. Computer Industry

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