

**立法會**  
***Legislative Council***

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**Panel on Commerce and Industry**

**Meeting on 17 December 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 parody<sup>1</sup> under the copyright regime. It also provides a summary of views and concerns expressed by members 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

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<sup>1</sup> 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 2012<sup>2</sup>.

### **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.

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<sup>2</sup> 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' views and concerns expressed at the meetings were summarized in the ensuing paragraphs.

8. 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.

9. 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. 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.

10. 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.

11. Some members enquired whether the three options proposed were mutually exclusive and whether it was technically feasible to draw up a proposal incorporating the merits of individual options so as to provide netizens with greater protection. Members urged the Administration to continue to listen to the views of various stakeholders and seek for a common ground between copyright owners and netizens in taking forward the legislative amendments. The Administration was requested to provide a preliminary assessment on whether the copyright exception for User-Generated Content (UGC) (i.e. the 4th Option) put forward by netizens was in compliance with Hong Kong's international obligations such as Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization<sup>3</sup> and the "three-step test" requirement under Article 13 of TRIPS Agreement<sup>4</sup> respectively.

12. The Administration advised that the three options proposed in the Consultation Paper were not necessarily mutually exclusive to each other. The Administration 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 fair balance between the legitimate interests of

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<sup>3</sup> Article 61 of the TRIPS Agreement provides that "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale."

<sup>4</sup> Article 13 of the TRIPS Agreement provides that "Members shall 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 rights holder." To comply with the "three-step test", the Government must ensure that the exception (a) is confined to "special cases", (b) does not conflict with a normal exploitation of the work, and (c) does not unreasonably prejudice the legitimate interests of the copyright owner.

copyright owners and users and were in compliance with Hong Kong's international obligations in respect of copyright protection. The Administration assured members that it would continue to listen to the views of stakeholders concerned in mapping out the way forward to serve the best interest of Hong Kong.

### **Latest position**

13. The Administration will brief the Panel the outcome of the public consultation exercise on the treatment of parody under the copyright regime and the way forward at the Panel meeting on 17 December 2013.

### **Relevant papers**

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

Council Business Division 1  
Legislative Council Secretariat  
13 December 2013

**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	<p>Report of the Bills Committee on Copyright (Amendment) Bill 2011</p> <p>Minutes of meeting</p>	<p>CB(1)1610/11-12</p> <p><a href="http://www.legco.gov.hk/yr11-12/english/hc/papers/hc0420cb1-1610-e.pdf">http://www.legco.gov.hk/yr11-12/english/hc/papers/hc0420cb1-1610-e.pdf</a></p> <p>CB(2) 1810/11-12</p> <p><a href="http://www.legco.gov.hk/yr11-12/english/hc/minutes/hc20120420.pdf">http://www.legco.gov.hk/yr11-12/english/hc/minutes/hc20120420.pdf</a></p>
27/4/2012	House Committee	Minutes of meeting	<p>CB(2) 1860/11-12</p> <p><a href="http://www.legco.gov.hk/yr11-12/english/hc/minutes/hc20120427.pdf">http://www.legco.gov.hk/yr11-12/english/hc/minutes/hc20120427.pdf</a></p>
16/7/2013	Panel on Commerce and Industry	<p>Administration's paper</p> <p>Background brief</p> <p>Minutes of meeting</p>	<p>CB(1)1508/12-13(03)</p> <p><a href="http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-3-e.pdf">http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-3-e.pdf</a></p> <p>CB(1)150812-13(04)</p> <p><a href="http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-4-e.pdf">http://www.legco.gov.hk/yr12-13/english/panels/ci/papers/ci0716cb1-1508-4-e.pdf</a></p> <p>CB(1)1797/12-13</p> <p><a href="http://www.legco.gov.hk/yr12-13/english/panels/ci/minutes/ci20130716.pdf">http://www.legco.gov.hk/yr12-13/english/panels/ci/minutes/ci20130716.pdf</a></p>

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
4/11/2013	Panel on Commerce and Industry	Administration's paper	CB(1)179/13-14(01)  <a href="http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1104cb1-179-1-e.pdf">http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1104cb1-179-1-e.pdf</a>
		Updated background brief	CB(1)179/13-14(02)  <a href="http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1104cb1-179-2-e.pdf">http://www.legco.gov.hk/yr13-14/english/panels/ci/papers/ci1104cb1-179-2-e.pdf</a>