For discussion on
18 March 2014

Legislative Council Panel on Commerce and Industry

Treatment of Parody under the Copyright Regime

The Government carried out a public consultation exercise from July to November 2013 to explore how our copyright regime should give due regard to present day circumstances and take care of parody as appropriate, to strike a balance between the legitimate interests of copyright owners and users and the general public and to serve the best interest of Hong Kong. After reporting the consultation outcome and our observations to Members at the meeting on 17 December 2013, we have continued our efforts to engage stakeholders and examine the pertinent issues.

2. This paper sets out the Government's proposed directions for taking the matter forward, with a view to formulating legislative proposals for the current round of update of our copyright regime started in 2006.

OVERVIEW

3. As set out in our last paper (LC Paper No. CB(1)516/13-14(03)), there are divergent views on the scope of special treatment of parody in the consultation. While there is strong appeal among users that the scope should be as wide as possible, copyright owners generally oppose to the consideration of matters outside the intended scope of the consultation exercise.

4. That said, a common ground between users and owners is apparent. Parodists and users engaged in "secondary creations" believe that their personal, not-for-profit works should not conflict with the commercial interest of copyright owners, while copyright owners believe that their push for legislative efforts to curb online copyright piracy are not targeting daily non-commercial activities of Internet users and indicate their preparedness to change the law to accommodate genuine parody without unintended consequences of unchecked piracy. There is thus general agreement to the following guiding principles which we repeatedly

underline in the current review –

(a) a fair balance between protecting the legitimate interests of copyright owners and other public interests such as reasonable use of copyright works and freedom of expression should be maintained;

(b) any criminal exemption or copyright exception to be introduced must be fully compliant with our international obligations such as Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization (WTO)[1] and the "three-step test" requirement under Article 13 of the TRIPS Agreement[2] respectively; and

(c) any proposed amendment to the Copyright Ordinance must be sufficiently clear and certain so as to afford a reasonable degree of legal certainty.

5. Some elaboration of the above principles may be helpful here -

(a) Copyright, being an intangible property right, is an engine driving creativity. However, its protection is not without limitations[3]. Fair access to contents and use is also important,

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[1] 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* (sic) *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."*

[2] 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.

[3] To facilitate dissemination and advancement of knowledge, copyright is subject to limitations. Copyright terms and exceptions are the most notable forms of limitations. According to section 17 of the Copyright Ordinance, copyright in literary, dramatic, musical or artistic work expires at the end of the period of 50 years from the end of calendar year in which the author dies subject to certain exceptions. In Division III of Part II of the existing Copyright Ordinance, there are over 60 sections specifying acts which may be done in relation to copyright works notwithstanding the subsistence of copyright (such as for the purposes of research, private study, education, criticism, review and news reporting), and thus attracting no civil or criminal liability.

not only for freedom of expression in its own right but also for dissemination and advancement of knowledge which also promotes creativity. To balance different interests of stakeholders in society, public interest is widely accepted as the overriding justification of exceptions under our copyright regime[4].

(b) Although copyright protection, being a legal vehicle and one of the intellectual property rights, is necessarily territorial, globalisation of trade and investment which drives growth and development requires us to look at copyright issues beyond jurisdictional boundaries. The international community has negotiated and concluded various copyright treaties setting the norm that embodies its consensus on the balance of interests and represents the mainstream treatment of copyright protection. Being an externally oriented economy, Hong Kong must abide by our international obligations and stay vigilant of future changes.

(c) Broad principles of balancing interests and international obligations must be translated into legislative language in our copyright regime in the local context. This process should achieve a reasonable level of legal certainty and set standards that steer users, owners and intermediaries (notably online service providers - OSPs) to the right direction of reasonable use of copyright works without causing unjustified prejudice to the legitimate interests of copyright owners. Following the tradition of our common law system, we should avoid overly prescriptive legislative language to allow our court to develop jurisprudence over a wide range of factual circumstances.

6. Applying these principles to the present exercise may help us consider the way forward. Importantly, in examining any special treatment for parody, we must not lose sight of the bigger context of the package of proposed revisions as an important initiative to update our copyright regime in the light of international developments since the turn of the century to address the emergence of digital economy and respond to rapid changes in user behaviours in the digital world[5]. The lack of legal

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[4] See section 192 of the Copyright Ordinance.

[5] The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)

certainty of some provisions[6] in our Copyright Ordinance is taking a certain toll on our regime. We accept that the balance of interests is required not only in respect of the possible special treatment of parody itself but also when considered all together with the total package of updating. On the one hand, the proposed introduction of the new communication right may remove some existing grey area in copyright protection in the digital environment. On the other hand, the proposed special treatment for parody and matters alike may provide *additional* legal bases to allow legitimate use of copyright works in appropriate circumstances[7].

SCOPE OF SPECIAL TREATMENT

Background

7. Our original purpose is to address an issue that arose during the scrutiny of the Copyright (Amendment) Bill 2011. i.e. to give due regard to the present day circumstances in which members of the public may easily express their views and commentary on current events by altering existing copyright works and disseminate them through the Internet. An important feature of this genre is the inclusion of an element of imitation or incorporation of certain elements of an underlying copyright work, creating comic or critical effects in general.

8. Referencing developments in overseas jurisdictions which have accommodated parody and similar matters in their copyright regimes or

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were adopted in 1996 and came into force in 2002 to address the challenges of the new digital technologies. They are commonly known as the "Internet treaties". In particular, the WCT deals with protection for authors of literary and artistic works, while the WPPT protects the rights of the producers of phonograms or sound recordings, as well as the rights of performers whose performances are fixed in sound recordings.

[6] We proposed to introduce a technology-neutral communication right in the Copyright (Amendment) Bill 2011 to ensure that our Copyright Ordinance will endure the test of rapid advances in technology such as streaming.

[7] For the avoidance of doubt, parody and other matters which do not constitute copyright infringement under the existing law for any of the reasons below will remain lawful in the future -

(a) the copyright owner has agreed or acquiesced,
(b) the copyright protection in the underlying work has expired,
(c) only the ideas of the underlying work have been incorporated,
(d) only an insubstantial part of the underlying work has been reproduced, and
(e) one of the permitted acts under the existing Copyright Ordinance (such as for the purposes of research, private study, education, criticism, review and news reporting) applies (footnote 3 above).

have plans to do so[8], we focus on four specific terms, viz. parody, satire, caricature and pastiche[9], as the subject matter for examining if special copyright treatment is warranted and whether it is justified to adopt any of these terms in our legislation. Any adoption will enlarge the current scope of special treatment in our copyright regime[10].

9. As brought out in the consultation, many users believe that consideration of special treatment should be given to a wide range of activities on the Internet which might make use of copyright works (often referring to those seen on social media websites such as Youtube, Facebook and Twitter and numerous discussion forums and blogs). The following examples illustrate the many types of works mentioned –

- mashups/remixes/sampling[11]
- altered pictures/videos
- appropriation art[12]

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[8] Including the United States (US), Australia, Canada and the United Kingdom (UK).

[9] For ease of reference, the Concise Oxford English Dictionary (12th Edition, 2012) defines the terms 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 of 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

For the sake of convenience, we use parody as a general reference to cover all the four terms to facilitate discussion, unless otherwise stated.

[10] See footnote 3 above.

[11] These terms may encompass overlapping concepts and may be used interchangeably.

The US Department of Commerce described remixes as "works created through changing and combining existing works to produce something new and creative" in its Green Paper "Copyright Policy, Creativity, and Innovation in the Digital Economy" released in July 2013. It also noted that other terms such as "mash-ups" or "sampling" are also used, especially with reference to music.

On the other hand, the Australian Law Reform Commission (ALRC) referred to the dictionary meaning in using these terms. In its paper "Copyright and the Digital Economy" released in June 2013, "sampling", "mashups" or "remixes" are discussed together under a section on "transformative works": "Sampling is the act of taking a part, or sample, of a work and reusing it in a different work. The concept is most well-known in relation to music……a mashup is a composite work comprising samples of other works. In music, a mashup is a song created by blending two or more songs, usually by overlaying the vocal track of one song onto the music track of another. Remixes are generally a combination of altered sound recordings of musical works."

For our present purposes, we would use "mashups" in this paper generally to cover also "remixes" and "sampling".

- doujinshi[13]
- fanfiction[14]
- kuso[15]
- image/video capture[16]
- streaming of video game playing[17]
- homemade video[18]
- posting of earnest performance of copyright works[19]
- rewriting lyrics for songs[20]
- adaptation[21]
- translation[22]

10. Obviously, there may be some overlapping in concept between some of the above types. The use of original copyright works by each type varies to different degree. To the extent that the use, or copying, of the original copyright works is substantial, without consent of the owners

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[12] According to the Dictionary on Modern and Contemporary Art, appropriation art refers to the use of pre-existing objects or images with little transformation. It is a practice that is often associated with a critique of the notions of originality and authenticity, central to some definition of art.

[13] Doujinshi is a Japanese term which may refer to self-published works, usually magazines, comics or novels. They are often works of amateurs who are fans of the original works.

[14] A fiction written by a fan of, and featuring characters from, a particular TV series, film, etc.

[15] Kuso is a Japanese term used for the internet culture which generally includes all types of style and parody. It is also used to describe outrageous matters and objects of poor quality e.g. political parodies targeting political figures.

[16] Image capture and sharing may refer to the use of an image of a TV drama/movie/music video, which can be seen on online discussion forums or sharing platforms as a means to express personal feelings or comments.

[17] This may refer to the sharing of the continuous screen capture of the playing of a video game on online platforms such as Youtube.

[18] Homemade videos are usually made by ordinary users documenting their social life. In some circumstances copyright issues may arise whether through deliberate or incidental inclusion of third party copyright works e.g. a video about a kid playing with a dog, against the background of a TV playing a copyright music video.

[19] This may refer to, for example, the uploading of one's earnest performance of a copyright song to online sharing platforms. Youtube has dedicated channels for music and our search for "songs and amateurs" returned with about 39 000 clips.

[20] This may refer to the act of rewriting lyrics of songs based on the same melodies. A mere textual presentation of totally rewritten lyrics (i.e. without substantial copying of the original lyrics) should not infringe copyright. But the online posting of the performance of the song in the rewritten lyrics might be infringement.

[21] Daily examples include adapting a comic book into a movie or vice versa.

[22] Daily examples include translating an English novel into Chinese, as well as subtitles of a foreign TV drama into the local language.

express or implied, and does not belong to a permitted act, it might amount to copyright infringement[23]. Some users therefore advocate the concept of User Generated Content (UGC) that encompasses all kinds of works as a case for special treatment (see discussions in paragraphs 38 et seq).

Arguments for and against special treatment

11. One principal line of argument for special treatment of the aforementioned types of works is that the use of the original copyright works may be "transformative" in nature or use, resulting in a new message or fresh insight in different context – the label of "secondary creation" is employed in such instances. Where the use does not fit this bill, another line of argument is that the use is very common among users on the Internet taking advantage of all the usual IT tools and platforms available and their use is "private". There may be some strength in these arguments to different extents, but as a matter of principle, we must make it clear that each *alone* cannot be a sufficient justification for crafting an exception. Transformative use may still be unfair to the original author or copyright owner in some circumstances. A behaviour that is common and prevalent cannot in itself be a justification for exception; online activities are not necessarily private[24].

12. On the other hand, copyright owners generally oppose to consideration of matters outside the intended scope of the consultation exercise, as they believe that the current copyright regime with licensing as the centrepiece together with various statutory exceptions is operating well to deal with these matters and causing no problems in practice in Hong Kong and elsewhere. Many indeed consider parody, or specifically political parody, as the only matter worthy of some special treatment and have reservations in extending the coverage to other subject matters raised in the consultation. Overall they firmly reject consideration of the idea of

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[23] See footnotes 3 and 7 above.

[24] Some users consider that sharing the works they created by using a copyright work on social media platforms such as Youtube and Facebook is private use and thus merits a copyright exception. In discussing whether an unauthorised private use of copyright material infringes copyright, the Australian Law Reform Commission (ALRC) noted that many stakeholders held the view that the copyright law should take account of consumer expectations and some private uses of copyright material were widely thought by the public to be fair. The Commission pointed out that there was a distinguished difference between private and social uses - "Uploading a copyrighted song or video clip to Youtube or Facebook is not a private use. Whether or not such cases should sometimes be considered fair, these uses are clearly not private and so will not be captured by the fair use illustrative purpose for 'non-commercial private use'…… the ALRC does not recommend that 'social uses' be included as an illustrative purpose for fair use." (paragraphs 10.98-10.99, Copyright and the Digital Economy- Final Report, ALRC, November 2013)

UGC in this round of consultation, believing that the concept is vague and ill-defined, the Canadian precedent is bad and non-compliant with the TRIPS Agreement and any special treatment might just inadvertently undermine the essential fabric of the copyright regime.

13. The arguments on both sides have their own merits. To move things forward, we should adhere to the guiding principles as elaborated in paragraph 5 above. In seeking a broad, overall balance of different interests, we may start the analysis with the three-step test as the overarching yardstick at the international treaty level.

Ideas to particularise the scope

14. The first step of the three-step test is to examine whether a certain special case might be made out for consideration of possible special treatment[25]. For our present purposes of drawing up the possible scope of special treatment, we at least need to particularise a genre that is arguably distinctive in scope and supported by some cogent reasons. Some ideas, and their possible coverage, which might be worth further consideration are given below. Such ideas might sometimes be overlapping in concept with each other.

15. One idea centres around the common use of *altered pictures/videos/posters, mash-ups and the like (including songs with lyrics rewritten on original melodies and kuso)* today to make a comment (often with political overtone) in response to current events. This indeed was the primary consideration among many vocal users in proposing new copyright exceptions during the scrutiny of the Copyright (Amendment) Bill 2011 in 2011-2012 (paragraph 7 above). The public policy ground underlined is freedom of expression, especially in the present political context. In this relation, it should be noted that there is already an existing fair dealing exception for reporting current events in our copyright regime [26].

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[25] The first step requires that an exception or limitation must be clearly defined, narrow in scope and has an exceptional or distinctive objective.

[26] The Hong Kong Bar Association submitted that the provision of an exception to infringing acts is based on a balancing of rights and interests of copyright owners and the public interest. The public interest in the freedom of expression together with other public interests have been taken care of under the fair dealing exception for "reporting current events" under section 39(2) of the Copyright Ordinance. As commenting on current events is analogous or akin to "reporting current events', it can and should be given the same treatment under the Ordinance. It therefore advocated that a fair dealing exception for "commenting current events" should be introduced by way of amending the existing fair dealing provision in section 39(2).

16. Such common use of *altered works, mash-ups and the like* is not necessarily confined to comments in response to current events. Regardless of such a purpose, in many instances we may observe a certain comic, exaggeration or like effect, generally with a critique element implicit or explicit. The subject of the critique may be the original or some other copyright work[27], some extrinsic subject matter, or even the creator himself or herself. The critique may often be humorous, mocking, sarcastic, ironic or satirical. The works are generally playful or parodic in tone, and should unlikely be a substitute for the original works.

17. On the other hand, there is a genre of works which are meant to be understood and appreciated as imitations of other works, with or without the above critique overtones but commonly in a respectful, tribute-paying or celebratory manner. It may be a new work that imitates others in style, manner, period, etc, or a combination made up from or imitating various original works. Examples may include some works of *doujinshi*[28], *fanfiction and appropriation art* in appropriate cases. Originality or transformative effect is generally expected in this genre, but the degree of course varies from case to case.

18. Thus another idea for consideration of possible special treatment may focus on such genres which indeed are well recognised as literary or artistic devices, and accommodated as appropriate in overseas copyright regimes (paragraph 8 above).

19. There are other common uses of copyright works without any alterations or transformative elements. Prime examples include *image and video capture from a picture, film or television programme, or text excerpts*, as used on blogs and social media websites. In various cases, such uses are not problematic at all. There may be consent or acquiescence from copyright owners. The use may not amount to

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[27] It should be noted that section 39 of the Copyright Ordinance already provides fair dealing with a work for the purposes of criticism and review, of that or another work or of a performance of work, if it is accompanied by a sufficient acknowledgement, does not infringe any copyright in the work, or in the case of a published edition, in the typographical arrangement.

[28] We understand that doujinshin has over the years established a presence in Hong Kong, with the local comic industry adopting an accommodating approach to the doujinshin works (physical copies and items) under the current copyright regime. For example, Comic World, an organised doujinshin event, has been held in Hong Kong since 1998, now twice a year. Doujinshin fans may take part in the event to share, promote and even sell their works in a small scale manner, subject to the house rules and, where necessary, consent from individual owners (who may even scout for talents at such events). A certain balance is apparently established. In the event that a dispute is brought to the court in future under our proposed enlarged scope of special treatment, the fairness assessment would need to take into account the industry practice established over the years.

substantial copying (for example, if the taking of a part is small in proportion and/or immaterial in relation to the whole work), or is otherwise covered by some existing exceptions[29]. The use may also be covered by the ideas as floated in the above paragraphs. But beyond such bounds, we may further consider an idea of special treatment that focuses on the use of textual and non-textual excerpts as may be justified by the specific purpose for which it is required. Such purposes may include the use of excerpts on online blogs and social media websites to help provide information and illustrate arguments and to engage in comment and debate.

20. We have also considered some other types of Internet activities, to the extent that they may not be covered by the ideas discussed above, which may in appropriate cases be covered by existing exceptions already.

21. One example is the *posting of video game playing clips as recorded by players*, the graphics and music in which may involve copyright materials. Generally speaking, many such clips are covered by the players' voice-over as commentary or guidance over the course of the playing of the video game[30]. To the extent that such commentary or guidance amounts to criticism or review of the underlying works, the practice may come under the existing fair dealing exception for those purposes[31]. More importantly, game developers generally welcome and give consent to such postings which would indeed attract players and increase popularity of the games[32]. There is indeed a huge volume of such video clips on the Youtube platform with dedicated channels.[33]

22. Another example is the *posting of homemade video* documenting social life with incidental incorporation of some copyright works (such as the unintentional inclusion of music or television broadcast in the home background). Section 40 of the Copyright Ordinance already provides that copyright in a work is not infringed by its incidental inclusion in an artistic

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[29] Footnote 3 above.

[30] In some cases, players may merely upload or live stream the screen capture of their playing without making any commentary.

[31] Footnote 27 above.

[32] For instance, Microsoft does not object to game players using its game contents (which are published by Microsoft Studios and where it owns the copyright) to make and redistribute new creations such as videos, web contents, etc (and other derivative works), for non-commercial and personal uses provided that they comply with its Usage Rules.

[33] On Youtube, our search for "streaming of video games playing" has returned with 15 million clips, many of which attract significant viewing.

work, sound recording, film, broadcast or cable programme[34].

Activities beyond the scope

23. Naturally, a line has to be drawn in enlarging the scope of special treatment. For activities beyond the ideas floated above, we can hardly find any cogent reasons to justify special treatment.

24. One example may be the online posting of *earnest performance of copyright works, for example, song singing with or without rewriting the lyrics based on the original melodies*. If it is without any parodic, critique, comic or imitative effects, nor is it related to any current events, it may be more akin to a mere expression of feelings or showing of talent, which can hardly provide sufficient public policy grounds to justify special treatment[35].

25. Another example is the unauthorised posting of *translation and adaptation works*. Again, if such works are devoid of any parodic, critique, comic or imitative effects, nor are they related to any current events, the mere fact that they might contain certain originality elements or even be transformative in effect could hardly provide sufficient public policy grounds to justify special treatment. It is doubtful if excluding translation and adaptation as a class from copyright protection would be in compliance with our international obligations[36].

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[34] The exception explicitly excludes deliberate inclusion of musical works. This reflects a fair balance and should not be tipped. It is hard to justify a differential treatment between, for example, the video shooting of a wedding by a professional contractor and by an amateurish friend, both with post-shooting editing and incorporation of a popular love song as background. Licence clearance is a business norm in such situations today.

[35] Section 27 of the Copyright Ordinance provides that the performance of the work in public is an act restricted by the copyright in a literary, dramatic or musical work. It is difficult to see why the same principle should not apply to the online streaming of the performances of the same copyright works. In fact, licensing public performances is a business norm. For example, the Leisure and Cultural Services Department has, for performing arts venues under its purview (except for the Hong Kong Coliseum and Queen Elizabeth Stadium), acquired music copyright licences from Composers and Authors Society of Hong Kong Limited and entered into royalty paying agreements with three licensing bodies to use works such as music, films, karaoke videos and lyrics of their members. Hirers of these performing arts venues do not have to acquire separate copyright licences. We understand that some collecting societies have entered into royalty paying agreements with online media sharing platforms to allow users to upload their works which may involve copyright works.

[36] The rights of translation and adaptation are expressly protected by the Berne Convention under Articles 8, 12 and 14 as follows -

Right of Translation (Articles 8):
"Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their

26. Unjustified uses of copyright works are infringements subject to legal recourse. But for many technical or trivial infringements as the factual circumstances may reveal, the full rigour of possible sanctions can be greatly mitigated in practice. See discussion below on criminal and civil liabilities (paragraphs 30-37 and 46-50 respectively).

FAIRNESS ASSESSMENT AS SAFEGUARD

27. The ideas floated above is meant to particularise a possible scope that should be distinctive as a certain special case, as a first step for consideration of special treatment. It would be futile to suggest that all activities covered by such ideas are necessarily justified exceptions to copyright protection. As the next steps in the analysis, we must look to the remaining criteria in the three-step test and determine whether an act in question may -

- conflict with a normal exploitation of the original copyright work
- unreasonably prejudice the legitimate interests of the copyright owner

28. Such determination is necessarily very fact sensitive depending on the exact circumstances of individual cases. One legislative device as widely used in common law jurisdictions[37], including Hong Kong[38], to

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rights in the original works."

Right of Adaptation, Arrangement and Other Alteration (Article 12):
"Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works."

Cinematographic and Related Rights (Article 14):
"(1) Authors of literary or artistic works shall have the exclusive right of authorizing:
(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;
(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.
(2) The adaptation into any other artistic form of a cinematographic production derived from literary or artistic works shall, without prejudice to the authorization of the author of the cinematographic production, remain subject to the authorization of the authors of the original works.
(3) The provisions of Article 13(1) shall not apply."

[37] The US has a long history in resorting to a fairness assessment by the court in applying the fair use doctrine, as do many other common law jurisdictions (including Australia, Canada and the UK) in dealing with specific copyright exceptions (such as for education, libraries and archives and news reporting purposes). Australia, Canada and the UK follow such a course in introducing a new exception for parody.

enable compliance with the remaining criteria is to invite the court to undertake a fairness assessment that would take into account the overall circumstances of a disputed case put before it. It is common to include in the statutory provisions a non-exhaustive list of relevant factors for assessment that would help the court analyse individual cases and balance different interests to arrive at a fair result[39]. Cases decided will over time develop a healthy body of jurisprudence that enhance certainty and keep in pace with technological and societal development.

29. Over the consultation we recently conducted, there is general support for this judicial approach in crafting new copyright exceptions. To facilitate the understanding of such a fairness assessment, we recapitulate and analyse in **Annex A** the relevant factors we put up in the consultation. We believe that this judicial approach should provide essential safeguards against possible abuse of any ideas suggested above to enlarge the scope of special treatment (paragraphs 14-19). We will further develop the ideas and consider the appropriate legislative language to incorporate them into the fairness assessment by the court.

CRIMINAL LIABILITY

30. To the extent that a copyright infringement is not covered by an exception, legal remedies are available to protect the right of lawful owners. But not all infringements attract criminal liabilities, which are subject to different tests, burden and standard of proof, procedures, etc from those of the civil proceedings.

31. We take the scope of criminal sanction in our copyright regime seriously. Criminal enforcement certainly deters infringing activities but too draconian a measure might well dampen creativity which the copyright regime is designed to promote in the first place. We must be mindful of the right use of scarce public resources to focus on reprehensible behaviour

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[38] In Division III of Part II of the existing Copyright Ordinance, there are over 60 sections specifying acts which may be done in relation to copyright works notwithstanding the subsistence of copyright, and thus attracting no civil or criminal liability. Such exceptions are either subject to a fairness assessment embodied as fair dealing provisions or being narrowly crafted for specific justifiable purposes such as for persons with a print disability or preservation or archival purposes of libraries.

[39] In contrast, a copyright exception may also be crafted to subject it to certain qualifying conditions, the application of which may perhaps carry greater certainty. But in more complicated areas where the proper balance is not that straightforward, it might be difficult to agree upon the conditions at the outset in view of many competing interests, and such an approach might be mechanical and inadvertently lead to unintended and undesirable results. A fairness assessment by the court could have better merits.

entailing societal harm; unjustified diversion of criminal enforcement efforts hurts not only users and society at large but also copyright owners themselves.

32. For criminal liabilities, section 118(1) of the Copyright Ordinance provides for a number of offences. Offences set out in subsections (1)(a) to (1)(f) target acts containing a certain commercial element. In particular, s118(1)(e) makes it an offence to distribute an infringing copy of the work for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works. On the other hand, the offence set out in subsection (1)(g) targets acts done 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. Instead of the purpose or nature of the act, the provision focuses on the effect of the act – distribution of infringing copies to such an extent as to affect prejudicially the copyright owner is prohibited[40].

33. In view of the proposed introduction of a communication right, and to allay netizens' concerns regarding the impact of the new criminal liability on the free flow of information across the Internet and to provide greater legal certainty[41], we proposed in the Copyright (Amendment) Bill

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[40] Section 118(1)(g) of Copyright Ordinance (Cap. 528) stipulates that :

"A person commits an offence if he, without the licence of the copyright owner of a copyright work -
……
(g) 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."

The Copyright (Amendment) Bill 2011 sought to introduce a technology-neutral communication right. The proposed criminal sanction against unauthorised communication of a copyright work to the public in the Bill mirrors the existing offences under section 118(1) of Copyright Ordinance. The proposed section 118(8B) reads:

"A person commits an offence if the person -
……
(b) without the licence of the copyright owner of a copyright work, communicates the work to the public (otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward) to such an extent as to affect prejudicially the copyright owner."

[41] At the early stage of the consultation, some members of the public queried (i) if the Government would insist on prosecuting the copyright offence without involving the copyright owner, and (ii) if the act of sharing a link with parodic content constitute copyright infringement. We have clarified through various means that-

(i) According to the criminal provisions in the Copyright Ordinance, the most fundamental element of copyright offences is that the relevant acts have been conducted without the consent of the copyright owner and thereby constitute copyright infringement. If the copyright owner does not object or pursue the matter any further, there is no basis for the enforcement agency to follow up any criminal investigation, not to mention laying a prosecution.

2011 to clarify what amounts to "*such an extent as to affect prejudicially the copyright owners*"[42]. The proposal put up for consultation reflects the consensus of the Bills Committee in refining the clarification proposal, 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 a non-exhaustive list of relevant factors to guide the Court in determining the magnitude of economic prejudice -

(a) the nature of the work, including its commercial value (if any);

(b) the mode and scale of distribution/communication; and

(c) whether the infringing copy so distributed/communicated amounts to a substitution for the work.

34. The consultation exercise held last year has come up with this common ground –

(a) It has all along been our policy intent to combat commercial-scale copyright infringement. Clarifying the criminal sanction can serve an important function of putting beyond doubt that many common Internet activities for personal use and non-commercial purposes are indeed outside the criminal net, and thus promotes credibility and respectability of the copyright regime.

(b) Copyright owners support this proposal as sufficient in balancing copyright protection and freedom of expression. They see its benefit in enhancing legal certainty by clarifying the scope of criminal liability. Owners always emphasise that they are only after piracy that would amount to a substitution for the underlying copyright works.

(c) Users do not believe that their works would amount to a substitution for the underlying copyright works.

(ii) If the "link" in question merely provides those who click on it a means to access materials on another website, and the person who shares the link does not distribute an infringing copy of the copyright work (e.g. by uploading an infringing song to a website for others to download), the mere act of sharing a link will not constitute copyright infringement. The legislative proposals introduced by the Government in the 2011 Bill contain provisions that clearly specify the same.

42 In both section 118(1)(g) and the proposed section 118(8B)(b).

35. We note many Internet users' objection to this proposal as insufficient to address **all** their concerns (given the retention of possible civil liability), as well as specific criticism about the imprecise meaning of *"more than trivial economic prejudice"*[43] which might leave the criminal net wide and result in legal uncertainty and a chilling effect on freedom of expression.

36. We believe clarification of criminal liability can go a long way to address users' concerns about the existing prejudicial distribution offence and the proposed prejudicial communication offence under the Copyright (Amendment) Bill 2011. One important merit is that it clarifies the threshold for criminal enforcement for all subject matters alleged to be infringing copyright, not confined to a particular type of use. We are considering possible refinement to the original proposal to answer the specific criticism. Notably, we may lay emphasis on the factor of whether the infringement would amount to a substitution for the original copyright work for the court to assess possible criminal liability with regard to the relevant provision of the Copyright Ordinance.

37. During our consultation we also invited public views on a possible categorical criminal exemption[44] for a specific and confined scope of acts and purposes subject to certain qualifying conditions. Although this has the merit of providing legal certainty, there is a view that singling out a certain genre for criminal exemption is not necessarily justifiable[45]. In particular, with the clarification of the potential criminal liability for the relevant distribution and communication offences as proposed, it will be made clear that works which do not substitute the underlying work should not be caught by the criminal net. Given the application of the clarification to all types of uses or purposes, we believe that a narrow criminal exemption for a certain genre is superfluous.

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[43] Some considered that the phrase as "vague", "subjective", "too low", "unseen in other overseas jurisdictions or international treaties", etc.

[44] From the existing "distribution" and the proposed "communication" offences committed otherwise than for the purpose of or in the course of trade or business which consists of dealing in infringing copies of copyright works.

[45] In Division III of Part II of the existing Copyright Ordinance, there are over 60 sections of permitted acts with no criminal and civil liabilities alike (footnote 3 above).

USER GENERATED CONTENT (UGC)

38. During the consultation, the Copyright and Derivative Works Alliance, which is active on the Internet championing "secondary creations", advocates (in addition to taking on a fair dealing exception) introducing a copyright exception for non-profit making UGC or UGC not disseminated in the course of trade. The UGC exception might be embodied in a new section 39B of the Copyright Ordinance primarily based on section 29.21 of the Canadian Copyright Act[46].

39. We set out our observations on the concept and relevant overseas developments in the previous report to Members in December 2013, which are now recapped and updated in **Annex B**. We have further pondered on the subject and a couple of fundamental issues. First what is UGC? Second what problem such an UGC exception is professed to respond to?

40. There is no widely accepted definition of UGC. The concept appears to be evolving alongside technological developments. For reference purposes, the following descriptions may shed some light –

(a) According to an OECD study[47] which the US quoted in its latest Green Paper (July 2013) and the ALRC quoted in its Final Report (November 2013)[48], UGC is defined as: (i) content made publicly available over the Internet, (ii) which reflects a certain amount of creative effort, and (iii) which is created outside of professional routines and practices.

(b) According to the European Union (in its consultation document of December 2013), UGC can cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort, and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content[49].

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[46] We understand that the idea actually originates from a proposal by Professor Peter K Yu, who also made a submission on behalf of the Journalism of Media Studies Centre, University of Hong Kong, which contains drafting suggestions along similar lines, among other things. Professor Yu is Kern Family Chair in Intellectual Property Law, Drake University Law School in the United States.

[47] "Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking" by Organisation for Economic Co-operation and Development (2007), at page 9.

[48] Footnote 11 above.

[49] The European Union launched in December 2013 a public consultation exercise as part of its

41. What the Alliance proposes as UGC is conditioned on a number of factors, as tabulated below with reference to the Canadian provision which is the only legislative precedent available to date –

UGC as proposed by the Alliance	**UGC in the Canadian provision**
A new work, a work of joint authorship or a work with transformative purposes, in which copyright subsists (i.e. the work does not have to be transformative).	A new work where copyright subsists (i.e. the work must be transformative).
At the time of the use or the authorisation to disseminate, the new work or work of joint authorship is done mainly for non-profit making purposes or not in the course of business.	The use or the authorization to disseminate the work is solely for non-commercial purposes.
Acknowledgement of the source of the existing work (if it is reasonable in the circumstances to do so) is one of the factors for the court to determine whether it is reasonable to believe that the existing work was not infringing.	Acknowledgement of the source of the existing work (if it is reasonable in the circumstances to do so) is one of the qualifying conditions for invoking the exception; the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright.
The act does not have a substantial adverse financial effect on the exploitation or market for the existing work to the extent that the work substitutes for the existing work.	The act does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or on an existing or potential market for it, including that the new work is not a substitute for the existing one.

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on-going efforts to review and modernise EU copyright rules. It is noted in the consultation document that while users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs. A typical example could be the "kitchen" or "wedding" video (adding one's own video to a pre-existing sound recording), or adding one's own text to a pre-existing photograph. Other examples are "mash-ups" (blending two sound recordings), and reproducing parts of journalistic work (report, review etc.) in a blog.

42. From the above, it appears that UGC is a very wide and vague concept subject to different understanding and interpretations. We have reservation in adopting it as a subject matter for special treatment, in particular bearing in mind the first criterion in the three-step test i.e. any limitation or exception should be confined to a certain special case.

43. Secondly, in our present context, it is not clear what additional problems an UGC provision may be able to address given the enlarged scope of special treatment proposed above (paragraphs 7-26). In theory, this may be able to give special treatment to some acts as exemplified in paragraphs 23-25 above which fall outside our proposed scope of special treatment. But this still begs the question why such acts are justified to be excepted from copyright protection.

44. In our considered view, it is highly unlikely that UGC which does not amount to a substitute for the original copyright work will be caught by the criminal net. The position will be made clear with clarification of the criminal liability of the existing distribution and proposed communication offences (paragraphs 30-37 above).

45. The remaining thrust of the UGC proponents' argument is that without such a UGC provision to except civil liability generally, the UGC works would be subject to frequent taking down by copyright owners who may liberally serve an infringement notice with the intermediaries. There is also a fear that the threat of civil litigation by resourceful owners would create a chilling effect dampening creativity of individual users and parodists many of whom are lack of means. We do not think this is necessarily the case, given the operation of the proposed safe harbour provisions and the principles governing civil liability discussed below (paragraphs 46-50). There should be reasonable safeguards to minimise abuses or frivolous or vexatious civil litigations.

SAFE HARBOUR AND CIVIL LIABILITY

46. We proposed in the Copyright (Amendment) Bill 2011 to introduce safe harbour provisions to limit OSPs' liability for copyright infringement on their service platforms caused by subscribers, provided that they meet certain prescribed conditions, including taking reasonable steps to limit or stop a copyright infringement when being notified. The provisions will be underpinned by a voluntary Code of Practice which sets out practical guidelines and procedures for OSPs to follow after notification. This serves as a mechanism to deal with infringement claims

in an efficient and effective manner other than court proceedings to the benefit of owners, users and intermediaries alike.

47. To address concerns about possible abuse, both the complainants and subscribers will be required to provide adequate and specific information to substantiate their allegations of copyright infringement and counter notices respectively. For example, a complainant must identify the copyright work alleged to be infringed, the material and activity alleged to be infringing, and himself as the owner of the copyright work concerned[50], and confirm the truth and accuracy of all the statements he made. A complainant or a subscriber who submits false statements is liable to both civil and criminal sanctions.[51]

48. On receipt of a counter-notice, an OSP must reinstate the material it has taken down unless the complainant has informed it in writing that proceedings have been commenced in Hong Kong seeking a court order in connection with the alleged infringing activity[52]. In the event that the complainant initiated a civil action against the subscriber, and the court found an infringement as alleged, the complainant may, among other things, seek damages as compensation by adducing evidence, for example, on the amount of damage or loss he has suffered as a result of the infringement.

49. A general principle behind civil litigation is to right the wrong that has been done to a claimant who must bear the burden of proof of the wrongdoing and the harm done. In practice, in a great many trivial cases in which copyright might have been infringed technically, the economic or other interest involved might be minimal to give a good reason for an owner to take out civil proceedings, given the litigation costs and time, legal uncertainties and effectiveness of remedies in question (not to mention large scale piracy cases on the web deserving priority attention). But in instances where a great interest, commercial or otherwise, is at stake, it is only fair for the rights owner to have his recourse in the court as a last resort to resolve the dispute based on the fundamental principles of justice.

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[50] Or is authorised to act on behalf of the copyright owner.

[51] A person who makes any statement that he knows to be false, or does not believe to be true, in a material respect, is liable in damages to any person who suffers loss or damage as a result. A person commits an offence if he knowingly or recklessly makes a statement that is false in a material respect, and is thus liable to a fine at level 2 and to imprisonment for 2 years.

[52] In general, the complainant has first to apply to the High Court for disclosure of the personal particulars of the subscriber and prove that such disclosure is necessary, proportionate and justified. *Cinepoly Records Company Limited & Others v Hong Kong Broadband Network Limited & Others* [2006] 1 HKLRD 255.

We recall no past local incidents of rights owners taking any claims against parodists.

50. Overall, as a matter of norm setting in the copyright regime, we believe the retention of the civil liability of unjustified UGC infringements may help shape the right environment for copyright owners and intermediaries to work out appropriate business models that may exploit a new market of UGC in a fair manner[53]. Users may ultimately benefit as they would be encouraged to exploit their creativity to churn out more UGC (which is what UGC proponents argue for), and might even benefit from the popularity of their UGC[54]. With no strong public policy justifications, we should not lightly tilt the present balance and impede the evolvement of appropriate business models.

WAY FORWARD

51. We will take the matter forward along the directions set out above, with a view to formulating appropriate legislative proposals and concluding our efforts started in 2006 to update our copyright regime in the digital environment.

52. We will also continue to monitor closely overseas developments in copyright protection, as part of our consideration in finalising the legislative proposals in the present exercise and in identifying and resolving further issues for any future legislative update.

Commerce and Economic Development Bureau
Commerce, Industry and Tourism Branch
March 2014

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[53] For example, Youtube has set up a profit sharing mechanism under which copyright owners may opt to share profits generated by a UGC work instead of taking it down. We understand that it is a common practice in the music industry for copyright owners to track and monetise a UGC work. Some collecting societies would enter into collective licensing agreements with the intermediaries. This is analogous to the arrangement in some public performance venues (footnote 35 above).

[54] Some have become hugely popular after uploading their UGC works to online sharing platform such as Youtube or Twitter, opening themselves to commercial contracts or business opportunities.

Annex A

Analysis of Fairness Assessment

To facilitate the understanding of the fairness assessment conducted by the court in assessing whether a dealing with a copyright work is fair, we recapitulate and analyse, with reference to experiences in overseas jurisdictions, the following factors we put up in the consultation exercise -

(a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;

(b) the nature of the work;

(c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and

(d) the effect of the dealing on the potential market for or value of the work[55].

2. According to decided cases in the US involving parody, satire and appropriation art, in considering the purpose and nature of the dealing (paragraph 1(a)), it is important to consider whether and to what extent the new work is "transformative", namely, whether the new work merely supersedes the original creation or adds something new, with a further purpose or different character, altering the underlying work with new expression, meaning or message[56]. The courts appear to be generally of the view that the more transformative is the new work, the less will be the significance of other factors, such as the commercial nature of the new work, that may weigh against a finding of fair use.

3. In respect of the nature of the original work (paragraph 1(b)), a particular use is more likely to be considered fair when the copied work is

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[55] In Hong Kong, such a list is provided in the fair dealing provisions for research and private study (section 38) and the fair dealing provisions for giving and receiving instructions (section 41A). They mirror the statutory list underpinning the fair use doctrine enshrined in the copyright statutes of the United States.

[56] Campbell v Acuff-Rose Music, Inc, Supreme Court of the United States, 510, U.S. 569, 114 Ct. 1164, Blanch v Koons 467 F.3d 244 (Court of Appeals (2nd Circuit), 2006) and Cariou v Prince 714 F.3d 694 (Court of Appeals (2nd Circuit), 2013).

factual rather than creative. The courts recognise that some works are closer to the core of intended copyright protection than others, with the consequence that it would be more difficult to establish fair use when the former works are copied.

4. Regarding the amount and substantiality of the portion dealt with in relation to the original work as a whole (paragraph 1(c) above), this factor calls for consideration not only about the quantity of the material used, but also their quality and importance of the amount copied. Whether a substantial portion of the new work was copied "verbatim" from the underlying work is also a relevant question for considering fairness, for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm to the underlying work which will be discussed below.

5. As to effect of the use upon the potential market for or value of the copyright work (paragraph 1(d) above), the courts note that when a commercial use amounts to a mere duplication of the entirety of the original, it clearly supersedes the "objects" of the original and serves as a market replacement, resulting in a recognisable market harm to the original work. Not only will the extent of market harm caused by particular actions of the alleged infringers to the underlying work be considered, but also whether unrestricted and widespread conduct of the sort engaged in by the alleged infringer would result in a substantially adverse impact on the potential market for the original will also be a relevant consideration. The enquiry must take into account not only of harm to the original work but also of harm to the potential market, including market for derivative works. Hence, if the use of a copyright work in a way that substitutes for the original in the market, it will weigh against fairness.

Annex B

Observations on UGC

We have set out our observations and relevant overseas developments regarding the concept of UGC in our previous report to Members in December 2013[57]. It is opportune for us to recap and update our observations for Members' reference.

2. Providing a copyright exception for UGC is not a mainstream development in international copyright legislation. UGC as a copyright exception is a concept new to us and the international community. Except Canada, no major overseas jurisdictions have adopted UGC in their copyright regimes.

3. We note that there have been recent discussions in Australia, the US, the European Union (EU) and Ireland about the implications of UGC for the copyright regime. In sum, the issue of UGC remains controversial and unsettled:

- In June 2013, the Australian Law Reform Commission (ALRC) issued a paper entitled "Copyright and the Digital Economy". Among other things, it rejects a standalone transformative use exception, after studying the Canadian UGC model and identifying many problems associated with it[58]. The ALRC reaffirmed this position in its Final Report submitted to the Australian Government in November 2013[59].

- In a Green Paper issued by the US in July 2013[60], it highlights the promising trend of using filtering technology such as the

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[57] Paragraphs 46 and 48 of the Panel Paper in December 2013(LC Paper No. CB(1)516/13-14(03).

[58] Notably, it may not provide adequate protection for the owner of the underlying copyright from the possible effects on that owner's interests of dissemination of the new work by the internet intermediary. The Commission observes that "[l]imiting any transformative use exception to non-commercial purposes is problematic because the boundary between non-commercial and commercial purposes is not clear given 'a digital environment that monetises social relations, friendships and social interactions'."

[59] "The ALRC agrees with the Copyright Council Expert Group's observation that user-generated content 'reflects a full spectrum of creative and non-creative re-uses' and should not automatically qualify for protection under any proposed exception aimed at fostering innovation and creativity." (paragraph 10.108)

[60] Footnote 11 of main text.

Content ID system[61] in allowing users to post remixes that may be monetised by the relevant rights holder, or by way of the Creative Commons licence through which creators can authorise remixes of their works subject to certain provisos[62]. It also underlines certain UGC principles established in 2007 by a group of private companies (i.e. copyright owners and UGC services should cooperate with regard to creating "content-rich, infringement-free services"[63]) "to foster an online environment that promotes the promises and benefits of UGC Services and protects the rights of Copyright Owners." An Internet Policy Task Force of the Department of the Commerce of the US will convene a series of roundtables to examine the issue of remixes[64].

- The EU launched in December 2013 a public consultation exercise as part of its on-going efforts to review and modernise EU copyright rules. UGC is one of the many subjects under review[65]. In February 2014, the UK published its responses to

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61 See http://www.youtube.com/t/contentid for details.

62 A Creative Commons (CC) licence is a set of standard terms licence devised by a private organisation called Creative Commons. CC licences are meant to facilitate copyright owners in licensing their works for use by others free of charge based on certain preset terms and conditions. The public may copy, distribute, display and perform a CC licenced work and/or any derivative works based on it, subject to any conditions the author has specified, such as acknowledging the author of the underlying work and for non-commercial purposes etc.

63 To which end they "should cooperate in the testing of new content identification technologies and should update these Principles as commercially reasonable, informed by advances in technology, the incorporation of new features, variations in patterns of infringing conduct, changes in users' online activities and other appropriate circumstances." Principles for User Generated Content Services, http://www. ugcprinciples.com/.

64 The US Green Paper discusses the issue of 'remixes' (other terms such as 'mashups' or 'sampling' are also used, especially with reference to music). Often, these works are part of a growing trend of 'user-generated content' that has become a hallmark of today's Internet, including sites like YouTube. Despite the availability of a number of possibilities to address the issue (such as the fair use doctrine, Content ID system of YouTube and Creative Commons licence), the paper accepts that a considerable area of legal uncertainty remains. The way forward is to consult widely on questions like - "Is there a need for new approaches to smooth the path for remixes, and if so, are there efficient ways that right holders can be compensated for this form of value where fair use does not apply? Can more widespread implementation of intermediary licensing play a constructive role? Should solutions such as microlicensing to individual consumers, a compulsory licence, or a specific exception be considered? Are any of these alternatives preferable to the status quo, which includes widespread reliance on uncompensated fair uses?" Apparently, the Canadian model is not the only answer.

65 It is noted in the consultation document that there are questions raised with regard to fundamental rights such as the freedom of expression and the right to property. It recalled that during previous rounds of discussions, no consensus was reached among stakeholders on either the problems to be addressed or even the definition of UGC. The document invites views as to experiences of different stakeholders (users, owners and online service providers) and the best way to respond to this phenomenon.

the EU consultation. Regarding UGC, "[t]he UK believes more transparency for users regarding blanket licensing arrangements for UGC platforms would be useful, as would a focus on educating users and creators of UGC about copyright rules more broadly. As the recent EU stakeholder dialogue found, the case for any other regulatory intervention in this area remains to be made."

- On the other hand, a Copyright Review Committee in Ireland submitted a report entitled "Modernising Copyright" to the Minister for Jobs, Enterprise and Innovation in October 2013. It recommends introducing a new copyright exception for non-commercial UGC along similar lines of the Canadian model. Nevertheless, no legislative proposal has been made by the Irish Government in this regard so far.

4. We provided LegCo with an assessment of the concept of UGC with reference to the Canadian provision and three-step test enshrined in the TRIPS Agreement[66]. The concept is a contentious subject. Whether the Canadian provision meets the international requirements has attracted debates within Canada and the international community.

5. While the scope of UGC applies to "non-commercial works" only, the distinction between commercial and non-commercial is not that straightforward in this day and age when monetisation of social interactions and the sharing of information among circles of friends, acquaintances, fans and netizens generally is so commonplace on the Internet. The UGC exception may bring unintended damage to copyright owners. We also note that owners are concerned that Internet intermediaries might, without paying copyright owners for a licence, be so authorised to disseminate UGC (uploaded by users for private and social purposes with no profit motives) on the Internet widely with commercial gain (notably through ads).

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[66] Appendix III to the Panel Paper in December 2013(LC Paper No. CB(1)516/13-14(03).