

## **Bills Committee on the Copyright (Amendment) Bill 2011**

### **Copyright Exception for Parody**

#### **Purpose**

At the meeting held on 11 October 2011, the Bills Committee requested the Administration to consider exempting from the criminal net parodies not involving large scale copyright piracy and profit-making.

#### **Proposed Exception for Parody**

2. Our earlier paper entitled “*Parody*” submitted to the Bills Committee<sup>1</sup> has explained that the Bill does not alter the existing legal principles in determining whether the making of a parody constitutes a copyright infringement. In this connection, a parody that does not amount to copyright infringement today will remain so under the Bill. Further, where the dissemination of a parody on the Internet is not made for profit, and does not prejudicially affect the copyright owners, such conduct will not constitute a criminal offence under either the existing Ordinance or the Bill. It follows that the worry that the Bill will “tighten the grip” on parody is unfounded.

3. Noting that there have been suggestions that an exception for parody should be included in the Bill to ease the concern of some netizens, we seek to review in this paper the relevant overseas experience, and highlight several material issues that have to be examined and resolved before proposing whether a new copyright exception for parody should be introduced in Hong Kong.

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<sup>1</sup> LC Paper No. CB(1)3061/10-11(03).

## Overseas Experience

### *Australia*

4. Amongst the major common law jurisdictions which we have surveyed, Australia is the only one that has introduced into its copyright statute a fair dealing exception for parody and satire.<sup>2</sup> However, the Australian law does not define “parody” and “satire”. In the absence of any decided cases, the concepts of “parody” and “satire” are open to interpretation. According to the Australian Copyright Council (an independent and non-profit organisation), parody is “an imitation of a work that may include parts of the original. In some cases, a parody may not be effective unless parts of the original are included. It seems that the purpose of a true parody is to make some comments on the imitated work or on its creator.”<sup>3</sup> On the other hand, a satire is to “draw attention to characteristics or actions – such as vice or folly – by using certain forms of expression – such as irony, sarcasm and ridicule”.<sup>4</sup> It opines that making something funny, in itself, is not a sufficient condition for qualifying for the exception for parody or satire. Some form of commentary (which may be implied) on the work or “characteristics or actions such as vice or folly” is required.<sup>5</sup>

5. Further, to qualify as a valid exception, a parody or satire must be “fair” to the copyright owner. There is no statutory definition of how “fairness” should be assessed for parodies and satires. Such an issue is subject to the interpretation by the court. Meanwhile, we are not aware of any relevant decided case from which we may otherwise draw reference. Accordingly, the precise scope and the effect of the Australian fair dealing provision as well as the distinction between parody and satire is unclear and uncertain.

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<sup>2</sup> Section 41A was introduced into the Copyright Act 1968 in 2006 which provides that “A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.”

<sup>3</sup> Australian Copyright Council Information Sheet G083 v03 January 2008 (available at [http://www.copyright.org.au/admin/cms-acc1/\\_images/2842923184d0015597ec78.pdf](http://www.copyright.org.au/admin/cms-acc1/_images/2842923184d0015597ec78.pdf)).

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

## Canada

6. In late September 2011, the Canadian government re-introduced the *Copyright Modernization Act* (known as Bill C-11 under which the legislative proposals are by and large identical to those under the previous Bill (known as Bill C-32) as introduced by the former government)<sup>6</sup>. The Bill, among other things, proposes two copyright exceptions relevant to this paper –

- (a) modifying the existing fair dealing exception to include parody and satire. Similar to the Australian position, the Bill does not provide any definition for these two terms. We are not aware of any official record that provides a detailed explanation about the intended scope of this proposed new exception; and
- (b) providing a new exception for “non-commercial user-generated content” (UGC)<sup>7</sup> subject to certain prescribed conditions, e.g. giving due credit to the underlying work and not having “a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation...or potential market” of the underlying work.

7. During the discussion of the original Act, there were criticisms that the exception for non-commercial UGC was too wide and the conditions attached thereto were unrealistic, and that it might violate the three-step test required by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization. Some lamented that the “creativity” bar set in the provision was too low, under which a very simple alteration to a work might already constitute a

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<sup>6</sup> The legislative proposals were originally introduced in June 2010 as Bill C-32, but the parliamentary scrutiny was aborted in early 2011 due to dissolution of the Parliament. The current Bill C-11 is available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4>.

<sup>7</sup> The proposed new section 29.21 provides that “It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual’s authorisation, a member of their household — to use the new work or other subject-matter or to authorise an intermediary to disseminate it”.

The term UGC is also widely used in academic literature on the Internet, and refers to “content that is created in whole or in part using tools specific to the online environment and/or disseminated using such tools”, e.g. many online videos in YouTube. See Daniel Gervais, 2009, “The Tangled Web of UGC: Making Copyright Sense of User-Generated Content”, Working Paper Number 09-17, Vanderbilt University Law School Public Law and Legal Theory (available at <http://ssrn.com/abstract=1444513>).

UGC. Others contended that it was not fair to allow intermediaries (such as YouTube) to charge or benefit (through advertising) from disseminating the UGC, while the creator of the original work received no remuneration or licence fees. In addition, some authors were worried that they might lose significant control over the use of their work and that the proposed exception would undermine the market for their work.

### *The US*

8. There is no specific exception or limitation for parody in the US copyright law. However, the law does provide an open-ended fair use exception which may be available for acts done for the purposes of criticism, comment, news reporting, teaching, scholarship or research, etc. There is no established rule in the US jurisprudence on whether a parody constitutes fair use of a copyright work. This issue has to be decided on a case-by-case basis.

9. In *Campbell v Acuff-Rose Music, Inc.*,<sup>8</sup> the US Supreme Court defined parody as a “literary style or artistic work that imitates the characteristic style of an author or work for comic effect or ridicule” that comments on the author’s original work, and held that “parody, like other comment or criticism, may claim fair use ...”.<sup>9</sup> On the other hand, the Court limited the fair use defence for satirical works. In defining “satire” as a work “in which prevalent follies or vices are assailed with ridicule,” the Court noted that satire comments are on society at large and not necessarily on the underlying work. The fair use defence does not exist, therefore, for a satirist who merely infringes another’s copyright “to avoid the drudgery in working up something fresh.”<sup>10</sup>

### *The UK*

10. While the European Union, in a Directive issued in May 2001, stipulates that Member States may provide a copyright exception for “use for the purpose of caricature, parody or pastiche”<sup>11</sup>, the UK copyright law does not provide any specific copyright exception for parody and satire.

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<sup>8</sup> 510 U.S. 569 (1994).

<sup>9</sup> Ibid. page 579-80.

<sup>10</sup> Ibid. page 580-81, note 15.

<sup>11</sup> The definition of these terms was not given in the relevant Directive (2001/29/EC).

11. In 2006, the *Gowers Review* commissioned by the UK Government recommended that a specific fair dealing exception for parody should be introduced by 2008. After two rounds of public consultations, the UK Intellectual Property Office (UKIPO) concluded in 2009 that there was insufficient justification for the exception. In particular, the UKIPO did not accept that a copyright exception for parody would be necessary for the copyright law to be compliant with the human rights provision on the freedom of expression. Specifically, it concluded that introducing the exception would likely bring about a potentially significant change to the balance of interest between the creators and right holders of underlying works, and those who sought to use them, e.g. the proposed new exception might also increase opportunities of abuses by blurring the line between parody and plagiarism, and depriving copyright owners of a source of licence revenue. In the absence of any consensus, the UKIPO was not persuaded that there were sufficient advantages for introducing the exception forthwith.

12. In August 2011, the UK Government indicated that it would bring forward the proposals made in *the Hargreaves Report* by conducting a public consultation on a number of copyright exceptions including that for parody.<sup>12</sup> This exercise will become the third consultation to be conducted by the UK government on the proposed parody exception since 2006. The UK experience demonstrates that the issue on parody is by no means straightforward. The outcome of the public consultations and how the UK Government may choose to proceed on the issue of parody remain to be seen.

### **Several Material Issues to be considered for a New Exception for Parody in Hong Kong**

13. The overseas experience cited above demonstrates the difficulty in constructing an undisputed legal definition of parody, and the potential uncertainty in terms of the scope and application of the proposed exception. Having regard to the overseas experience, we have initially identified several material issues that would need to be carefully considered before the Administration is in a position to make any legislative proposal.

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<sup>12</sup> *The Government Response to the Hargreaves Review of Intellectual Property and Growth*, August 2011 (available at <http://www.bis.gov.uk/assets/biscore/innovation/docs/g/11-1199-government-response-to-hargreaves-review>). When writing this paper, we are not aware of any public consultation document issued by the UK Government.

*(a) International Obligation*

14. In compliance with the international standard, the Administration is obliged to ensure that a copyright exception complies with the three-step test as required by TRIPS of the World Trade Organization. In this connection, the Administration must ensure that any 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. In this connection, we consider it preferable to have a definition for parody in place to ensure that the scope of the proposed new copyright exception is confined to “special cases” only, and that the legitimate interests of copyright owners will not be jeopardised by the proposed exception.

*(b) Definition and Scope*

15. None of the overseas jurisdictions discussed above has provided a legal definition for “parody” or “satire”. The US case law suggests that parody (which targets the underlying work) is distinguishable from satire (which does not target the underlying work as such), and the fair use defence may be applicable to parody only. On the other hand, the Canadian government appears to have taken the view that parody and satire is different from non-commercial UGC, and therefore two separate exceptions are required. It is however unclear how these two exceptions would correlate or interact with each other in practice.

16. In reality, “parody” is loosely used for referring to a wide range of materials created by netizens that have adapted or modified existing copyright works for sharing and dissemination on the Internet. The term is often associated or used interchangeably with “satire”, “re-mix”, “caricature”, “mash-up works”, “derivative works”, etc. to describe a variety of online materials created for different purposes, including –

- (a) materials that constitute criticism or review of either a copyright work, or the underlying philosophy or value of the work;
- (b) materials that simply adapt or modify a popular copyright work mainly to express comments, views and even criticisms on wider social issues or public figures; and

- (c) materials without any underlying social or political message created mainly as humorous expressions of ideas and thoughts.

17. It is uncertain whether all these diverse types of works can be properly categorised as “parodies”, and if so, whether there is sufficient legal justification for some, if not all, of these works to be covered by the proposed copyright exception. In this regard, the Australian Copyright Council has taken the view that “changing the words of songs or other material, or using the material in an incongruous context, is not necessarily a parody or satire”.<sup>13</sup>

18. Unless a consensus on the legal meaning for “parody” can be reached, a copyright exception purportedly for “parody” or “satire” is bound to give rise to legal uncertainty. Not only is this likely to create confusion amongst the public, it would also render the exception susceptible to abuse.

*(c) Legitimate Interests of Copyright Owners*

19. One of the primary purposes of copyright law in Hong Kong is to provide incentives to authors, composers and artists on one hand to create original works, and to entrepreneurs (such as publishers) on the other to invest in the dissemination and exploitation of these original works for the ultimate benefit of the public. In striking a reasonable balance between the legitimate interests of the copyright owners and the public interest, the Copyright Ordinance contains over 60 sections of copyright exceptions in which the public is allowed to use the copyright works in certain specific circumstance and manner without authorisation of the copyright owners. By and large, the current regime is seen to have struck a reasonable balance between copyright protection and reasonable use of copyright works.

20. In the UK,<sup>14</sup> views gathered from the earlier public consultation surrounding the Gowers Review were split, giving no clear consensus as to whether a copyright exception for parody should be introduced. Copyright owners expressed their concerns that the introduction of a parody exception would increase uncertainty which will result in more litigation and opportunities for abuse. Some of them were worried that the proposed exception would limit their control over the use of

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<sup>13</sup> See footnote 3.

<sup>14</sup> *Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions* (available at <http://www.ipo.gov.uk/consult-gowers2.pdf>).

their work and adversely affect their licensing revenue. Others were of the view that the existing exception for criticism and review (which is similar to section 39 of the Copyright Ordinance in Hong Kong) was broad enough to cover parody, and that the absence of a specific exception for parody had not hindered the creation of parodic works. Similar concerns have been expressed by copyright owners in Hong Kong (see LC Paper No. CB(1)271/11/12(01)).

*(d) Qualifying Conditions*

21. If an exception is to be introduced, it is important to consider whether qualifying conditions should be attached to the exception, and if so, what these conditions ought to be in order to suit local circumstances. Same as the Australian position, the proposed exception for satire and parody in Canada will be limited to fair dealing with the underlying work, and there is no statutory definition of how “fairness” should be assessed for parodies and satires. On the other hand, the proposed exception for non-commercial UGC are subject to certain conditions, including (a) solely non-commercial use, (b) giving due credit to the underlying work, and (c) not causing a substantial adverse effect on the market and potential market of the underlying work.

22. In Hong Kong, under the current fair dealing exception for criticism, review and news reporting, the criticism and review or news reporting in question should be accompanied by a sufficient acknowledgment.<sup>15</sup> Whether the same requirement is appropriate for a proposed exception for parody to ensure that the author/the underlying work is given due credit is debatable.<sup>16</sup> An author may not wish to have any association with a parody. Thus, it is necessary to consider whether an author should be provided with any legal recourse to raise an objection against a parody of his work.

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<sup>15</sup> Except for reporting of current events by means of a sound recording, film, broadcast or cable programme.

<sup>16</sup> In the UK, many respondents in the public consultation agreed that it was not appropriate for naming the author of the underlying work as the creator of the new work. On the other hand, approximately a third of respondents suggested that the contribution of the author of the underlying work should be acknowledged in some way and that an exemption from the right to be identified as an author or director would not be appropriate (paragraph 321 of *Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions*).



23. It is also necessary to consider whether the proposed exception should be made conditional upon non-commercial use. According to the present legislative proposal in Canada, only non-commercial UGC should be included as an exception and such distinction is not made in respect of parody and satire. Although non-commercial use is one of the guiding factors in evaluating a fair use claim in the US, it appears that the US court does not consider that commercial use *per se* necessarily negates a fair use claim. Should the proposed exception allow commercial use of a parody, it is necessary to decide whether the financial reward is to be distributed among the copyright owner of the underlying work and the creator of the parody, and if so, how to make such distribution in practice.

### **Conclusion**

24. Introducing a copyright exception for parody would potentially be controversial, as it is liable to change significantly the existing balance of interests between the right holders and the users under the Copyright Ordinance. The legislative proposal cannot be made lightly in the absence of a thorough assessment and public consultation. Given Hong Kong's international obligation on copyright protection, and the complexity of the issues involved as highlighted in the preceding paragraphs, the Administration is of the view that venturing into this subject in the context of the current Bill outright without the benefit of any prior informed public consultation is neither prudent nor responsible. The Administration remains to be receptive to the views expressed by the copyright owners and the users, and would continue to monitor the latest international developments before deciding whether a concrete legislative proposal on copyright exception for parody ought to be made.