

Copyright (Amendment) Bill 2014

Background

- The Government will introduce the Copyright (Amendment) Bill 2014 into the Legislative Council (LegCo) on 18 June 2014 to update Hong Kong's copyright regime to ensure that it keeps pace with technological and overseas developments. The Bill also provides a number of copyright exceptions to facilitate reasonable uses of copyright works.

Key Legislative Proposals

- (a) introducing a technology-neutral exclusive right for copyright owners to communicate their works through any mode of electronic transmission. The new right will facilitate copyright owners in exploiting their works in the digital environment and promote the development of digital content;
- (b) expanding the scope of copyright exception under the existing law to balance copyright protection and reasonable uses of copyright works and to protect users' freedom of expression, by exempting criminal and civil liabilities for the following purposes in appropriate circumstances :
 - (i) parody, satire, caricature and pastiche¹;
 - (ii) commenting on current events;
 - (iii) quotation;

¹ For the sake of convenience, we use parody as a general reference to cover all the four terms to facilitate discussion in the consultation exercise completed last year and in this paper, unless otherwise stated.

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 or 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.

- (iv) temporary reproduction of copyright works by Online Service Providers (OSPs), which is technically required for the digital transmission process to function efficiently;
 - (v) media shifting of sound recordings; and
 - (vi) giving educational instructions (especially for distance learning) and facilitating daily operations of libraries, archives and museums;
- (c) introducing corresponding criminal sanctions against unauthorised communication of copyright works to the public. To allay concerns about the possible impact on the free flow of information across the Internet and to provide greater legal certainty, the legislation will clarify the criminal liability of causing prejudice to the copyright owner and provide that the court will examine all the circumstances of a case and in particular the economic prejudice, having regard to whether the infringing copy amounts to a substitution for the work;
- (d) establishing a statutory "safe harbour" for OSPs so that their liabilities for copyright infringement occurring on their service platforms could be limited, provided that OSPs meet certain prescribed conditions, including the taking of reasonable steps to limit or stop copyright infringement when being notified. The proposal aims at facilitating OSPs' handling of alleged infringements balancing the interests between copyright owners and users; and
- (e) introducing additional factor for the court to consider in assessing damages in civil cases in which infringement has been established.

The Need for the 2014 Bill

- We need to amend the Copyright Ordinance and update our copyright regime for the following reasons -
 - (a) Rapid technological developments (notably the Internet) and rapid changes in user behaviours have driven many overseas jurisdictions to update their copyright regimes, including the introduction of a communication right to enhance copyright protection in the digital environment (For example, European Union (2001), Australia (2001), the United Kingdom (2003), Singapore (2005), New Zealand (2008))

and Canada (2012)). We need to stay on par with international copyright developments.

- (b) We are not free from the watchful eyes of the international community. Some US copyright owners associations have made submissions to the Office of the United States Trade Representative (USTR) suggesting that Hong Kong should be put under a list of “Deserving Special Mention” and “Watch List” in the Special 301 Report as they allege that the existing copyright legislation of Hong Kong provides inadequate copyright protection in the digital environment. Although Hong Kong has not been placed on any list in the USTR report released in April 2014, we are facing continuous pressure on this front.
- (c) Our updating exercise started way back in 2006. The package of proposals contained in the Copyright (Amendment) 2011 with the Committee Stage Amendments agreed with the LegCo Bills Committee, though lapsed, is the respectable result of years of deliberations of the Government, LegCo, copyright owners, OSPs and general users representing a broad consensus in an always sensitive subject. We should conclude our efforts on this basis as soon as possible.
- (d) For advanced economies which aspire to exploit innovation and creativity to drive economic growth, they would exercise proactive efforts to ensure a robust and up-to-date intellectual property regime underpinned by a clear legal framework. For instance, further to their reforms in the late 1990s and early 2000s, the United Kingdom, Australia, Ireland, the United States and the European Union are looking to new rounds of efforts to modernise their copyright regimes. Hong Kong cannot afford to mark time and should complete the current round in earnest to move further ahead.

Impact of the 2014 Bill

- Legislative proposals contained in the 2014 Bill will help us maintain a robust copyright regime which is conducive to the development of creative industries. It will also contribute to the vibrancy of Hong Kong’s economy. A clear legal framework will help remove

uncertainties and risks of our copyright regime, which would be important in promoting freedom of creation and expression, enhancing the business environment and protecting intellectual property.

On Copyright Owners

- The proposed communication right will allow owners to communicate their works through any mode of electronic transmission. The new right will facilitate copyright owners in exploiting their works in the digital environment and promote the development of digital content.

On Users

- The Bill proposes to provide new copyright exceptions to facilitate users, in appropriate circumstances, to use copyright works by way of fair dealing without attracting any legal liability for copyright infringement. The exceptions cover the following purposes -
 - (a) parody, satire, caricature and pastiche;
 - (b) commenting on current events; and
 - (c) quotation (which may include the use of excerpts to help provide information and illustrate arguments and to engage in communication, such as image capture).
- The existing Copyright Ordinance contains over 60 sections specifying permitted acts (such as for the purposes of research, private study, education, criticism, review and news reporting). With the new exceptions in place, many of the common activities on the Internet such as parody will be taken care of. Users' freedom of expression will be safeguarded and their concerns will be addressed.
- The 2014 Bill also proposes to clarify the criminal liability of the existing prejudicial distribution and the proposed prejudicial communication offences under the Copyright Ordinance. The legislation will provide that the court will examine all the circumstances of a case and in particular the economic prejudice, having regard to whether the infringing copy amounts to a substitution for the work.

- The proposed safe harbour provisions will provide a fair and transparent mechanism for users to file counter notices in cases of alleged infringements. They may provide reasons as to why their works should not be taken down by OSPs and copyright owners. The proposals will better safeguard their freedom of expression.

On OSPs

- Under the proposed safe harbour provisions, OSPs' liabilities for copyright infringement occurring on their service platforms could be limited provided that they meet certain prescribed conditions, including the taking of reasonable steps to limit or stop copyright infringement when being notified. The safe harbour will be underpinned by a Code of Practice which sets out practical guidelines and procedures for OSPs to follow upon notification of infringement. The proposal aims at facilitating OSPs' handling of alleged infringements balancing the interests between copyright owners and users.

Conclusion

- In formulating legislative proposals, the Government has maintained a close dialogue with key stakeholders including copyright owners, users and OSPs to listen to their views to ensure that the Bill maintains a reasonable balance between the interests of different stakeholders.
- On the one hand, the Bill will enhance copyright protection in the digital environment and help combat large scale online piracy. On the other hand, the proposed copyright exceptions will take care of many common Internet activities such as parody and safeguard users' freedom of expression. The Government will continue to work with LegCo and stakeholders in the ensuing updating exercise.