

Public Consultation on Parody

Q&A

Q1- Why is the Government conducting a public consultation on parody? What is the objective of the consultation exercise?

A1- With technological advancements, parody is now commonly seen on the Internet. There are wide-ranging or even opposing views within the community on the treatment of parody as well as the relationship between copyright protection and freedom of expression. (see Q3)

There is a need for us 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 copyright protection and freedom of expression. The consultation paper contains three options regarding the treatment of parody, including exemption from criminal and civil liabilities.

The objectives of the consultation exercise are to build consensus in the community, and enable the Government to identify an option which serves the best interest of Hong Kong.

Q2- What is parody?

A2- There is no uniform definition of parody or unified approach in dealing with parody within the international community. Parody is not defined in the respective copyright legislations of Hong Kong and overseas countries such as Australia, the US, Canada and the UK.

Nevertheless, a variety of terms such as “parody”, “satire”, “caricature” and “pastiche”¹ are used in the legislation, policy discussions or case law in different jurisdictions to describe various works which include an element of imitation or incorporate certain elements of an underlying copyright work for the purposes of creating comic or critical effects etc.

For the sake of convenience and facilitating public discussion, we will use “parody” as a collective term to refer to the above works in this consultation exercise.

In Hong Kong, popular forms of this genre appearing on the Internet in recent years include (a) combining existing news photos or movie posters with pictures of political figures; (b) providing new lyrics to popular songs; and (c) editing a short clip from a television drama or movie to relate to a current event.

¹ The Oxford English Dictionary defines the terms as follows -

Parody:	an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect
Satire:	the use of humour, irony, exaggeration, or ridicule to expose and criticise people’s stupidity or vices, particularly in the context of contemporary politics and other topical issues
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

Q3- What are the different views on the treatment of parody in our society?

A3- Supporting views for special treatment of parody include-

- parody causes little or no economic damage to the copyright owners as a parody is unlikely to substitute the original work;
- parody, may, in some cases, make the original work more popular by drawing attention to it;
- parody encourages creativity, nurtures new talents and even entertainment business, and therefore contributes to the overall economic and cultural development of society; and
- parody serves as effective tools for the public to express views or comment on social and public affairs, and enhances freedom of expression.

On the other hand, there are opposing views which consider that-

- the present regime already strikes a fair balance between the legitimate interests of different parties, and evidently has not hindered the creation and dissemination of parody;
- a special parody treatment would create uncertainty and increase opportunities for abuse by blurring the line between parody and outright copyright infringement;
- a special parody treatment would affect copyright owners' legitimate interests in seeking licensing revenue over use of their works for parody, lowering the returns for their creative works and thereby dampening creativity; and
- a special parody treatment might conflict with certain moral rights of creators, e.g. right to be attributed and right to preserve the integrity of their works.

Q4- What is the difference between parody and “secondary creation”? Why is the public not consulted on “secondary creation”?

A4- “Parody” is used by the Government as a collective term to refer to a wide scope of works such as “parody”, “satire”, “caricature” or ‘pastiche” which include an element of imitation or incorporate certain elements of an underlying copyright work for the purposes of creating comic or critical effects. The coverage is very broad.

“Secondary creation” is not a term commonly used in copyright jurisprudence and it is difficult to ascertain its actual coverage.

For instance, there are views suggesting that “secondary creation” should include translations and adaptations, or should be treated as “derivative works”. However, the concepts of translation and adaptation, both being derivative works, are clear under international copyright treaties and copyright laws in different jurisdictions. In particular, the owner of the copyright in a work has the exclusive right to make a translation or an adaptation of the same. Although there may be original elements in the later work itself, it may not be appropriate to take this as the sole basis in considering any copyright exception.

The provision of a copyright exception solely based on the rather ambiguous concept of “secondary creation” may blur the line between infringing and non-infringing works, create uncertainty and increase opportunities for abuse.

Q5- Will the creation and distribution of parody infringe copyright under the existing Copyright Ordinance (Cap 528)?

A5- The existing Copyright Ordinance does not contain any provision targeting parody. Whether a work is a parody or not has no direct bearing on whether there is copyright infringement.

In determining if a work (be it a parody or not) infringes copyright, the actual circumstances of each case should be considered.

In the following circumstances, the use of copyright works does not infringe copyright-

- (a) where the parody only incorporates the idea of the underlying work, as copyright protects the expression of ideas and information and does not grant copyright owners a monopoly over the underlying ideas or information.
- (b) where the parody only reproduces an insubstantial part of the underlying work, as according to section 22 of the Copyright Ordinance, copyright infringement must involve a reproduction of the whole or any substantial part of the copyright work.
- (c) where consent from the copyright owner of the underlying work has been obtained, or where the parody only incorporates works in the public domain with expired copyrights.
- (d) where the relevant act falls within the ambit of permitted acts under the existing Copyright Ordinance, such as fair dealing with copyright works for the purposes of education, research and private study, criticism and review (regarding the subject copyright works or other works), and news reporting in appropriate circumstances.

If a work infringes copyright, the copyright owner may pursue civil claims against the infringer.

Q6- Will a parody that attracts civil liability for copyright infringement inevitably attract criminal liability as well?

A6- Where a person distributes an infringing copy of a work (be it a parody or not) to the public in the course of any trade or business which consists of dealing in infringing copies of copyright works or to such an extent as to affect prejudicially the copyright owner, he may be subject to criminal liability.

In other words, a person will not be subject to criminal liability if the work (be it a parody or not) is not distributed in the course of any trade or business nor to such an extent as to affect prejudicially the copyright owner.

We note that, in reality, a parody would not normally displace the legitimate market of an underlying work. Hence it is rather unlikely that the distribution of a parody would be “to such an extent as to affect prejudicially the copyright owner”. Further, we are not aware of any instance of criminal prosecution of a parody, whether in Hong Kong or the other common law jurisdictions that we have surveyed.

Q7- In cases where the copyright owner does not object or seek legal recourse, will the Government insist on prosecuting the copyright offence without involving the copyright owner?

A7- Absolutely not.

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.

In practice, if the enforcement agency comes across an act which is alleged or reasonably suspected to be constituting a copyright offence, it must take the necessary step to promptly locate and contact the copyright owner to see if he has any objection or wishes to pursue the matter further. It is only when the copyright owner wishes to pursue the matter further that the enforcement agency has reasons to consider further steps.

Even if the copyright owner wishes to pursue the matter further, he must prove to the enforcement agency in investigations (a) the subsistence and legitimate ownership of copyright in the underlying work; and (b) that the work in question has indeed infringed such copyright. The enforcement agency will only refer the case to the Department of Justice for consideration of whether to prosecute if such key evidence and all other necessary evidence are available.

If during the process, the copyright owner fails to provide sufficient evidence, or changes his stance and considers that there is no copyright infringement (e.g. the parties reach a settlement in the litigation), the enforcement agency will not be able to continue its investigation or prosecution.

Q8- Is it unlawful to upload/post/share links that would lead to parodic content on the Internet?

A8- 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 last year contain provisions that clearly specify the same.

Q9- Does the Copyright (Amendment) Bill 2011 contain any provision targeting parody?

A9- The Copyright (Amendment) Bill 2011 (introduced into the Legislative Council in 2011) does not contain any legislative proposal targeting parody.

During the scrutiny of the Bill by the Bills Committee in the Legislative Council, some people considered that the proposed “communication offence” in the Bill targeted parody. At that time, we reiterated that the objective of introducing the criminal sanction was to combat large-scale infringement and not parodies.

To further clarify our policy intent, we submitted in March 2012 Committee Stage Amendments to introduce, in respect of the “communication offence”, a “more than trivial economic prejudice” factor to guide the court’s consideration of whether the conduct of a particular act would be “to such an extent as to affect prejudicially the copyright owner”. Given that a parody would not normally displace the legitimate market of an underlying work, it is rather unlikely that the communication of a parody would be “to such an extent as to affect prejudicially the copyright owner” and thereby entail criminal liability.

The Bills Committee supported the Committee Stage Amendments and agreed that the Bill should resume Second Reading Debate in May 2012. At the same time, the Government pledged to conduct a public consultation on parody after the passage of the Bill.

However, owing to other pressing business the Legislative Council had to transact, the Bill did not resume Second Reading Debate and lapsed upon expiry of the previous term of the Legislative Council.

Q10- How do other overseas countries deal with parody? Can we make reference to them?

A10- We have surveyed legislations and case law in Australia, the UK, the US and Canada. In general, these countries do not adopt a unified approach in dealing with parody.

The US- The US copyright law does not provide for any specific copyright exception for parody. According to its fair use provision, a restricted act that constitutes fair use would not be considered as copyright infringement. The US court considers that whether a parody constitutes fair use of a copyright work has to be determined on a case-by-case basis by balancing different factors.

Australia- Australia introduced a fair dealing copyright exception for parody and satire in 2006. However, no statutory definition for the terms has been provided in the legislation. The law also has not specified how fairness should be assessed. There is no decided case for reference. The Australian Law Reform Commission launched a consultation in June 2013 inviting public views on whether an open-ended “fair use” provision (similar to that adopted in the US) should be introduced to replace its existing specific “fair dealing” copyright exceptions, including the exception for parody and satire etc..

Canada- Canada introduced a fair dealing copyright exception for parody and satire in 2012. But the law does not offer definitions of the terms or advise how fairness should be assessed. There is no decided case for reference.

The UK- The European Union allows its members to provide for exceptions for caricature, parody and pastiche in the legislations. However, the UK does not currently provide any specific exception for such works. The UK announced in the end of 2012 that a fair dealing provision would be

introduced for caricature, parody and pastiche. Draft legislative proposals have been published for public consultation.

Q11- What are the options for dealing with parody as put forward in the consultation paper?

A11- We have set out three options for public discussion in the consultation paper-

- (a) Option 1- clarifying the existing provisions for criminal sanction in the Copyright Ordinance
- (b) Option 2- introducing a criminal exemption for parody
- (c) Option 3- introducing a fair dealing exception for parody

Option 1- clarifying the existing provisions for criminal sanction in the Copyright Ordinance

According to the existing provisions in the Copyright Ordinance, a person may be subject to civil liability for distributing an infringing copy of a work without authorisation of the copyright owner. He may be subject to criminal liability if the distribution is to such an extent as to affect prejudicially the copyright owner.

As there are views that the provisions concerning the existing “prejudicial distribution offence” and the proposed “prejudicial communication offence” are not sufficiently clear, this option enables us to clarify the relevant criminal sanctions to better reflect that our policy intent is to combat copyright infringement activities on a commercial scale.

Under this option, we would highlight in the legislation the consideration of whether the infringing acts have caused “more than trivial economic prejudice” to the copyright owner and introduce relevant factors for the court to consider. This option would clarify and further demonstrate our policy intent i.e. parodies commonly disseminated on the Internet nowadays would likely fall outside the criminal net if they do not displace

the market of the copyright work.

Option 2- introducing a criminal exemption for parody

Under this option, the new provisions would clearly specify that any distribution or communication of a parody would not attract criminal liability under the provisions concerning the “prejudicial distribution and communication offences²”, so long as the qualifying conditions specified in the provisions are met.

If this option is to be pursued, we have to consider some relevant questions, including how the qualifying conditions should be determined (should reference be made to “economic prejudice” or other elements?). In our current proposal, the qualifying condition is “if the distribution/communication does not cause more than trivial economic prejudice to the copyright owner”. We welcome public views on this issue.

We need to comply with our international obligations under WTO’s TRIPS Agreement i.e. criminal procedures and penalties shall be provided at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Hence, under this option, we must specify suitable qualifying conditions for the provision of criminal exemption.

Option 3- introducing a fair dealing exception for parody

Under this option, the creation, distribution or communication of a parody would not attract any civil or criminal liability, so long as the qualifying conditions specified in the provision are met (i.e. the act is a fair dealing act).

We may consider providing a list of non-exhaustive factors to guide the court’s determination of whether the dealing of a particular work is fair as currently set out in sections 38 and 41A of the Copyright Ordinance (copyright exceptions for the purposes of research and private study, as well as teaching). For

² For details about the proposed communication offence, please refer to paragraph 1 and footnote 18 of the consultation document.

instance, the court shall take into account all the circumstances of the case and, in particular-

- (a) the purpose and nature of the dealing;
- (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.

Whether a particular dealing is fair would depend on the court's eventual determination.

We maintain an open mind towards the above options and welcome public views on the same.

Q12- What are the policy considerations in formulating the options?
Which option does the Government prefer?

A12- We maintain an open mind towards the options set out in the consultation paper and welcome public views on the same.

In considering the possible options, we have been guided by the following broad principles-

- (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) the provision of any criminal exemption or copyright exception must be in full compliance with our international obligations, such as those in WTO's TRIPS Agreement; 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, especially in the criminal jurisdiction where law enforcement agencies are involved, and to ensure that members of the general public are able to regulate their conduct accordingly.

Q13- Does the Government have any public engagement plans for this consultation exercise?

A13- During the consultation period, we will organise public forums to explain the details of the options and collect views. We will encourage stakeholders to take part in these engagements.