

Key Points of the Consultation Paper on Parody

Objective of the consultation

- 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.

Definition of parody

- There is no uniform definition of parody or unified approach in dealing with parody within the international community. A variety of terms such as “parody”, “satire”, “caricature” and “pastiche” are used in the legislations, 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. Such terms are not defined in the respective copyright legislations of Hong Kong and overseas countries such as Australia, the US, Canada and the UK.
- For the sake of convenience and facilitating public discussion, we will use “parody” as a collective term to refer to the above imitations in this consultation exercise. We note that some people sometimes use the term “secondary creation” (“二次創作”) interchangeably with “parody”. This is not a term commonly used in copyright jurisprudence and may entail a much larger scope than parody. In fact, the term "secondary creation" has been used very loosely to cover a wide-range of activities, including a mere adaptation or modification of a copyright work. As such, the subject of the present consultation is parody but not “secondary creation”.

Overseas experience

- 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 provide definitions of the terms or specify how fairness should be assessed. There is no decided case for reference.
- The UK - Currently, the UK does not provide any specific exception for such works. However, 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.

- 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.

The proposed three options

	Civil liability	Criminal liability
Option 1: clarifying the relevant existing provisions in the Copyright Ordinance	<p>According to the existing provision, unauthorized distribution of an infringing copy of a work may attract civil liability for copyright infringement.</p> <p>Under this option, the threshold for civil liability for copyright infringement remains unchanged.</p>	<p>According to the existing provision, unauthorized distribution of an infringing copy of a work to such an extent as to affect prejudicially the copyright owner may attract criminal liability for the offence of “prejudicial distribution”</p> <p>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-</p> <p>(a) the nature of the work, including its commercial value;</p> <p>(b) the mode and scale of distribution; and</p> <p>(c) whether the infringing copy distributed amounts to a substitution for the work.</p> <p>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 given that they would not normally displace the market of the copyright work and distribution of the same would unlikely cause “more than trivial</p>

		economic prejudice” to the copyright owner.
Option 2: introducing a criminal exemption	Under this option, the threshold for civil liability for copyright infringement remains unchanged.	<p>Under this option, the new provisions would specify that the prejudicial distribution offence shall not apply to parodies, as long as the distribution in question meets the qualifying condition.</p> <p>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 copyright piracy on a commercial scale. Hence, under this option, we must specify suitable qualifying conditions for the provision of criminal exemption. For example, we may consider specifying “the distribution does not cause more than trivial economic prejudice to the copyright owner” or other factors as qualifying conditions.</p>
Option 3: introducing a fair dealing exception	Under this option, the distribution of parody would not infringe copyright and hence would not attract any civil liability, so long as the act is considered as fair dealing.	Under this option, the distribution of parody would not infringe copyright and hence would not attract any criminal liability, so long as the act is considered as fair dealing.
	<p>Whether a particular dealing is fair would depend on the court’s eventual determination.</p> <p>Considering experiences in overseas jurisdictions (such as the US “fair use” provision) and the fair dealing provisions in sections 38 and 41A of the Copyright Ordinance (for the purposes of research and private study, as well as teaching), we may explore whether we can specify in the legislation that the court shall take into account all the circumstances of the case and, in particular-</p> <ul style="list-style-type: none"> (a) the purpose and nature of the dealing; (b) the nature of the original work; (c) the amount and substantiality of the portion dealt with in relation to the original work as a whole; and (d) the effect of the dealing on the potential market for or value 	

	of the original work.
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Views on the following questions are invited

- (1) Whether the application of criminal sanction of copyright infringement should be clarified under the existing copyright regime in view of the current use of parody?
- (2) Whether a new criminal exemption or copyright exception for parody or other similar purposes should be introduced into the Copyright Ordinance?
- (3) If a new criminal exemption or copyright exception for parody or other similar purposes is to be introduced, what should be the scope of and the appropriate qualifying conditions or limitations for such a criminal exemption or copyright exception?
- (4) Whether moral rights for authors and directors should be maintained notwithstanding any special treatment of parody in the copyright regime.
- (5) If criminal exemption (option 2) or fair dealing exception (option 3) is to be provided, we have to consider the following issues-
 - (a) What subject matter should be covered by the exemption? Should it cover “parody”, “satire”, “caricature” or “pastiche”, or a certain combination of such terms? Or should the exemption instead cover a more specific formulation such as “commentary on current events, social, economic or political issues”?
 - (b) Should a statutory definition of “parody”, “satire” or other relevant terms be provided or would the ordinary dictionary meanings of these terms be sufficient?
 - (c) What should be the qualifying conditions for the exemption? Should reference be made to elements like economic prejudice?
 - (d) Should the proposed exception be subject to the requirement of making sufficient acknowledgement as in the current fair dealing exceptions for criticism or review? If the requirement of making sufficient acknowledgement for parody is not necessary, should a corresponding exception to the relevant moral right be added in respect of the parody exception, in particular, the right to be identified as author or director of a work?
 - (e) Should all classes and types of copyright works be covered by the exception? Is there any reason for excluding any

particular classes or types of works from the exception? For instance, should we exclude unpublished works from the exception or should we leave it as one of the factors for determining whether the dealing is fair?

- (f) Should a list of factors for determining fairness (similar to that as provided in the existing permitted acts under sections 38 and 41A) be stipulated?

Conclusion

- We maintain an open mind towards the options set out in the consultation paper and welcome public views. The objectives of this consultation are to build consensus in the community, and enable the Government to identify an option which serves the best interest of Hong Kong. We will carefully consider the views collected and take a policy view on how parody should be treated.

Commerce and Economic Development Bureau
Intellectual Property Department
July 2013