



**“How should parody be  
appropriately taken care of  
under our copyright regime?”**

## **Public Consultation**

**Commerce and Economic Development Bureau  
Intellectual Property Department  
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# Background

- The existing Copyright Ordinance does not contain any provision that separately deals with parody.
- The distribution of a parody under any of the following circumstances does not constitute copyright infringement -
  - 1) the copyright owner has agreed or acquiesced
  - 2) the copyright protection in the underlying work has expired
  - 3) only the ideas of the underlying work have been incorporated
  - 4) only an insubstantial part of the underlying work has been reproduced
  - 5) 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
- The proposals put forward by the Government **will not** change the above legal position and **will not** restrict freedom of expression.



# Objective

- To explore how parody should be appropriately taken care of under our copyright regime having regard to present day circumstances.
- In respect of acts that are done without the agreement or acquiescence of the copyright owner, the three proposals have the effect of clarifying or raising the threshold for alleging copyright infringement, thus further protecting freedom of expression.
- Regarding some parodies that are suspected of having infringed copyright, the three proposals provide different legal justifications, in appropriate circumstances, to clarify that they fall outside the criminal net, or to exempt them from criminal, and even civil, liabilities.
- Parodists will enjoy clearer and greater protection under the law, while striking a balance with the need to protect copyright.



## 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 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.



## Definition of Parody (2)

- Such terms are not defined in the respective copyright legislation 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.



## Definition of Parody (3)

- “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.



## Overseas Experience

- Australia and Canada introduced a fair dealing copyright exception for parody and satire in 2006 and 2012 respectively. However, no 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.



## Overseas Experience (2)

- **The UK** –
  - The law does not provide any specific exception for such works.
  - After years of research and rounds of consultations, the UK government announced in the end of 2012 that a fair dealing copyright exception would be introduced for parody, caricature and pastiche. Draft legislative proposals have been published for public consultation.



## Overseas Experience (3)

- **The US -**
  - The 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 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.
  - The copyright law stipulates that the court should consider factors including –
    - a. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
    - b. the nature of the copyrighted work;
    - c. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
    - d. the effect of the use upon the potential market for or value of the copyrighted work.



# Options for Change

- Guiding principles:
  - 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.
  - The provision of any copyright exception must be in compliance with our international obligations.
  - Any proposed amendment to the Copyright Ordinance must be sufficiently clear and certain so as to afford a reasonable degree of legal certainty.



## Options for Change (2)

- Key legal provisions balancing various parties' interests include -
  - Article 6 of the Basic Law provides that the HKSAR “*shall protect the right of private ownership of property in accordance with law*”. Article 140 specifically requires the Government to “*protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation.*”
  - Article 27 of the Basic Law provides, inter alia, that “*Hong Kong residents shall have freedom of speech, of the press and of publication*”. Article 16(2) of the Hong Kong Bill of Rights provides that “*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*”



## Options for Change (3)

- We need to comply with international obligations including those under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization-
  - 1) the Government must ensure that copyright 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.
  - 2) the Government shall provide for criminal procedures and penalties to be applied at least in cases of wilful copyright piracy on a commercial scale.



## Current Situation

- According to the existing provisions in the Copyright Ordinance, **a person who without the licence of the copyright owner -**
  - sells or lets for hire an infringing copy of a work [see Note 1];
  - distributes for the purpose of or in the course of any trade or business an infringing copy of a work (hereinafter referred to as “**commercial distribution**”) [see Note 2]; or
  - distributes (otherwise than for “commercial distribution” as mentioned in (b) above) an infringing copy of a work to such an extent as to affect prejudicially the owner of the copyright (hereinafter referred to as “**prejudicial distribution**”),may be subject to civil or criminal liability (no matter whether it is a parody or not).

Note 1 – There may be criminal liability if the selling or letting for hire is for the purpose of or in the course of any trade or business.

Note 2 – There may be criminal liability if the distribution is for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works.



## Current Situation (2)

- The Government will not prosecute copyright offences without involving the copyright owner or in the absence of copyright owners' complaints.
- According to the criminal provisions in the Copyright Ordinance, the most fundamental element of copyright offences is that the relevant acts are done 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.
- The mere act of sharing a link will not constitute copyright infringement 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).

# Option I: Clarifying existing provisions for Criminal Liability

Civil Liability	Criminal Liability
<p>Under this option, the threshold for civil liability for copyright infringement remains unchanged.</p>	<p><u>Sale, letting for hire, commercial distribution</u> Under this option, the threshold for criminal liability in relation to the sale, letting for hire, commercial distribution of infringing copies remains unchanged.</p> <p><u>Prejudicial distribution</u> The threshold for the prejudicial distribution offence remains unchanged. However, additional provisions will be introduced in the legislation to highlight the consideration of whether the infringing acts have caused “more than trivial economic prejudice” to the copyright owner and set out relevant factors for the court to consider -</p> <ul style="list-style-type: none"><li>(a) the nature of the work, including its commercial value;</li><li>(b) the mode and scale of distribution; and</li><li>(c) whether the infringing copy distributed amounts to a substitution for the work.</li></ul>

## Option 2: Introducing a criminal exemption

Civil Liability	Criminal Liability
<p>Under this option, the threshold for civil liability for copyright infringement remains unchanged.</p>	<p><u>Sale, letting for hire, commercial distribution</u> Under this option, the threshold for criminal liability in relation to the sale, letting for hire, commercial distribution of infringing copies remains unchanged.</p> <p><u>Prejudicial distribution</u> Under this option, new provisions will be introduced in the legislation to specify that the prejudicial distribution offence shall not apply to parodies.</p> <p>We need to comply with our international obligations under TRIPS 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 criminal exemption. For example, the qualifying condition could be “the distribution does not cause more than trivial economic prejudice to the copyright owner”, or other formulation.</p>

## Option 3: Introducing a fair dealing copyright exception

### Civil Liability

Under this option, the sale, letting for hire, 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.

### Criminal Liability

Under this option, the sale, letting for hire, 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.

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

Taking into account experiences in overseas jurisdictions (such as the fair use provision adopted by the US) and sections 38 and 41A of the Copyright Ordinance (fair dealing copyright exceptions for the purposes of research and private study, as well as education), 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-

- 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.

# Potential Legal Liabilities of Various Works under the Options

Example	Options 1 and 2	Option 3
(I) Modify a logo for making T-shirts (if the original logo is not used on T-shirts)	Generally speaking, a parody is unlikely to amount to a substitution for the original work. If the T-shirts bearing the modified logo are not for sale, it is unlikely to cause more than trivial economic prejudice to the copyright owner of the original logo and is unlikely to be criminally liable for copyright infringement.	If the modified logo was made for the purpose of parody and does not amount to a substitution for the original work or adversely affect its potential value or market, it would be more inclined to be regarded as a “fair dealing” and is more likely to be exempted from criminal and civil liability for copyright infringement.

## Potential Legal Liabilities of Various Works under the Options (2)

Example	Options 1 and 2	Option 3
(2) Modify a poster of a commercial organisation	As a poster of a commercial organisation is generally for advertising purposes, the modified poster is unlikely to amount to a substitution for the original poster causing “more than trivial economic prejudice” to the copyright owner. Thus, it is unlikely to be criminally liable.	As the modified poster is to satirise the commercial organisation, it is unlikely that it would amount to a substitution for the original poster or adversely affect the potential value or market of the original poster. It is more likely to constitute a fair dealing and be exempted from civil and criminal liabilities.

## Potential Legal Liabilities of Various Works under the Options (3)

Example	Options 1 and 2	Option 3
<p>(3) Making video clips by taking a few minutes' content from movies (with new subtitles to comment on current affairs and being posted on personal website or social discussion forum)</p>	<p>As the video clips are unlikely to amount to substitutions for the original movies and cause more than trivial economic prejudice to the copyright owners of the original movies, they are unlikely to attract criminal liability.</p>	<p>If the video clips are made for the purpose of commenting on current affairs and do not amount to substitutions for the original movies or adversely affect the potential value or market of the original movies, they are more likely to constitute fair dealings and be exempted from civil and criminal liability.</p>

# Potential Legal Liabilities of Various Works under the Options (4)

Example	Options 1 and 2	Option 3
<p>(4) Modify songs (by altering the lyrics)</p>	<p>If pop songs are altered with new lyrics for commenting on current affairs, unless the new songs amount to substitutions for the original songs causing more than trivial economic prejudice to the copyright owners, they are unlikely to attract criminal liability.</p>	<p>If the new lyrics were made for the purpose of parody or commenting on current events, generally speaking, the parodic songs would not amount to substitutions for the original songs (the whole song) or adversely affect their potential market or value.</p> <p>But there are views that if the music works of the entire track have been reproduced and only the lyrics were altered, it is possible that the new works would adversely affect the potential market of the underlying musical works, and should not be regarded as fair dealings.</p>

# US Decided Cases (I)

Case	Court Decision
<p data-bbox="430 400 898 852">(I) “2 Live Crew” (a hip-hop group ) modified part of the melody and lyrics of the song “<i>Oh, Pretty Woman</i>” and released albums of the parodic song</p> <p data-bbox="430 922 846 1023"><i>Campbell v. Acuff-Rose Music</i>,(1994)</p>	<ul data-bbox="958 400 2018 1369" style="list-style-type: none"><li data-bbox="958 400 2018 619">➤The US Supreme Court considered that the more transformative of the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.</li><li data-bbox="958 692 2018 852">➤The new song could be perceived as commenting on the original or criticising or ridiculing it, to some degree.</li><li data-bbox="958 925 2018 1369">➤As the new song was highly transformative and the parties did not adduce any evidence addressing the likely effect of 2 Live Crew’s parodic rap song on the market for a non-parody, rap version of “<i>Oh, Pretty Woman</i>”, the Supreme Court reversed the Court of Appeal’s decision against fair use and remanded the case to lower court. The parties eventually settled the case.</li></ul>

## US Decided Cases (2)

Case	Court Decision
<p>(2) Made a poster imitating the photograph of Demi Moore and superimposed the main actor Nielsen's mischievous smirk face on the photograph for advertising a film</p> <p><i>Leibovitz v. Paramount Pictures Corporation</i> (1998)</p>	<ul style="list-style-type: none"><li>➤ The Court found that although the making of the poster was for commercial purpose, the use itself was transformative.</li><li>➤ The smirking face of Nielsen contrasted so strikingly with the serious expression on the face of Demi Moore, which might reasonably be perceived as commenting on the seriousness, even the pretentiousness of the original, and was of a strong parodic nature.</li><li>➤ The plaintiff conceded that the defendant's poster did not interfere with any potential market for the original photograph or for derivative works based upon it. The new poster was found to be a "fair use".</li></ul>

## US Decided Cases (3)

Case	Court Decision
<p data-bbox="443 528 857 863">(3) Imitated the promotional poster and trailer of the film “<i>Men In Black</i>” for advertising the film “<i>The Big One</i>”</p> <p data-bbox="443 991 808 1214"><i>Columbia Pictures Industries Inc v. Miramax Film Corp.</i> (1998)</p>	<ul data-bbox="925 528 1993 1174" style="list-style-type: none"><li data-bbox="925 528 1993 863">➤ The District Court considered that the new work was not transformative. The Defendants merely sought to use the plaintiffs’ ads as a vehicle to entice viewers to see “<i>The Big One</i>” in the same manner as the plaintiffs used their own advertisement to entice viewers to see “<i>Men In Black</i>”.</li><li data-bbox="925 959 1993 1174">➤ The Defendants failed to offer any evidence as to the lack of harm within the relevant market done by the infringing work. The Court held that the defendant failed to establish the fair use defense.</li></ul>

## US Decided Cases (4)

Case	Court Decision
<p data-bbox="459 395 817 1029">(4) Published a novel named “<i>The Wind Done Gone</i>” based on the plot, characters and major scenes of a book and a film “<i>Gone With the Wind</i>” with a rewrite of the character traits</p> <p data-bbox="459 1101 772 1268"><i>Suntrust Bank v. Houghton Mifflin</i> (2001)</p>	<ul data-bbox="896 395 2027 1364" style="list-style-type: none"><li data-bbox="896 395 2027 614">➤ The Court of Appeal found that the new book criticized the values romanticised in the original book as corrupt and was highly transformative, which outweighed the negative impact of its for-profit status.</li><li data-bbox="896 710 2027 997">➤ In analyzing the extent of “transformative use”, the inquiry is “<i>whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message</i>”.</li><li data-bbox="896 1077 2027 1364">➤ There was evidence to support that the Defendant’s book was unlikely to displace sales of the original book. The Court of Appeal vacated the preliminary injunction and remanded the case to the District Court. The case was eventually settled between the parties.</li></ul>



## Conclusion

- We maintain an open mind towards the options and welcome public views.
- The objectives of this consultation are to build consensus in the community, and enable us to identify an option which serves the best interest of Hong Kong.
- We will carefully consider the views collected and take a view on how parody should be appropriately taken care of under our copyright regime.



**Thank you!**