

**Treatment of
Parody**
Main Topic

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**Submissions on the Treatment of Parody under the Copyright Regime by The
Copyright and Derivative Works Alliance**

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Submissions on the Treatment of Parody under the Copyright Regime

1. The Commerce and Economic Development Bureau invited the public to submit their views on the treatment of parody under the copyright regime. In its consultation paper, the Administration proposed 3 options to deal with parody under the copyright laws. The Copyright and Derivative Works Alliance (the “**Alliance**”) submits that none of the 3 options are satisfactory to provide sufficient protection to the cherishable right to freedom of expression or strike a balance between the legitimate interests of copyright owners and users of the general public. In this submission, we will explain why the 3 options fall short of protection of the citizens’ rights.

2. It is our stance that not only parody should be exempted but also certain contents created based on existing copyright works should be exempted from both civil and criminal liabilities to preempt the possibilities of the future developments in technology and ways of creation. Therefore, in this submission, we will counter propose a new option to safeguard the freedom of expression, the exemption to user-generated contents.

A. Background

3. In 2011, the government attempted to put the Copyright (Amendments) Bill 2011 (the “**Bill**”) on the table in the Legislative Council. It had received enormous opposition due to a lot of unresolved controversial issues, e.g. adopting a technology neutral term “communication”, safe harbour, the secondary creation and derivative works etc. Parody was not at the of the dispute at that time. The main concern of the netizens was that the Bill would constrain the freedom of expression and internet freedom. Therefore, the consultation at the first place should not be restricted to parody treatment under the copyright regime only.

4. Fortunately, the Bill did not get through in the Legislative Council in 2011. In 2013, the Administration intends to put the Bill on the table again and commences the consultation on the treatment of parody under the copyright regime. This consultation does not provide the public the full picture of the impact of the Bill but only narrows it down to one tiny part of the issues. We must stress that the other issues left in 2011 are not resolved and the Administration must consult the public on those issues.

B. Current proposals

Option 1 Clarifying the existing provisions on the criminal offences for prejudicial distribution/communication

5. Under Article 61 of Trade-Related Aspects of Intellectual Property Rights (“**TRIPS**”) Agreement of the World Trade Organization, criminal procedures and penalties are only required for copyright piracy on a commercial scale. There are no international obligations to do more than that. Secondary creations / derivative works, works of parody, satire, pastiche and caricature are clearly not piracy. Option 1 fails to distinguish what the activities of mere

copyright infringement from copyright piracy on a commercial scale are. Should the Administration is minded to impose criminal offence on mere copyright infringement acts, they must provide citizens full and unambiguous explanation.

6. Under this option, a new section 118(2AA) will be added. The newly added section is ambiguous as to what types of work are exempted. It provides no specific exemption to any parody, satire, caricature, pastiche, derivative creations or whatsoever. It adopts the same old test if a work constitutes a copyright infringement, i.e. if the work is substantially copied from a copyright work. Parody of its very special nature inevitably copies substantial part of the copyright work in order to relate the audience with the original work. Therefore, *prima facie*, parody is still a copyright infringement under Option 1.

7. Furthermore, the new section 118(2AA) creates more uncertainty in laws than it purports to be. Under this section, the court may take into account all the circumstances of the case, including whether more than trivial economic prejudice is caused to the copyright owner. To decide whether trivial economic prejudice has been caused, the court may take into account of various factors: the nature of work, including its commercial value, the mode and scale of distribution and whether the infringing copy so distributed amounts to a substitution for the work.

8. Those factors are not compulsory. The court may or may not take those into account. This causes uncertainty in laws as to when these considerations should be taken into account.

9. Even if the section is amended to be mandatory in deciding whether the distribution/communication of an infringing copy of the work has affected prejudicially the copyright owner, the definition of trivial economic prejudice itself is unclear. The concept of trivial economic prejudice is an unprecedented legal concept in all common law jurisdictions. No case law or legislation in any common law jurisdictions has given a definition to it. What amounts to trivial? Does the prejudice have to be a monetary loss or like *HKSAR v. Chan Nai Ming*, the prejudice is not necessarily restricted to economic prejudice?

10. Therefore, we submit that the test for trivial economic prejudice is too uncertain to be adopted. "Substantial economic damage" should substitute "more than trivial economic prejudice" in this Option to provide protection of freedom of expression and to be in line with the spirit of Article 61 TRIPS.

Option 2 Introducing a criminal exemption for parody

11. Option 2 suffers the same uncertainty in laws due to adopting the same wordings of trivial economic prejudice requirement. Even worse, all relevant considerations under Option 1, i.e. whether any distribution/communication of the work to the public is made to an extent as to affect prejudicially the copyright owner or more than trivial economic prejudice is caused, are missing.

12. Hence, we strongly oppose Option 1 or 2 to be adopted.

Option 3 Fair dealing exception

13. The current proposal of fair dealing only covers works for the purpose of commenting current events and parody, but not satire, caricature, pastiche or other derivative creations. We submit that such exemption is too narrow to cover most existing derivative creations and will damage the creative industry in Hong Kong.

14. We notice that there is a serious discrepancy in the proposed Chinese version and English version of section 39. Under Annex C, section 39A is written as follows,

“39A Parody

Fair dealing with a work for the purposes of parody does not infringe any copyright in work.”;

whereas in the Chinese version of Annex C, it is written as follows,

“39A. [戲仿作品]

為[戲仿作品]而公平處理某一作品，不屬侵犯該作品的任何版權。”

The translation of the Chinese version does not reflect the same meaning in the English where the English is an exemption for a work for the purposes of parody but in Chinese version it is an exemption to parody work. We urge the Administration to adopt the English version as the correct version in the Bill.

15. Last but not least, the Administration should consult scholars on the correct Chinese translation of the words “pastiche” and “caricature” so as to reflect the social and artistic meanings of them.

C. Our recommendations

16. Due to the shortcomings mentioned above, we recommend Option 3 to be amended and redrafted to give the widest protection to the users. Moral rights should not be in any way enhanced.

Widening the scope of protection under Option 3

17. We propose that different types of secondary creations should be fully covered in all options 3, including but not limited to commenting public events, parody, satire, caricature, pastiche etc.:-

After section 39 of the Copyright Ordinance, add a new section 39A:

“ 39A. Parody, Satire, Caricature or Pastiche

Fair dealing with a work for the purposes of parody, satire, caricature or pastiche do not infringe any copyright in the work. ”

In section 91(4) of the Copyright Ordinance, add the following provision:

“ (g) section 39A fair dealing for parody, satire, caricature or pastiche. ”

In section 93 of the Copyright Ordinance, add the following provision:

“ (8) The right is not infringed by any act that is consisted as fair dealing with a work for the purposes of parody, satire, caricature or pastiche. ”

18. We are of the strong opinion that no statutory definition should be given to parody, satire, caricature or pastiche. We trust the court has extensive experience in determining what is fairness. The court should be allowed to interpret them according to the future cases in other common law jurisdictions.

Introducing an exception for non-profit making user-generated contents or user-generated contents not in the course of trade including but not limited to parody, satire, caricature or pastiche.

19. Despite including parody, satire, caricature or pastiche under the exemption of the fair dealings, there are commonly seen creations falling out of the ambit of the exemptions, for example, the orthogonal use of a picture from a movie with the caption to express the user's opinion, self recorded audio/video singing or performing a song etc.

20. Whilst the 2011 Bill provides a strong measure to combat internet piracy by adopting a technology-neutral term, “communications”, there must be a corresponding exemption to protect the freedom of expression guaranteed under the Basic law and fulfill the international duties under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

21. Therefore, we propose that a stand-alone civil and criminal exemption for user-generated contents ("**UGC**") should be introduced in the copyright law regime. The exemption will balance up the over-regulation in the creation of UGC which is essential to the diversity on the internet. This will catch all forms of creations which parody, satire, caricature or pastiche may not include. Moreover, in order to protect the legitimate interest of the copyright owner, to invoke the UGC exemption, the use must not be profit making or cause financial impact on the market and the exploitation. Therefore, we submit that the UGC exemption not only protects and encourages the creative industry but also strikes a balance in safeguarding the legitimate rights of the copyright owners.

22. Under the Canadian Copyright Act, apart from the fair dealing exceptions to parody and satire, the law provides a fuller protection to creators of a work using existing works for non-commercial purpose. We propose to add a new section, section 39B, after the proposed section 39A to give fuller protection to the ordinary users:-

“ 39B. Non-profit making User-generated Contents or User-generated Contents not in the course of business.

(1) It is not an infringement of copyright for an individual to use an existing work or copy of one, which has been published or otherwise made available to the public, in a new work, a new work of joint authorship or a work with transformative purpose, in which copyright subsists, and for the individual to use the work or to authorize to an intermediary to disseminate it, if:-

(a) at the time of the use of, or the authorization to disseminate the work or the work of joint authorship, is one mainly for the non-profit making purpose or not in the course of business;

(b) the individual had reasonable ground to believe that the existing work or copy of it, as the case may be, was not infringing copyright. The court in deciding if the individual had reasonable ground under this subsection, it may consider if the name of the author, performer, maker or broadcaster — of the existing work or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the use of, or the authorization to disseminate the work does not have a substantial adverse financial effect on the exploitation or market for the existing work to the extent that the work substitutes for the existing work.

(2) For the purposes of subsection (1)

"intermediary" means a person who regularly provides space or means for works to be enjoyed by the public; and

"use" means to exercise the right of the owner of the copyright in an existing work under section 22(1). "

23. The Alliance is well aware of the international obligations under the Berne Convention, the World Intellectual Property Organization Copyright Treaty and other international treaties. We submit that the UGC exemption conforms to the three-step test.

24. The current proposal of UGC imposes stricter requirements than the fair use doctrine adopted in the United States. Under section 107 of the Copyright Act, it sets out four factors to be considered in determining whether or not a particular use is fair:

- a. The purpose and character of the use, including whether such use is of 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;
- d. The effect of the use upon the potential market for, or value of, the copyrighted work.

The current proposal of UGC not only requires the use to be either non-profit making or not in the course of business, but also does not cause adverse financial effect on its market and exploitation, as required under the three-step test. Furthermore, the creator of the UGC must have a reasonable ground to believe that the existing work is not an infringed work which does not exist in the fair use doctrine. Therefore, we submit that the proposal of UGC is stricter and narrower than the fair use doctrine and it conforms to the three-step test.

25. For the intermediary exemption under the proposed UGC exemption, it is our submission that opposing an individual to authorize the intermediary to use, disseminate or communicate the UGC contents is equal to opposing the right of freedom of expression and freedom of communications of the citizens because without a proper platform, the creation would not be able to be delivered to the public. In addition, most forms of copyright exemption, fair dealing, under the copyright law will inevitably involve an intermediary, opposing giving the intermediary an exemption is opposing all forms of exemption under the copyright laws;

for example, a teacher is earning a salary in distributing education copyrighted work, a newspaper is in the course of business while publishing an article of comments on current events etc. Therefore, it is groundless to oppose that the intermediary should be exempted under the UGC exemption.

26. Should the Administration still have concern about our non-profit making UGC exemption, we propose that the Administration should give a constructive advice and counter propose the wordings of a UGC exemption.

D. Conclusion

27. In conclusion, we strongly oppose Option 1 and Option 2 to be adopted because of its uncertainty in laws and insufficient protection to the freedom of expression. If Option 3 is adopted, we urge the Administration to consider expanding the scope of protection to different types of derivative creations and adding a new section alongside with Option 3 to cover all user-generated contents.

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Submitted by The Copyright and Derivative Works Alliance

Special thanks to the following persons and groups

Professor Peter Yu

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