

**Treatment of  
Parody**  
Main Topic

**Carman KM**  
**HO/CITB/HKSARG**  
05/12/2013 09:27

**Subject:** S1031\_Joe  
**Category:**

Originator	Reviewers	Review Options	
Carman KM HO/CITB/HKSAR G		Type of review:	One reviewer at a time
		Time Limit Options:	No time limit for each review
		Notify originator after:	final reviewer

**Submission for public consultation on treatment of parody under copyright regime by  
Online Service Providers Alliance**

to: co\_consultation@cedb.gov.hk

15/11/2013 14:52

From:

To: "co\_consultation@cedb.gov.hk" <co\_consultation@cedb.gov.hk>

Dear Sir/Madam,

Attach our Submission for public consultation on treatment of parody under copyright regime by Online Service Providers Alliance.

Thanks.

Regards,  
Joe



Chairman of Online Service Providers Alliance OSP\_response\_15112013.pdf

# **Submission for public consultation on treatment of parody under copyright regime by Online Service Providers Alliance**

## **I. Part I (Online Service Providers Comment)**

### **(a) Communication right**

We are welcome for the clarification on when a person does not initiate communication of a work to the public if he does not “determine the content” of the communication, such as merely (a) gaining access to what is made available by someone else in the communication or (b) receiving the electronic transmission of which the communication consists. (For instance, a person is not initiating a communication by posting a hyperlink to an infringing music file made available by someone else, as he has no control over the content of that file.). Therefore, if a person who just post a hyperlink and even it is linked to infringement item. That will not be considered as copyright infringing. Hyperlink itself is not cause any infringement, in Internet world, it just a path to somewhere or something. However those things can be change by time and time by the owner and it is not determined by the person who just posts the hyperlink.

### **(b) Online Service Providers (OSP) Liability**

We are welcome to hear that the use of Code of Practice can limit the liability of OSP.

However we have concern on below issues:

- The Cost to handle the complaint notice and counter notice
  - i. Copyright can involve a lot of things, not only music and movie, but also text, picture, etc. Everybody can be a copyright owner. Therefore, we can foresee that the volume of copyright complaint notice, counter notice will substantially increase after we announce such changes on Copyright Law.
  - ii. In order to handle the above notices. OSPs may need to have designated staffs. Almost all of Hong Kong OSPs are providing free service to more than 4.7 millions Hong Kong Internet user. However, most of OSP's company scale is very small, some of them are less than 4 full time staffs and some of them are even running in part time mode. The new designated staffs to handle above notices definitely make a heavy cost burden to most of OSPs operation.
  - iii. Since, OSPs are helping and assisting the copyright owner to protect their right and asset. Also, almost all of OSPs are just a platform to provide free service to their members; they are not gaining revenue from such infringement activity. So, we suggest a reasonable cost should be charge for each complaint notice and counter notice.

- The abuse of complaint notice
  - i. We agree that the true identity of the complainant should be provided and the complainant has civil liability on his declaration and misrepresentation in a notification of claimed infringement.
  - ii. However, we still afraid that if the complainant did not bear any cost, they may abuse the complaint notice. So, we suggest to charges a reasonable cost on the complainant to avoid the abuse of use.
  - iii. If the publisher issues the counter notice to insist his content did not cause any copyright infringement. The OSP should provide the publisher's information to High Court for further legal action if necessary, rather than complainant directly. It can avoid people use complaint notice to acquire someone's personal data.
  
- The reasonable time to handle the complaint notice and counter notice
  - i. In order to have limit liability, OSPs need takes reasonable steps to handle the complaint notice and counter notice. However, we need clearly define the definition of "reasonable time". Because all OSPs web sites are running 7 x 24 base. However, OSPs staffs have normal business hours. Therefore, too tight response time will cause extra costs on OSPs business operation burden.

- **The Code of Practice :**

Based on following section on the Note submitted to us by CEDB :

“If an OSP complies with all the provisions in the code of practice to be issued by the Secretary for Commerce and Economic Development applicable to OSPs and the notification of alleged infringement, it will be deemed to have taken reasonable steps to combat the infringement”

We have strong concerns about the establishment and life-time management of the “Code of Practice” :

- i. *About the Agent*

*Delegated Third Party Agent.* We suggest that Hong Kong Government Department e.g. Hong Kong Customs and Excise Department or Intellectual Property Department can take a role as a single organization to handle all copyright infringement complaint notices. For the implementation, one single organization can fairly apply same standard to all complaint notices among different OSPs.

*ii. About the Cost*

We suggest that the Copyright holder should bear the extra cost of OSP on handling such notice and notice procedure arising from protecting their intellectual property right. For example, in England, the cost is bear by copyright holder.

*iii. About the terms "Access to copyright infringement material"*

We agree that OSP should remove the copyright infringement material from their online service. But we don't agree that we should remove or block the "access" to the materials or activity. Since, in Internet world, the access means a path to the destination. But the designated materials can be changed anytime by the material or activity owner. So, the content of the "access" itself should not cause any infringement and we cannot ensure that when the access is connected to the copyright infringement materials or not.

*iv. About the Notice and Take Down Procedure*

The overall procedure is too complicated, we need to do a lot of communications work and we can foresee that it will involve a lot of manpower to handle it. So, we insist that the extra cost should be bear or recover by the copyright holder. It is much complicated compare with other western country's COP.

*v. About the Abuse of use*

We still insist that the cost of handling the whole procedure should be bear by the complainer and it can reduce or avoid the abuse of use.

*vi. About the 18 Months Record*

OSPs will be required to keep records of the notices of alleged infringement and counter notices received for a period of 18 months. Such records are required for law enforcement purpose. It is an extra cost of OSPs operation to protect copyright holder's intellectual property right. Again, this cost should be bear by those copyright holders.

*vii. About the "Form A – Notice of Alleged Infringement"*

About the point 4, identification of the material and/or activity which is the subject of the alleged infringement. In the Guidance Note, only the website is too general, as it can consists a wide number of pages. We should require the complainer to provide the Universal Resource Locator (URL) and particular which content alleged infringement occurred.

*viii. About the ownership*

We suggest that OSP & ISP should own the COP and we have right to amend and review it regularly.

*ix. Our conclusion*

- i) The current draft COP cannot fulfill our original purpose.
- ii) Most Hong Kong OSPs are small scale and some of them even running in non-profit making model. But they are servicing 4.7 millions Hong Kong Internet users. Therefore, if the procedure and requirement of COP is too complicated. It will definitely affect the survival of our OSP and finally affecting our people.
- iii) We just able to provide our opinion based on current draft COP and limited opinion from public. So, even though CEDB accept above suggestions, but it does not mean that we will accept the revised COP. We emphasize more consultation on this COP among copyright holder, OSP, ISP and public users is very important.
- iv) We strongly suggest that the draft "Code of Practice" should be consulted for public discussion.
- v) We also strongly proposed that the upcoming "Code of Practice" should have the mechanism which will allow the industry OSP players and public consent before it is agreed.

## **II. Part II (Netizens' Comment)**

### **(a) Public opinion of the three options as proposed in the Consultation Paper**

The Government has proposed three possible options of how the copyright regime should deal appropriately with parody, namely, (1) clarification of existing provisions for criminal sanction under the Copyright Ordinance (Cap. 528); (2) introduction of a criminal exemption for parody; and (3) introduction of a fair dealing exception for parody.

A survey about public response to the copyright consultation had been conducted at HKGolden.com, one of the most famous online discussion boards in Hong Kong. In which, 56.1% of the 647 respondents reject all three options, while Option 2 and Option 3, which are the most welcomed, take up merely 17.59% and 16.05% respectively.

The lack of popularity of the proposed options by the Government indicates that Hong Kong Netizens consider the three options to be not ideal; and, that a better option is needed. It should also be noted that Option 2 and Option 3 are preferred to Option 1. It reflects the public concern over whether criminal and civil liability would be attracted under certain conditions, and whether the fairness of dealing is determined by legislature or the courts. These should be taken into consideration if a fourth option is to be introduced.

### **(b) Freedom of Speech and Opinion**

Derivative work is a form of opinion expression. Although some people may argue that there are forms like original essays or short text messages as well, the effect of a derivative work based on an existing work, such as a Canto-pop song or a movie poster, that is relevant and appropriate is much stronger in expressing opinion on social issues. The transformative quality combined with reference to popular works are more likely to draw people's attention and concern to the issue discussed. Derivative work is an effective form to reflect our people's opinion to society and Government. If creators are restrained from making derivative works, it definitely is the loss of our society and people.

### **(c) Option Four as demanded by Netizens**

Over 70 discussion threads regarding the Copyright (Amendment) Bill 2011 and the recent Consultation on parody, which includes over 3,000 replies and involves over 1,000 Netizens, generated from the online discussion board of HKGolden.com, have been collected. From such threads, their demands can be concluded as followed:

- i. Criminal exemption for non-commercial use copyright infringement;
- ii. Criminal and civil exemption for non-commercial use derivative work; and,
- iii. Inclusion of Fair Dealing or Fair Use due to social or public interest factor.

Their main concern is the line of criminal liability of copyright infringement. Netizens disagree that the criminal liability is to be determined by consequences of economic loss; instead, it should be determined by the initial cause of the act in question. Generally speaking, if the work involves commercial activity, they may have criminal or civil liability. On the contrary, if the work does not involve commercial activity, they should never bear criminal liability, but they may still bear civil liability if the work involves infringement, instead of simply being a derivative work. Regarding the definition of derivative work, factors of social interest or public interest should be considered, and exemption should be granted as a result of Fair Dealing or Fair Use. If these are introduced, Netizens will not be afraid to create derivative works to express opinion in the society, because what they are creating is non-commercial, and they will not suffer criminal liability. Moreover, if their works concern social interest, such as commentary to Government policies, Government officials, public figures and the like, they won't suffer any civil liability, too. This simple and clear definition protect Netizens from the liability that they don't deserve. It also helps OSP understand if some content is illegal or not.

### **(d) Conclusion**

Creating derivative works is not robbing and stealing. The creators do not take any money from someone else's pockets; and, more importantly, they can actually contribute to society. The worst situation is not that someone make derivative works and get sued as they are illegal; rather, that creators of derivative work stop expressing their opinion to society, when they are afraid to be sued. Finally, it is a loss to our Government and our society.

**About the OSPA:** *The Online Service Providers Alliance (OSPA) is a platform to bring together policy makers, professionals from related fields, and stakeholders from the community, to advise on and promote methods for achieving the goal of providing better online services to society. OSPA is also active in setting up mechanism for OSPs to combat Internet problems including defamation, copyright infringement, and inappropriate and illegal content provided by third parties while balancing the need to ensure freedom of expression and the development of Internet services in Hong Kong. OSPA was formed in 2010 by the Internet Professional Association (iProA) and ten web sites, major local websites: Baby-Kingdom.com, FoodEasy.com, HKGolden.com, Qooza.hk, sina.com.hk, TradeDuck.com, Travellife.org, 28hse.com, 28phone.com and the international trading web site eBay.com.hk.*

*Date: 15 – Nov -2013*