



Criminalisation of Parodies: The Hong Kong Perspective

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The fact that rapid and advance changes in information technology have increased the challenges faced by copyright owners seeking to safeguard their legitimate interest cannot be denied. In order to strike a balance between the legitimate interests of copyright owners and users of the Internet and the general public, the Legislative Council in Hong Kong tabled the Copyright (Amendment) Bill 2011 (“the 2011 Bill”) in June 2011 to update the Copyright Ordinance (Cap. 528). Amongst other things, the 2011 Bill sought to introduce a technology – neutral communication right which will endure the test of rapid advances in technology and will obviate the need to change the law every time a new communication mode emerges.¹ The 2011 bill also aims to provide better cooperation between copyright owners and online service providers to curb online copyright infringement and to facilitate new modes of uses copyright works such as e learning and media shifting. However, parody was not a subject, which was addressed in the 2011 Bill. Nevertheless, during the examination of the 2011 Bill in the Legislative Council, the community in Hong Kong had expressed wide-ranging views on parody for (amongst others) two main reasons. First, the introduction of a “communication” right (Section 28A)¹ has imposed a further public restriction on freedom of expression. Second, in view of the proposed wording of the 2011 Bill,¹ dissemination of parodies on the Internet may attract both civil and criminal liability. Although after thorough scrutiny, the Legislative Council Bills Committee supported the passage of the 2011 Bill with suitable amendments, it requested the Administration to separately consult the public on parody in the arena of copyright. Due to other pressing matters, which the Legislative Council had to transact, the 2011 Bill did not resume Second Reading Debate and lapsed upon expiration of the previous term of the Legislative Council in July 2012.¹

In order to explore how the copyright regime in Hong Kong should give due regard to the current circumstances, and to provide the necessary protection for parody, the Hong Kong Government carried out consultation exercise from 11 July to 15 November 2013. This consultation was built on two earlier consultations on digital copyright reform launched in December 2006 and April 2008.¹ The objectives of this latest 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. In this regard, the Hong Kong Government had set out three options for public discussion in the consultation paper, which are as follows:

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

After having received 2455 written submissions¹ on the above 3 options and taking into the relevant overseas experience, the Hong Kong Government has proposed that a new fair dealing exception for parody and further clarification of criminal liability in relation to the existing prejudicial distribution and the proposed prejudicial communication offences be added to the original proposal in the 2011 Bill to form a new package for the current round of update. The new package is now contained in the Copyright (Amendment) Bill 2014 (the 2014 Bill)¹ and has been crafted following three guiding principles which were introduced by the Hong Kong Government at the outset of the consultation exercise and reflect the consensus forged between copyright owners and users over consultation- 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;

- (a) any criminal exemption or copyright exception to be introduced must be fully compliant with Hong Kong’s international obligations such as Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization and the “three-step test”