

DIGITAL COPYRIGHT AND THE PARODY EXCEPTION IN HONG KONG

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In July 2013, the Hong Kong government conducted a public consultation on the treatment of parody under the copyright regime. Building on two earlier consultations on digital copyright reform in December 2006 and April 2008, this latest consultation was launched in part to address the free speech concerns raised by the Copyright (Amendment) Bill 2011. Because the Legislative Council failed to pass this bill before its term expired in July 2012, the government now needs to introduce a new copyright amendment bill.

Included in the recent consultation were three legislative options: (a) clarifying the threshold for criminal copyright infringement; (b) introducing a criminal exemption for parody, satire, caricature, pastiche or similar work; and (c) introducing a fair dealing exception for these works. This consultation is particularly timely, considering Hong Kong citizens' widespread dissatisfaction with the government and their growing demand for more democratic elections (especially in relation to the Chief Executive and members of the Legislative Council). As shown by the region's many repeated protests, Hong Kong is now at a critical juncture where the development of a wider political discourse is of great urgency.

As part of this consultation, I submitted a position paper on behalf of the Journalism and Media Studies Centre at the University of Hong Kong. This paper, which the government's discussion papers have since repeatedly cited, made three key assertions. First, none of the three identified options *alone* can adequately address the needs, interests and concerns of Internet users in Hong Kong. Because each option serves a different purpose and has varying strengths, the government should consider adopting a combination of all three identified options.

Second, both civil and criminal exceptions, with appropriate qualifications, should be created for parodies, satires, caricatures and pastiches. Although the creation of a fair dealing exception is highly welcome, a separate criminal exception will still be needed even if that exception is to be adopted. After all, an Internet user can still be exempted from criminal sanctions even though the court does not find his or her dealing with the copyright work fair.

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Finally, in addition to the three identified options, the government should consider adopting a fourth option not identified for consultation—an exception for predominantly non-commercial user-generated content (UGC). This option is much needed because even a broad, unlimited copyright exception for parody, satire, caricature or pastiche will not cover most of the derivative creations generated by Internet users. Examples of these creations are modified photos, altered lyrics and homemade videos of music performances.

The proposal for this exception draws heavily on Section 29.21 of the recently adopted Canadian Copyright Modernization Act. For reasons ranging from shared legislative experiences to protection against international isolation, the proposal calls for a virtually verbatim transplant of the Canadian provision. Specifically retained are the provision's three key qualifying conditions: (a) identification of the underlying work, (b) legality of the work or copy used, and (c) the absence of a substantial adverse impact on the original work.

The only substantive change was the replacement of the word 'solely' with 'predominantly' in the qualifying condition concerning non-commercial purposes. Although this change arguably broadens the exception to cover a wider array of UGC works, it was made primarily to clarify the law in situations where the UGC in question may not be considered 'solely for non-commercial purposes'. A case in point is when the UGC developer receives inconsequential advertising revenue from an Internet or social media platform.

Legal commentators generally disfavour transplanting foreign laws without careful adaptation due largely to their ineffectiveness and insensitivity to local conditions. Nevertheless, the proposed transplant will provide an important compromise needed to advance digital copyright reform in Hong Kong. A UGC exception is also badly needed considering the government's hitherto failure to fully address the needs and interests of Internet users. Because users will play an increasingly important role in Internet development, the proposed transplant would further strengthen Hong Kong's knowledge-based economy while transforming the region into an internet service and information technology hub.

Over the course of the consultation, similar proposals have been advanced by Internet users, human-rights groups and civil-liberties groups in Hong Kong. For example, the Copyright and Derivative Works Alliance, formed out of the Concern Group of Rights of Derivative Works and Keyboard Frontline, called for the establishment of an exception for 'non-profit making user-generated contents or user-generated contents not in the course of business [or trade]'. Both Amnesty International (Hong Kong) and the Hong Kong Civil Liberties Union also advocated the creation of a copyright exception for non-commercial or non-profit-making UGC.

Notwithstanding the widespread support for introducing a UGC exception into Hong Kong copyright law, copyright owners and their industry groups have heavily criticised these proposals. Among their concerns are the exception's noncompliance with the WTO TRIPS Agreement (in particular its provisions on the three-step test and criminal intellectual property enforcement). Also noted are the lack of case law concerning the Canadian UGC exception, the potential complications for rights in the underlying works, and the loophole the proposed exception would create for commercial pirates.

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In December 2013, the government finally released its report on the consultation, which was followed a few months later by a discussion paper submitted to the Panel on Commerce and Industry of the Legislative Council. Eighty-four pages in length, the December report was comprehensive, thoughtful and even-handed. It covered both the strengths and weaknesses of the various legislative options, including those not identified by the government. Although the report stated the government's intention to further "engage stakeholders to exchange thoughts on how best to consolidate and reconcile ideas" before introducing a new copyright amendment bill, it sadly expressed concern that the proposed UGC exception might not meet international standards under the TRIPS Agreement.

The government's reaction is disappointing, yet understandable, considering the vocal and outright opposition by copyright owners and their industry groups. The government has also faced intense pressure from US rights owners and their supportive government. Nevertheless, given the many benefits offered by the proposed UGC exception, the international compliance questions raised by these self-interested players alone should not prevent the exception from being considered.

To begin with, Canadian legislators and many established legal scholars have considered the proposed exception compliant with the TRIPS Agreement, including under its three-step test. Given the polarised nature of the current debate on digital copyright reform and the high economic stakes involved, it is virtually impossible to find a proposal that all parties would accept.

More importantly, even if we take seriously the government's or copyright owners' highly restrictive interpretation of WTO standards, many ways still exist to reformulate the proposed UGC exception. Just because policymakers fear that the present drafting language may spark international compliance concerns does not mean they should stop debating how the copyright regime can better accommodate the needs and interests of Internet users.

As I noted earlier in an opinion piece in the *South China Morning Post*, the government could easily build the relevant WTO standards into the proposed exception, similar to the existing provisions in the Hong Kong Copyright Ordinance. As a matter of logic, an exception incorporating the three-step test can never fail that test. The government can also introduce a fair dealing exception for UGC. If the government takes the position that fair dealing exceptions meet international standards, a fair dealing exception for UGC will necessarily meet those standards. After all, the latter is a subset of the former.

In addition, the government can introduce a quid pro quo arrangement that allows authors and copyright owners to use Internet users' derivative creations for predominantly non-commercial purposes. If significant commercial interests are involved, the government could also introduce a profit-sharing arrangement that requires Internet users and intermediaries to provide equitable remuneration to copyright owners. Levy systems, for example, have been widely practised in Canada, Europe, the United States and other parts of the world.

Even if the government remained concerned about legalising the creation of UGC, in light of the ongoing, unsettled international copyright policy debate, it can introduce laws to prevent Internet users from being criminally prosecuted or sued in civil actions. The government

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can also institute a five-year sunset period for the proposed exception if it hesitates to make the exception permanent in light of the rapidly changing licensing environment.

Finally, if the government is seriously concerned about compliance of international standards, it cannot just focus on WTO obligations alone. UN human-rights bodies have repeatedly noted the tensions and conflicts between intellectual property and human rights. Such tensions and conflicts are clearly present in the area of parodies, satires and caricatures. More importantly, Hong Kong is a party to more than a dozen international human-rights treaties. Its human-rights records remain subject to heavy media scrutiny.

The proposed UGC exception is the legislative choice overwhelmingly supported by Internet users and their supportive groups. These constituencies accounted for more than 97 percent of the close to 2,500 total consultation submissions the government has received. This exception is also highly expedient. It not only provides Internet users with important benefits but also helps promote the development of the creative and information technology sectors in Hong Kong. In the long run, the exception may even benefit copyright owners despite their present objections.

If the Hong Kong government is willing to keep an open mind, as it has repeatedly stated during and after the consultation, it should include a UGC exception in the new copyright amendment bill. It should not return to only those consulted options about which Hong Kong citizens have already expressed reservation.