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The Controversies of the Copyright (Amendment) Bill 2011 - Creation and Communication of Derivative Works (二次創作) by Netizens through the Internet as Play

Chow Pok-yin Adrian

The Bill

The HK Government's public consultation on "Treatment of Parody under the Copyright Regime" ended on 15 November 2013. This is part of the consultations regarding the Copyright (Amendment) Bill ("the Bill") introduced in June 2011 which stirred up heated debates regarding the liabilities of those who create and communicate derivative works via the internet without the prior consent of the copyright owners concerned. This round of consultation generated no less amount of controversies. "Netizen" organizations such as Derivative Works Concerned Group and Keyboard Frontier jointly proposed a "4th Option" in addition to the Government's three¹ and introduced the concept of "User Generated Content"². Despite the Government's repeated reassurance that they were open to the public's opinion, the prospect of this option being adopted and incorporated into the wordings of the upcoming Bill remains highly doubtful.

It is not intended in this paper to dig into the detailed legal issues surrounding these consultations. Instead, what exactly do these netizens do with the internet media, especially such social media as Facebook ("FB") and Golden Discussion Forum ("GDF") via creating and circulating their derivative works is of interest here. The ultimate question is: why are they so afraid of the Bill?

Civil & Criminal Liabilities

Before moving on to look at what the netizens do with the media, however, it is useful to have a brief understanding of the current legal position and the Bill regarding derivative works. In the Government's Consultation Paper on Treatment of Parody under the Copyright Regime of July 2013 ("the

¹ Para 28 – 36, *Treatment of Parody under the Copyright Regime, Consultation Paper*, Commerce & Economic Development Bureau, the Government of HKSAR, July 2013.

² Press release of the League of Copyright and Derivative Work Concern, 22 Sep 2013.

Consultation Paper”), derivative works by inclusion of an element of imitation or incorporation of certain elements of an underlying copyright work such as parody, satire, caricature and pastiche are collectively called “parody”³. Under the existing Copyright Ordinance (Cap.528), parodies do not constitute copyright infringement if:

1. they only incorporate the idea or reproduce an insubstantial part of the underlying works;
2. they incorporate a substantial part of the underlying work with consent from the copyright owner;
3. they incorporate works in the public domain with expired copyrights; or
4. their incorporation of underlying copyrighted works falls within the copyright exceptions or permitted acts for users to facilitate the reasonable use of copyright works in various ways (like for the purposes of education, research, criticisms and review, and news reporting)⁴.

For parodies falling outside of the above, they may attract civil liability for copyright infringement. Furthermore, “distribution” of a copy of an infringing parody to the public in the course of trade or business, or to such extent as to affect prejudicially the copyright owner may attract criminal liability⁵.

On top of the existing position, the Bill introduces a technology-neutral “communication right”⁶, so that a person may also be criminally liable if he/she “communicates” a copy of an infringing parody to the public in the course of

³ Para 5, the Consultation Paper.

⁴ Para 12-14, the Consultation Paper.

⁵ S. 118(1) of Copyright Ordinance (Cap. 528).

⁶ The introduction of a new communication right is to ensure that HK’s copyright law will endure the test of rapid advances in technology and to obviate the need to change the law every time a new communication mode emerges (Para 1, the Consultation Paper).

trade or business or to such extent as to affect prejudicially the copyright owner⁷.

How do Netizens Parod-ize?

With this legal framework in mind, let's look at what netizens usually do with their parody works. As the Government rightly identifies, popular forms of parody in recent years include (a) combining existing news photos or movie posters with pictures of political figure; (b) providing new lyrics to pop songs; and (c) editing a short clip from TV drama or movie to relate to a current event (sometimes with new subtitles or dialogues)⁸, as shown in Appendix A, B and C respectively. They share the following commonalities:

1. They incorporate and reproduce a substantial part of the underlying works (with arguably the exception of that in Appendix C in which only about a 4-minute clip was extracted from a 2-hour movie);
2. The amendments / re-creations in these cases were done without the consent of the original copyright owners (with the partial exception of that in Appendix B in which the original songwriters gave their consent to the re-writing but the record company (owner of the copyright of the song's sound recording) did not);
3. The underlying works are not works in public domain with expired copyright; and
4. These incorporations do not technically fall within any of the copyright exceptions or permitted acts in the Copyright Ordinance (Cap.528)⁹.

Hence under the existing law, these works may attract civil liability, and the distribution of them to the public (a) in the course of trade or business or (b) to such extent as to affect prejudicially the copyright owner may attract criminal

⁷ S. 118(8B) as proposed in the Bill.

⁸ Para 4, the Consultation Paper.

⁹ S. 38-39, Copyright Ordinance (Cap. 528).

liability. With the Bill's proposed addition of "communication right", people who "communicate" these works to the public under similar circumstances may also be criminally liable. For netizens, these works are usually shared and circulated in FB and/or internet's discussion forums. While it can be argued that these communications are not done in the course of trade or business, it is highly uncertain if they are done "to the extent as to affect prejudicially the copyright owner". With uncertainty comes fear, netizens are understandably skeptical about the Bill.

Consent of the copyright owner is the key to sweep away all these fears. Netizens can be free to engage in parodies and their communications if they seek the prior consent of the relevant copyright owners. However, the practical difficulties faced by the netizens include the followings:

1. Parodies such as those in the Appendixes are usually done in response to political incidents which are timely in nature. Seeking copyright owners' consent can be time consuming. The works may be outdated by the time such consents are given, and their purpose of expressing the creators' grievances to the political incidents in a timely manner is totally defeated.
2. Netizens may not know whom to approach even if they want to seek the relevant consent. Most creators of original copyrighted works have their rights assigned to or managed by some copyright agents (e.g. music publishers for pop songs) and these agents don't publish information about what rights they hold or manage. Identifying and locating the right copyright owner can itself be time consuming too.
3. Like those for the original work in Appendix A and C (the HK Government and the movie company of the German film), some copyright owners are highly unlikely to grant consent for parody.
4. Even copyright owners are willing to grant such consent, it may be conditional upon the applicant's payment of royalty. Netizens are either

unable or unwilling to afford such royalty if they are creating those derivative works for the purpose of expressing ideas without any profit-making intent.

Though the balance between freedom of expression and the legitimate rights of copyright owners should be struck, it remains a delicate one. However, are netizens just concerned with their freedom of expression? What is the fundamental nature of their act of creating and communicating those parodies?

Play

Threshold & Rules

In asking the question “what we do with our media”, Roger Silverstone suggested several aspects of experience which intersect with the images, voices and sounds that comprise our media environment¹⁰, namely play, performance and consumption. It is contended here that via creating and circulating derivative works over the internet, netizens attain principally the everyday and ordinary experience of play.

To Silverstone, play is a powerful tool for the analysis of the media experience, and the study of media requires attention to play as a core activity of daily life. Quite contrary to the common belief that play is irrational, he suggests that it is entirely rational, only its forms of rationality are not those of the mundane and the quotidian. Even so, however, play is part of everyday life, just as it is separated from it. To step into a space and a time to play is to move across a threshold, to leave some kind of order behind and to grasp a different reality and rationality defined by its own rules and terms of trade and action¹¹. Hence play is a space where meanings are constructed through participation within a shared and structured place, a place demarcated as being distinct from and other than the ordinariness of everyday life, a place of modest security and trust, in which players can leave real life and engage in an activity that is

¹⁰ Silverstone, Roger, *Why Study the Media?* London, Thousand Oaks and New Delhi: Sage Publications, 1999, p. 57.

¹¹ *Ibid*, pp. 59-60.

meaningful in its rule governed excess¹². By quoting Jan Huizinga, Silverstone also highlights another main characteristics of play: its secludedness and limitedness. All play has its rules which determine what “holds” in the temporary world circumscribed by play. It is also associated with ritual and involves a suspension of disbelief. Play is “as-if” culture par excellence¹³.

The Internet and the social media of FB or GDF from which netizens draw primary material for their parody works and in which such works are most frequently circulated can be quite comprehensively understood from this perspective of play. Every time these netizens step away from their daily business, sit in front of the computer, launch a website and log in as a FB user or a “brother/sister” in GDF, they are like crossing a threshold, walking from real life into these cyber communities. Though both their daily business and FB/GDF are part of their daily life, they are just distinct spaces which people keep crossing. These platforms have the capacity to engage the participants within spaces and times that are marked off from the otherwise relentless confusions of everyday life. There is a threshold to be crossed each time the netizens join in the process of mediation¹⁴.

In FB and GDF, apart from the written rules set out by the relevant website administrators, there are unspoken rules jointly created by and somehow evolved through the participation of the users. As far as derivative works / parody are concerned, unspoken rules governing what a netizen can post or is encouraged to post are laid down by “viewers’ marking” expressed through such mechanisms as “like”, “comments” and “share” in FB, and “written comments” and/or “emoticon comments” in GDF. The more “like”, positive comments, or “share” a work gets in FB, the greater the popularity it means for that work. On a contrary, the more “negative comments (負評)” a work receives in GDF, the greater the humiliation it means for the creator of that work. Nonetheless, the “quality” of the parody work alone doesn’t determine

¹² Ibid, p. 60.

¹³ Ibid.

¹⁴ Ibid, p. 61.

how well received it will be. The “fame” of the creator / posting person has a large part to play. In FB for instance, a post from a celebrity attracts larger number of “likes” much easier. Similarly, a well-known or frequent parody work creator can have his/her work liked and widely shared with greater ease. In GDF, a post from “senior member” (a status earned by frequent posting and commenting) gets more respected. Negative comments to a work of such member may be criticized by tons of “brothers/sisters” who are fans of that member. These are just some examples of the unwritten rules governing the posting of parody work in these platforms. They are non-exhaustive and keep evolving. They however show that there exist a sophisticated system of rules and rationalities in these spaces and if netizens’ creation and circulating of derivative works there are considered “play”, that is really serious play.

Dimensions of Play

The behavior of netizens in relation to parody work can also be understood by referencing the different dimensions of play. By quoting Roger Caillois, Silverstone distinguishes 4 dimensions of play, namely agon (competition), alea (chance), mimicry (simulation) and ilinx (vertigo). Examples include:

1. Agon: football, chess, billiards involving competition;
2. Alea: roulette or lottery in which chance is a primary element;
3. Mimicry: one plays Hamlet or a pirate;
4. Ilinx: one produces in oneself, by rapid whirling or falling movement creating a state of dizziness and disorder¹⁵.

As far as agon is concerned, Callois points to the importance of maintaining a somewhat even playing field and it is like a combat in which equality of chances is artificially created in order that the adversaries should confront each other under ideal conditions¹⁶. For alea, it comes from the Latin name for the game of dice which reveals the flavor of destiny and provides latitudes for innovations being left to the players’ initiatives¹⁷. Mimicry by contrast is the

¹⁵ Callois, Roger, *Man, Play and Games*, published by Librairie Gallimard, 1958, p. 130.

¹⁶ Ibid, p. 131.

¹⁷ Ibid, pp. 128, 133.

domain of imaginative role play and “make believe” in character¹⁸, while *ilinx* is the Greek term for “whirlpool” which consists of a joyous quality where enthusiastic players momentarily destroy the stability of perception and inflict a kind of voluptuous panic upon an otherwise lucid mind¹⁹.

Netizens’ parody works and their act of circulating those works in FB or GDF do embrace some elements of play. Competition (*agon*) is the most prominent one. For the work in Appendix A, apart from expressing his/her ridicule at the HK Chief Executive (by swapping his head with that of the soft toy wolf “Lufsig”²⁰, hinting he’s as cunning as a wolf), the creator must have some intention of getting his/her worked “liked”, shared or positively commented in FB and/or GDF. The informal competition of comparing the number of “likes” / positive comments among different parody works has been a silent tradition in FB or GDF. This competition can be between different creators of parody works or one with the creator him/herself. The number of “likes” / positive comments also provides incentive for the netizens’ continuation of this kind of creation. The “ultimate” reward for them is having their works noticed and publicized by mainstream media, or according to the famous GDF’s saying, “having a worked pushed to newspapers (推到上報)”.

There is an element of chance (*alea*) too. Taking the same example, the original photo of the HK Chief Executive in Appendix A just appeared on 11 December 2013 as an unexpected happening. No one knew in advance about the release of that photo. However, when netizens came across such photo by chance, they discerned the potential of parody in it. This parody work, and like many other parody works in HK, is entirely a product of chance and coincidence. On the level of the creator, he is never certain whether the work will be “liked” and shared. All he can do is to complete the work and post it on FB or GDF. What happens to the work afterwards is entirely out of his/her hands. Similar to Callois’ suggestion that an outcome known in advance, with

¹⁸ Ibid.

¹⁹ Ibid, pp. 128-139.

²⁰ For more background information about “Lufsig”, please see <http://www.bbc.co.uk/news/world-asia-china-25314580>

no possibility of error or surprise, clearly leading to an inescapable result, is incompatible with the nature of play²¹, this uncertainty about the “fate” of the parody work bears close resemblance of play.

Mimicry is also seen in the work in Appendix C, only this is a mutated version which I'll call “surrogate mimicry”. Instead of physically playing a character to voice out his/her anger over the Government's unfair and opaque handling of the HKTU Incident²², the creator selected a movie clip (which was actually used many times to perform similar function regarding other social issues), made up the subtitles to mime with the movie character, and let this character “speak” out what were in his/her mind. It is like the creator of the work mimicking a character (Hitler in this case) to criticize the government. The movie character becomes the creator's agent or avatar through whom the effect of mimicry is achieved in an indirect or surrogatory manner. The fact that the movie character speaks German particularly enhances this clip's potential for this purpose since not many people in HK understands German and it becomes an “empty signifier” on which exterior meanings of whatever nature can be imposed seamlessly.

Of course some derivative works display very little or no traits of the above dimensions of play. The re-written song in Appendix B was created to commemorate the deceased and injured of the Lamma Ferry Disaster of 2012. Though it is fair to speculate the existence of a competition (agon) mindset in the creator's head in that he does want to have this work “liked” and shared, and he does care about the numbers and comments, his primary purpose of writing seems more to be one of condolences. This act of creation seems more like an act of performance, through which he shows himself to public that he cares about the people involved in the disaster, he feels sorry for them, he is empathetic towards them, and he belongs too to a wider community of this incident's concern. It is more an act of identity construction. However, due

²¹ Callois, Roger, *Man, Play and Games*, published by Librairie Gallimard, 1958, pp. 124, 126.

²² This incident is about the Government's denial of HKTU's application of a free TV operating license in October 2013 (HKTU is a TV station formed in HK, which is one of the 3 applicants for the 3 licenses allegedly offered by the Government). Concrete reasons for such denial were never disclosed despite the apparent adequate qualification of HKTU and repeated public demand.

to the limit in length of this paper, the performative aspect of this act of creation will not be discussed in detail.

“As if-ness”

In addition to the above, many of the HK parody works in recent years bear a remarkable stamp of play: its “as if-ness” or subjunctivity. Taking again the example in Appendix C, the creator used a movie clip to express his resentment over the Government’s handling of the HKTV affair. By doing so, he/she successfully mocked the Government “as if” some actions have been taken to effect change, “as if” he/she was involved in some kind of campaign defending free competition or freedom of expression. However, nothing has been changed by this work, at least not immediately and substantially. The Government has yet disclosed any convincing reason for the denial of HKTV’s application. Similarly, though the parody work in Appendix A quite humorously used a photo provided by the HK Chief Executive and produced an effect of satire on him, its effect ends as a satire. Nothing has been done to contribute to his actual step down. The creator just made up something “as if” something effective has been done, as if he had played a part in actualizing his downfall. Just as Silverstone’s comment that the moments and sites for play allow and legitimize a modicum of re-enchantment in our otherwise disenchanting lives²³, these parody works allow and legitimize a modicum of seeming empowerment in our otherwise dis-empowered lives.

This dis-empowerment or helplessness of HK people in their everyday lives is perhaps the primary reason for the frequent political overtone in recent years’ derivative works of netizens. Ever since the handover of HK in 1997, the quality of public governance has been declining, resulting in worsening poverty, widening gap between the rich and the poor, ever-rising property price beyond ordinary people’s reach, increasing unemployment / under-employment rate, and ever-more acute conflicts between HK and mainland people (residents or tourists) etc. All in all, the quality of life in HK has been

²³ Silverstone, Roger, *Why Study the Media?* London, Thousand Oaks and New Delhi: Sage Publications, 1999, p. 63.

deteriorating. However, people's ability to improve these situations via normal political channels is hampered by HK's innate political structure under the Basic Law. The existence of functional constituencies and the split voting system in its legislature, and the selection mechanism of the Chief Executive have all ensured the triumph of the "executive led" principle, leaving people completely powerless within the establishment parameter to effect change. Together with such tactics as "de facto bribing" of elderly voters and "vote planting" employed by the pro-government / PRC political parties / organizations, one sees little hope of a true democracy coming even with the Basic Law's promise of "progressive democratic development" leading eventually to universal suffrage²⁴. What people can do is subjunctive anyway, and hence parody (or play in general) becomes almost the sole vent for or form of releasing people's political grievances. That's why political themes keep revolving in these kind of works because they let us feel "as if" we have done something politically potent.

Then why parody only and not more extreme social actions? It is contended the overwhelming power (both political and economical) of the PRC government, the ultimate sovereign power of HK, deters any imagination of success of any such actions in people's mind, at least for now. This is an authoritative power which instigated the June Fourth Massacre, "suicided" mainland activist Li Wangyang, imprisoned the Nobel Peace Prize winner Liu Xiaobo on the ground of his initiation of Charter 08 being an act of "inciting subversion of state power", home detained Liu's wife Liu Xia without trial, and administratively arrested political opponents under "re-education through labor" laws. Military crack-downs against "anti-governmental" activities have not been unfamiliar measures taken by this authority. In face of this presently invincible power, "as if-ness" seems to be the only tactic against oppression.

That said, of course, one cannot judge all futile actions as "as-if" kind of play. Marches and protests with no immediate impact, bearing a sense of subjunctivity but short of the aforementioned dimensions of play, cannot be

²⁴ Chow, Adrian, *Looking At Hong Kong Politics Through a Pair of Affective Spectacles*, CUS511G Assignment 3, 2012, p.16.

regarded as such. Also, as mentioned, some parody or derivative works (such as that in Appendix B) are more in the nature of something other than play. But as far as those playful works and sharing behavior are concerned, they don't necessarily stay statically as play. For example, in dealing with the Bill, netizens created their own communities out of FB and GDF. They went further to form such actual pressure groups as Derivative Works Concerned Group, organizing seminars, protests and marches to try influencing the Government's policy on parody. They would even cross-over with mainstream media for such purpose (like joining force with Commercial Radio HK to organize a "Concert of Derivative Works" in 2012). These efforts and events would in turn be circulated around and mediated through FB/GDF causing greater public awareness over the controversies. With such media, they and their derivative works become catalyst of further social actions. Their parody works might start out as play, something to let them feel "as if" effective measures are taken. But these playful activities evolved into social actions, and in the case of the Bill, into actions to defend their right to play.

Why Fear?

Then look back at the opening question, we seem to know why netizens are so afraid of the Bill, at least on 2 levels. On the surface, they are afraid of the Bill's chilling effect. They fear that their freedom of speech and expression will get eroded by the Bill's imposition of criminal liability on creation and communication of derivative works under certain circumstances²⁵. As mentioned, in the context of HK's handicapped political system, creating and sharing these works on the Internet are the very few available means for netizens to voice out their political discontent. Introducing criminal liability for these acts will simply put a halt to them. Moreover, with the Government's unpopularity and its track record of promoting irritating policies²⁶, these netizens are convinced that the Government actually intends through the Bill to restrain the freedom HK people on the request of the PRC Government.

²⁵ See p. 3 above.

²⁶ Like the promotion of legislating for Article 23 of the Basic (laws regarding subversion) in 2003 and the National Education Curriculum in 2012.

This blatant betrayal of HK people by the Government is totally unacceptable to these netizens.

On a more fundamental level (or even unconscious to these netizens), however, they fear that the Bill invades their right to play! As discussed above, what they do with the Internet social media (the creation and sharing of parody works) can in many cases be understood as an experience of play. It is something extremely ordinary, something which they do on a daily basis. It is an experience of the quotidian. Everybody plays. They play like the rest of us, only the “game” they play somehow relates to derivative works and parody. In mentioning the psychological studies of children by D.W. Winnicott, Silverstone goes further to suggest that play serves some ontological purposes and is an experience we gathered since childhood. In play the trusting child explores the world through the manipulation of objects and the construction of fantasy. Through play, and within an environment which offers trust and security and in which play can be both simulated and contained, a child pleasurable constructs him/herself a place in culture. Through play, the reality is tested, internal reality is defined, and through such testing and play, the child constructs a symbolic world²⁷. Hence, play is something that we developed since childhood, and through which we keep testing the different boundaries and thresholds in our daily lives and construct our identities even in adulthood. In parody work the creator tests the boundaries between like and dislike, popular and unpopular, the identity of an artist and amateur, or the stance of “an egg and the wall”²⁸, for instance. Restriction of play is restriction on our basic, quotidian, yet essential experience. It is the Bill’s possible corrosion of our right to play that the netizens most object to and fear.

Of course, as both Silverstone and the netizens are well aware of, there are dangers in play. Boundaries cannot always be held, and the trust we require may not always be offered. In the process, we make mistakes and get stuck.

²⁷ Silverstone, Roger, *Why Study the Media?* London, Thousand Oaks and New Delhi: Sage Publications, 1999, p. 64.

²⁸ The “egg vs the wall” is a common analogy used amongst the netizens community of HK, with the egg representing the people and the wall the authority. This analogy is borrowed from the writing of the Japanese novelist Haruki Murakami.

We misread the signs and sometimes tragically so²⁹. In parody the dangers lie in infringing the rights or hurting the feelings of the copyright owners, getting “unfriend” in FB or negative comments in GDF, and now being criminally liable under the Bill. From my personal encounters with some of these netizens, I note that they well respect the balance between their rights (of expression and to play) and that the copyright owners. They have no intention to prejudicially affect them. They do not purport to make any profit out of their derivative works. They fully support those parts of the Bill which counteracts copyright piracy. They acknowledge that some dangers of their kind of play are well justified, and they won’t step into those danger zones. It is however the danger of criminal liability for their bona fide play that they cannot reasonably contemplate and find utterly unacceptable. This is why they fear.

²⁹ Silverstone, Roger, *Why Study the Media?* London, Thousand Oaks and New Delhi: Sage Publications, 1999, pp. 64-65.

References

Caillois, Roger, *Man, Play and Games*, published by Librairie Gallimard, 1958.

Chow, Adrian, *Looking At Hong Kong Politics Through a Pair of Affective Spectacles*, CUS511G Assignment 3, 2012.

Commerce & Economic Development Bureau, the Government of HKSAR, *Consultation Paper on Treatment of Parody under the Copyright Regime*, July 2013.

The League of Copyright and Derivative Works Concern, *Press Release on the 4th Option*, 22 September 2013.

Silverstone, Roger, *Why Study the Media?* London, Thousand Oaks and New Delhi: Sage Publications, 1999.

Appendix A

Original Photo



A photo posted on 11 December 2013 by the HK Chief Executive in his blog showing himself and the popular soft toy “Lufsig”.

(<http://www.ceo.gov.hk/chi/blog/blog20131211.html>).

Amended Photo



Appendix B

《大愛香港》

原曲：大愛感動（曲：Cousin Fung／詞：周博賢）

改編作詞：山卡啦

主唱：G 大調

MV 製作：山卡啦

音樂提供：周博賢

煙花未璀璨，生死兩分

數十生命下沉，心裡著急震撼

這福地天蔭，天不再狠

何以讓人禍降臨，於大海被困

曾歷遍幾多災劫，以強忍飽經試煉

若老天恩賜為何禍患再現

*曾艱辛仍能走過，自怨自艾難開朗

承受過劇痛盼望會見到好風光

曾哭泣徬徨沮喪，淚眼漸紅仍堅壯

仍願意大愛守護心愛地方*

當厄運淹浸，敢於挺身

無悔在危難裡尋，守望相助困

憑自救抵擋災劫，奮鬥心譜寫故事

縱使傷感了臨危盡力救治

Repeat *

曾傷心仍能走過，就算淚流仍開朗
危難裡互勉最後會見到好風光
若果厄運避不開，逆處自強仍堅壯
仍願意大愛守護燦爛香港

(<http://www.youtube.com/watch?v=OT1kqzFVUOU>)

Appendix C



YouTube HK

Guide

維基台搞咗咁多嘢都話唔批！

1:13 / 3:50

希特拉得知 HKTv 不獲發牌

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