

Bei, Jing

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## Cover Version and Copyright: Based on Copyright (Amendment) Bill 2014 of Hong Kong

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# Cover Version and Copyright: Based on Copyright (Amendment) Bill 2014 of Hong Kong

Jing BEI

## Abstract

Huge controversy has arisen since the Copyright (Amendment) Bill 2014 of Hong Kong, dubbed “Internet Article 23” by netizens, appeared in public view again, which was not adopted in the end. One of the concerns commonly raised by end users was whether uploading cover version (which refers to “online posting of earnest performance of copyright works” according to the Government’s definition) would attract legal liability under the Bill. This article intends to first give an overview of the legal framework concerning cover version issue under Hong Kong copyright law. It then considers why such issue has provoked intense discussion in a political context. The article argues in conclusion that both the Government and public institutions can further their role in supporting creative and social innovation in music industry in the digital environment.

**Keywords:** Copyright (Amendment) Bill 2014; earnest performance; cover version; copyright; legislation

## 1. Introduction

According to the Copyright Ordinance of Hong Kong (“Ordinance”)<sup>1</sup>, copyright is a property right which subsists in (a) original literary, dramatic, musical or artistic works; (b) sound recordings, films, broadcasts or cable programmes; and (c) the typographical arrangement of published editions.<sup>2</sup> Copyright is one of the laws concerned with the protection of intellectual property, protected by the Basic Law as right of private ownership of property.<sup>3</sup>

Rapid technological developments have driven many overseas jurisdictions to update copyright regimes since 2000. Meanwhile, the Government of Hong Kong is committed to developing Hong Kong into a premier IP trading hub.<sup>4</sup> The Government introduced the Copyright (Amendment) Bill 2014 (“Bill 2014” / “Bill”) into the Legislative Council on 18 June 2014. However, since the Bill appeared in public view again,<sup>5</sup> there have been many objections. A lot of posters and “copyright legislation for

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<sup>1</sup> Chapter 528, Laws of Hong Kong.

<sup>2</sup> Section 2 of the Copyright Ordinance.

<sup>3</sup> The Basic Law Article 6 provides “The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law”; Article 105 provides “The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property”; Article 140 provides “The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on culture and protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation”.

<sup>4</sup> <http://www.ip.gov.hk/en/index.html>

<sup>5</sup> The Government introduced the Copyright (Amendment) Bill 2011 in 2011, but it evenly lapsed upon expiry of the term of the Previous Legislative Council.

dummies”<sup>6</sup> emerged on the Internet. Netizens called it “Internet Article 23”<sup>7</sup> or “evil law”, claiming the Bill will limit the secondary creation and even the freedom of speech. Controversies over the Bill 2014 fall into three topics: (1) Addition of a user-generated content (“UGC”) exception; (2) Adoption of an open-ended fair use exception instead of the current specific fair dealing exceptions; (3) Express provision to disallow contract override. Discussions and debates can be seen in the administration documents<sup>8</sup>, public consultation<sup>9</sup>, paper of the Bills Committee<sup>10</sup>, position paper of the Law Society of Hong Kong<sup>11</sup>, and position paper of Hong Kong Bar Association Special Committee on Intellectual Property<sup>12</sup>, etc. Celebrity<sup>13</sup>, union and organization,<sup>14</sup> web media<sup>15</sup> and political student organization (for example, Scholarism) expressed their opinions. Many pro-democratic legislators announced to undertake filibuster.

After the three months of scrutiny and filibuster, the examination of the Bill still was not completed till March 2016. The Government had to move the Bill to the end of the agenda to be discussed. It was thus believed that the current Government has no intention to mention it to the Legislative Council (“LegCo”) again. To this moment, the Bill ended.

Although the Bill 2014 has ended, it remains a significant issue as it ignites so much attention and debate. There are several concerns raised by the netizens, one of them being the cover version issue. This article examines the issue of cover version

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<sup>6</sup> This term originates from Taiwan, meaning skipping the details and summarising the context into a few pictures and texts for readers’ acknowledgement of the issue.

<sup>7</sup> This term refers to government’s control over the Internet, originated from Article 23 of the Basic Law on national security, which provides “The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”

<sup>8</sup> See the Legislative Council Brief - Copyright (Amendment) Bill 2014, File Ref.: CITB 07/09/17, 11 June 2014, para.19.

<sup>9</sup> Commerce and Economic Development Bureau, Treatment of Parody under the Copyright Regime Consultation Paper, 11 July 2013.

<sup>10</sup> See Bills Committee on the Copyright (Amendment) Bill 2014, Copyright Cases Illustrating Fairness Assessment, LC Paper No. CB(4)11/14-15(02), October 2014.

<sup>11</sup> The Law Society of Hong Kong, Position Paper on Copyright (Amendment) Bill 2014, 29 December 2016.

<sup>12</sup> Hong Kong Bar Association Special Committee on Intellectual Property, Hong Kong Bar Association - Special Committee on Intellectual Property Position Paper on the Copyright (Amendment) Bill 2014 and the 3 Amendments Proposed by Certain LegCo Members, 17 February 2016; Hong Kong Bar Association Special Committee on Intellectual Property, Hong Kong Bar Association - Special Committee on Intellectual Property, Further Response on the Copyright (Amendment) Bill 2014, 3 March 2016.

<sup>13</sup> Including Albert Leung, Wyman Wong, Adam Wong Sau Ping, Philip Yung, Patrick Leung, Adrian Chow, and Anthony Wong Chau Sang, etc.

<sup>14</sup> Including “Keyboard Frontline 鍵盤戰線”, “Copyrights & Derivative Works Alliance 版權及二次創作關注聯盟”, “Mocking Jer 學舌鳥”, etc.

<sup>15</sup> For instance, Independent Media (HK) issued “Opinions on Treatment of Parody under the Copyright Regime Consultation Paper” on 14 November 2013. See: <https://inmediak.org/2013/11/14/%E7%8D%A8%E5%AA%92%E5%B0%B1%E3%80%8C%E5%9C%A8%E7%89%88%E6%AC%8A%E5%88%B6%E5%BA%A6%E4%B8%8B%E8%99%95%E7%90%86%E6%88%B2%E4%BB%BF%E4%BD%9C%E5%93%81%E8%AB%AE%E8%A9%A2%E6%96%87%E4%BB%B6%E3%80%8D%E7%9A%84/> (Last visit: 1 May 2017)

under the Copyright (Amendment) Bill 2014 using analytical approach. It first gives an overview of the legal framework concerning cover version issue under Hong Kong copyright law, then discusses why such issue has provoked intensive discussion in a political and social context. The article argues in conclusion that both the Government and public institutions like licensing bodies can further their role in cultivating innovation in music industry in the digital environment.

## 2. Overview of Cover Version

### 2.1 Definition

In the digital era, no longer are end users or consumers seen as passive receptors of information, consumers can take on the role of producers to become what Creative Commons legal counsel Mia Grlick calls “content conductors”.<sup>16</sup> New technologies along with the Internet have opened up enormous potential for what has become known as cover version, mash-ups, remix, and sampling.

“Cover version” is not a legal concept. Its contrary concept is the original song. The original artist refers to the first singer of an original song that is previously recorded and commercially released.<sup>17</sup> Up until now, people study the topic of cover version mainly from legal profession and music industry. Only a few of legal academics specialize on it.

There are different views on the definition of “cover version”, among others: (1) It is a new recording of a song that is previously commercially released and sung by others. It could be divided into two types: literal interpretation (the whole song is used) and a deductive cover (the song is wholly or partially used with substantial variation, e.g. addition, deletion and modification);<sup>18</sup> (2) It refers to original song re-recorded by a new artist and the whole song is used;<sup>19</sup> (3) The difference between cover versions and non-cover versions is one of degree, not of kind;<sup>20</sup> (4) Looks more at the covering performer than the cover recording itself. A song offers a role to play. Covers are to comment not only on the different performers, but also on the shifting identities of the performers;<sup>21</sup> (5) “There is a difference between cover records and cover songs”.<sup>22</sup>

Although “cover version” is a difficult concept to define, the consensus is that an “intertextual commentary on another musical work or style”<sup>23</sup> is the common

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<sup>16</sup> Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York, USA: Penguin Press, 2004, 283-284.

<sup>17</sup> Yu Jiahui, *A Research of Cover Song in Copyright Issues*, Master Thesis of Jinan University, 2014, Guangzhou, China.

<sup>18</sup> Yu Jiahui, *A Research of Cover Song in Copyright Issues*, Master Thesis of Jinan University, 2014, Guangzhou, China; Su Ping, He Peiyu, *The Legality and Illegality of Music Cover - and to Comment the Draft Bill for the Amendment of Copyright Law Article 46, Intellectual Property*, 2012 Vol. 6.

<sup>19</sup> Eira Mishra, *Cover versions and the new copy right regime in India*, *Journal of Intellectual Property Law & Practice*, 2014 Vol. 9, No. 6.

<sup>20</sup> Thomas Robinson, *The Singer and the Song: Core Components in Jimmy Webb’s “Didn’t We”*, *Popular Music*, 2014 Vol. 33/2, 315-336.

<sup>21</sup> Griffiths. D, *Cover Versions and the Sound of Identity in Motion*, *Popular Music Studies*, ed. D. Hesmondhalgh and K. Negus (London, Hodder & Stoughton), 2002, 51-64.

<sup>22</sup> Cusic. D, *In Defense of Cover Songs*, *Popular Music and Society*, 2005, 28/2, 171-177; Solis. G, *I Did It My Way: Rock and the Logic of Covers*, *Popular Music and Society*, 2010, 33/3, 297-318.

<sup>23</sup> Butler. M, *Taking it seriously: intertextuality and authenticity in two covers by the Pet Shop Boys*, *Popular Music*, 2003, 22/1, 1-19.

characteristic of cover version. Based on the literature and public views, this article adopts the classification method to divide cover song into “minor interpretative cover”<sup>24</sup> and “major interpretation”<sup>25</sup>. The former tends to show the original appearance of the original song, while the latter edits the song by bringing creative work to the original song by way of modification, mash-ups, rewriting lyrics for songs, etc.<sup>26</sup>

It is seen in the documents of the LegCo and the Government that mash-ups/remixes/sampling<sup>27</sup>, online posting of earnest performance of copyright works and rewriting lyrics for songs are put in different categories.<sup>28</sup> It is also expressly indicated that the latter two are to be dealt with differently: the online posting of earnest performance of copyright works “may fall outside the enlarged scope”, and it “can hardly provide sufficient public policy grounds to justify special treatment”;<sup>29</sup> for the latter, what needs to be considered is whether it falls within the existing or proposed scope of exceptions (e.g. for the purposes of criticism and review, commenting on current events or parody etc.), and meets the relevant qualifying conditions (for example, the dealing of the copyright work is fair).<sup>30</sup>

The object of study in this article is therefore confined to minor interpretative cover, namely the works that does not changed the lyrics of the original songs and constitutes an earnest performance of copyright works. It is “more akin to a mere expression of feelings or showing of talent”.<sup>31</sup> The scope does not include mash-ups/remixes/sampling, nor rewriting lyrics for songs. Meanwhile, considering what attracts much attention and raises controversy is the risk that netizens will face when uploading cover versions online, here the article will not discuss the cover version that is of commercial nature (e.g. those used in singing competitions).

## 2.2 Rights Exist in Original Material

In determining what copyright law will allow in relation to cover version, it is first necessary to identify the relevant rights which may exist in original material. Under the

<sup>24</sup> He Xiaohua, *A Copyright Research on Music Cover*, Business, 2014 Vol. 49.

<sup>25</sup> Lei Meiqin, *Unveil Cover Version - Aesthetic Critic to Covering Music in Pop Music Industry*, People’s Music, 2007 Vol. 7.

<sup>26</sup> Su Ping, He Peiyu, *The Legality and Illegality of Music Cover – and to Comment the Draft Bill for the Amendment of Copyright Law Article 46*, Intellectual Property, 2012 Vol. 6.

<sup>27</sup> These three terms may encompass overlapping concepts. See Legislative Council Panel on Commerce and Industry, *Treatment of Parody under the Copyright Regime Consultation Paper*, LC Paper No. CB(1)1072/13-14(05), 18 March 2014, fn. 11.

<sup>28</sup> Legislative Council Panel on Commerce and Industry, *Treatment of Parody under the Copyright Regime Consultation Paper*, LC Paper No. CB(1)1072/13-14(05), 18 March 2014, 4-5; Legislative Council Brief - Copyright (Amendment) Bill 2014, File Ref.: CITB 07/09/17, 11 June 2014, Appendix D.

<sup>29</sup> Legislative Council Brief - Copyright (Amendment) Bill 2014, File Ref.: CITB 07/09/17, 11 June 2014, fn. 31.

<sup>30</sup> See Legislative Council Brief - Copyright (Amendment) Bill 2014, File Ref.: CITB 07/09/17, 11 June 2014, fn. 31; See also the website of Intellectual Property Department, *FAQs on Copyright (Amendment) Bill 2014*, Q5. Will the posting of an earnest performance of a copyright work on the Internet constitute a copyright infringement? Q6. Will rewriting lyrics for songs be covered by any copyright exception? Retrieved from [http://www.ipd.gov.hk/eng/intellectual\\_property/copyright/Q\\_A\\_2014.htm#q5](http://www.ipd.gov.hk/eng/intellectual_property/copyright/Q_A_2014.htm#q5). See also the corresponding Traditional Chinese versions, Q10 & Q13: [http://www.ipd.gov.hk/chi/intellectual\\_property/copyright/Q\\_A\\_FAT\\_2014.htm](http://www.ipd.gov.hk/chi/intellectual_property/copyright/Q_A_FAT_2014.htm) (Last visit: 15 May 2017)

<sup>31</sup> Legislative Council Brief - Copyright (Amendment) Bill 2014, File Ref.: CITB 07/09/17, 11 June 2014.

Copyright Ordinance of Hong Kong, a single composition of recorded music may give rise to different types of copyright. This include economic rights in the literary work (lyrics), musical work (melody), sound recording and performance of the song, as well as moral rights in the lyrics, melody and performance of the song. The copyright can be hold by different owners respectively, who have the exclusive right in Hong Kong to:<sup>32</sup>

- (a) copy the work (see Section 23 of the Ordinance);
- (b) issue copies of the work to the public (see Section 24);
- (c) rent copies of the work to the public, where the work is a sound recording, a film, a literary, dramatic or musical work included in a sound recording, etc. (see Section 25);
- (d) make available copies of the work to the public (see Section 26);
- (e) perform, show or play the work in public (see Section 27);
- (f) broadcast the work or include it in a cable programme service (see Section 28);
- (g) make an adaptation of the work or do any of the above in relation to an adaptation (see Section 29).

To facilitate trade efficiency, copyright owners might form and authorize copyright licensing bodies pursuant to the Ordinance to administer their rights.<sup>33</sup> If the activity in question is not an exempted act under the Ordinance, one or more appropriate license should be sought separately from copyright owners or their agents by users so as not to constitute an infringement. The major copyright licensing bodies in Hong Kong include:

Copyright Work	Copyright Owner	Major Copyright Licensing Body in Hong Kong
(1) Lyrics - literary work	Author	<ul style="list-style-type: none"> <li>• Composers and Authors Society of Hong Kong Limited (“CASH”).<sup>34</sup></li> </ul>
(2) Melody - musical work	Composer	
(3) Recording - sound recording  (4) Audio-visual recording	Producer	<ul style="list-style-type: none"> <li>• Photographic Performance (South East Asia) Limited (“PPSEAL”). It is a wholly-owned subsidiary of IFPI (Hong Kong Group) Limited (“IFPIHKG”).<sup>35</sup> Members include East Asia Record Production Co. Ltd., Emperor Entertainment (HK) Ltd., Media Asia Music Limited., etc.<sup>36</sup></li> <li>• Hong Kong Recording Industry Alliance Limited (“HKRIA”).<sup>37</sup> Members include Universal Music Hong Kong, Sony Music, Warner Music Hong Kong, EMI, Gold Typhoon, etc.<sup>38</sup></li> <li>• Depending on the copyright ownership in the sound and audio-visual recordings played, it may be necessary to obtain relevant licenses from both bodies at the same time.</li> </ul>

<sup>32</sup> Section 22 of the Copyright Ordinance.

<sup>33</sup> Part II, Division VIII of the Copyright Ordinance, Copyright Licensing.

<sup>34</sup> The website of Composers and Authors Society of Hong Kong Limited (CASH), <http://www.cash.org.hk/tc/>

<sup>35</sup> The website of Phonographic Performance South East Asia Ltd (PPSEAL), <http://www.ppseal.com/zh-hant/>

<sup>36</sup> See <http://www.ppseal.com/zh-hant/section2/main/1> (Last visit: 27 April 2016)

<sup>37</sup> The website of Hong Kong Recording Industry Alliance Limited (HKRIA), <http://www.hkria.com/b5/index.aspx>.

<sup>38</sup> See <http://www.hkria.com/b5/music-label.aspx>. (Last visit: 30 April 2017)

Meanwhile, three types of moral rights are established in the Ordinance:

- (a) the right to be identified as the author or director of the work (paternity right, see Section 89 of the Ordinance);
- (b) the right of author or director of the work to object to derogatory treatment of the work (integrity right, see Section 92);
- (c) the right of everyone not to have work falsely attributed to them (protection against false attribution, see Section 96).

## **2.3 Key Provisions Relating to Cover Version**

Gregory So, Secretary for Commerce and Economic Development Bureau states in his article that the Bill will not restrict the freedom of speech or affect the exceptions under the existing copyright law; and it is not targeting daily activities of Internet users.<sup>39</sup> The author agrees to the extent that under current copyright system, online posting of earnest performance of copyright works, if it is without authorization or where no exception shall apply, will constitute copyright infringement (civil liability only). However, there are still uncertainties, or “grey area” where further clarification is needed or which will be subject to court’s discretion should a lawsuit is filed (see below 2.4).

Key relevant provisions relating to cover version under the existing Ordinance and proposed amendments are listed out as follows.

### **2.3.1 Perform, Show or Play the Work in Public**

Unless the activity is an act expressly exempted by law, the performing, showing or playing of a copyright work in public without the authorisation by the relevant copyright owners or their agents constitutes an act of copyright infringement. The same principle should apply to the online streaming of the performances of the same copyright works as those set out in Section 27 of the Ordinance. This right will not attract any criminal liability, but might attract civil liability.

As mentioned, the melody and lyrics of a song, as well as its sound and audio-visual recordings are all protected copyright works. Under the scope of this discussion, what might happen is: (1) Live performance of songs or music (which does not involve the playing or showing of any sound or audio-visual recordings) generally requires a license from CASH only. (2) If the public performance involves the playing or showing of sound and audio-visual recordings of songs or music, licenses should also be obtained from the copyright owners of the recordings or the copyright licensing bodies representing them.

This above section is only in relation to performance but not communication process. The restricted acts of performance, showing or playing in public under the existing Section 27 concern with those take place in the presence of a public audience. The restricted acts of communication to public under the proposed new Section 28A concern primarily with cases where a work is communicated through an electronic transmission process to the public. Where the public showing and playing of a work is

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<sup>39</sup> Gregory So, Secretary for Commerce and Economic Development Bureau’s Article (Only available in Traditional Chinese) published on 9 December 2015, retrieved from the website of the Intellectual Property Department, [http://www.ipd.gov.hk/chi/intellectual\\_property/copyright/版權條例-理性討論法案優劣\\_網上誤傳易失焦點.pdf](http://www.ipd.gov.hk/chi/intellectual_property/copyright/版權條例-理性討論法案優劣_網上誤傳易失焦點.pdf) (Last visit: 27 April 2016)

to be preceded by an electronic transmission process, the acts may involve both the playing and showing of a work in public and communicating a work to the public.<sup>40</sup>

The Copyright (Amendment) Bill 2014 does not change any rights and their corresponding legal liabilities regarding the rights of performance, playing or showing of copyright works in public.

### **2.3.2 Proposed: Communication Right**

Over the latest consultation on parody<sup>41</sup>, copyright owners see the introduction of a technology-neutral communication right as the mainstay of the current round of legislative update, whereas users see this as removing some grey area in copyright protection.<sup>42</sup> New Section 22(1)(fa) in Clause 9(3) of the Bill 2014 proposes an exclusive right of copyright owners in a work to communicate the work to the public through any mode of electronic transmission.<sup>43</sup> Infringement of this right may carry both civil and criminal liabilities as provided under the new Section 28A and 118(8B) in Clauses 13<sup>44</sup> and 57(8)<sup>45</sup> of the Bill 2014 respectively.<sup>46</sup>

### **2.3.3 Proposed: Revised and New Copyright Exceptions**

The exceptions adopted under the existing Ordinance are a mixed of the UK “fair dealing” approach and the US “fair use” approach. Section 39 concerns “Criticism, review and news reporting”<sup>47</sup>, where fair dealing with a work for the specific purposes is allowed. Since the clear guideline is provided which is easily understood by the public at large, this reflects the “fair dealing” approach. On the contrary, the existing Section 38, 41A and 54A state respectively that for the purpose of research and private study, giving or receiving instruction, as well as public administration, fair dealing is required. Section 38 (3), 41A (2) and 54A (2) provide respectively that:

*In determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular*

- (a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;*
- (b) the nature of the work;*
- (c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and*

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<sup>40</sup> Legislative Council, Paper for the House Committee meeting on 13 November 2015, Report of the Bills Committee on Copyright (Amendment) Bill 2014, LC Paper No. CB(4)199/15-16, 12 November 2015, para. 56.

<sup>41</sup> Commerce and Economic Development Bureau, Treatment of Parody under the Copyright Regime Consultation Paper, 11 July 2013.

<sup>42</sup> Legislative Council Brief - Copyright (Amendment) Bill 2014, File Ref.: CITB 07/09/17, 11 June 2014, para. 8.

<sup>43</sup> Clause 9 (3) of the Copyright (Amendment) Bill 2014 provides “Section 22 amended (the acts restricted by copyright in a work) ... (3) Before section 22 (1) (g) – Add (fa) to communicate the work to the public (see section 28A)”.

<sup>44</sup> Clause 13 of the Copyright (Amendment) Bill 2014 provides “Section 28A added (Infringement by communicating to public).”

<sup>45</sup> Clause 57(8) of the Copyright (Amendment) Bill 2014 provides before section 118(9) add (8B) - (8D).

<sup>46</sup> Legislative Council, Paper for the House Committee meeting on 13 November 2015, Report of the Bills Committee on Copyright (Amendment) Bill 2014, LC Paper No. CB(4)199/15-16, 12 November 2015, para. 11.

<sup>47</sup> Copyright Ordinance Section 39, Criticism, review and news reporting.



*(d) the effect of the dealing on the potential market for or value of the work.*

These four factors are essentially the same as those in the US approach.<sup>48</sup>

Thus it is believed that Hong Kong adopts a two-step test in this regard, namely “a fair dealing approach needed to look at whether the use of a work is fair”, or “a fair use approach under for the specific purposes”.<sup>49</sup>

Under the Copyright (Amendment) Bill 2014, the relevant revised and new copyright exceptions include:

- (1) Clause 18 proposed Section 39 substituted (Criticism, review, quotation, and reporting and commenting on current events);<sup>50</sup>
- (2) Clause 19 proposed Section 39A added (Parody, satire, caricature and pastiche);<sup>51</sup>
- (3) Clause 75<sup>52</sup> and 76<sup>53</sup> introduced corresponding exceptions to rights in performances in respect of the fair dealing of performances or fixations in Section 241 and the new Section 241A. Same non-exclusive four factors for determining fairness have been included in these provisions for the sake of consistency and clarity.

In summary, the six additional exceptions are quotation (new Section 39(2)), commenting on current events (new Section 39(3)), parody, satire, caricature and pastiche (these four are set out in the new Section 39A). For these six additional exceptions and the original review and news reporting exceptions (the old “news reporting” is incorporated in the new provision), it sets out clearly that the court shall consider all the circumstances of the case and in particular the mentioned four factors in determining whether any dealing with a work is fair dealing. Such change ensures the consistency between the existing Section 39 and other exceptions, at the same time further highlights the characteristic of Hong Kong’s two-step approach.

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<sup>48</sup> 17 U.S. Code § 107 - Limitations on exclusive rights: Fair use

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

<sup>49</sup> Peter K. Yu, “Is Fair Use Applicable in Hong Kong? - Already Adopted!” 「公平使用原則在香港可行嗎? (二) 香港已採納公平使用大原則, 無須『轉軌』! 」, 21 December 2015, retrieved from Inmediahk, <http://www.inmediahk.net/node/1039617> (Last visit: 27 April 2016)

<sup>50</sup> Clause 18 of the Copyright (Amendment) Bill 2014 provides “Section 39 substituted”. Repeal the section. Substitute “39. Criticism, review, quotation, and reporting and commenting on current events”.

<sup>51</sup> Clause 19 of the Copyright (Amendment) Bill 2014 provides “Section 39A added (Parody, satire, caricature and pastiche).”

<sup>52</sup> Clause 75 of the Copyright (Amendment) Bill 2014 provides “Section 241 substituted”. Repeal the section. Substitute “241. Criticism, review, quotation, and reporting and commenting on current events”.

<sup>53</sup> Clause 76 of the Copyright (Amendment) Bill 2014 provides “Section 241A added” (Parody, satire, caricature and pastiche).

### 2.3.4 Proposed: Safe Harbour Provisions

The Copyright (Amendment) Bill 2011 proposed to introduce safe harbour provisions to limit online service providers' liability for copyright infringement on their service platforms caused by subscribers, provided that they meet certain prescribed conditions, including taking reasonable steps to limit or stop a copyright infringement when being notified. Clause 50 in the Bill 2014 proposed Part II, Division IIIA added (Limitations on Liability of Service Provider Relating to Online Materials), i.e. the new Section 88A – 88J.

In response to the query on cover version, the Government states that the safe harbour provisions can prevent the user's works from being taken down easily without any reason.<sup>54</sup>

## 2.4 Infringement

To answer the question of whether an act is an infringing one under Hong Kong copyright law, one might need to consider: What kind of act it is? Is such act restricted by copyright law? If yes, has the user obtained all relevant authorization from copyright owner? Alternatively, is there any ground of defence in relation to permitted acts or public interest so to exempt user from obtaining license?

As far as this article concerned on the topic of cover version, in order to eventually incur civil liability:

- (1) The copyright owner has the intention to hold users accountable for the potential infringement;
- (2) The copyright owner is able to provide sufficient evidence to support the claim of infringement;
- (3) The court entertains the claim;
- (4) The user fails to provide strong defence in the case examination, or the defence is not accepted by the court;
- (5) Civil liability might incur;
- (6) In instances where a great interest, commercial or otherwise, is at stake, a copyright owner can seek remedies including damages. The owner must prove the loss suffered by him or her as a result of infringement.<sup>55</sup>

Within the scope of this discussion, what might also happen with regards the proposed safe harbour provisions is:

- (1) The complainant issues a notice of alleged infringement to the service provider (e.g. YouTube);
- (2) Upon receipt of a notice of alleged infringement, the OSP will remove the material or disable access to the material or activity to which the alleged infringement relates without. The OSP is not required to verify the authenticity of the content entered into a notice of alleged infringement but should promptly take reasonable steps to send a written notice to the subscriber.

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<sup>54</sup> Copyright (Amendment) Bill 2014 - Facts & Truth and FAQs in details (Only available in Traditional Chinese), retrieved from the website of Intellectual Property Department, [http://www.ipd.gov.hk/chi/intellectual\\_property/copyright/Q\\_A\\_FAT\\_2014.htm](http://www.ipd.gov.hk/chi/intellectual_property/copyright/Q_A_FAT_2014.htm) (Last visit: 29 April 2017)

<sup>55</sup> Legislative Council Brief - Copyright (Amendment) Bill 2014, File Ref.: CITB 07/09/17, 11 June 2014, para. 18.

- (3) Provided the subscriber wishes to dispute or deny the alleged infringement and/or dispute the removal or disabling, he or she may send a counter notice to the service provider.<sup>56</sup>

Regarding whether “online posting of earnest performance of copyright works” will lead to civil liability, the author holds the view that such possibility is rather low, major reasons being:

- (1) Plaintiff (i.e. copyright owner) bears heavy onus of proof;
- (2) There has no precedent in Hong Kong;
- (3) It is believed that the business development mode in Hong Kong has already provided freedom of covering songs for users. There appears to be a common ground between users and owners: users believe that their personal, not-for-profit works should not conflict with the commercial interest of copyright owners; copyright owners believe that their push for legislative efforts to curb online copyright piracy is not targeting daily non-commercial activities of Internet users. In fact, the online streaming of the performances of copyright works has the effect of promotion for the original works.

Having said that, there still exists uncertainty in this regard. The following will discuss some crucial points with reference to the Government’s official documents and response on dealing with cover version under the Bill.

#### **2.4.1 Discussion: Consent or Authorization from Relevant Copyright Owners**

Civil liability might exist only when the copyright owner has the intention to take claim against the user. In response to the cover version issue, the Government states that YouTube has entered into a licensing agreement with CASH, authorising YouTube to communicate cover versions of songs. Some record companies have also entered into licensing agreements with YouTube, authorising YouTube to communicate cover versions of songs in which commercial sound recordings of the original works (e.g. instrumental or karaoke recording) are used.<sup>57</sup> But neither the name list of “some record companies” nor the member list of CASH has been disclosed.

It should be noted as in the obvious inconsistency and ambiguity in the term of “cover version” even in government statements. The Chinese interpretation of “cover version” seen in documents is twofold. It could either simply mean “covering a song”<sup>58</sup>

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<sup>56</sup> Scarlett Yu, “Study Legislative Council’s Documents on Copyright Registration” [《版權條例》立法會文件解讀——點先會被拉? ], 10 December 2015, retrieved from Inmediahk, <http://www.inmediahk.net/node/1039430> (Last visit: 30 April 2017)

<sup>57</sup> Copyright (Amendment) Bill 2014 - Frequently Asked Questions, Q5 “Will the posting of an earnest performance of a copyright work on the Internet constitute a copyright infringement?”, retrieved from the website of Intellectual Property Department, [http://www.ipd.gov.hk/eng/intellectual\\_property/copyright/Q\\_A\\_2014.htm#q5](http://www.ipd.gov.hk/eng/intellectual_property/copyright/Q_A_2014.htm#q5) (Last visit: 29 April 2017)

<sup>58</sup> Copyright (Amendment) Bill 2014 - Facts & Truth and FAQs in details (Only available in Traditional Chinese), retrieved from the website of Intellectual Property Department, [http://www.ipd.gov.hk/chi/intellectual\\_property/copyright/Q\\_A\\_FAT\\_2014.htm](http://www.ipd.gov.hk/chi/intellectual_property/copyright/Q_A_FAT_2014.htm) (Last visit: 29 April 2017); Gregory So, Secretary for Commerce and Economic Development Bureau’s Article (Only available in Traditional Chinese) published on 28 December 2015, retrieved from the website of the Intellectual Property Department, [http://www.ipd.gov.hk/chi/intellectual\\_property/copyright/版權陷阱\\_偏我遇上.pdf](http://www.ipd.gov.hk/chi/intellectual_property/copyright/版權陷阱_偏我遇上.pdf) (Last visit: 29 April 2017)

or an “acoustic cover” of a song<sup>59</sup> (which means singing with self-accompaniment). The legal effects of these two interpretations are apparently different. Generally speaking, “covering a song” has a broader meaning than “acoustic cover”. Acoustic cover does not involve playing or showing of any sound or audio-visual recordings, thus it usually requires a license from CASH only. Covering a song, however, further requires licenses obtained from the copyright owners for the melody, lyrics, sound and audio-visual recordings due to the possible involvement of sound playing and audio-visual recordings usage.

Meanwhile, although YouTube is a very popular video sharing site, there are also many users uploading cover songs directly on Facebook in practice. The Government does not mention, nor can it be found online that Facebook has signed similar licensing agreements with any relevant copyright licensing organizations in Hong Kong. Then what method should be applicable for these users?

#### **2.4.2 Discussion: “Earnest Performance”**

Whether “online posting of earnest performance of copyright works” can invoke exceptions depends on its purpose. Accordingly, if the uploaded cover is out of tune, the new Section 39A might apply as the user might argue that he or she was intended to comment on the singing skills of the original singer. However, if the song is nicely covered which does not involve quotation or commenting on current events, it is likely to fall outside the scope of exception.<sup>60</sup>

It makes sense to some extent, as a cover is a particular kind of version: a new recording or performance of an older song that exists in the memories of musicians and audiences because of a strong, previous recorded version, and for which authority and authenticity are understood to be shared by the original performer and the covering performer.<sup>61</sup> However, for netizens who do not aim to gain profit from covering a song, if the exception is not applicable because their act is “more akin to a mere expression of feelings or showing of talent”, the rationale therein is questionable. The expectation that every second or note of recorded music must be paid for and therefore cannot be utilised without permission is too rigid and ignores the fact that the creativity of today builds on that of the past often without any compensation being paid.<sup>62</sup>

#### **2.4.3 Discussion: “Commercial Nature”**

When the purpose of covering a song makes invoking exceptions possible, in determining whether the dealing with a work is fair dealing, the court “shall take into account all the circumstances of the case and, in particular - (a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature”. A legislator concerned that whether netizens’ acts, such as uploading materials on the web and receiving advertising

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<sup>59</sup> Frequently Asked Questions, Q10, retrieved from the Chinese website of Intellectual Property Department, [http://www.ipd.gov.hk/chi/intellectual\\_property/copyright/Q\\_A\\_FAT\\_2014.htm#q10](http://www.ipd.gov.hk/chi/intellectual_property/copyright/Q_A_FAT_2014.htm#q10) (Last visit: 27 April 2016)

<sup>60</sup> See Peter K. Yu, “Law Scholar’s Comment on the Puzzling Bill 2014” 「法學者點評：令人費解的版權修訂條例（2014）」, 17 June 2014, retrieved from Inmediahk, <http://www.inmediahk.net/node/1023682> (Last visit: 29 April 2017)

<sup>61</sup> Solis. G, I Did It My Way: Rock and the Logic of Covers, *Popular Music and Society*, 2010, 33/3.

<sup>62</sup> *Emerson v Davies* 8 F. Cas 615 at 619 (C.C. Mas. 1845); W Landes and R Posner, *An Economic Analysis of Copyright Law*, *J. Legal Stud.* 1989, 325 at 332.

payments and paying to boost or promote one's posts constitute a dealing of commercial nature and would therefore not qualify for the copyright exception under the proposed Section 241 in relation to fair dealing with a performance or fixation. The Administration then advised that whether a dealing is for a profitmaking purpose or of commercial nature is only one of the factors for consideration. "Even if the dealing in question is for a profit-making purpose or of commercial nature, it does not automatically render it unfair."<sup>63</sup>

However, how should the "commercial purposes" be defined? Under the circumstances where, for (1) singers who have already gain popularity (such as Kandy from Sugar Club) or famous blogger; and (2) netizens who score a massive smash because of uploading their song covers - if they wholeheartedly cover a copyright song, which objectively promotes the original work and possibly brings them economic benefits immediately or afterwards, does it constitute a "commercial nature"? If the covering acts have been going on for a while, how should the starting point be determined? This is all unclear for now and future clarification is needed.

#### **2.4.4 Discussion: Criminal Liability and Statutory Construction**

In view of the proposed communication right, end users concern might attract criminal liability due to infringement of the said right. But the author believes that, generally speaking, the possibility that an ordinary netizen sees his/her criminal liability resulting from uploading cover version would be rather low for reasons set out below.

For criminal prosecution, there could have been no viable case brought to court unless the investigation was supported if not initiated by a request from the copyright owner, and the subsequent prosecution was also with the full support of the copyright owner, subject further to a criminal standard of proof and a lack of knowledge defence".<sup>64</sup> To date, no claim has been found against the so-called secondary creation and parody works by invoking Section 118(1) (g) of the Ordinance.<sup>65</sup> The amended Ordinance seeks to clarify the threshold of criminal liability. As long as it does not cause economic loss or replace the original work, it will not attract criminal liability.<sup>66</sup>

Further, from a law maker's perspective, the Government states that its policy intent is not to "criminalize" any acts which attract only civil liabilities under the Copyright Ordinance by invoking Section 161 of the Crimes Ordinance.<sup>67</sup> The policy intent of introducing the concept of communication right and corresponding criminal sanctions in the Ordinance is to combat large-scale online copyright piracy.<sup>68</sup>

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<sup>63</sup> Legislative Council, Paper for the House Committee meeting on 13 November 2015, Report of the Bills Committee on Copyright (Amendment) Bill 2014, LC Paper No. CB(4)199/15-16, 12 November 2015, para. 59-60.

<sup>64</sup> Hong Kong Bar Association Special Committee on Intellectual Property, Hong Kong Bar Association - Special Committee on Intellectual Property Position Paper on the Copyright (Amendment) Bill 2014 and the 3 Amendments Proposed by Certain LegCo Members, 17 February 2016, para. 6, retrieved from the website of Hong Kong Bar Association.

<sup>65</sup> Legislative Council Office Record of Proceedings, 13 June 2012, 40-41.

<sup>66</sup> Frequently Asked Questions, Q10, retrieved from the Chinese website of Intellectual Property Department, [http://www.ipd.gov.hk/chi/intellectual\\_property/copyright/Q\\_A\\_FAT\\_2014.htm#q10](http://www.ipd.gov.hk/chi/intellectual_property/copyright/Q_A_FAT_2014.htm#q10) (Last visit: 27 April 2016)

<sup>67</sup> Legislative Council, Paper for the House Committee meeting on 13 November 2015, Report of the Bills Committee on Copyright (Amendment) Bill 2014, LC Paper No. CB(4)199/15-16, 12 November 2015, para. 32.

<sup>68</sup> Ibid. para.17.

There has been voice challenging the reliability and credibility of such official statements. Whether and to what extent the courts may make use of extrinsic materials generally as an aid to statutory interpretation is a matter of continuing debate in Hong Kong.<sup>69</sup> Also, as legislator pointed out, in the case of *CHAN Nai-ming* (“the Big Crook”)<sup>70</sup>, the pressing of alternative charges under Section 161 of the Crimes Ordinance<sup>71</sup> in the Big Crook case was contrary to what the then Secretary for Security had said in the resumption of the Second Reading debate of the relevant bill on 21 April 1993.<sup>72</sup> The credibility of officials’ speech in Legislative Council is questioned and challenged.

### 3. Why Is the Bill So Controversial?

#### 3.1 “Loving You” Incident

On 7 December 2015, right before the resumption of the Second reading of the Bill 2014, Chief Executive Mr. Leung Chun-ying performed Beyond’s famous song “Loving You” at a banquet held by the Business and Professionals Alliance for Hong Kong. He uploaded the video on Facebook later. This action was questioned to have violated the Copyright (Amendment) Bill 2014. The next day, Mrs. Leung Ka-lai, Director of the Intellectual Property Department, explained in an interview of Radio Television Hong Kong (RTHK) that, as Mr. Leung is a public figure, it was possible for him to invoke the exemption of commenting on current events. On 9 December, the Chief Executive’s Office said that they had retroactively applied for the relevant licenses and paid the royalties and HKD\$600 license fee valid for three months to CASH.

However, Ricky Fung, CEO of the International Federation of the Phonographic Industry (Hong Kong Group) Limited (“IFPI”), stated in a radio interview that despite obtaining licenses from CASH, royalty payment to IFPI was also necessary. He said normally one needs to ask the producer for the copyright unless the copyright of the song had already been authorized to some sharing website such as YouTube; and if the copyright owners think their copyright is infringed, they can require the user to apply

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<sup>69</sup> Eamonn Moran, Frances Hui, Allen Lai, Mabel Cheung & Angie Li, Government Counsel of Law Drafting Division of Department of Justice of Hong Kong Special Administrative Region, *Legislation about Legislation - A general overview of Hong Kong’s Interpretation and General Clauses Ordinance* (Cap.1), fn. 58, retrieved from the website of Department of Justice, <http://www.doj.gov.hk/chi/public/pdf/2010/ldd20101118e.pdf> (Last visit: 30 April 2017)

<sup>70</sup> *TMCC 1268/2005 HKSAR v CHAN NAI MING*; *HCMA 1221/2005 HKSAR v CHAN NAI MING*; *FAMC 0061/2006 HKSAR v CHAN NAI MING*; *FAMC 0061A/2006 HKSAR v CHAN NAI MING*; *FACC 0003/2007 CHAN NAI MING v HKSAR*. In 2005, Customs and Excise Department took action against an Internet user who, through the use of Bit Torrent software, uploaded three infringing movies onto the Internet for file sharing. The uploader (who used an alias “the Big Crook” (古惑天王) on the Internet to disguise his true identity) was prosecuted and sentenced to three months’ imprisonment. This case is a landmark case in which the court examines what constitutes “to such an extent as to affect prejudicially the copyright owner”. See also Bills Committee on the Copyright (Amendment) Bill 2014, *Criminal Cases in Copyright Infringement*, LC Paper No. CB(4)11/14-15(01), September 2014, para. 8-9.

<sup>71</sup> Crimes Ordinance (Chapter 200) Section 161, the Access to computer with criminal or dishonest intent.

<sup>72</sup> Legislative Council, Paper for the House Committee meeting on 13 November 2015, Report of the Bills Committee on Copyright (Amendment) Bill 2014, LC Paper No. CB(4)199/15-16, 12 November 2015, para. 29-32.

for licenses; yet copyright owners are usually tacitly consent to this usage nowadays.<sup>73</sup> Charles Peter Mok, a legislator representing IT sector, doubted that people would think Chief Executive enjoyed privileges if the exception was applied due to his being a public figure.<sup>74</sup>

Adrian Chow, a music author, posted on Facebook that Leung Chun-ying needs 6 more licenses for covering and uploading “Loving You”, including mechanical license and synchronization license from music publisher, as well as mechanical license and synchronization license from producer, for reproduction right and synchronization right of lyrics/songs and sound recording respectively; and streaming license from CASH and from IFPI/HKRIA respectively. (He subsequently added that he was not sure whether CASH’s streaming license includes reproduction right of lyrics/songs.)<sup>75</sup> In Gregory So’s reply to Hon CHAN Chi-chuen, a member of People Power, the Chief Executive’s Office had tried to contact with the copyright owner of the sound recording; if founded, they were willing to pay the fee.<sup>76</sup>

Regardless of the correctness of Adrian Chow’s words, the event itself was big enough to draw our attention. As Chief Executive (not a general official), having all the assistance from Chief Executive’s Office and other staffs, Mr. Leung should have had stronger awareness and ability to handle these legal issues. However application for licenses was made only after Mr. Leung was questioned. The issue of cover versions involves many parties, relevant necessary information is yet fully open to public. Even though one hopes to comply with relevant requirements set by law, what might happen is that he/she (1) does not know if application for licenses is needed since the licensing bodies’ member list is not fully open; (2) does not know which licensing bodies should be applied to; (3) does not know what type of and how many licenses should be applied for. Even the Chief Executive had missed the proper obtainment of licenses in advance, let alone the ordinary users. Application procedures for permitted use are complicated, leading to people’s concern that they bear the risk of liabilities due to the missing of

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<sup>73</sup> Hong Kong Economic Times, “IFPI: Leung Chun-ying should Pay Copyright Royalties to IFPI” [國際唱片業協會指梁振英翻唱歌曲須向 IFPI 支付版稅], 10 December 2015, retrieved from <http://topick.hket.com/article/1067116/%E5%9C%8B%E9%9A%9B%E5%94%B1%E7%89%87%E6%A5%AD%E5%8D%94%E6%9C%83%E6%8C%87%E6%A2%81%E6%8C%AF%E8%8B%B1%E7%BF%BB%E5%94%B1%E6%AD%8C%E6%9B%B2%E9%A0%88%E5%90%91IFPI%E6%94%AF%E4%BB%98%E7%89%88%E7%A8%85> (Last visit: 30 April 2017)

<sup>74</sup> Radio Television Hong Kong, “Charles Mok: People Would Think Chief Executive Enjoyed Privileges If the Exception Was Applied Due to His Being a Public Figure” [莫乃光: 若特首作為公眾人物可獲豁免令人覺得有特權], 9 December 2015, retrieved from <http://news.rthk.hk/rthk/ch/component/k2/1228553-20151209.htm> (Last visit: 8 May 2017)

<sup>75</sup> Hong Kong Economic Times, “Composer and Author Adrian Chow: Leung Chun-ying Needs 6 More Licenses for Covering and Uploading ‘Loving You’” [創作人周博賢指梁振英翻唱及上載《喜歡你》尚欠 6 個牌照], 10 December 2015, retrieved from <http://topick.hket.com/article/1067097/%E5%89%B5%E4%BD%9C%E4%BA%BA%E5%91%A8%E5%8D%9A%E8%B3%A2%E6%8C%87%E6%A2%81%E6%8C%AF%E8%8B%B1%E7%BF%BB%E5%94%B1%E5%8F%8A%E4%B8%8A%E8%BC%89%E3%80%8A%E5%96%9C%E6%AD%A1%E4%BD%A0%E3%80%8B%E5%B0%9A%E6%AC%A0%E5%80%8B%E7%89%8C%E7%85%A7> (Last visit: 30 April 2017)

<sup>76</sup> Hong Kong Economic Journal, “Leung Chun-ying’s Cover of ‘Loving You’ Did Not Pay for Copyright Royalties” [梁振英翻唱喜歡你未付伴唱音樂版權費], 20 January 2016, retrieved from <http://www2.hkej.com/instantnews/current/article/1226239/%E6%A2%81%E6%8C%AF%E8%8B%B1%E7%BF%BB%E5%94%B1%E5%96%9C%E6%AD%A1%E4%BD%A0%E6%9C%AA%E4%B9%8E4%BC%B4%E5%94%B1%E9%9F%B3%E6%A8%82%E7%89%88%E6%AC%8A%E8%B2%BB> (Last visit: 30 April 2017)

certain authorization steps. Users are worried that the Bill's passing would have a chilling effect on network activities, and even the cultural industries.

### 3.2 Social and Political Environment

The introduction and scrutiny of the Bill has evolved from a legal event into a political one. During the process of the scrutiny of the Bill, in the 96 hours of discussion within more than three months, 38 hours were used on head-counting, 29 hours on the motion for adjournment, and then the rest (less than 29 hours) were spent on the examination. So little time was spent on reviewing the substantive issues that the Bill was still in the Committee Stage after given the Second Reading, leading to passing the Bill is still nowhere to be seen.<sup>77</sup>

Both the Law Society of Hong Kong and Hong Kong Bar Association have issued their Position Paper respectively to express their supportive attitude towards the Bill from the perspective of legal professionals. Yet the tremendous response to the Bill it mirrors the unique political environment in Hong Kong. Glacier Kwong, spokesperson of Keyboard Frontline, believes that the controversy is due to the lack of trust to the government. She states people support the protection of copyright as it encourages creative thoughts and works, but it seems that people do not trust the Government no matter what; if this is a democratically elected government, perhaps people are willing to pass the Bill first and review afterwards.<sup>78</sup> Winnie Tam, Chairman of the Hong Kong Bar Association, expresses her view too. She believes that Bill 2014 causes controversy because of the sensitive political environment. Some politicians and public figures who have knowledge of law wrongly link civil rights and freedom, and interpret the Bill as one way that the Government uses to suppress freedom.<sup>79</sup> And the Leung Chun-ying incident makes both him and the Bill the focal point of public comments, which happens to illustrate the Bill's impact if it was to be passed and thus led to panic among the public.

In fact, uploading cover version might already constitute infringement under existing copyright law in Hong Kong. Such content is not newly added to the law by the Bill. However, just as what Winnie Tam said, netizens think it is their right to use copyrighted works when right owners have always taken a laissez-faire attitude.<sup>80</sup> The Government might need to consider enhancing education in terms of copyright protection and promote citizen's awareness of intellectual property right, especially in today's new information society.

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<sup>77</sup> See Ma Fung-kok, "On the Death of the Bill" 「悼念版權草案壽終正寢」, Hong Kong Economic Journal, A19, 15 April 2016. (Last visit: 30 April 2017)

<sup>78</sup> BBC (Chinese Website), "Why Is the Copyright Amendment Controversial" 「分析：香港版權法修訂為何『惹人怕』」, 16 December 2015, retrieved from [http://www.bbc.com/zhongwen/trad/china/2015/12/151216\\_ana\\_hongkong\\_new\\_copyright\\_law](http://www.bbc.com/zhongwen/trad/china/2015/12/151216_ana_hongkong_new_copyright_law) (Last visit: 30 April 2017)

<sup>79</sup> Ming Pao, "Winnie Tam Criticized the Politician for Appalling Comments and Encouraged the Government to Promote Creative Commons" 「譚允芝：版權例與公民自由不掛鉤 斥熟法律政治人危言聳聽 促政府倡林夕式共享創意」, 15 February 2016, retrieved from [http://news.mingpao.com/pns/dailynews/web\\_tc/article/20160215/s00002/1455471616659](http://news.mingpao.com/pns/dailynews/web_tc/article/20160215/s00002/1455471616659) (Last visit: 30 April 2017)

<sup>80</sup> Ming Pao, "Users Take It for Granted Due to Copyright Owners' Laissez-faire Attitude" 「指網民反彈因『版權持有人一直放任』」, 15 February 2016, retrieved from [http://news.mingpao.com/pns/dailynews/web\\_tc/article/20160215/s00002/1455471618968](http://news.mingpao.com/pns/dailynews/web_tc/article/20160215/s00002/1455471618968) (Last visit: 30 April 2017)



The Government should act proactively when dealing with sensitive issue, in particular, on network behaviour. The Intellectual Property Department released the “Facts & Truth and FAQs in details” (Only available in Traditional Chinese) on its website and strengthened efforts to clarify the concerns after the Bill 2014 had been interpreted as “Internet Article 23” on the Internet (particularly seen in Facebook). By this time, the negative image of the legalisation had already rooted in people’s mind. Aside from the political atmosphere, people’s keen challenge in courts’ discretion shows they have to some extent lost faith on judicial independence and fairness.

Meanwhile, some views from the media press and public figures are radical, which lack basic objectivity and authenticity. Although extreme comments have always been part of the media ecosystem in Hong Kong, such appalling voice has prevented the Bill 2014 from being objectively scrutinized and reviewed. It will further impede the update and development of copyright regime in Hong Kong.

#### 4. Suggestion and Conclusion

In relation to cover version, the great dilemma that faces the spirit of social or cultural innovation is the degree to which the law can respond to iron out the apparent roadblocks. The author finds that both the Government and public institutions, for example, licensing bodies, can further their role in helping with the development of creative industries by cultivating Creative Commons (“CC”) in Hong Kong.<sup>81</sup> Traditionally, Licensing bodies adopt the rule of “all rights reserved”, which lacks flexibility. A licensing body for authors, lyricists and composers in the Nederland, Buma/Stemra has cooperated with CC, allowing their members to, besides commercial exploitation through Buma/Stemra, license non-commercial exploitation of their musical works through CC themselves, strictly for promotional purposes. Authors that are already a member of Buma/Stemra can therefore license non-commercial use according to the CC conditions within the membership context of – and the commercial exploitation by – Buma/Stemra.<sup>82</sup> Another successful example of music sharing based on CC is Jamendo Music, founded in Luxembourg in 2004, which is the first platform to legally share music for free from any creator under CC license. It aims to connect musicians and music lovers from all over the world. Besides, Australia government has provided funds for several research relating to CC and its interaction with the government.<sup>83</sup>

In Hong Kong, the renowned song authors Albert Leung<sup>84</sup> and Wyman Wong<sup>85</sup> have stated in their online special column and Facebook that netizens are welcome to use their lyrics. Winnie Tam encouraged the Government to promote Creative Commons: if there are more copyright owners expressing consent, people can have an

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<sup>81</sup> See the website of Creative Commons Hong Kong, <http://hk.creativecommons.org/>

<sup>82</sup> <https://www.bumastemra.nl/en/faq/creative-commons/>

<sup>83</sup> Brian Fitzgerald (Ed.), *Open Content Licensing: Cultivating the Creative Commons*, Sydney, Australia: Sydney University Press, 2007.

<sup>84</sup> Albert Leung, “Welcome to Use My Lyrics” 「歡迎惡搞我的歌詞」, 9 December 2015, retrieved from Apple Daily, <http://hk.apple.nextmedia.com/supplement/columnist/art/20151209/19404221> (Last visit: 8 May 2017)

<sup>85</sup> Wyman Wong’s Facebook post on 9 December 2015. (Last visit: 8 May 2017)

idea about which works is usable for “secondary creation” without considering legal risks.<sup>86</sup>

The Copyright (Amendment) Bill 2014 was withdrawn from the agenda subject to the passing of the motion for adjournment on 14 April 2016, which means its temporary end. Although the Law Society of Hong Kong and Hong Kong Bar Association have issued their Position Paper respectively, and Winnie Tam has explained to the public for many times, it cannot bring the Bill out of the deadlock of filibuster. The situation keeps unchanged for now, as some users wish. The Bill remains questionable. And Winnie Tam’s call for passing first and reviewing the details afterwards,<sup>87</sup> is unable address the public concerns given this sensitive political environment.

Still, in the scope of this discussion, there admittedly remain some doubts and uncertainties, yet which the author believes are minor and can be discussed and settled later. Overall, the Bill 2014 will have positive impact on the update of copyright regime to catch up with international development. The author believes that the grey areas in the field of law and queries should not be an excuse to simply withdraw it. Now the Bill 2014 ends. Is it a victory, or defeat?

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<sup>86</sup> Ming Pao, “Winnie Tam Criticized the Politician for Appalling Comments and Encouraged the Government to Promote Creative Commons” [譚允芝：版權例與公民自由不掛鉤 斥熟法律政治人危言聳聽 促政府倡林夕式共享創意], 15 February 2016, retrieved from [http://news.mingpao.com/pns/dailynews/web\\_tc/article/20160215/s00002/1455471616659](http://news.mingpao.com/pns/dailynews/web_tc/article/20160215/s00002/1455471616659) (Last visit: 30 April 2017)

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