

Bills Committee on the Copyright (Amendment) Bill 2011

Derogatory Treatment

Purpose

At the meeting on 23 July 2011, Members of the Bills Committee requested the Administration to elaborate on the definition of “derogatory treatment of a work” under section 92 of the Copyright Ordinance (Cap. 528). This paper provides the information required.

Introduction

2. Broadly speaking, there are two categories of rights in relation to copyright works, namely (a) alienable *economic rights* which allow copyright owners to derive financial reward or benefit from the exploitation of their works; and (b) inalienable *moral rights* which allow the authors of literary, dramatic, musical and artistic works, and the directors of films to preserve their relationship with the creation of their works. Under the existing copyright regime, the “right to object to derogatory treatment” is one of the established moral rights enjoyed by the authors and the directors.

International obligation

3. Article 6bis(1) of the Berne Convention provides that -

“Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”

4. The Berne Convention recognises the moral rights of the author to (a) be identified as the author or director of his work (“the paternity right”); and (b) object to any derogatory treatment of his work (“the integrity right”). The Berne Convention is applicable to Hong Kong. We have fulfilled the international treaty obligation to protect these two kinds of moral rights through incorporating appropriate provisions into the Copyright Ordinance since its enactment in 1997. Similar provisions are found in the copyright laws of other common law jurisdictions such as Australia, Canada, New Zealand and the United Kingdom.

Moral rights under the Copyright Ordinance

5. Division IV of Part II of the Copyright Ordinance affords protection to three kinds of moral rights¹, namely -

- (a) the right to be identified as author or director;²
- (b) the right to object to derogatory treatment of a work;³ and
- (c) the right not to have a work falsely attributed to him as author or director.⁴

6. While the economic rights relating to copyright works are assignable, the moral rights are not.⁵ In this regard, the right to be identified as author or director, and the right to object to derogatory treatment of a work remain to be held by the author or director regardless of any transfer of the economic rights, whereas the right to object to false attribution may be exercised by someone other than an author or director.

7. An author or director may commence proceedings against an infringer of his moral rights to seek appropriate remedies, such as injunction and damages. Such action is civil in nature. In other words, an infringement of the moral rights (including the integrity right against derogatory treatment) does not attract criminal liability.

Meaning of “derogatory treatment”

8. Section 92 of the Copyright Ordinance, which is modelled on section 80 of the UK Copyright, Designs and Patents Act 1988, defines the concept of “derogatory treatment” and specifies certain acts (e.g. commercial publication and performance in public of a derogatory treatment of a work) which would amount to infringement of the integrity right.

¹ Although these three kinds of rights are all termed moral rights, only the paternity and integrity rights as respectively stated in paragraphs 4, 5(a) and (b) are “authors’ rights” as contemplated by the Berne Convention.

² Section 89(1), Copyright Ordinance.

³ Section 92(1), Copyright Ordinance.

⁴ Section 96, Copyright Ordinance.

⁵ Section 105, Copyright Ordinance.

9. According to section 92, “treatment” of a work means “any addition to, deletion from or alteration to or adaptation of the work”, but excludes a translation of a literary or dramatic work; or an arrangement or transcription of a musical work involving no more than a change of key or register.⁶ In addition, the treatment of a work is derogatory if it amounts to being prejudicial to the honour or reputation of the author or director through (a) distortion; (b) mutilation; or (c) other modifications of this work.⁷ Details are as follows –

- (a) a distortion of a work involves some form of twisting or perversion of it;
- (b) mutilation of a work involves some form of cutting or destruction so as to render it imperfect; and
- (c) other modifications of a work may cover any addition to, deletion from or alteration to or adaptation of the work which, although not a distortion or mutilation, is nevertheless prejudicial to the honour or reputation of the author or director.

10. To our best knowledge, there is no local judicial authority about infringement of integrity right, nor is there a successful claim in the UK. According to reported cases in the UK,⁸ the court held that -

- (a) the mere fact that the author or director is himself aggrieved by what has occurred is insufficient to support a claim for derogatory treatment;
- (b) not any treatment of a work is actionable as an infringement of the integrity right; and
- (c) only when the treatment in question (be it distortion, mutilation or otherwise) is prejudicial to the honour or reputation of the author or director, does it amount to derogatory treatment.⁹

⁶ Section 92(2)(a), Copyright Ordinance.

⁷ Section 92(2)(b), Copyright Ordinance; paragraphs 11-43 and 11-44 of *Copinger and Skone James on Copyright* (Vol. One, 16th Edition)

⁸ *Tidy v Trustees of the Natural History Museum* [1995] 39 I.P.R. 50; *Confetti Records Ltd v Warner Music UK Ltd* [2003] EWHC 1274 (Ch); *Pasterfield v Denham and Another* [1999] F.S.R. 168.

⁹ In *Pasterfield v Denham and Another* [1999] F.S.R. 168, the claimants argued that their drawings had been subject to derogatory treatment because certain details had been omitted or altered and colours had been changed by the defendants. The court held that in order to succeed in a claim for derogatory treatment of a work, a claimant had to prove that “the treatment accorded to his work is either a distortion or mutilation that prejudices his honour or reputation as an artist. It is not sufficient that the author is himself aggrieved by what has occurred.” Upon reviewing the facts of the case, the judge also opined that while there were trivial differences between the original and altered works, “it would be wrong to elevate such differences to derogatory treatment”. The judge therefore held that the claimants’ evidence failed to establish that there was an objective prejudice to honour or reputation.

11. In reviewing the UK case law, a legal scholar opines that there can be no breach of the integrity right “without evidence of prejudice to honour or reputation. It has also been held that the existence of such prejudice must be objectively demonstrated. In providing objective evidence of prejudice, the following factors have been considered to be of relevance: public association of the author with the treatment complained of, the existing reputation of the author, the author’s own intended exploitation of the work, and the public’s ability to recognize the allegedly derogatory nature of the treatment of a work.”¹⁰

Moral rights under the Copyright (Amendment) Bill 2011

12. The Bill does not change the existing legal framework for the protection of moral rights. It remains the case that an infringement of the moral rights (including the right to object to derogatory treatment) does not attract criminal liability.

13. Members are invited to note the information provided in this paper.

Commerce and Economic Development Bureau
Intellectual Property Department
October 2011

¹⁰ John Griffiths, “Not Such a ‘Timid Thing’: The United Kingdom’s Integrity Right and Freedom of Expression” in *Copyright and Free Speech* (edited by J. Griffiths and U. Suthersanen), Oxford University Press (2005), p. 220.