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IFPI's Further Comments on a Parody Exception in Hong Kong

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INTRODUCTION

The existing copyright framework in Hong Kong already provides a list of specific permitted acts which may be done without the copyright owners' permission, including, inter alia, criticism, review, reporting current events, research and private study, and use for educational purposes etc. Any further expansion of the list of exceptions or modifications of the existing criminal threshold needs to be carefully considered, to avoid creating uncertainties in the market with respect to the scope of permitted acts.

If the Government nevertheless decides to proceed with a public consultation on expanding copyright exceptions in Hong Kong, the risk of tipping the balance of interests against copyright owners could be minimised by:

- (1) carefully consider the objectives, the intended effects and negative impacts of any new exception with solid evidence and justification (e.g. create value and promote creativity in the society);
- (2) appropriately define the scope of the exception to avoid undermining right holders' legitimate interests and balance the interests of all stakeholders;
- (3) comply with the "three-step" test under TRIPS agreement.

SHOULD OFFENSIVE MATERIALS QUALIFY AS "PARODY"?

A new "fair dealing" exception for parody and satire in Hong Kong should be narrowly crafted to ensure that it is not misinterpreted as permitting derogatory treatment of copyright-protected content. For illustration purposes, the annex of this paper provides a few examples commonly found on social networking sites and forums in Hong Kong. These examples illustrate that many of the so-called "parody" or "mash-ups" are not only offensive, but were made with the intention to diminish the reputation of the performing artist and the sound recording. It is clear that in these cases, the so called "parody" is unlikely to create any value or promote creativity in the society.

AN ONEROUS CRIMINAL THRESHOLD FOR A COPYRIGHT OFFENCE IS UNDESIRABLE

It is also important to note that Article 61 of the TRIPS agreement requires WTO members to provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale".

In the 2009 US China WTO dispute, the Panel concluded that “commercial scale” activity means something different than “commercial” activity. The Panel also explained that the term “commercial scale” in Article 61 meant “the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market”. Since online infringing activities often cause devastating harm to copyright owners regardless of any profit or trade or business motive, it is extremely important to criminalize acts in which the person engaging in infringement is not for the purpose of or in the course of trade or business.

For example, if someone makes available or copies one single pre-release music track, OR makes available one music file/link to allow many people to access, OR makes available a large number of music files/link on the Internet without right holders’ authorisation, even it is not for the purpose of or in the course of any trade or business, it would cause serious damage to copyright owners’ legitimate interests. Any change to the current criminal threshold to make it more difficult for Hong Kong to carry out criminal actions against the abovementioned acts would cause undesirable effect to the criminal enforcement system in Hong Kong.

THE OBJECTIVES AND INTENDED EFFECTS OF A PARODY EXCEPTION

All of the above-mentioned issues and views prompt us to question the purpose and intended effects or value of introducing a parody exception in Hong Kong. Under existing practice and the provisions of the current Copyright Ordinance, broadcasters and entertainers are able to produce works of parody without difficulties or objections from right owners. Any offensive, defamatory or derogatory materials normally would not qualify as “parody” even in overseas jurisdictions. The very purpose of copyright law is to encourage creativity and therefore it is very important to consider whether the so-called “parody”, “mash-up works”, or “derivative works” serve the purpose of encouraging creativity or in fact infringe others’ copyright which took the original creators significant time and efforts to create, with no additional value to the society.

Unless and until there are solid evidence showing the benefits and a demonstrable need of introducing a parody exception in Hong Kong, we are of the view that the exception should be carefully considered in a thorough public consultation in next round of copyright law amendment.



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Annex 1 – Potential offensive treatment of the performing artist “Mr”

[高登音樂台][宇宙巨BAND - Mr.] 抄歌之王 - 含冤莫白版 (原曲:K 歌之王)
<http://www.youtube.com/watch?v=fGx7e9cvH9E&feature=related>



[高登音樂台] 隨時抄中 (原曲: Mr. - 零時起哄 & Such Great Heights)
<http://www.youtube.com/watch?v=vzKdniAEkos&feature=related>



Annex 2 – Potential offensive treatment of Fiona Sit’s album “August Girl”

Original album cover



Distorted version 1



Distorted version 2



Distorted version 3

Annex 3 – Potential offensive treatment of performing artist Kay Tse

<http://www.youtube.com/watch?v=MQ4VRquz52E>

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