

3rd November, 2011

Chairperson,
Bills Committee on Copyright Amendment (2011) Bill
c/o Secretariat
Legislative Council
Government of the Hong Kong SAR

Dear Sirs/Madam,

Re: Parody the mis-conception by the general public in Hong Kong

Copyright Amendment (2011) Bill

The International Federation of the Phonographic Industry (Hong Kong Group) Limited is an industry body association representing the majority of record producers in Hong Kong. The efforts of the producers along with their contracted recording artistes who record works form music composers accounts for much of the music related economic sector development including telecommunication, internet, home audio visual electronics, mobile devices, as well as the core industry being record distribution both physical and online, concert promotion, artist management and Karaoke licensing etc.

We fully support in principle the passing of the Copyright Amendment (2011) Bill within this LegCo term even though we believe that there is a room for improvement.

Following the heated discussion on Parody, that is not a subject matter of the proposed Amendment Bill, before the LegCo Bills Committee on Copyright Amendment Bill (2011) on 23 July 2011, and further noting that the recent writing on the online forum aiming to ask the government to include parody exception well beyond the scope of parody in our copyright law by using scare tactics, sometimes, verbal attack against those who oppose it. We do take verbal assault just as serious as physical attack which should be discouraged in our civilized society. Nevertheless, their intention is clearly writing on the wall, they believe that they should have an absolute control the cyber world, using whatever materials that have been successfully attracted the mass audience (such as popular music, comic book characters, popular TV drama serious)

they like to create their version of creation in order to get the attention of the public on their views on certain matters without any acknowledgement of and respect for the author of the underlying work. Let alone getting his prior consent. In the premises, we cannot resist the temptation of submitting our views on parody.

We believe that it would not be amiss to point out, probably to the surprise of parodists, that copyright is a statutory creation that protects the freedom of expression and the authorship is also a human right which ought to be respected and protected (see discussion below). Copyright facilitates creation over the Internet and must be protected. Any attempt to widen the fair dealing defence beyond the international norms would only lead to destructive creation; not creative destructive that the parodists would make us believe.

We would like to make the following observations and comments for the Bills Committee to consider:

A. Background

(1) The scope of Parody

First and foremost, one must understand the scope of parody that relates only to the underlying work or for wider purposes e.g. social commentary.

In common law countries such as the **such as the UK, New Zealand, and Hong Kong.**, Parody may be assimilated to the fair dealing exemption **for the purpose of criticism** or news reporting¹ so long as the parody meets the statutory requirement of sufficiently identifying the original work and its author² and that its limit of use must not amount to substantial reproduction of the original work and also to a derogatory treatment of the work or otherwise prejudicial to the honour or reputation of the author (moral rights of an author)³ as to which there is no fair dealing defence. There is no exception except in so far as the existing copyright law of criticism or review or news reporting already permits such acts or by seeking permission from the right owners to use the underlying work.

¹ Section 39 of the Copyright Ordinance refers. Section 39(3) provides that no acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.

² Sections 89-91 of the Copyright Ordinance refer.

³ See section 92 (Right to object to derogatory treatment of work and section 96 (False attribution of work)

Unless it is within the scope of fair dealing, ‘[p]arody is not an exception to copyright infringement under the *Copyright [law]* and therefore does not constitute a defence’.⁴ In short, ‘parody is not a defence to a copyright claim.’⁵

(2) Freedom of Expression Argument

- (a) The problem with the present web culture is that web surfers believe that web community should have an absolute control and freedom in the networked environment and that they can do whatever they want in the cyber world, a sort of lawless community, and everything on the web is freely accessible including copyrighted materials free of charge. However, the freedom of expression is not the right to take someone else’s copyrighted expression and copy it. In a U.K. fair dealing defence case based on freedom of expression argument,⁶ the U. K. Court of Appeal held that freedom of expression should not normally carry with it the right to make free use of another’s work. The US Supreme Court in *Harper & Row, Publishers, Inc v Nation Enterprises*⁷ held that it does not violate the First Amendment for a person to prevent a third party using his copyrighted expression by copyright law since the ‘Framers intended copyright itself to be the engine of free expression.’⁸

⁴ Para 63 of the judgment of *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and Générale Workers Union of Canada (CAW – Canada)* (1996) 71 C.P.R. (3d) 348.

⁵ Paragraph 15 of the judgment of a recent Canadian Case *Canwest v. Horizon* (2008) BCSC 1609 delivered on November 24, 2008 Docket: S078309

⁶ *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, decided on 18 July 2001: ‘rare circumstances could arise where the right of freedom of expression [guaranteed by art 10 of the European Convention on Human Rights] came into conflict with the protection afforded by the Copyright, Designs and Patents Act 1988 if a newspaper considered it necessary to copy the exact words created by another, it should in principle indemnify the author for any loss caused to him or account to him for any profit made as a result of copying his work.’ see also *Hyde Park Residence Ltd v Yelland* [2000] EMLR 363.

⁷ *Harper & Row, Publishers, Inc. v. Nation Enterprises* 471 U.S. 539 (1985) decided on 20 May 1985: at page 560: First, 17 U.S.C. § 102(b), which makes only expression, not ideas, eligible for copyright protection, strikes a definitional balance between the First Amendment and copyright law by permitting free communication of facts while still protecting an author’s expression.(Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed)..... it should not be forgotten that the Framers intended copyright itself to be the engine of free expression.’ available at <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=471&page=539>>[Access ed March 09].

⁸ *Ibid.* 561.

Following Harper & Row argument, Article 140 of the Hong Kong Basic Law (copyright clause) is considered as an engine of free expression. That copyright clause and the freedom of expression (Article 39 of the Hong Kong Basic Law) are not in conflict with each other. The fact that the copyright clause and the freedom of expression are enshrined in the Basic Law indicates that, according to the view of the ‘Framers’ of the Basic Law, the copyright is compatible with the principle of freedom of expression. Indeed the copyright’s purpose is to promote the creation and publication of free expression (also see *Eldred v Ashcroft* 2003⁹, a US Supreme Court case).

(b) The International Covenant on Civil and Political Rights (‘ICCPR’),

Article 39 of the Basic Law stipulates that the International Covenant on Civil and Political Rights (‘ICCPR’), the International Covenant on Economic, Social and Cultural Rights and various international labour conventions apply to Hong Kong law.

Article 19 of ICCPR provides that:

1. Everyone shall have the right to hold opinions without interference.
2. **Everyone shall have the right to freedom of expression;** this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. **The exercise of the rights** provided for in paragraph 2 of this article **carries with it special duties and responsibilities.** It may therefore **be subject to certain restrictions**, but these shall only be such as are **provided by law and are necessary:**
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health **or morals.**

Section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383) also embodies the above article into Hong Kong Law.

⁹ *Eldred v Ashcroft* (01-618) 537 U.S. 186 (2003) 239 F.3d 372, [15 January 15 2003].
<<http://www.copyright.gov/docs/eldredd1.pdf>>.

However, Article 15 (1) (c) of **International Covenant on Economic, Social and Cultural Rights** provides that

‘The States Parties to the present Covenant recognize the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’

(c) **Universal Declaration of Human Rights**

To put the matter beyond doubt, although article 19 of the Universal Declaration of Human Rights stipulates that

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 27 (2) further stipulates that

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which **he is the author.**

(d) **Copyright and Freedom of expression**

In a Canadian case, it was held that the defendants’ right to freedom of expression was not restricted. The **Charter** does not confer the right to use private property – the plaintiff’s copyright – in the service of freedom of expression...’ and freedom of expression is not a defence to copyright or trademark infringement.¹⁰

The U.K. Gower 2006 report did not propose to change the current approach to parody, caricature and pastiche in the UK. Hong Kong law simply follows the U.K.’s approach.

(e) **Observations**

To suggest parody *per se* as a right of freedom of expression is problematic because the value of expressive content of one’s work cannot be determined without due regard to

¹⁰ *Compagnie Générale des Établissements Michelin-Michelin & Cie* (n 4) above, para 79.

that individual work. This partly explains, and in any case lends support to, some common wealth countries' (including the U.K. and Canada) failure to recognize a parody defence. The strength of Freedom of expression right, and therefore the protection of which, depends on the content and value of the expression itself.

(3) Fair dealing-The General Exemption Rules

First and foremost, we believe that it would not be amiss to point out that fair dealing exceptions, under Hong Kong Copyright Ordinance, are subject to the two steps as laid down in section 37 (3) which provides that

In determining whether an act specified in this Division may be done in relation to a copyright work notwithstanding the subsistence of copyright, the primary consideration is that

the act *does not* conflict with a normal exploitation of the work by the copyright owner and *does not* unreasonably prejudice the legitimate interests of the copyright owner.

These are the second and third steps of the Three Step Test according to Article 13 of the TRIPS and Article 9(2) of the Berne Convention to which Hong Kong is a member/signatory.

On 15 June 2000, the *Dispute Settlement Body* of the World Trade Organisation (WT/DS/160R) ruled that section 110(5) (B) of the U.S. Copyright Act 1976 does not meet the second and third steps of Article 13 of the TRIPS Agreement as it conflicts with a normal exploitation of the work by the copyright owner and it has not demonstrated that it does not unreasonably prejudices the legitimate interests of the rights holders. The WTO interpreted the word 'exploitation' as found in the second step test to refer to 'the activity by which copyright owners employ the exclusive rights conferred on them to extract economic values from their rights to those works.'¹¹ Therefore exceptions would only be presumed not to conflict with a normal exploitation of works if they are confined to a scope or degree that does not compete economically with the non-exempted use.

¹¹ WTO Panel discussion dated 15 June 2000, paragraph 6.165.

The WTO panel considered the way of looking at legitimate interests under the third step test is **the economic value of the exclusive rights** conferred by copyright on their holders. “It is possible to estimate in economic terms the value of exercising, e.g., by licensing, such rights.”¹² For the **first time** in a binding international proceeding the long standing but general **THREE STEP TEST** has now been carefully interpreted by the World Trade Organisation.

In addition, *American Geophysical Union et al v Texaco Inc.*,¹³ a U.S. case, ruled that the existence of a licensing scheme implies that any purported fair dealing use of a copyright work without payment would compete with the normal exploitation of a work and cause unreasonable prejudice to the legitimate interest of the copyright owner. In short, the scope of the exceptions or fair dealings under copyright law is imperatively narrow.

B. The Issues

(4) Destructive Creation

We believe that the so called concept of parody as advanced by the interest groups is leading to the process of ‘destructive creation.’¹⁴ Their view simply ignores the creative value and effort of the underlying work when coming to parodic use and they do not shy away from admitting the free-riding and use of the most popular copyrighted works would facilitate the attraction of large audience to side with their parodic views without any acknowledgement, totally ignoring the right of expression of the author of the underlying work that is being parodied.

In short, they believe that there should never any law or statutory rules govern the cyber world and the lawless cyber world belongs to them. However, the end result is that there is no protection for the right of expression and the right of authorship in cyber world and anybody can adapt or mutilate or distort the underlying work (even to the extent that it

¹² WTO Panel decision dated 15 June 2000, paragraph 6.227.

¹³ 37 F 3d 881 (2nd Cir 1994) and the decision was affirmed by the Court of Appeals for the Second Circuit, 60 F 3d 913 (2nd Cir 1995).

¹⁴ The term destructive creation was popularized during the financial crisis of 2007-2009, when large banks and insurance companies ceased to exist as a result of financial innovations.

would cause prejudice to the honour or reputation of the author) at will without getting any consent from the copyright owner of that underlying work.

It reminds us the well and often quotation of Thomas Hobbes's work: 'in the state of nature the life of man is 'solitary, poor, nasty, brutish and short'¹⁵ and so does the creative effort of the society in the absence of protection of intellectual property of a man.¹⁶ A lawless cyber world would only make the creative industries cease to exist as a result of Hong Kong way of parody exception. If this were to be the case, the creativity of Hong Kong people will be solely reliance on state subsidy or support and elite patronage, there will no longer be any investors for cultural and creative products and the government will then have the complete control as to what kind and what nature of ideas they would like to facilitate and support to create in our society, forgoing the freedom of expression in a strict sense.

We could now imagine our next generation would only have access to textbooks, musical sound recordings, movies, newspapers and all other creative media, cultural or entertainment ones that are funded and supported by Hong Kong government or imported from overseas.

(5) The Disadvantage of Parody

- (a) Drawing a distinction between an original (legitimate) parodic and infringing use is extremely difficult for all concerned-see Canadian cases.
- (b) Drawing a distinction between parody and plagiarism is difficult.
- (c) Rights to be identified as an author and to prevent derogatory treatment of existing copyright shall never be compromise or interfere as they represent universal value that have been enshrined as moral rights of an author. No false attribution of work is to be allowed (see section 96 of the Copyright Ordinance).

¹⁵ Leviathan (1651, part 1, Ch 13) as quoted in James Penner, David Schiff and Richard Nobles *Introduction to Jurisprudence and Legal Theory Commentary and Materials* (Oxford University Press, Oxford (2005)) p 43.

¹⁶ Hobbes and other philosophers used the state of nature as a hypothetical inquiry into what might justify property, the authority of the state, and the like, not as part of an explanation of how these institutions evolved historically.

- (d) It creates negative impact on rights holders in various ways, such as suffering financial loss, loss of artistic control, potential competition from the resulting parody and loss of reputation.
- (e) The creation of Hong Kong way of parody exception would inevitably invites more litigation as to what amounts to parody exception that must be subject to the two step test as laid down in section 34(3) of the Copyright Ordinance. Nevertheless, there exists an exception of parody based on fair dealing defence of criticism and news reporting.

We would like to conclude that parody is not and shall not be an issue for this amendment bill.

We are grateful for your kind attention to our submission. In case of further clarification needed, you are welcome to contact the undersigned by email: rickceo@ifpihk.org and/or phone 28614303 for further action.

Yours truly,

For and on behalf of

International Federation of the Phonographic Industry
(Hong Kong Group) Limited



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