Dear Sir:

The following is the full text of my presentation on October 25th 2014 in Legco regarding the 3rd Public Hearing on the Copyright Amend Bill 2014. Due to time constrain on the day, the verbal presentation was an abridged version of the enclosed text; the original full copy of which was submitted to the Public Affair Forum on November 15th 2013 on the treatment of Parody under the Copyright Regime. In this letter, I am also submitting a copy of another piece of contribution by Mr. Bradley Mark John who also wrote to the Forum on July 24th, 2013. The reason I am including his contribution is because I was referring to him in my writing and I concurred with his reasoning.

My copy: (dated Oct 25th, 2013)

> I read the comments written on this forum and I concur with what Mr. Bradley Mark John wrote on July 24th, 2013. I believe the current copyright ordinance, along with the draft copy of "Code of Practice for Service Providers" are sufficient enough to strike a balance between allowing for "derivative creations", of which parody is one of its many forms and the protection of copyright owners' interests. So it is not necessary to do any changes.
>
> As Mr. Bradly had suggested, if any reform should be made, it should be made with the consideration of not limiting, but exempting these "derivative creations". One important thing to consider which no one has mentioned, is whether these new creations have enough significant differences to create "points of departure" from the original, either in context, in syntax or in form so that essentially they become new creations in their own rights and these new creations are not competing in the same arena, on the same scale as the original and that they do not cause significant economic damages to the original copyright owners.
>
> Again, there is no reason short of a political one to focus on "parody" in this new proposed ordinance reform because presently the law is sufficient enough to protect. If not careful, the proposed option two, though innocuous as it seems, can potentially become a wolf in sheep skin trap designed to tighten the noose. All you have to do is narrowly defined what parody is and in the same stroke, bring in criminal penalties. If that is the case, it will easily become an instrument for political prosecution. And I don't think anyone wants to see that.
>
> On November 2nd, there was a forum in Wanchai on the topic. – (Title of the forum: "在版權制度下處理戲仿諮詢" 研討會) - Mr. Ricky Fung of the International Federation of the Phonographic Industry said he is working on the 5th option, which will have some rules for exemption and they will be based on the US definition of Fair Use. I like the idea and I so look forward to see how that can accommodate what I call "derivative creations" of which parody is one. These creations are usually not with the purpose or the means to do adversely economic impact on the copyright owners, but in most cases, they tend to be strands of creation, some with greater and some with less points of departure, reflecting on our history and our culture.

Mr. Bradley Mark John copy: (dated July 24th 2013)

It is doubtful whether any 'reform' is required, but if reform there must be, it should be for the purpose of eliminating any assertion that parody, satire, are capable of offending the copyright regime, rather than the 'limiting' process of establishing a 'fair use' exception. We can start with footnote 24 of Treatment of Parody under the Copyright Regime, which reads:

But there have been conflicting decisions in the US on parodies over similar facts, as in the cases of Columbia Pictures Industries Inc v Miramax Films Corp and Leibovitz v Paramount Pictures Corporation.

This is not quite correct. Columbia Pictures Industries Inc v Miramax Films Corp involved a copy of the Men In Black poster by Michael Moore, (with the tagline: "PROTECTING THE EARTH FROM THE SCUM OF CORPORATE AMERICA.") for the purpose of promoting his own movie. The Court decided that Moore's poster was a knock-off rather than a parody:

'39. Rather than commenting on or criticizing Plaintiffs' ads, Defendants' ads seek to use Plaintiffs' ads as a vehicle to entice viewers to see "The Big One" in the same manner as Plaintiffs used their own ads to entice viewers to see "Men In Black." In such circumstances, Defendants have not created a transformative work which alters the original with new expression, meaning or message.'

In Leibovitz v Paramount Pictures Corporation, a pose of Demi Moore in a advanced state of pregnancy was mimicked by a pose of the (middle-aged male) actor Leslie Nielsen to publicise a comedy movie as “DUE THIS MARCH.”

'On balance, the strong parodic nature of the ad tips the first factor significantly toward fair use, even after making some discount for the fact that it promotes a commercial product. “[L]ess indulgence,” id. at 585, 114 S.Ct. at 1174, does not mean no indulgence at all. This is not a case like Steinberg v. Columbia Pictures Industries, Inc., 663 F.Supp. 706 (S.D.N.Y.1987), where a copyrighted drawing was appropriated solely to advertise a movie, without any pretense of making a comment upon the original, see id. at 715.'

The whole point about the protection of parody is that its purpose is never to protect the tender sensitivities of the copyright holder of the original work - quite the reverse. A substantial, or at least recognizable, degree of copying is intrinsic to the concept of parody itself. Hence the claim:

those who oppose a special treatment of parody consider that -

...

(d) a special parody treatment might conflict with certain moral rights of creators, e.g. right to be attributed and right to preserve the integrity of their works.

is misconceived. It could hardly be put better than in CAMPBELL v. ACUFF-ROSE MUSIC, INC.,

'We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically," B. Kaplan, An Unhurried View of Copyright 69 (1967), the role of the courts is to distinguish between "[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it."'

In closing, the topic most worrisome is the treatment of parody and the likes. I see what is now in clause 19, section 39A in your latest version of the Copyright (Amendment) Bill 2014 with regard to parody, satire, caricature and pastiche is a welcoming approach because the conditions for exemption are similar to the US terms for fair use. I believe civil or criminal liabilities need to come into play only when there is willful counterfeiting and/or copyright piracy on a commercial scale resulting in financial lost to the original copyright owners and parody, satire, caricature and pastiche do not normally conform to that scenario. Also most people have forgotten when judging for copyright infringement, the idea is not so much on what is similar but most importantly on what the differences between two pieces of work are; whether there is transformation in the process of making so that by the end they exist as separate pieces of work. This concept of "point of departure" has to be applied and considered on a case by case basis. An example of something similar but dissimilar can be seen in the artist Vik Muniz's deconstructive homage to the Netherland master Hieronymus Bosch's "The Garden of Earthly Delights". (Hieronymus Bosch's "The Garden of Earthly Delights" - http://en.wikipedia.org/wiki/The_Garden_of_Earthly_Delights) / Vik Muniz's http://www.arndtberlin.com/website/media/artists/Muniz/MUNI0081_Garden-of-Earthly-Delights_opt.jpg. The verdict is they are both legitimate and renounced pieces of work and yet you can see how one extends from the other in terms of inspiration and proximally in material substance.

This brings up the point that by only exempting certain types of derivative work based on their forms, genre and applications is too limiting in scope and as you can see in the example of Vik Muniz's work; it is none of the permissible kinds for exemption and the law needs to be broad enough to be able to exempt that as well.

Regards,

Anthony Lee

Anthony Lee
(Executive Committee Member (by invitation) of the Hong Kong Federation of Filmmakers)