



17th October, 2014

Clerk to Bills Committee on Copyright (Amendment) Bill 2014
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

By Fax : 2840 0269
and E-mail : bc_106_13@legco.gov.hk

Dear Sir/Madam,

Re: IFPI (Hong Kong Group) Limited Submission to Legco on Copyright (Amendment) Bill 2014

The International Federation of the Phonographic Industry (Hong Kong Group) Limited "IFPI (HKG)" has 86 local members and such represent the very majority of record producers in Hong Kong that invest in signing of local artistes and the making of records for distribution in Hong Kong and overseas.

We would like to express our gratitude and appreciation in allowing IFPI (HKG) to make submissions on our views on the proposed Copyright (Amendment) Bill 2014 and we believe that the Bill has duly addressed the controversial issue on the netizens' alleged fear of criminalization of parody arising from the last ill-fated Copyright (Amendment) 2011 that would require the law to safeguard and protect the right of freedom of expression of both the copyright owners and the users of copyrighted materials based on international copyright treaties and human right regime. As we have stated before, our stances have always been that as a matter of fact, true parody is rarely a substitutable for an original work and accordingly it would cause no harm to that original work or its author and definitely would not impair the market or potential market for the original work.

First and foremost, we hereby support and agree with the IFPI's submission on the Copyright (Amendment) Bill 2014.

However, we must state in no uncertain term that the Copyright (Amendment) Bill 2014 represented hundreds of hours of hard works and negotiations between ISPs, the internet users and the copyright industries since the Administration's issuance of a consultation paper on the "Copyright Protection in the Digital Environment" on 19 December 2006 in which it proposed to enact digital copyright law that would bring the Hong Kong copyright law in

line with the international norms and standards in the digital networked environment. Obviously, the long awaited enactment of new digital copyright law has yet to materialize (for almost 8 years) but in the meantime, the copyright industries have suffered severe hemorrhage as a result of rampant online copyright infringement, giving Hong Kong IP investors an impression that “does our political system really care about the creative industries in Hong Kong” or it rather prefers to import copyright goods from neighboring territories. Hong Kong’s vision to become a regional IP hub remains as a slogan rather an action.

Our stances in this Copyright (Amendment) Bill 2014 have always been the same, we need the updated digital copyright law to foster our copyright industries in Hong Kong and to make Hong Kong a regional creative hub and we therefore desperately urge the LegCo to pass the Bill into Law sooner rather than later. Any controversial issues may be subject to the next round of public consultation, and if it is necessary, be part of the next copyright (Amendment) Bill. The proposed Bill provides for and covers other important copyright issues such as communication rights, safe harbor for ISPs and clarification of prejudicial distribution offence in the context of digital environment.

That being said, we wish to make a few observations and comments on the Bill as follows:

I The Role of Copyright Law in a Free Market Economy

1. “[T]he central objective of copyright law is to provide incentive to creator and content investors.”¹ In a free market economy, the primary essence of attribution of property rights in intellectual goods is to give the right holders an opportunity to recoup their intellectual efforts and investment in creation. The social benefits created by the commoditisation of copyright have driven political institutions all over the world to protect copyright in a free market economy. The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws.
2. Put it simply, realistically, the objectives of digital copyright law is to help to restructure our copyright market to cope with the ever changing digital environment and to organize the markets to allow the IP creators to disseminate the fruits of their intellectual creations to making a living. There will be a market failure (and our digital copyright law system fails miserably) if say, composers, lyricists and performers of musical works

¹ Digital Opportunity A Review of Intellectual Report and Growth prepared by Professor Ian Hargreaves May 2011; Para 5 on page 8 of that review.

cannot make a living from their works, much less the investors who invested in these works.

3. Intellectual property rights are the key pillar for the shifting of industrial economies to the knowledge-based economies in the advanced nations. There is simply no incentive to create or innovate if people are allowed to take a free-ride of the fruit of the hard work and creativity of right creators. **Copyright Infringement is wrong not because it takes something from an owner, but because it unfairly exploits the hard work and resources expended to create that property.**

II The Role of Derivative Works in Copyright Law

4. A derivative work is derived from an existing original work and the author has the right to control his/her work being adapted such as translation of a literary work into foreign language, making a movie from or dramatization of a novel, making an arrangement of a musical work.
5. Before any meaningful discussion on the alleged impact of the derivative right on freedom of expression, one must understand and appreciate that there are two sets of rights in a derivative work that a right owner of an original work is entitled to have: the right on the original and on the new derivative work.² Under Articles 8 and 12 of the Berne Convention (as incorporated in TRIPS), no derivative work of a copyrighted work may be made without the authorization of the author of the original work. Based on the principle of *nemo auditur turpitudinem suam allegans* and *ex turpi causa non oritur action*, “unlicensed adaption enjoys no copyright in its own right, regardless of its originality.”³
6. In international copyright norms, the adaptation or a derivative work is a new copyright work if and only if sufficient skill and labour is expended upon it. The new work so created will amount to infringement of the original one **only if it is a substantial reproduction of an original work.**⁴
7. Therefore, just like parody, a “derivative work” is not an infringement so long as the adaptation of an original work meets the statutory requirement

² For example, a well-known novel may be adapted for screen play purpose. The producer of the film based on this novel must get authorization from the copyright owner of that novel before starting film production.

³ Sam Ricketson – Jane C. Ginsburg: International Copyright and Neighboring Rights, Oxford University Press, 2005; para 8.83 on page 484. *Springfield v Thame* (1903)89 L.T. 242. It does not preclude the original author from taking legal action against an infringer based on passing off claim.

⁴ *Springfield v Thame* (1903)89 L.T. 242. Our observation: it does not preclude the original author from taking legal action against an infringer based on passing off claim.

of an originality and its author and the part taken does not amount to substantial reproduction of the original work (see *Schweppes* test).⁵

8. The key contentious issue is that the authors and the investors of copyrighted works consider that any relaxation of the scope the derivative rights would have devastating effect on the market values for the original works and their various “derivatives”, whereas the netizens consider that the derivative right hinders their creativity “based upon” the preexisting works.
9. Perhaps, if we may, on the question of the so called “secondary creation”, we would like to share with the Legco members, and invite the LegCo members to consider, the third to the last paragraph and also penultimate paragraph of Dr. Mihály J. Ficsor (the former assistant director general of WIPO, Chairman of Central and Eastern European Copyright Alliance)’s recent article entitled “ *Why Hong Kong’s Copyright (Amendment) Bill 2014 is right on the issue of UGC*” published in the August 2014 edition of Hong Kong Lawyer: “*However, they may not be regarded as being able to come anywhere close to replacing “mainstream” original works requiring serious creative efforts and financial investments. Possible exceptions aimed at facilitating secondary productions must not endanger the sustainable creation and production of the primary works.*
.....although new exceptions may result in easier access in the short term to existing works for certain uses, “[t]he economic incentive to create and to invest in new works could weaken, with the dynamic, medium- to longer-term effect being that the production of creative content could be reduced.”

III News Reporting and Commenting on Current Event

10. In addition, we also note that the proposed amendment to section 39 on “Criticism, Review and News Reporting” to “Criticism, Review, Reporting and Commenting on the current event” exemption (free use) to copyright infringement might not be consistent to article 10*bis* (1) of the Berne Convention that is aimed for the benefit of the press, the absence of the word “news” in the new section 39 will widen the scope of exemptions-not limited to news reporting.’ Article 10*bis* is meant for the benefit of the press,⁶ not netizens. The netizens will be under the shelter of fair dealing

⁵ The ‘substantial part test’ was applied in *Schweppes Ltd and Others v Wellingtons Ltd* (1984) F.S.R. 210. Also *Williamson Music Ltd v The Pearson Partnership Ltd* (1987) .S.R. 210 Judge Paul Baker Q.C. considered the previous authorities on parody and concluded without further comments that the relevant test is the ‘substantial part test’ as put forward by Falconer J in the *Schweppes* case.

⁶ Article 10*bis* of the Berne Convention,

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the

on Parody.

11. According to the views of the Berne scholars, Sam Ricketson and Jane C Ginsburg, the conditions for reporting current events **would be limited “to the extent justified by the informatory purpose”; the subject matter of the reporting must be “the current event” and the work must be seen or heard.** (Paragraph 13.55 at page 804 of their book entitled “International Copyright and Neighbouring Rights” Volume 1 2nd edition Oxford University Press 2005 refers).
12. As it is stated in paragraph 6 on page 2 of the Public Consultation on Parody that “[a]t the international level, Hong Kong has an obligation to protect copyright pursuant to several international copyright conventions which apply to Hong Kong” and Hong Kong is a signatory of both the Berne and Berne-in TRIPS, perhaps you may wish to take Article 10(bis) into consideration when drafting the exceptions for the benefit of the press. Not for the benefit of the netizens since they (and so will the press) will enjoy the free use of the copyright materials for **commenting** on the current events under the umbrella of the Parody exceptions.
13. We respectfully submit that reporting and ***commenting*** on current event (as opposed to news reporting on current event) does not fit nicely on Article 10bis. Again, if we may, we wish to share with the Legco members, and invite you to consider, the eighth paragraph of Dr. Mihály J. Ficsor’s aforesaid article in the August 2014 edition of Hong Kong Lawyer:

“The Hong Kong Bill also includes provisions on a quotation exception; this is specifically provided in Article 10(1) of the Berne Convention under strict conditions for certain purposes such as commenting on existing works. In view of this, it is not clear what else the separate exception for “commenting on current events” might mean under the Bill. In order to avoid possible conflicts with the international treaties, it would be advisable to clarify and narrow the scope of that exception, preferably along the lines of Article 10bis of the Berne Convention.”

14. LAST BUT NOT LEAST, subject to the observations and comments made

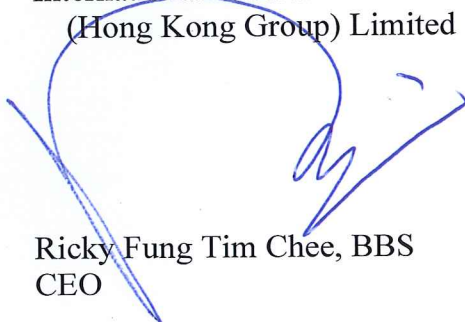
press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed. (2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

above and also by the aforesaid IFPI's submission of today's date, we would invite the Administration and the LegCo to take these observations and comments into consideration before CSA stage, we must state that we are not satisfied with the other provisions of the Copyright (Amendment) Bill 2014 but just that we could live with it (as we would like to have the Bill enacted into law as soon as it is practicably to do so) albeit we would like to see improvement over the digital copyright law in the forthcoming rounds of public consultation on other issues of copyright law. We will make further submissions to clarify our views further if it is necessary to do so to deal with other issues in the Bill and to avoid misunderstanding and misinterpretation of our views.

Please contact the undersigned for any further clarifications.

Thank you for your kind attention.

For and on behalf of
International Federation of the Phonographic Industry
(Hong Kong Group) Limited



Ricky Fung Tim Chee, BBS
CEO

c.c. Committee – IFPI (Hong Kong Group) Limited
IFPI