Treatment of Parody
Main Topic

Sherry YIP/CITB/HKSARG
04/12/2013 15:38

Subject: S1204A_Ricky FUNG Tim Chee (IFPI (HKG))
Category:

Originator	Reviewers	Review Options	
Sherry YIP/CITB/HKSARG		Type of review:	One reviewer at a time
		Time Limit Options:	No time limit for each review
		Notify originator after:	final reviewer

From:
To: <co_consultation@cedb.gov.hk>
Date: 17/11/2013 18:27
Subject: Re: IFPI Hong Kong Group submission on Parody treatment

Dear Sir/Madam,

The IFPI (Hong Kong Group) Ltd submits this as a replacement of the previous version, to be used as our submission on Treatment of Parody under the Copyright Regime.

It was also re-submitted by fax to .

For enquiries, please contact the undersigned including by telehone .

We thank you for your kind attention.

For and on behalf of
IFPI (Hong Kong Group) Ltd.

Ricky FUNG Tim Chee
CEO

From: Ricky Fung
Date: Friday, 15 November 2013 7:22 PM
To: <co_consultation@cedb.gov.hk>
Subject: IFPI Hong Kong Group submission on Parody treatment

Dear Sir/Madam,

The IFPI (Hong Kong Group) Ltd is pleased to submit its paper on Treatement of Parody under the Copyright Regime.

It is also submitted by fax to .

For enquiries, please contact the undersigned including by telehone .

We thank you for your kind attention.

For and on behalf of
IFPI (Hong Kong Group) Ltd.

Ricky FUNG Tim Chee

CEO IFPIHK Parody sub Nov 15 f.pdf

HONG KONG GROUP

15 November, 2013

Division 3
Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
23/F West Wing Central Government Offices
2 Tim Mei Avenue
Tamar
Hong Kong

BY Fax number : 2147 3065 and by
Email address : co_consultation@cedb.gov.hk

Dear Sir/Madam,

Re Consultation Paper on Treatment of Parody under the Copyright Regime

The International Federation of Phonographic Industries (Hong Kong Group) Limited ("IFPI (HKG)"), our organization represents record companies both from local and overseas.

We refer to the Public Consultation on Treatment of Parody under the Copyright Regime. As a matter of fact, the scope of consultation is a narrow one and simply focuses on one issue: parody, the very issue that hampered the passage of the Copyright Amendment (2011) Bill last year-right before the end of the term of the fourth Legislative Council (2008-2012).

First of all, we would like to express our gratitude and appreciation in allowing IFPI (HKG) to make submissions on our views on parody and hopefully, we might be able to narrow down the controversial issue on the netizens' alleged fear of criminalization

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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 copyright owners and users based on international copyright treaties and human right regime.

In summary, we venture to propose that a true parodist shall be exempted from criminal liability but we do not agree that Hong Kong needs a fair dealing for parody as so far there is no convincing evidence to show that copyright has interfered the freedom of expression in Hong Kong. In short, no defence of freedom of expression has ever been raised before the court in copyright infringement case. The U.K. has also taken a cautious approach on parody exception after years of consultation and prefers the status quo for the present moment.

As regards the recent discussion on the so-called user generated content (UGC), it has shocked not only the content industry but also the creators of copyright. The discussion has been brought by the usual suspects making hysterical prediction about what the proposed Copyright (Amendment) Bill might do against the parodists. They further advanced their call for freedom of "secondary creation"-which means free use of original copyrighted materials for whatever purposes as they want as long as it is for non- commercial purpose. We are strongly against any thought of having it taken into consideration into this round of consultation for the reasons stated below. Even if (which is denied) UGC were to be allowed notwithstanding its violation of three step test, it would only be fair that there should not be any safe harbor provisions for OSPs. Legally and economically speaking, the copyright owners should have redress against OSPs and indeed, it is much more cost effective to take OSP to court for contributory liability (there is a link between infringing activities and OSPs)[1] than to go after

[1] Wan Charn Wing The Reform of Copyright Protection in the Networked Environment: A Hong Kong Perspective, *11 (5/6) the Journal Of World Intellectual Property (2009) 498-526. See paragraph under the heading of "Meaning of Authorization" on pp 502-503.* On page 503 "The case of *Sony Music Entertainment (UK) Ltd and others v Easyinternet Café Limited* [2003 EWHC 62] suggests that any person who has a role in the infringement of copyright may be liable in a networked environment. Hong Kong follows the UK's approach that an OSP may be exempted from liability as long as it has no knowledge of and cannot exercise any control over the act in respect of the use of the materials by the

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individual copyright infringers who choose to infringe copyright under the cloak of UGC.

We would like to make our comments and observations as follows:

A. The Justification of Copyright

1. Our industry existence owes very much to the copyright law that provides a property-like protection system in our free market economy in order to encourage people to invest in the creation of new knowledge and to enable the creators/investors to recoup their sunk costs of development given that not all the creative works are marketable.

2. 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.

3. Under the TRIPS, that serve to harmonise the global protection of international intellectual property in international trade among the members of WTO, the protection of intellectual property is formulated in the context of trade. [2]

B. International Copyright Law On Exemptions

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users but not those which are specially designed to facilitate the downloading of infringing files. It is more akin to the US concept of contributory infringement." Endnote 17 on p 520 states that" S108 provides that a person who infringes copyright is not liable to damages if he or she did not know and had no reason to believe that copyright subsisted in the work to which the action related."

[2] May, Christopher, *A Global Political Economy of Intellectual Property Rights: The New Enclosures?* (Routledge, London 2000) 68.

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4. International copyright law allows people to an exempted use of copyrighted materials for a specific purpose such as education or research etc. as long as it complies with the well-known **Three Step Test** which in general only allows a very narrow scope for copyright exceptions. A conflict with a normal exploitation of a work occurs where an exception or limitation deprives right holders of an actual or potential market of considerable practical or economic importance. We must not allow **"commercial parasitism"** to exist in our creative industry.

5. Therefore, we submit that any legislative process to create a fair dealing for a special purpose in copyright must pass two tests:
   (i) the exogenous test: it must comply with the international copyright law and standards and,
   (ii) the endogenous test: consider if the proposed policy is economically sounded (increases social welfare).

   These two parameters would guide the debates among the competing interest groups leading to the final compromising legislative rules.

6. Tautological as it may sound, we believe that we could only have a meaningful discussion if we all share with a common belief that Hong Kong must ensure that any new exception must comply with the three step test before the Administration would table the proposed bill on that exception before the LegCo for consideration. This means that we would like to invite those who suggest any exception (or permitted use) do justify their view based on three step test.

B **Freedom of Expression and Copyright**

7. Under the U.N. Declaration of Human Rights, both the authorship[3] and freedom

[3] Article 27 (2) of the **Universal Declaration of Human Rights** provides 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." article 15 (1) of the United Nations **International Covenant on**

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of expression[4] are human rights. Besides economic function, copyright protects the authors' expression of his idea on certain issues; "Freedom of expression is meaningless without assurances that the expression will remain unadulterated. Free speech requires that speech be guaranteed some integrity" (Justin Hughes 1988). [5] Article 140 of Hong Kong Basic Law (better known as copyright clause) is considered as an engine of free expression. Needless to say, the protection of free expression is also subject to Article 35 of Hong Kong Basic Law. Copyright permits free communication of facts while still protecting an author's own expression. Freedom of expression is not an absolute right under the Basic Law and Human right regime.[6]

8. We are not alone in struggling with finding the "fair" balance between copyright protection and freedom of expression in a modern Internet age.

   The debate really boils down to how to balance between the copyright economic interests and his/her right of free expression and the users' right of free expression at the end of the day. The U.K case law indicates that it is difficult to justify free expression defence under public interest ground if the act causes pecuniary and/or non-pecuniary interests of the right owners and so did the recent ruling made by European Court of Human Right.[7]

Economic, Social and Cultural Rights also provides that "The States Parties to the present covenant recognize the right of everyone:

1. To take part in cultural life;
2. To enjoy the benefits of scientific progress and its applications';
3. 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**.

[4] Article 16 (a) of the **Universal Declaration of Human Rights.**

[5] Justin Huges, the Philosophy of Intellectual Property" *Georgetown Law Journal* 77, 287 (1988).

[6] Wan Charn Wing Three Strikes Law: A least cost solution to rampant online piracy, *Oxford Journal of Intellectual Property Law & Practice 5 (4) (2010) 232-244.* For detail discussion, please refer to the heading of Freedom of expression and copyright on page 242.

[7] *Ashby Donald and others v. France;* ECHR Judgment on 10 January 2013. No violation of right of free expression and held that that the conviction of the applicants because of breach of the French Copyright Act (photographers made catwalk pictures of Paris fashion shows available to the public via internet) did not amount to a violation of Article 10 of the Convention (freedom of expression) by the French authorities. The Court was indeed of the opinion that the conviction for breach of copyright and the award of damages was to be considered as an interference with their rights protected by Article 10 of the Convention. However, this interference was prescribed by law, pursued the legitimate aim of protecting the rights of others and was to be considered necessary in a democratic society. Also EHRC found that no violation of freedom of expression in *Peta Deutschland v. Germany; Szima v. Hungary*

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C. Parody

9. Parody is accepted under the Berne as a permitted use as long as it meets Article 9(2)'s three step test. A parodist uses part of a work to provide a critique of individuals or institutions or society in general. The parodist tries to express himself on certain views by using part of the underlying original work and his purpose must be to criticise through creation. However, it is not obligatory to provide parody exception.

10. The problem is that there has never been any agreed definition or meaning of Parody in the leading jurisdictions and as explained below, different jurisdictions have different policy on parody. However, the fair dealing of parody entails a parodist who may indulge in his art without obtaining any authorization from an author of the parodied work *provided that it embodies no risk of confusion with that work and does no harm to the original work or its author- complies with three-step test* (a permitted use).

11. As it involves the interests of the author of an original work, the parodist and the public, a parodist must consider the purpose of the use made of the work and then ascertain the perceived purpose of that use. **The criterion of no confusion between the parodied work and the original work makes parody different and distinct from plagiarism.**[8]

12. The application of the principle of proportionality *(Lato Sensu)* involves the evaluation of two factors: *the suitability of the use for the attainment of its goal* in the sense that *not to borrow excessive copyrighted materials* for that goal and under no circumstance shall a parodist be allowed to take that much as constituting substantial part; and *the necessity of it* (in the sense that there is no option causing less harm to the other party's interests). **The criterion of not using excessive copyrighted materials from an original work as opposed to using**

[8] Plagiarism is an appropriation of someone else's creativity, embodying in an outward form that creativity as one's own product of one's work.

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substantial part of which makes parody different and distinct from copyright infringement.[9]

13. Like the UK and New Zealand, there is no exception to parody *per se* in **Hong Kong**. but Parody may be assimilated to the fair dealing exception **for the purpose of criticism or review or newspaper reporting** so long as a parody meets the statutory requirement of sufficiently identifying the original work and its author and the part taken does not amount to substantial reproduction of the original work (*Schweppes* test-see footnote 9).

14. In short

(i) **The criterion of no confusion between the parodied work and the original work** [10]**- that makes parody different and distinct from plagiarism.**[11]

(ii) **The criterion of not using excessive copyrighted materials from an original work makes parody different and distinct from copyright infringement.**

(iii) **True parodies of a copyright work are very rarely substitutable for the original work and accordingly will not impair the market for the original work.**

(iv) **However, any act of commercial use is excluded for the purpose of Parody.**[12]

(v) Any commercial use of a Parody must be covered by the relevant License.

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[9] 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) F.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.

[10] WTO Panel § 6.183.

[11] Plagiarism is an appropriation of someone else's creativity, embodying in an outward form that creativity as one's own product of one's work.

[12] WTO Panel report on United States –section 110 (5) of the US copyright Act, 15th June 2000, WTO/DS/160/R. §*6.181 all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved to the authors*; exceptions that might restrict the possibilities open to the authors in these respects were unacceptable

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For example, Weird Al Yankovic, an American singer-songwriter, 'has received 25 gold and platinum albums, four gold-certified home videos and two GRAMMYs® by parodying other songs, but he had to ask permission from rights holders.'[13]

D Derivative work and Parody

15. Secondary creation is not the copyright term and therefore its definition is uncertain ambiguous and problematic. One may move the goalpost from time to time to suit his purpose. Content industry perceive that secondary creation means the right to take someone else work, copy whatever as s/he likes in order to create a new derivative work without any authorization from the right owner as long as it is for non-commercial purpose even though it amounts to unreasonably prejudice to the legitimate interests (that include both pecuniary and non-pecuniary ones) of the right holders by violating their adaptation and reproduction rights and, in the case of user generated content, for non-special purpose such as entertaining friends and relatives or making the UGC available to the public via internet so that people may share and admire the creativity of the users for adapting and reproducing the copyright work into their new UGC contents.

16. If we may, we would like to stick to use the term "derivative work" based on international norm which is a work derived from an existing work e.g. translation of a literary work, dramatization of a non-dramatic work or an arrangement of a musical work that requires the consent of the author of an original work.

17. The alteration 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.

18. In reality there are two sets of rights in a derivative work that a right owner of an

[13] Para 4.90 on page 68 of *Gowers Review of Intellectual Property,* December 2006, HM Treasury, http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf

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original work is entitled to have: the right on the original and on the new derivative work.[14] 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."[15]

19. In parody, because by serving the very purpose of parody, the contents of transformative use of an original work by a parodist must inevitably be different and distinctive from the original work subject *to the requirement of no risk of causing any confusion with that work to the original work, such transformation of use has always been within the ambit of fair dealing and the extent of such use is limited to that much necessary for attaining its purpose(definitely no substantive part is allowed).* However if an alteration is not a substantial reproduction of an original work, no licence is required from the author of that original work as usually the case for parodical use of an original work (see *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd.* below).

20. Therefore, broadly speaking, one must **distinguish** paradical use of a work (as use does not amount to substantial reproduction of an original work under Schweppes test), which substitutes an original, **from a derivative work,** which must include substantial reproduction of the original work and which infringes.

E. Parody Exceptions in Different Jurisdictions

21. Article 24 of the German Copyright Act is against free use of musical element in

[14] 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.

[15] Sam Ricketson – Jane C. Ginsburg: International Copyright and Neighboring Rights, Oxford University Press, 2005; para 8.83 on page 484.

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later works.[16]

22. Article 39 of the Spanish Copyright Act clearly provides that 'parody of a disclosed work shall not be considered as a transformation as requires the consent of the author provided that it embodies no risk of confusion with that work and does no harm to the original work or its author.'

23. In the US, it is covered under Fair Use. The US Supreme Court in its first parody case *Campbell v Acuff-Rose Music, Inc* (510 US 569 (1994) held that parody may amount to copyright infringement if a parodist has borrowed excessive copyrighted materials and therefore impaired its marketability (at p 589). The key issue is that a claimed parody falls outside the scope of fair use if it is the kind of use that the owner of the copyright itself could reasonably be expected to make.

    The US courts have drawn a distinction between parody and satire on the basis that parody must target the original work, at least in part, while satire does not. The Second District Court of Appeal in Dr Seuss v Penguin Books[17] held that the would-be satirist will be able to either obtain a licence from some copyright owner, or forgo the use of copyright works, in order to make his or her statement.

24. In the U.K. the Court in *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd*[18] held that there was no infringement for parodying a song Rock-a-Billy to Rock-a-Philip because a parodist had changed the lyrics sufficiently enough not to take a substantial part of the original work.

    However, the U.K. Court in *Williamson Music Ltd v The Pearson Partnership*

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[16] Article 24 Copyright Law (Urheberrechtsgesetz, UrhG): Free Use
(1) An independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work.
(2) Paragraph (1) shall not apply to the use of a musical work where a melody has been recognizably borrowed from the work and used as a basis for a new work.
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http://www.iuscomp.org/gla/statutes/UrhG.htm

[17] 924 F. Supp. 1559 (S.D. Cal. 1996)

[18] *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd* (1960) 2 Q.B. 60.

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Ltd[19] held that an alleged parodical use of the famous song 'There is Nothin' Like a Dame', originating from the play 'South Pacific' as part of advertising a service of express coaches between London and other places in the United Kingdom was an infringement of the copyright. Any commercial use of a copyrighted work will not be covered by fair dealing exception as it must fail the berne's and TRIPS' three step test. Any commercial use would hardly pass the first step test of special circumstances, let alone the second and third tests.

It is interesting to note that the U.K. has now taken a cautious look as whether fair dealing for parody or other should be introduced into their new copyright law.[20]

25. Section 29 of Canadian Copyright Act (2012) provides that "Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright." No conditions seem to attach to it. However, the question of fairness is laid down by the Supreme Court of Canada in CCH v. LSUC (2004)[21]in which the Supreme Court of Canada held, at paragraph 53 of the judgment, that "…….the following factors be considered in assessing whether a dealing was fair:

(1) the purpose of the dealing;

(2) the character of the dealing;

(3) the amount of the dealing;

(4) alternatives to the dealing;

(5) the nature of the work; and

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[19] *Williamson Music Ltd v The Pearson Partnership Ltd* (1987) F.S.R. 210.

[20] Richard Mollet expressed this view on P 116 of the report on *Supporting the creative economy* volume one published on 26 September 2013 by House of Commons, Culture, Media and Sport Committee; arguing that "without sufficient evidential backing behind them, like on parody. Is there really an economic case to create a new loophole in copyright for parody…as we have discussed?" See the parliamentary debate on this subject matter.

[21] CCH Canadian Ltd. *v.* Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13. Para 53 on page 366.

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(6) the effect of the dealing on the work.

Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases."

26. In short, exception for transformative use of an underlying work for the purpose of parody can only be justified within the parameters of the International Copyright Law's Three-Step Test (Berne or TRIPs or WIPO internet treaties).

27. Modern copyright law forbids use not only of exact text, but also of any communication audiences recognize as "substantially similar" or obviously derived from an original. Infringement exists whenever an ordinary observer would conclude that the defendant has incorporated something of substance and value from the plaintiffs' work, regardless of whether audiences would mistake the second work for the former.

28. The fact that there has never been a legal case against parodical use of a work in Hong Kong suggests that Hong Kong copyright owners do respect the right of free expression of parodists and they are now expecting the same from parodists as well and that the content industry do respect the right of a copyright owner of an original work by obtaining the relevant licence from it before adapting or transforming the original work into a new work or better known as a derivative work and without the prior consent from the copyright owner, the derivative work infringes the copyright of the original work.

29. To sum up, the parody defence to copyright infringement case based on freedom of expression grounds may only be upheld as long as

(i) there is no confusion between the two works (*the freedom of expression of both the parodist and the writer of an original work is protected and preserved*);

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(ii) the original work taken not to be excessive especially not to the extent that constitutes the substantial part- *Schweppes test*-(*de minimis* principle); and

(iii) the transformative use does not cause any harm to the legitimate interests of the copyright owner of the underlying work (*complying three step test*).

F. PARODY AND CRIMINAL SANCTION

30. As explained above, a real parodical use of a work cannot be within the ambit of criminal sanction that requires the prosecution to prove three elements: (i) substantial reproduction of an original work (this cannot be the case for any parodical use of a work- *based on Schweppes test*); (ii) the infringing act is done without the consent of the copyright owner (the very nature of fair dealing or permitted use of copyright work does not require the consent of the copyright owner) and (iii) to cause economic harm or injury to the copyright owner (it cannot be the case as the purpose of parody is to criticize not for commercial exploitation). No question of substitution of original work[22] as the very nature of parody is that people will not confuse between the parody and original work. Lastly, any prosecution of copyright infringement can only be initiated by and brought with the consent of copyright owner.

31. We would further point out that a true parody cannot be and will never be within the ambit of criminal sanction. The fear of a parodist from being criminal prosecuted only exists in paper or words but it does not exist in the real world. In a way, s/he is chasing after a phantom.

32. The fact that there has never been a legal case against a true parodical use of a work in Hong Kong speaks for itself-it is legally impossible to do so.

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[22] Sections 118 (2AA) (c) and 118 (8C) of the CSA Amendment made to the Copyright (Amendment) Bill 2011 on 28 March 2012 , both of which provide that:
' Whether the infringing copy so distributed amounts to a substitution for the work.'.

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G. User Generated Content ("UGC")

33. Last but not least, we oppose any introduction of new exception such as UGC that does not fall within the ambit of present public consultation on parody. Any such new proposal must be subject to the next round of public consultation. For the reasons stated above, we must re-examine the role of safe harbour when dealing with issue on UGC; much less the violation of three step test.

34. The fact that there are two different provisions for exceptions of Parody or Satire (S 29) and of UGC under the Canadian Copyright Act (2012) (S 29.21) clearly indicates that Parody or Satire and UGC serve two different special purposes. Parody or Satire will be there to stay even if UGC were found to be violating three step test.

35. First and foremost, let us re-examine the purpose and characteristic of parody based on US fair use approach:-[23]

(i) parody requires that the public knows the source work;

(iii) parody involves both closeness to and distance from its source material, because the source work is not uncritically devoted but transformed in – often – a witty way and it differs in this way from plagiarism;

(iv) most importantly, parody is capable of simultaneously showing disapproval and respect, criticism and sympathy, parasitism and creativity;

(iv) the source work is the target;

(v) often laughter if provoked. On the other hand, parody may cause anger or shock.

36. The purpose of parody is quite clear that warrants the passing of the first step test-namely criticism of a work or the author of the work as the case may be.

37. ***Section 29.21 provides for exemption of UGC which allows the creation of (i) a*** new work that (ii) must not be for commercial use and (iii) must not be a

[23] C. Rütz, 'Parody: A Missed Opportunity?' (2004) 3 *I.P.Q.* 284.

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substitute of the existing copyright materials and (iv) does not cause harm or negatively impact on **the existing or potential market and reputation** on the existing materials as long as (v) the existing materials were legitimately acquired and (vi) the user has properly acknowledged the authors of the existing works as long as the user may be able to do so. Some scholars have suggested that UGC might be in breach of the adaptation right of the authors and also of the three step test.[24] It remains to be seen how Canadian court will interpret the working of UGC provisions such as the meaning of adverse effect (economic loss, reputation or other non-pecuniary matters), new work, and non-commercial transformative use in the context of International Obligations. It does not obviate the concern of a user who wishes to avoid unnecessary litigation.

38. The losers are the users, copyright owners and Hong Kong. Only the intermediaries or online service providers stand gain commercially as more infringing works will be made available online accessible by the public globally under the cloak of user generated content that in turn attract more subscribers to them. OSP is litigation proof under the safe harbor provision while making money at the expenses of the copyright owner; only the users, not the intermediary service providers, will get caught and sued by the copyright owners.

39. In a way, the OSPs have tried to externalize the costs to the content industry in the same way that pollution by a chemical factory does to its neighborhood. The bottom line is who should pay for the cleaning up of the pollution. Content industry considers that OSPs should internalize the costs of negative externality or harmful effects.

40. However, according to WIPO scholars such as Dr. Ficsor and also the view of the U.K scholar; they question how can a general transformative use exception be considered a special case under the first step of the three step test? It could be for a whole range of unrelated purposes of self-entertainment, bullying the weakness

[24] Dr. Mihály Ficsor's Comments on UGC Oct 23, 2010.

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party or group in school unrelated to education, character assassination, "commercial speech", "commercial parasitism" etc. (Remember originality rather than substantiality is the real test for UGC-the requirement of creation of a new work ensuring no substitution of an original work). In short, there is no specific and clear justification objective- too broad in general. Available in internet means large scale infringement. IT FAILS THE FIRST STEP TEST.

41. The creation of a new work for non-commercial purpose does not stop it from being disseminating them through OSP's online system working for commercial purpose. The UGC generator himself cannot monetize user-generated content. It deprives right holders of an actual or potential market of considerable practical or economic importance given the "astronomical" number of internet users globally that can access the UGC. It also devalues the adaptation and reproduction rights of the right owners. Furthermore, the extensive use of popular copyrighted material in UGC and making them available online accessible globally means that if we add the total sums or the aggregate amount of all UGC embodying the copyrighted material that are accessible to internet users globally, objectively and certainly, one may easily conclude that the accumulated losses to the copyright owner of that popular copyrighted material are well beyond any commercial scale-it is the infringing activity that is objectionable not the fun of an individual.[25] IT FAILS THE SECOND STEP TEST.

42. Undoubtedly, it unreasonably prejudices the legitimate interests (pecuniary and non-pecuniary ones) of an author of a copyright work by taking away his/her control over his/her right to make an adaptation of his/her work; let alone reproduction right; and more importantly, their control over future use of his/her work; thereby, depriving his/her right of objection to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would prejudice his or her reputation or other grounds and that right shall apply in

[25] Similar argument also noted on first paragraph of p 513 of Wan's paper-see n. 1 when discussing the issues on download activities.

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relation to an adaptation of the work. IT FAILS THE THIRD STEP TEST.

43. It is interesting to note that the U.K. has not pursued the introduction of UGC content for now for fear of violating international copyright law.

44. We believe that we should not consider UGC at this stage so as to provide the copyright owner with an opportunity to establish voluntary, cross-industry agreements that seem to be able to solve the issue in a well-balanced and user-friendly way without unjustified limitation of the relevant exclusive rights of authors and other owners of rights.

45. In any event, we believe that there should not be any safe harbor provisions for OSPs when dealing with UGC based on sound and justifiable legal and economic grounds.

46. Our position is very clear-no UGC without public consultation on the role of OSPs, the impact of such UGC on Hong Kong content industry, and the impact of UGC on the creative industries and its impact on Hong Kong economical political social and cultural policies and past practice.

47. In conclusion, we believe that we may add a "for an avoidance of doubt provision" exempting a true parodist from criminal liability and that it is unnecessary for Hong Kong to create a new fair dealing exception for parody and others at this stage. No UGC without reconsidering the role of OSP in this new context. We believe that OSP should not hide behind the cloak of safe habour provisions when dealing with UGC that fail to meet the statutory requirements for UGC exception (we believe that it is wrong to introduce UGC without the benefit of the experience of other jurisdictions).

H. Our Submissions

48. We would like to let you have our views on the 4 questions posed in this round of public consultation on Parody:

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(i) Whether the application of criminal sanction of copyright infringement should be clarified under the existing copyright regime in view of the current use of parody?

Our view is that criminal sanction of our present Copyright Ordinance deals with commercial dealing of infringing copies of copyrighted works and it cannot and in fact legally impossible to target against people who use copyrighted materials within the ambit of fair dealing such as education or even parody as long as it satisfies *Schweppes* test. No amendment should ever be made to these criminal provisions. We need them to fight against piracy.

(ii) Whether a new criminal exemption or copyright exception for parody or other similar purposes should be introduced into the Copyright Ordinance?

Our view is that we may consider providing for an avoidance of doubt provision to exclude true parodist from being criminally prosecuted if s/he passes the purpose test[26] and of course the *Schweppes* test.

Our view is that we do not support or agree with any new fair dealing on or exception for parody be introduced in Hong Kong as there is simply no convincing evidence that copyright do interfere the right of free expression of the users. On the contrary, content industry perceive that the users do not respect their freedom of expression by not referring to the need to protect the author's right of free expression as conveyed in his/her work that s/he intends to convey without any distortion whatsoever. Acknowledging the source would be the first step in the right direction towards recognizing and respecting the authors' right of free expression.

[26] Albeit it is speaking the obvious; no such for an avoidance of doubt provision has ever been introduced in other jurisdictions such as the U.K as it is legally impossible to criminally prosecute a true parodist when his/her work passes *the Schweppes test*-just like providing a "for an avoidance of doubt" clause in a traffic offence law by stating that "for an avoidance of doubt, those who obey the traffic law will not be prosecuted"-it is legally impossible to prosecute a driver for any traffic offence who has duly obeyed and complied with the traffic statutory rules and law.

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(iii) If a new criminal exemption or copyright exception for parody is to be introduced, what should be the scope of and the appropriate qualifying conditions or limitations for such a criminal exemption or copyright exception?

Our view is that for reasons as stated in the above, we would propose the Criminal Exemption for Parody (no copyright exception for Parody) and suggest that we may provide the following for the avoidance of doubt provisions into section 118:[27]

(1) Section 118 (2AA) – section 118 (1) does not apply to an infringing copy **for the purpose of parody** if the use of the original copyright work is solely for non-commercial purposes and the parody is not a substitute of the original underlying work. *For the purposes of subsection (1)(g), in determining whether any distribution of a parody is made to such an extent as to affect prejudicially the copyright owner of the original underlying work, the court may take into account all the circumstances of the case and, in particular, whether it causes or has the potential to cause an unreasonable loss of income to the copyright owner*[28] *as a consequence of the distribution having regard to, amongst others -*

(a) whether the purpose and character of the use is of parody nature;

(b) the nature of the work, including its commercial value (if any);

[27] Without in any sense wishing to be sarcastic or satirical, perhaps the Administration should consider providing similar provisions in other offences such as traffic offence, Personal Data Offence (say any-body who complies with or obeys the personal data law will not be prosecuted), theft and better still, an all-embracing for an avoidance of doubt provision be introduced in the Interpretation and General Clauses Ordinance (CAP 1).

[28] The WTO report of the Panel on *United States – Section 110(5) of the US Copyright Act* **WT/DS160/R** dated 15 June 2000. Paragraph 6.229 on page 59 "The crucial question is which degree or level of "prejudice" may be considered as "unreasonable", given that, under the third condition, a certain amount of "prejudice" has to be presumed justified as "not unreasonable". In our view, prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner."

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(c) the mode and scale of distribution; and

(d) whether the infringing copy so distributed amounts to a substitution for the work.".

(2) *Section 118 (8C):* " section 118 (8B) (1) does not apply to an infringing copy for the purpose of parody if the use of the original underlying work is solely for non-commercial purposes and the parody is not a substitute of the original underlying work. *For the purposes of For the purposes of subsection (8B)(b), in determining whether any communication of a parody to the public is made to such an extent as to affect prejudicially the copyright owner, the court may take into account all the circumstances of the case and, in particular, whether it causes or has the potential to cause an unreasonable loss of income to the copyright owner as a consequence of the communication having regard to, amongst others -*

(a) whether the purpose and character of the use is of parody nature;

(b) the nature of the work, including its commercial value (if any);

(c) the mode and scale of communication; and

(d) whether the communication amounts to a substitution for the work."

(iv) Whether moral rights for authors and directors should be maintained notwithstanding any special treatment of parody in the copyright regime?

As a true parody must not be a substitute of an original work, a parody work will not violate the integrity of authorship. Given that Human Rights protect the authorship of an original writer.[29] Therefore, following the practice of

[29] See footnote n.3.

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other jurisdictions such as Canada, the United Kingdom etc., it is imperative that moral rights of an author be maintained without any amendment.

49. As regards the position of parody, we support the view of IFPI (London) that parody exemption be limited to parody only not satire or others.

50. Parody is generally taken to mean humorous imitation of a particular work; while satire, in the copyright law construction, extends to using a work to critique or ridicule other facets or members of society. It must be treated differently and independently. There is no evidential basis for introducing fair dealing exceptions for parody and other special purposes in Hong Kong.

51. We suggest that the government should let the LegCo know the limit that Hong Kong can do when formulating an exception or exemption under the three step test; this position is not unique in Hong Kong; other jurisdictions have also gone through the debates on similar issues when updating their digital copyright law.

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Submitted For and on behalf of
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