

The submission made by International Federation of the Phonographic Industry (Hong Kong Group) Limited by its CEO, Ricky FUNG Tim Chee to LegCo dated 4th November, 2013, "Treatment of parody under the copyright regime"

Dear Chairman and panel members,

I represent the International Federation of Phonographic Industries (Hong Kong Group) Limited, our organization represents record companies both from local and overseas.

First of all, I would like to express my gratitude to those organisers and the administration for arranging my attendance to those forums on Parody, the subject matter of this round of Public Consultation, in which I have managed to express our positions and exchange views with the netizens on copyright exceptions. I believe that we might be able to narrow down the controversial issue on the netizen's fear of criminalization of parody arising from the last ill-fated Copyright (Amendment) 2011; leading to the enactment on the parody law based on international copyright treaties and to safeguard the freedom of expression.

A. The Justification of Copyright

Our industry existence owes very much to the copyright law that provides a property-like protection system 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.

Intellectual property rights are the key pillar for the shifting of industrial economies to the knowledge-based economies in the advanced nations.

The social benefits created by the commoditisation of copyright have driven political institutions to protect copyright in our free market economy. Under the TRIPS, a trade-based approach to intellectual property right, the protection of intellectual property is formulated in the context of trade.¹

¹ May, Christopher, *A Global Political Economy of Intellectual Property Rights: The New Enclosures?* (Routledge, London 2000) 68.

There is simply no incentive to create or innovate if people are allowed to take a free-ride.

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.'²

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.

B. INTERNATIONAL COPYRIGHT LAW ON EXEMPTIONS

International Copyright law allows people to the 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 does not allow a very wide scope for copyright exception.

A conflict with a normal exploitation occurs where an exception or limitation deprives rightholders of an actual or potential market of considerable practical or economic importance. We must not allow "commercial parasitism" to exist in our creative industry.

Therefore, I submit that any legislative process to create a new special dealing in copyright must pass two tests:

1. the exogenous test: it must comply with the international copyright law and standards and,
2. 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.

² 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>

C. PARODY

International norms allow exempted parodical use of a source work provided that

- (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*);
- (ii) the original work taken not to be excessive to the extent *for the attainment of its goal* (principle of proportionality (*Lato Sensu*)); and
- (iii) the new work does not cause any harm to the rights of the copyright owner of the underlying work (*complying three step test*).

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 an original work and then ascertain the perceived purpose of that use. He must take a note of the following 4 factors:

- 1. The criterion of no confusion between the parodied work and the original work ³ - that makes parody different and distinct from plagiarism.⁴**
- 2. The criterion of not using excessive copyrighted materials from an original work makes parody different and distinct from copyright infringement.**
- 3. 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.**
- 4. However, any act of commercial use is excluded for the purpose of Parody.⁵**

³ WTO Panel § 6.183.

⁴ 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.

⁵ 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*

D. PARODY AND CRIMINAL SANCTION

I would further point out that a true parody cannot be within the ambit of criminal sanction it is one of the permitted use under special dealing regime. 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

The fact that there has never been a legal case against parodical use of a work in Hong Kong speaks for itself.

E. OUR SUBMISSIONS

Our view is that criminal sanction of our present copyright ordinance deals with large scale copyright infringement cases not target against people who use copyrighted materials within the ambit of special dealing such as education or parody (covered under special dealing for the purpose of criticism or review or newspaper reporting). No amendment should ever be made to these criminal provisions. We need them to fight against piracy. We may consider providing for an avoidance of doubt provision to exclude true parodist from being criminally prosecuted if he passes the purpose test.

As regards the position of parody, we support the view of IFPI (London).

Last but not least, we oppose any introduction of new exemption 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. We suggest that the government should let the LegCo know the limit that Hong Kong can do when formulating an exception under the three step test; this position is not unique in Hong Kong and other jurisdictions have also gone through the similar issues when updating their digital copyright law.

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

Ricky FUNG Tim Chee