

**Treatment of  
Parody**  
Main Topic

Sherry YIP/CITB/HKSARG  
12/11/2013 15:21

Subject: S0428\_dillys (HKIPA)  
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From:  
To: <co\_consultation@cedb.gov.hk>  
Date: 12/11/2013 13:15  
Subject: HKIPA Submission

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Dear Sirs,

Attached please find our submission regarding the Treatment of Parody under the Copyright Regime.

Regards,

Hong Kong and International Publishers' Alliance (HKIPA)  
Secretariat: HKRRLS



T: HKIPA Submission 12-11-2013.pdf

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## 香 港 及 國 際 出 版 聯 盟 Hong Kong and International Publishers' Alliance

**Secretariat**

Hong Kong Reprographic Rights Licensing Society  
Unit Nos. 909-910, 9/F Prosperity Millennia Plaza  
663 King's Road, North Point, Hong Kong  
Tel: (852) 2516-6268 Fax: (852) 3105-1468  
E-mail: [info@hkrrls.org](mailto:info@hkrrls.org) Website: [www.hkrrls.org](http://www.hkrrls.org)

By email: [co\\_consultation@cedb.gov.hk](mailto:co_consultation@cedb.gov.hk)

12 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

Dear Sirs

The Hong Kong and International Publishers' Alliance (HKIPA) thanks the Bureau for this opportunity to provide its views regarding the Treatment of Parody under the Copyright Regime.

### **About HKIPA**

HKIPA was formed in September 2002. Its members include the Hong Kong Publishing Federation, the Anglo-Chinese Textbook Publishers Organisation, and the Hong Kong Educational Publishers Association in Hong Kong, as well as the Association of American Publishers in the USA, the Publishers Association in the UK, and the International Association of Scientific, Technical and Medical Publishers in the Netherlands.

HKIPA supports reform of the copyright regime in Hong Kong to encourage creative

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freedom of expression whilst safeguarding publishers' and authors' economic rights. We previously contributed to the consultation on the Copyright (Amendment) Bill 2011.

In broad terms, HKIPA believes that parody (adopting an inclusive definition of the term) contributes to a free society and plays a part in enabling the continuing evolution of culture. We are inclined to agree with the Bureau's statement that distribution of a copy of an infringing parody is unlikely to affect prejudicially the copyright owner<sup>1</sup> as the target markets are different. Where such prejudice does occur, it is likely to arise from damage to the reputation of the original work.

We are of the view that the rights of the copyright owner in respect of parodies are currently sufficiently covered by the provisions of the current copyright law; in fact far greater harm is suffered by HKIPA's members through online piracy which is still lacking adequate legislation. There also exists a limited protection for parodists from criminal sanctions: provided an infringing copy of a work is not exploited in the course of any trade or business or distributed to an extent to affect prejudicially the copyright owner, there will be no criminal liability. However, we are sympathetic to the concerns of parodists and consumers: of those who do not engage in their art for profit, they may have little control over distribution of their works if they go viral. Meanwhile, those who do retain control over their works may indeed be seeking to profit from their art. This is something of a catch-22.

HKIPA upholds the principle of freedom of speech and takes the view that there must be a fair balance between protecting the rights of copyright owners and safeguarding free expression. Where the two collide, necessitating exceptions and limitations to both free speech and copyright protection, we believe that such exceptions and limitations should be made clear and easily understandable, but also limited in scope to address only the exact harms being perpetrated and complained of at that interface.

### **Progress in Hong Kong**

There is no reason why the development of the law in Hong Kong must follow the footsteps of other Commonwealth countries such as Australia, Canada and the UK where the progress of Hong Kong is quite unique. Instead, in reforming laws, the

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1 Consultation Paper, para. 15

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government should follow the precautionary principle and address only the specific harm being caused or perceived to be caused. Here, the perceived harm is the danger of government repression over political parody.

It appears to HKIPA that the majority of the public's concern over the introduction of the Copyright (Amendment) Bill 2011 was directed towards the failure to include a parody exemption in the face of strengthening rights of copyright owners. To address that concern, the Hong Kong SAR government now seeks to codify the same. Following the successful conclusion of this legislative exercise, HKIPA hopes that the government will immediately return to considering the laudable goals of the Bill, which include updating the Copyright Ordinance to reflect current practices and better cope with modern technologies.

The ease, speed and breadth with which infringing copies of copyright works may be created and disseminated online remain a significant concern for the HKIPA and its members. Indeed, as HKIPA previously noted during the consultation on the Bill<sup>2</sup>, the digital environment offers exciting new opportunities for publishers to develop bigger and more robust markets for copyright works; making them more accessible to consumers. Yet, widespread online infringement undermines such growth, and hinders Hong Kong's development as Asia's digital hub.

### **Comments on the three options proposed by the Bureau**

HKIPA believes the least disruptive option is the introduction of a criminal exemption for parody, referred to in the Consultation Paper as Option 2.

HKIPA notes that any exemption or exception, whilst addressing consumers' legitimate grievances as we set out above, should be clearly defined and narrowly tailored to adequately protect against unfair use. Activities which can be considered unfair use include those which cause more than trivial economic prejudice, or damage to the reputation of original works.

The courts should therefore be given a reasonable degree of discretion in determining whether the distribution of parody is indeed exempt from criminal liability, when evaluated against the relevant factors or circumstances of the case. HKIPA would

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2 In its submission of 11 January 2010

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support the application of the fair dealing tests set out, for example, in s.38 of the Copyright Ordinance in relation to the research and private study exemption<sup>3</sup> as well as the primary consideration set out in s.37, that the use does not conflict with the copyright owner's normal exploitation or unreasonably prejudice against the owner's legitimate interests, which include a more than trivial economic prejudice. These tests afford the courts an adequate degree of latitude whilst also giving guidance to parodists.

The two parts of the s.37 test also reflects the wording of Article 61 of TRIPS which sets out the so-called "three-step test", the other step being that any exception is limited to "certain special cases". The government is of course mindful of its need to remain in compliance with TRIPS and HKIPA's view is that parody alone must be considered the "special case". Explicitly including acts of satire, caricature and pastiche, or attempting to define "parody", would likely have the effect of unnecessarily broadening the exemption beyond the special case. This should be left to the courts, the situation being somewhat reminiscent of the US Supreme Court's famous statement in *Jacobellis v Ohio*<sup>4</sup>, a case on freedom of speech, specifically what material is obscene: "*I know it when I see it*".

Removing the threat of criminal sanctions, and of politically motivated prosecutions brought without the request or involvement of copyright owners, should go a long way to addressing parodists' concerns. Regarding civil action, damages are a less extreme threat than deprivation of liberty. Meanwhile, pursuing damages, even on the assumption that the typically counter-culture parodist could ultimately afford to pay them, would still require the copyright owner to finance a legal action in the face of unsettled and very fact-specific law – an undesirable prospect in all but those cases where serious actual harm is being suffered. Again, adopting the precautionary principle, there is no justification for lessening copyright owners' rights at this point in time, when the fears of the public can be allayed simply by eliminating the likelihood of criminal prosecution for fair and honest parody.

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3 That is, consideration of the purpose and nature of the dealing, the nature of the work, the amount and substantiality of the portion dealt with in relation to the whole work, and the effect of the dealing on the potential market for or value of the work (i.e. its reputation).

4 378 US 184 (1964)

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Considering that by the time any case reaches trial, the parody is likely to have long left the public consciousness anyway, thus rendering civil action even less desirable to the copyright owner, option 2 seems to strike a fair balance between the two sides of this debate. There remains of course the possibility of copyright owners seeking emergency interim injunctions but this is no less of an expensive step than full civil action, and potentially riskier. Whether the courts will permit parody to be restrained in this way is for them to decide, but at least they will have a choice; the people of Hong Kong should be thankful for, not mistrustful of, their independent judiciary.

HKIPA does, however, wish to express concern at the proposed wording of option 2. Firstly, as currently worded, the exemption would seem to exempt the distribution of purely infringing copies of a work – without any original thought or effort added – provided that the distribution is done for the purpose of parody. Ascertaining defendants’ intentions – whether they distributed for the purpose of parody – is much harder than ascertaining the parodical nature of a work. Secondly, it is important to remember that a work re-made for the purpose of parody can, notwithstanding it infringes an existing work, also constitute its own work and there is thus an argument that, by definition, it cannot cause more than trivial – or indeed, any – economic prejudice to the original copyright owner.

We would therefore suggest a revision to the wording to focus the exemption on the parody itself, rather than the distributor or communicator. Possible revisions to the two sections could be: “*Subsection (1)(g) does not apply to any distribution of an infringing copy of a work **made** for the purpose of parody ...*” and “*Subsection (X) does not apply to any communication to the public of an infringing copy of the work **made** for the purpose of parody ...*”

Notwithstanding any special treatment of parody in the copyright regime, moral rights for authors and directors should be maintained and this is essential whichever route the government ultimately takes. Taking action against derogatory treatment of a work, which may cause reputation damage, can come a step before actual prejudice and economic harm is, in fact, caused. It is vital to retain moral rights unaltered, in particular those rights related to preserving the integrity of an original work.

Proponents of parody argue that “imitation is the sincerest form of flattery”, and that they respect copyright works used as a basis for their own material. Notwithstanding

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any argument that a parody has failed if it is not possible to identify the source material, HKIPA wishes to encourage a legitimate creative culture based on mutual respect, so we believe it is appropriate also to retain the attribution right in its present form. This will also aid copyright owners in locating and monitoring parody works online.

We look forward to engaging with you further as the issues of copyright reform move forward.

Respectfully submitted

Elvin Lee

Convenor (Hong Kong)

(no signature via electronic transmission)