

**Treatment of Parody**  
Main Topic

Carman KM  
HO/CITB/HKSARG  
05/12/2013 09:16

Subject: S1026\_Sam Ho (Hong Kong Copyright Concern Group)  
Category:

| Originator                       | Reviewers | Review Options           |                               |
|----------------------------------|-----------|--------------------------|-------------------------------|
| Carman KM<br>HO/CITB/HKSARG<br>G |           | Type of review:          | One reviewer at a time        |
|                                  |           | Time Limit Options:      | No time limit for each review |
|                                  |           | Notify originator after: | final reviewer                |

**Submission on the "Treatment of Parody under the Copyright Regime Consultation Paper"**

to: co\_consultation@cedb.gov.hk

15/11/2013 14:45

From:

To: <co\_consultation@cedb.gov.hk>

Dear Sirs,

**Submission on the "Treatment of Parody under the Copyright Regime Consultation Paper"**

The Hong Kong Copyright Concern Groups (HKCCG) represents the key stakeholders of the copyright industry in Hong Kong. In response to the current consultation, the HKCCG proposes the followings:

**Criminal Exception for Parody (without Fair Dealing for Parody)**

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<sup>[1]</sup> 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);
- (c) the mode and scale of distribution; and
- (d) whether the infringing copy so distributed amounts to a

substitution for the work.

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.”

Furthermore, we strongly oppose the Administration to consider the UGC exemption proposal by some of the user groups. We append below the reasons to support our statement.

User Generated Content (UGC)

WIPO scholars have suggested that UGC might be in breach of the adaption and reproduction right of the authors<sup>[2]</sup> and also three-step test<sup>[3]</sup>. It remains to be seen how Canadian court will interpret the working of UGC provisions in the context of International Obligations.

One thing for sure is that only the intermediaries or online service providers stand gain commercially as more infringing works will be circulated around online in the disguise of User Generated Contents that in turn attract more subscribers to them (more infringing copyright works are freely available online without any fear of being punished by law (under the safe harbor provisions-that must be wrong in the context of UGC that exempt free use of copyrighted materials for non-commercial purpose): only the users, not the intermediaries service providers, will get caught and sued by the copyright owners).

Oxymoronic as it may sound, on the one hand, UGC is only allowed if it is for non-commercial purpose but, on the other hand, the OSP intermediaries are allowed to have commercial gain without any fear of being prosecuted under the cloak of safe harbor provisions as a result of posting these UGC contents online in the servers of OSP intermediaries knowing that many of them are infringing copies. Clearly it conflicts with the normal exploitation of a work and causes unreasonably prejudice the legitimate interests of the copyright owners. Therefore we must re-examine the safe harbor provisions for OSP to ensure that OSP are liable for distributing UGC contents as well and the right owners are entitled to remedial measures such as blocking, tracking and monetizing.

UGC cannot and must not be included for consideration in this round of public consultation given the complexity of legal issues involved.

Submitted and best regards.

Sam Ho  
Hon. Secretary  
Hong Kong Copyright Concern Group

c.c. Fung Hang Records Limited  
Hong Kong and International Publishers' Alliance  
Hong Kong Comics & Animation Federation Limited  
Hong Kong Digital Entertainment Association  
Hong Kong Film & Video Limited  
Hong Kong Motion Picture Industry Association  
Hong Kong Record Merchants Association  
Hong Kong Reprographic Rights Licensing Society  
Hong Kong Video Development Foundation Limited  
International Federation Of Creativity And Technology Limited  
International Federation of the Phonographic Industry (Hong Kong Group) Ltd.  
Modern Audio Limited  
Movie Producers and Distributors Association of Hong Kong Limited  
Phonographic Performance (South East Asia) Limited  
The Hong Kong Copyright Licensing Association Limited

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<sup>[1]</sup> 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.”

<sup>[2]</sup> See section 29 of the Copyright Ordinance (Cap 528).

<sup>[3]</sup> It fails the first step test as it is not limited to a special case and therefore it is not qualified as a special case. It fails the second test as it violates the economic values of adaptation and reproduction right of an author for which s/he has no control over the use of his/her work, not to mention the problem of permitting online intermediaries to knowingly host infringing content with no liability because of safe harbor provisions. It fails the third step test because the extensive adaptations that user is entitled to use would unreasonably prejudice the legitimate interests, both pecuniary and non-pecuniary interests, of the author as s/he has no control over the



creation adaptation and dissimilation of a new work s/he might find objectionable. img-Y15142642-0001.pdf

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November 15, 2013

Division 3  
Commerce, Industry and Tourism Branch  
Commerce and Economic Development Bureau  
23rd Floor, West Wing  
Central Government Offices  
2 Tim Mei Avenue  
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- (c) the mode and scale of distribution; and
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Modern Audio Limited  
Movie Producers and Distributors Association of Hong Kong Limited  
Phonographic Performance (South East Asia) Limited  
The Hong Kong Copyright Licensing Association Limited