

**Treatment of
Parody**
Main Topic

Sherry YIP/CITB/HKSARG
12/11/2013 14:54

Subject: S0425_John Ure (AIC)
Category:

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From:
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Date: 11/11/2013 11:48
Subject: AIC comments to the HK LEGCO Copyright Bill dialogue



11 November 2013

Division 3, Commerce, Industry and Tourism Branch

Commerce and Economic Development Bureau

23rd Floor, West Wing

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Comments on the Hong Kong Copyright Law – Parody Exception

About the Asia Internet Coalition

The Asia Internet Coalition (the “AIC”) is an industry association formed by eBay, Facebook, Google, LinkedIn, Salesforce and Yahoo. The AIC seeks to promote the understanding and resolution of Internet policy issues in the Asia Pacific region.

The Asia Internet Coalition welcomes the Administration's decision to open up for public comment the desirability of having a separate parody exception to claims of copyright infringement and are pleased to have the opportunity to provide our comments on the "Treatment of Parody under the Copyright Regime Consultation Paper".

A Parody Exception in Hong Kong

Hong Kong has a strong tradition of freedom of expression; a parody exception will bolster its status regionally and internationally as a critical place to do business because of its free flow of information. We support such an exception from civil and criminal laws, properly drafted to take into account internationally accepted factors. We thus favor Option 3 in the Consultation Paper. We do not believe that such an exception should be disallowed if the parodist receives financial benefit from the parody: parodies rarely if ever harm the market for the original. Moreover, in the Internet Age, financial benefit can be unplanned for or unexpected, as when a work intended for a niche market becomes a viral hit. Disallowing a parody created for non-profit purposes just because it later became popular may punish those who are the most creative.

As the Consultation Paper acknowledges, parodies are not new to Chinese society, but that "[w]ith advances in technology, it has become easier for members of the public to express their views and commentary on current events by altering existing copyright works and to disseminate them through the Internet." We believe such developments are positive: permitting such creativity will foster a healthy environment for both entertainment and commentary.

New digital tools and platforms such as YouTube have already led to an explosion in individual creativity. These works can reach vast global audiences. South Korean Pop star Psy's "Gangnam Style," which has received over 1 billion views on YouTube is one such example. Psy's work is a parody – a parody of certain styles of Korean pop music videos and of a culture of materialism.¹⁴ It is done in a good-natured humorous way, and does not incorporate portions from others' works. It would thus have no need for a parody exception, as noted in Paragraph 12 of the Consultation Paper. Other parodies do, however, incorporate portions of previous copyrighted works, but do so in transformative, creative ways that do not harm the economic interests of the original, and provide new cultural or social insights. Unless they fall within existing exceptions, as noted in Paragraph 13 of the

Consultation Paper, they would be considered infringing, and subject even to possible criminal prosecution. For this reason, we respectfully suggest that the Consultation Paper's first option – retaining the status quo – is not the most desirable approach. Such an approach works in the United States, where parody is not an enumerated purpose,^[2] because fair use in the United States is not a closed list. As a result, U.S. courts have had no problem treating parody as a form of criticism of commentary, or simply as a fair use: how you label a use is of little or no consequence in such a regime. Were Hong Kong to include a general, flexible exception for creativity or innovation, or create an exception for user-generated content as Canada recently did, we would feel differently. But absent such amendments, we believe Option 3's approach will encourage the most creativity while still protecting the legitimate economic interests of authors whose works are parodied.

We wish to state our disagreement with the opposition to adopting fair use on the grounds that a parody exception would “create uncertainty and increase opportunities for abuse by blurring the line between parody and outright copyright infringement.” Consultation paper at page 4, paragraph 10(b). Such argument is unfounded and shows little understanding of the situation and issue. Having a possible parody exception does not mean anything goes. It doesn't even mean that most claims of parody will succeed. It only means that an individual claim of parody, when evaluated by internationally recognized factors, will be evaluated according to those factors. “Outright infringement” will still be “outright infringement,” and obviously so. We also disagree with the argument that a parody exception will adversely affect copyright owners' revenues from licensing parodies, lower their return on investment and thereby dampen their creativity. This argument is unsupported.

We shall now address the individual questions posed in the Consultation Paper.

Application of Criminal Laws to Parodies

Criminal laws should never apply to parodies. Criminal laws – the taking away of someone's most basic freedom – should be carefully limited to serious, intentional, commercial instances of what has been called “outright copyright infringement.” Parodies never fall into this category.

Moral Rights

The Consultation Paper asks whether moral rights should be “maintained” in the event of a parody exception. We do not believe moral rights should be eliminated but neither do we believe they should trump a valid parody claim. If moral rights did trump an otherwise valid parody claim, parodies would likely never be allowed through the simple artifice of claiming your honor or reputation has been injured because someone made fun of you. We believe that moral rights claims should be maintained but limited to situations where the injury to one’s honor or reputation stems from sources other than parody. Such situations are best evaluated on a case-by-case basis. Moreover, as the Consultation Paper points out on page 10, in introducing parody exceptions into their laws, neither Australia nor Canada found it necessary to change the moral rights provisions under their pre-existing laws.

Scope and definition

As the Government pointed out, there is no definition available for “parody” or related terms in the Hong Kong laws or other jurisdictions. We are of the view that no legal definition would be needed, or capable to serve the purpose, especially in view of the frequent changes in technology and nature of these kinds of works. The interpretation may as well be left for consideration on a case-by-case basis. In any case, it is our view that in most cases, these kinds of works can be easily identified and differentiated from “outright infringements”. We however would urge that the exception be stated to apply to all of “parody, satire, caricature and pastiche” under the laws of Hong Kong. Should the law only refer to one type of the foregoing, there would be uncertainty whether the exception should just apply to that type of work since the legislation omits the mentioning of the other kinds of works.

We also strongly submit that the exception should apply to all classes and types of copyright works. To exclude one class or the other will be confusing and create ambiguities and uncertainty to the public and must be avoided.

Which Option to Choose?

For the reasons given at the beginning of these remarks, we favor Option 3, a separate parody exception.

The Fair Use Doctrine

The transformative power of the Internet on the economy is analogous to that of electricity.

The direct contribution of the Internet to the Hong Kong economy was worth approximately HK\$96 billion in 2010, equivalent to 5.9% of GDP, and outpacing the broader economy growing at 7% pa.^[3] Copyright will become an increasingly crucial element of economic policy as Hong Kong transitions to a leading digital economy that relies heavily on knowledge, innovation & creativity.

The Asia Internet Coalition would like to see a copyright regime that is future-proofed with an open-ended flexible exception to keep pace with rapid developments in technology and the expectations of consumers and creators. This is crucial to make Hong Kong more attractive to technology investment, attract a digitally skilled workforce, allow Hong Kong technology and content creators to be competitive on the world stage, and permit Hong Kong consumers to enjoy the content they own in innovative ways.

Therefore, while we welcome the Administration's introduction of a parody exception, we also wish to point out that the introduction of a US-style fair use doctrine will ensure that Hong Kong can fully benefit from the innovations brought about by the Internet. Hong Kong's fair use defense is narrow and specific to enumerated purposes, which is holding back innovation, creativity, investment and the enjoyment of content. In contrast, the US fair use doctrine's flexibility has enabled it to protect both creative cultural output, such as parody or news commentary, and technological innovation built on digital copying. It has played an important role in enabling US copyright law to adjust to the new digital reality and enable the legal creation of Internet services. Based on hundreds of years of precedent as well as guidance from Congress, the fair use doctrine enables courts to judge whether or not unlicensed uses of copyrighted materials should be allowed, on a case by case basis, considering:

- the purpose and character of the use
- the nature of the copyrighted work
- the amount of the portion used in relation to the work as a whole
- the effect of the use upon the market for or value of the copyrighted work

Fair use is regularly referred to as the key tool by which the US fosters innovation by attempting to maintain a balance between the monopoly rights of the original creator, and the socially and economically beneficial output of subsequent creators or innovators. In the US, companies benefiting from fair use accounted for one out of every eight jobs, represented one-sixth of total US GDP, and generated average annual revenue of \$4.6 trillion in 2008 and 2009.^[4] It is also worth noting that other countries, such as Singapore and Australia, have recognised the clear importance of fair use and crafted flexible exceptions accordingly, leading to tangible economic benefits. In Singapore, flexible fair use policy contributes € 2.27 billion to the private copying technology industries during 2005-2010.^[5] In Australia, the 'copyright exceptions sector' is adding \$182 billion dollars in economic value per annum, or 14% of Australia's GDP.^[6]

As a next-stage reform goal, we would recommend the Hong Kong government to replace the existing purpose based exceptions with an open-ended flexible exception, so as to provide Hong Kong technology innovators and content creators with as open a market as possible.

We appreciate the opportunity to have responded to this important inquiry.

Yours Sincerely,



Dr. John Ure

Executive Director

Asia Internet Coalition

^[1] The video has itself led to thousands of parodies, a rare example of parodies of a parody.

^[2] We respectfully suggest that the Consultation Paper's comment that satire is treated less favorably in the United States than parody is inaccurate. We appreciate that certain language in the U.S. Supreme Court's opinion in the 2 Live Crew case, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S.Ct. 1164 (1994), may lead one to this conclusion, but subsequent court of appeal cases have rejected such a distinction, see e.g., most recently *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

^[3] "The Connected Harbour: How the Internet is Transforming Hong Kong's Economy," Boston Consulting Group, 2011. <http://www.connectedharbour.hk/>

^[4] "Economic Contribution of Industries Relying on Fair Use, Computer & Communications Industry Association," 2011.

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^[5] "The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore," Roya Ghafele and Benjamin Gibert, 2012. http://works.bepress.com/roya_ghafele/12/

^[6] "Exceptional Industries: The economic contribution to Australia of industries relying on limitations and exceptions to copyright," Lateral Economics, August 2012. <http://digital.org.au/media/167>



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A handwritten signature in blue ink, appearing to read 'John Ure', with a horizontal line underneath.

Dr. John Ure
Executive Director
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