



INTERNATIONAL FEDERATION OF CREATIVITY AND TECHNOLOGY LTD.

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

The International Federation of Creativity and Technology Limited (IFOCAT) is a non-profit making association representing 364 members from the Creative, I.T and Technological industries.

In response to the current consultation, the IFOCAT invites the Legislative Council to note the following:

- 1) With all due respect to the efforts the Administration has given to protecting creative activities, IFOCAT considers that it would be a mistake to contemplate any sort of blanket exemption from liability for "parody", "satire", "caricature" or "pastiche". International conventions such as Berne and TRIPS provide a minimum level of protection to copyright owners under the "three-step test". It is difficult to see how a blanket exemption could comply with that test and (i) be confined to a special case; (ii) not conflict with a normal exploitation of the copyright owner's works; and (iii) not unreasonably prejudice the legitimate interests of rights owners. Furthermore, Article 61 of the TRIPS agreement provides that "members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale". Hong Kong would be in a difficult position if introducing such exemptions that do not comply with these international standards. Moreover, care should be taken to ensure that any proposed legislative amendments will not make it harder for Hong Kong authorities or copyright owners to act against those who make a living out of piracy.
- 2) There are important distinctions between terms such as parody, pastiche, satire and caricature, which need to be taken into consideration when considering the impact on copyright owners' interests, and care should be taken not to use them interchangeably for the purposes of this inquiry. With our support on "freedom of expression", IFOCAT would not object to a variant of option 3 for a carefully crafted exception for parody that (a) is limited to true parodies of the work in question which comments on the work itself, and (b) does not supplant or have an adverse effect on the copyright owner's markets or potential markets. The taking of a work to parody another work should not fall within that exception. IFOCAT does not support the extension of such an exception to the vague categories of "caricature" or "pastiche" as this would involve a time-consuming questioning on definitions, and would encourage bad-faith defences. Any exception should be limited to parody alone.



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- 3) IFOCAT is aware that a fourth option, not included in the current consultation document, has been proposed by 'netizens' and other online users. This option seeks to follow the approach to parody recently introduced in Canada. At this stage, without seeing the full details of what is proposed, IFOCAT considers that a fair dealing exception based on the Canadian approach would be premature. The Act only came into law in June 2012, so it will be unclear exactly what the scope of "non-commercial purposes" (s. 29.21(1)(a)) or "a substantial adverse effect, financial or otherwise" (s. 29.21(1)(d)) might be for some time to come. The Act also introduces a new concept that any new work should not be "a substitute for the existing one" (s. 29.21(1)(d)). Clearly while these uncertainties exist, users and copyright owners of existing works will be forced to turn to the courts to seek judicial interpretation of these terms. If 'netizens' are seeking clarity on which parodies might attract civil or criminal liability, IFOCAT considers that this approach put forward in this "fourth option" may only defeat that purpose.

The treatment of parody under the copyright regime was not a subject that the 2011 Bill sought to address and it is disappointing that attention has been diverted to this unrelated issue. To the extent the Administration wishes to undertake any examination of the fair dealing provisions under the existing Copyright Ordinance, IFOCAT believes it should be the subject of a separate initiative, unrelated to the "digital agenda" provisions which underscore the 2011 Bill.

IFOCAT is hopeful that this consultation process can now be swiftly concluded so that attention can be returned to the very real concerns expressed by the Community at large, especially by some of our members, regarding the lack of "safe harbour provisions" for the I.T. industry in the fast moving Cloud Computing Age.

Dated: October 25, 2013