Treatment of Parody
Main Topic

Carman KM
HO/CITB/HKSARG
04/12/2013 14:54

Subject: S0952_Motion Picture Association
Category:

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

Motion Picture Association submission to CEDB on the Public Consultation on Treatment of Parody under the Copyright Regime

to: co_consultation@cedb.gov.hk 15/11/2013 12:22

Sent by:
Cc:

From:

To: <co_consultation@cedb.gov.hk>

Cc:

Sent by:

Dear Sir:

Attached please find the Motion Picture Association submission on the Public Consultation on Treatment of Parody under the Copyright Regime.

Thank you.

Regards,

MPA Parody Consultation submission to CEDB HK - Nov 15 2013.pdf

MOTION PICTURE ASSOCIATION – INTERNATIONAL

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Frank S. Rittman
Senior Vice President,
Deputy Managing Director
& Regional Policy Officer
Asia-Pacific

ASIA-PACIFIC OFFICE
No. 1 Magazine Road
#04-07 Central Mall
SINGAPORE 059567
TEL: (65) 6253 1033
FAX: (65) 6255 1838
E-mail: Frank_Rittman@mpaa.org

November 15th, 2013

VIA EMAIL: co_consultation@cedb.gov.hk

Division 3
Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
23rd Floor, West Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

Re: MPA Submission on the "Treatment of Parody under the Copyright Regime Consultation Paper"

Dear Sir/Madam:

The MPA is a trade association representing six international producers and distributors of theatrical motion pictures, home video entertainment and television programming.[1] Those products are distributed in more than 150 markets globally, including Hong Kong.

Summary

For the reasons detailed more fully below and in response to the questions raised in paragraph 27 of the above-referenced Consultation Paper, the MPA hereby states its preference for Option 1 (referenced in paragraphs 28, 29, and Annex A) as the best resolution to balance the interests between copyright owners and users, i.e. either maintain the status quo entirely, or provide minor amendments to section 118 of the Ordinance to provide further guidance to the courts and clarity to users. We disagree with, and do not support, the proposal(s) to provide criminal (or civil) liability exemptions for parody whether undertaken on a commercial or non-commercial scale.

[1]MPA represented studios include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.

Discussion

Prior to the onset of the present consultation on the "treatment of parody" the MPA had previously communicated its views concerning more pressing proposals for strengthening copyright protection in the digital environment, including the Copyright (Amendment) Bill 2011 ("the 2011 Bill"), to the Hong Kong Government on a number of occasions dating back to 2005 and provided related testimony to the Legislative Council on three occasions. Despite previously expressed concern about perceived insufficiencies in the 2011 Bill, we were nonetheless pleased and supportive that Hong Kong was, at least and at last, taking steps to update the Copyright Ordinance in a number of important areas that would have benefitted copyright owners and advanced Hong Kong's interests to remain at the forefront of intellectual property rights protection in Asia. It is lamentable that the Bureau was unable to complete that modest initiative, and has instead become side-tracked by the present exercise, which we suspect has very little to do with any actual concerns about copyright reform.

However, we take due note of paragraph 3 of the Bureau's above-referenced Consultation Paper that resolution of such concerns will "enable the re-introduction of a new amendment Bill into LegCo to update our copyright regime in earnest" and in the spirit of cooperation towards that end wish to comment as follows:

1) The MPA considers that it would be a mistake to contemplate any sort of blanket exemption from liability for "parody", "satire", "caricature" or "pastiche".[2] International conventions such as Berne and TRIPS generally limit the application of liability exemptions through the "three-step test". It is difficult to see how a blanket exemption for parody could in all instances 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. As a matter of policy, and to maintain consistency with internationally accepted norms of protection, Hong Kong should not introduce any uniform exemption that does not comply with these threshold requirements. Despite mistaken assertions to the contrary by various individuals, there is no "right" of parody (of another person's copyrighted work) in any jurisdiction, and international practice regarding exceptions in such regard is varied.

2) Our observations, based on attendance and participation in several public meetings and careful monitoring of more than 90 related news articles since the onset of this consultation, is that the present concerns regarding copyright reform voiced by certain elements of society are primarily grounded in suspicion that the administration might use criminal penalties available under the Copyright Ordinance (such as those contemplated under the 2011 Bill) to suppress unsupportive or opposing "political speech", which is typically expressed in the form of parody/satire/caricature/pastiche, by construing such statements to have infringed upon a copyright owner's right of reproduction and/or communication of such parodied work(s) to the public. As such MPA believes, and has previously communicated to the administration, that any proposed reform should be limited to addressing those particular concerns rather than weakening, on an overall basis, any present levels of normative protection. MPA therefore prefers Option 1 as the best among the three alternatives presented. As a secondary alternative, MPA might not object to a variant of option 3 for a carefully crafted fair dealing 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.[3] However, given the Bureau's observation

[2] We note the Bureau's helpful clarification in footnotes 5 and 6 of the Consultation Paper clarifying distinctions between these terms and confirming that the present terms of reference are in fact limited to parody.

[3] The taking of a work to parody another work should not fall within that exception, so for example the verbatim taking of a musical work in order to make a parody of the words of the song should not be excepted.

that the Copyright Ordinance already recognizes more than 60 provisions on permitted acts governing the reasonable use of copyrighted works under specific circumstances, it is difficult to see any compelling need to enact a further exception based on a criteria as broad as parody[4] or to ensure its proper interpretation.[5] Under either alternative, we agree with the Bureau's suggestion in paragraph 27(d) that moral rights in the relevant work(s), if any, should be maintained notwithstanding any special treatment of parody under the copyright regime.

3) MPA 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. As in the UK and Australia, the Canadian Copyright Modernization Act ("the Act") introduces a fair dealing exception for parody and satire. However, the Canadian Act goes a stage further as it also includes a provision for non-commercial user generated content ("UGC") that effectively creates a legal safe harbour for creators of non-commercial UGC (provided they meet four conditions in the law) and for sites that host such content. This provision has been variously referred to as the "YouTube defence".

The Canadian exception is unprecedented, worldwide, in its scope and permits very substantial copying of very large parts of a work (ostensibly an entire music album, or a television series). The only condition placed upon the individual is that "existing works" be used in the creation of a new work, which could in fact be merely a collective work or compilation of works (such as a "best of" TV series or artist's work presentation). There is no requirement under the Canadian law that the new work be transformative or that the copying be limited in extent or be fair. Neither is there any prohibition in the Canadian law on circumventing technological protection measures to create new works.

At this stage, without seeing the full details of what is proposed, the MPA considers that a fair dealing exception based on the Canadian approach would be premature and thus ill-advised. Because the Act only came into law in June 2012 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, the MPA considers that the approach put forward in this so-called 'fourth option' defeats that purpose.

Conclusion

Throughout the 1990's, Hong Kong stood at the forefront of intellectual property rights protection but with the failure of the 2011 Bill to reach its second reading in 2012, Hong Kong is now falling far behind with respect to the so-called "digital protections" which many other jurisdictions have already enacted. 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.

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[4] Based on discussions with our represented studios, we are unaware of any instances wherein permission has been sought to parody their copyrighted material (in either a non-commercial context of for a commercial application) and suspect that the expressed concerns are driven more by suspicion towards what might possibly happen in the future than by anything that is actually happening today.

[5] The problems for enforcement are far from imaginary, given the need for fact-based assessment of fair dealing factors. J.K. Rowling had to meet this defense in her 2003 action in the Netherlands to prevent the distribution of the "Tanya Grotter" books, as did the Salinger estate in their 2009 attempt to halt publication of a Swedish author's sequel to "Catcher in the Rye."

The MPA is hopeful that this consultation process can now be swiftly concluded so that attention can be returned to the very real concerns expressed by rights owners for the past eight years about the need for the Copyright Ordinance to properly address online infringement.

We thank the Bureau for the opportunity to have provided the foregoing comments and remain available to assist in any further manner that might be requested.

With kind regards,

Frank S. Rittman