CONSULTATION PAPER

TREATMENT OF PARODY UNDER THE COPYRIGHT REGIME

The Law Society's Intellectual Property Committee has reviewed the Commerce and Economic Development Bureau's Consultation Paper "*Treatment of Parody under the Copyright Regime*" ("Consultation Paper") on the subject of parody in relation to copyright and has the following comments:

Parody, regardless of how it may be defined, has never been a significant source of litigation in Hong Kong or jurisdictions with similar copyright laws such as the UK and Australia. This suggests that the existing law is satisfactory. Creating an exception for parody, so that it would not infringe somebody else's copyright, should not therefore be viewed as a necessary or urgent step to take. However, we are aware that public policy and the Basic Law require the protection of both freedom of speech and private ownership rights and that the exercise of such rights might produce scope for conflict in some (very limited) circumstances.

The protection of free speech is almost always not affected by the protection of copyright because it is axiomatic that copyright does not protect ideas themselves but only the manner in which they are materially expressed. However, the UK, Australia and other common law jurisdictions have already introduced, or proposed to introduce, parody exceptions without any pressing need to do so. We take the view that Hong Kong may follow suit provided that copyrights are adequately protected against the possibility of a parody exception being abused.

The *Berne Copyright Convention*, of which the PRC and most other countries are members, provides in Article 9(2) that: -

"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".

This is informally known as the "three-step test" and must be complied with by member countries when introducing permissive legislation to legitimise acts of copying that would otherwise constitute copyright infringement. The proposed Copyright Ordinance should therefore strike the right balance as contemplated by Article 9(2), between the competing rights concerned.

The Law Society believes that, as in the UK and Australia, the right balance would be achievable by having a limited exception for parody (which is to be left to the courts to define) and that the applicability of the exception in each individual case is to be subject to the statutory defence of "fair dealing". This would allow for some flexibility when the court considers infringement according to the "substantial part" definition. The fairness of the particular copying and use for parody would then depend on all the circumstances but, for example, there would typically not be fair dealing if:

- the whole of a copyright work were to be copied or adapted in some way without the consent of the copyright owner; or
- the sole or dominant purpose of the parody was commercial or unduly prejudicial to the owner's rights in the work concerned.

"Free riding" by the parodist for commercial purposes should not be permitted and, at the very least, the parody should contain added, independent creative content in order to invoke a fair dealing defence.

The Law Society therefore believes that Option 3 (Annex C of the Consultation Paper) would be appropriate for Hong Kong. In relation to the questions posed in Annex C, we respond as follows:-

(a) The subject matter should be "parody", including satire, caricature and pastiche. The US jurisprudence should not be adopted because the relevant law is markedly different from that in the UK and Australia.

(b) There should be no statutory definition of "parody" or other similar terms. This should be left to the courts to determine.

(c) We have no particular objection to a very limited definition of "parody" being enacted, instead of having no definition at all, but Hong Kong case law would then develop very slowly because of the lack of relevant court decisions elsewhere. However, as mentioned above, we prefer an open definition so that the courts can apply the law appropriately according to the facts of the case being heard.

(d) A sufficient acknowledgement of copyright ownership should be required in order to qualify for the fair dealing exception. As proposed in the UK, we believe that the question of whether moral rights have been infringed should be assessed as part of the enquiry as to whether there has been "fair" dealing. No exception to moral rights should be introduced.

(e) All classes and types of copyright works should be covered by the parody exception as there seems to be no justification for selecting a narrower range. Unpublished works should not be excluded and, in each case, the fairness of the dealing in question should determine whether the exception should apply.

(f) We are not in favour of including a list of "fairness" factors. The court is very well-equipped to determine such matters in the light of all the surrounding circumstances.

As noted in the Consultation Paper, the application of a parody exception, if available on the facts of a particular case, would effectively exclude both civil and criminal liability if Option 3 were to be adopted. This is sensible and serves to emphasize that a parody exception would not be available in all circumstances. We would also stress that a parody exception, even if this were to apply in a particular case, would only be a defence to

copyright infringement and not, for example, defamation, malicious falsehood or criminal incitement.

The Law Society of Hong Kong
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