Hong Kong Considers Significant Changes to Parody Under Copyright Law

By Winnie W.N. Chan

In July 2013, the Hong Kong Government commenced a three-month public consultation on three options to deal with parody under Hong Kong copyright law. One of the options was the introduction of a fair dealing exception for parody under Hong Kong copyright law, where the “distribution and communication of parody will not attract any civil or criminal liability if the qualifying conditions for exception are met.”

In December 2013, the Hong Kong Government issued a report summarizing various views submitted by copyright owners, copyright users, and the general public, in response to the public consultation. Many copyright owners submitted views that a fair dealing exception for parody was unnecessary to balance the protection of intellectual property rights and freedom of expression, for example, because there are already fair dealing defenses under the present Copyright Ordinance, and copyright owners have implemented various licensing systems. Some copyright owners submitted concerns that the exception might limit the copyright owners’ control and rights over copyright work. On the other hand, some copyright users supported the exemption of civil and criminal liabilities to protect freedom of speech, expression, and creativity. Some online service providers commented that the exception should expressly refer to parody, satire, caricature, and pastiche to reduce uncertainty as to the coverage of the copyright exception.

The Basic Law of Hong Kong generally protects the right of private ownership of property, freedom of speech, and obliges the government to protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation. Hong Kong is also obliged to follow Article 13 of TRIPS, so that the exception is confined to “special cases which do not conflict with a normal exploitation of the work and do not unreasonably
prejudice the legitimate interests of the rights holder.” Article 61 of the TRIPS Agreement\(^7\) also obliges Hong Kong to provide criminal procedures and penalties in cases of copyright piracy on a commercial scale.

“Fair dealing” without any specific reference to parody is dealt with under the current copyright law in Hong Kong. Section 38(3) of the Copyright Ordinance states that in determining whether any dealing with a work is fair dealing under Section 38(1),\(^8\) “the Court shall take into account all the circumstances of the case and, in particular-

(a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;

(b) the nature of the work;

(c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and

(d) the effect of the dealing on the potential market for or value of the work.”

In view of the above, if legislation on a fair dealing exception for parody is implemented, it would be necessary to balance the rights of copyright owners, freedom of speech, and international obligations such as the TRIPS Agreement, under which the Court may be given the task of determining “fair dealing” on a case-by-case basis.

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\(^7\) Article 61 of the TRIPS Agreement states that “members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.”

\(^8\) Copyright Ordinance (Cap 528)
Section: 38 Research and private study
(1) Fair dealing with a work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.
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Author:
Winnie W.N. Chan
winnie.chan@klgates.com
+852.2230.3503