Bills Committee on the Copyright (Amendment) Bill 2011

Parody

Purpose

At the meeting on 5 July 2011, the Bills Committee invited the Administration to elaborate on –

(a) the circumstances under which a parody might be regarded as infringing the copyright of a work;

(b) whether the communication of such a parody on the Internet without the authorisation of the copyright owner of that work would constitute an offence; and

(c) the relevant "permitted acts" and "fair dealing" provisions under the existing Copyright Ordinance (Cap. 528).

2. This paper provides the information required.

Background

3. According to the Oxford Advanced Learners' Dictionary, "parody" means "a piece of writing, music, acting, etc. that deliberately copies the style of somebody/something in order to be amusing". Similarly, Webster's Dictionary defines parody as "a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule". Most recently, parody, among such terms as re-mix, mash-up works and derivative works, are loosely and collectively referred to by many in society to describe certain materials that sometimes adapt existing copyright works for amusement, criticism and satire.

Overseas Experience

Australia

4. Australia is the first common law jurisdiction that introduces a fair dealing exception for parody and satire.[1] However, the Australian law does not define "parody" and "satire". Therefore, the concept of "parody" and "satire" is still open to interpretation. According to the Australian Copyright Council (an independent and non-profit organisation), parody is "an imitation of a work that may include parts of the original. In some cases, a parody may not be effective unless parts of the original are included. It seems that the purpose of a true parody is to make some comment on the imitated work or on its creator."[2] On the other hand, a satire is to

[1] Section 41A was introduced into the Copyright Act 1968 in 2006 which provides that "A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire."

[2] Australian Copyright Council Information Sheet G083 v03 January 2008.

"draw attention to characteristics or actions – such as vice or folly – by using certain forms of expression – such as irony, sarcasm and ridicule".[3] It opines that making something funny, in itself, is not a sufficient condition for qualifying for the exception for parody or satire. Some form of commentary (which may be implied) on the work or "characteristics or actions such as vice or folly" is required.[4] Also, "changing the words of songs or other material, or using the material in an incongruous context, is not necessarily parody or satire."[5]

5. Further, to qualify as a valid permitted act, a parody or satire must be "fair" to the copyright owner. There is no statutory definition of how "fairness" should be assessed for parodies and satires. Such an issue is subject to the interpretation by the court. Meanwhile, we are not aware of any relevant decided case from which we may otherwise draw reference. Accordingly, the precise scope of this fair dealing provision is not clear or certain.

The US

6. There is no specific exception or limitation for parody or satire in the US copyright law. However, the law does provide an open-ended fair use exception which may be available for acts done for the purposes of criticism, comment, news reporting, teaching, scholarship or research, etc. There is no hard and fast rule in the US jurisprudence on whether a parody or a satire constitutes fair use of a copyright work, which has to be decided on a case-by-case basis.[6]

7. In *Campbell v Acuff-Rose Music, Inc.*,[7] the US Supreme Court defined parody as a "literary style or artistic work that imitates the characteristic style of an author or work for comic effect or ridicule" that comments on the author's original work, and held that "parody, like other comment or criticism, may claim fair use …".[8] On the other hand, the Court limited the fair use defence for satirical works. In defining satire as a work "in which prevalent follies or vices are assailed with ridicule," the Court noted that satire comments are on society at large and not

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[3] ibid.

[4] ibid.

[5] ibid.

[6] In this connection, the laws particularly highlight the following four factors for consideration by the court -
(a) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
(b) the nature of the copyrighted work;
(c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(d) the effect of the use upon the potential market for, or value of, the copyrighted work.

[7] 510 U.S. 569 (1994).

[8] Ibid. page 579-80.

necessarily on the original work. The fair use defence does not exist, therefore, for a satirist, who merely infringes another's copyright "to avoid the drudgery in working up something fresh."[9]

The UK

8. While the European Union, in a Directive issued in May 2001, stipulates that Member States may provide a copyright exception for "use for the purpose of caricature, parody or pastiche" (Directive 2001/29/EC), the UK copyright law does not provide any specific copyright exception for parody and satire.

9. In 2006, the Gowers Review commissioned by the UK Government recommended that a specific fair dealing exception for parody should be introduced by 2008. However, after two rounds of public consultations, the UK Intellectual Property Office (UKIPO) concluded in 2009 that there was insufficient justification for the exception. In particular, the UKIPO did not accept that a copyright exception for parody is necessary for the copyright law to be compliant with the human rights provision on the freedom of expression. Specifically, it concluded that introducing the exception would likely bring about a potentially significant change to the balance between the creators and right holders of underlying works, and those who sought to use them, e.g. the proposed new exception might also increase opportunities of abuses by blurring the line between parody and plagiarism, and depriving copyright owners of a source of licence revenue. In the absence of any consensus, the UKIPO was not persuaded that there were sufficient advantages of introducing the exception forthwith.

10. The UK Government has recently indicated that it would bring forward the proposals made in the "Hargreaves Report" by conducting public consultations on a number of copyright exceptions including that for parody.[10] This exercise will be the third consultation to be conducted by the UK government on the proposed parody exception since 2006. The UK experience demonstrates that the issue on parody is by no mean straightforward. The outcome of the public consultations and how the UK Government may choose to proceed on the issue of parody remain to be seen.

Others

11. Other major common law jurisdictions such as Canada and New Zealand do not provide a specific exception for parody.

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[9] Ibid. page 580-81, note 15.

[10] The Government Response to the Hargreaves Review of Intellectual Property and Growth, August 2011. See http://www.bis.gov.uk/assets/biscore/innovation/docs/g/11-1199-government-response-to-hargreaves-review.

Parody and the Copyright (Amendment) Bill 2011

12. After the introduction of the Copyright (Amendment) Bill 2011 (hereinafter referred to as "the Bill") into the Legislative Council in June 2011, we have picked up commentaries alleging that it aims to stifle the freedom of expression by way of "criminalising" the dissemination of parody on the Internet. We believe that this is due to a misconception about the objective and scope of the Bill.

Communication right and corresponding criminal sanction

13. Our policy intent in introducing the proposed criminal sanction is to combat large-scale copyright piracy, rather than targeting parodies. One of the key proposals in the Bill is the introduction of an exclusive right for copyright owners to communicate their works through any mode of electronic transmission to the public (hereinafter referred to as "the communication right"). This will facilitate copyright owners in exploiting their works in the digital environment, and is conducive to the development of digital content and advancement of technology in digital transmission. By introducing a technology-neutral right encompassing future developments in electronic transmission, it would enable copyright to remain adequately protected in the digital environment, and minimise the need to amend the Copyright Ordinance whenever a new digital technology emerges. To tie in with the introduction of the communication right, the Bill proposes corresponding criminal sanctions against unauthorised communication of a copyright work to the public. The proposed sanctions, mirroring the existing sanctions available against unauthorised distribution in section 118(1)(e) and 118(1)(g) of the Ordinance, are targeted at unauthorised communication conducted (a) for the purpose of or in the course of any trade or business that consists of communicating copyright works to the public for profit or reward; or (b) to such an extent as to affect prejudicially the copyright owner (hereinafter referred to as "the prejudicial communication offence"). The Bill maintains the existing line demarcating the boundary between criminal and civil liability arising from copyright infringement (see Annex).[11]

14. At present, unauthorised distribution of an infringing copy of a copyright work on the Internet may attract civil liability. Such an act may also attract criminal liability if an infringing copy is distributed for the purpose of or in the course of any trade or business[12] which consists of dealing in infringing copies of copyright works; or to such an extent as to affect prejudicially the copyright owners (hereinafter referred to as "the prejudicial distribution offence").

[11] Section 118(1)(e) and (g) of the Copyright Ordinance.

[12] "Business" also includes business conducted otherwise than for profit. See section 198(1) of the Copyright Ordinance.

15. The proposed provision in the Bill does not change the present line demarcating the criminal and civil liability arising from dissemination of parody on the Internet. In other words, dissemination of parody on the Internet that does not prejudicially affect the copyright owners will not, as at present, fall into the criminal net under the Bill.

Parody and Infringement of Copyright

16. When a copyright work is adapted without authorisation, whether or not for the purpose of parody or satire, a potential copyright issue may arise. On the other hand, an original political cartoon, however satirical or critical it may be, has nothing to do with copyright infringement. It is an original work protected by copyright law.

17. For unauthorised dissemination of a parody not made for profit or reward to be ever caught by the criminal sanction, it has to at least cross the following thresholds –

(a) idea vs expression;
(b) *de minimis* use;
(c) permitted act and fair dealing; and
(d) the criminal threshold.

Idea vs expression

18. First and foremost, copyright protects the form of expression of ideas or information. It does not grant any monopoly of use of ideas or information. In other words, the use of ideas or information underlying a copyright work is <u>not</u> limited by copyright law.

The principle of de minimis use

19. Parody that only reproduces an insubstantial part of the underlying work will not attract liability for copyright infringement. Section 22 of the Copyright Ordinance provides that an infringement of copyright must involve reproduction of the whole or any substantial part of a work. Case law suggests that the extent of "substantial copying" has to be determined in terms of the "quantity" and "quality" of the part(s) being copied. In other words, copyright law clearly allows one to express one's views and ideas by using an insubstantial part of a copyright work.[13]

[13] "it has never been the law that copying of any part of a work, no matter how small, is unlawful; copyright should not be allowed to become an instrument of oppression and extortion. Some use of a copyright work is clearly permissible." See paragraph 7.25 of *Copinger and Skone James on Copyright*, 16th Edition.

Permitted act and fair dealing

20. For parodies involving substantial copying of the underlying works, it is still possible that creation and dissemination of such parodies qualifies as an existing permitted act under the Copyright Ordinance. One particularly pertinent permitted act in the present context is the one under section 39 of the Copyright Ordinance. Under this provision, it is not a copyright infringement for "fair dealing" with a copyright work for the purpose of criticising or reviewing a copyright work or another work, subject to compliance with the prescribed conditions. Thus, it is possible for parodists to use copyright materials to criticise or review the underlying work or another copyright work.

21. Furthermore, it has been supported by decided cases that the concept of criticism and review under section 39 should be interpreted liberally. In *Capcom Co. Ltd. v Pioneer Technologies Ltd.*,[14] the Hong Kong District Court held, by reference to the UK authorities[15], "that criticism or review need not be limited to criticism or review of literary style or merit of the work, and may include, for example, the doctrine or philosophy expounded in the work. . . or ideas and events expounded in the work . . . . The criticism or review can also be of either the work copied, or of another work. . ." .[16]

22. In considering whether use of a copyright work for the purpose of criticism or review is fair, the court in *Capcom* commented that "the extent and amount of use, the use made, and the perceived purpose of use" are relevant to the issue of fair dealing. These factors should be balanced against each other and evaluated case-by-case under an "objective standard of a fair-minded and honest person."[17] This broad fair dealing application suggests that some parodies could come within the fair dealing exception for criticism or review.

Criminal threshold

23. Even if it is established that a parody has infringed copyright, it is still necessary to show that it has crossed the criminal threshold to establish its criminality. In this connection, it is worth noting that the provisions of both the existing prejudicial distribution offence and the proposed prejudicial communication offence are so drafted as to draw a clear distinction between criminal piracy and civil infringement.

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[14] DCCJ 2655/2007, 7 March 2008.

[15] *Hubbard v Vosper* [1972] 2 Q.B. 84; *Pro Sieben A.G. v. Carlton Television Ltd.*[1999]1 WLR 605.

[16] Ibid. paragraph 24.

[17] See paragraphs 28, 32-33 of note 14, explaining that the factors are not exclusive of each other and that even a commercial rival of a copyright owner may create a fair dealing of a copyrighted work.

24. In criminal proceedings against unauthorised distribution/communication that is not made for the purpose of or in the course of trade or business, the prosecution has to prove to the court beyond reasonable doubt that not only has an infringement taken place, but also the infringing material has been distributed/communicated "*to such an extent* as to affect prejudicially the copyright owner", i.e. on a substantial scale resulting in clear prejudice to copyright owners.

25. In addition, the prosecution bears the burden to prove beyond reasonable doubt the *mens rea* of a defendant, namely the infringer has an intention to commit the infringing act to such an extent as to affect prejudicially the copyright owner. At present, lack of actual and constructive knowledge on the part of the defendant is a statutory defence to the existing prejudicial distribution offence. In this connection, the Bill proposes to introduce a defence of the same nature in respect of the prejudicial communication offence.[18]

26. To provide greater legal certainty, the Bill introduces a non-exhaustive list of factors that the court may take into account when examining what constitutes "to such an extent as to affect prejudicially the copyright owner" for the purpose of the existing and proposed offences. One of the factors is the economic prejudice caused to the copyright owner including the effect on the potential market for or value of the original copyright work. This bears out our policy intention to tackle large-scale copyright piracy. The non-exhaustive list of factors as set out in the Bill together with the stringent burden of proof for establishing criminal liability would, we believe, achieve our policy objective of targeting large-scale copyright piracy.

Conclusion

27. The overseas experience cited above demonstrates the difficulty in constructing an undisputed legal definition of parody from the copyright legislation and case law of jurisdictions that we have surveyed. Nor is it evident that there exists a widely accepted approach in dealing with parody. It should be noted that any proposal to introduce a new exception for parody is liable to substantially changing the existing balance of interests between copyright owners and users and requires thorough consideration and extensive public consultation.

28. The Bill does not alter the existing legal principles in determining whether a certain parody disseminated on the Internet constitutes a copyright infringement. In this connection, parody that does not amount to copyright infringement nowadays will remain so under the Bill. Further, where the dissemination of a parody on the Internet is not made for profit, and does not prejudicially affect the copyright owners, such conduct will not constitute a criminal offence under the existing Ordinance or the Bill. It follows that the worry that the Bill will "tighten the grip" on parody is unfounded.

[18] See section 118(3) of the Copyright Ordinance and section 118(8D) under Clause 51 of the Bill.

29. Members are invited to note the information provided in this paper.

Commerce and Economic Development Bureau
Intellectual Property Department
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Annex

Existing and Proposed Criminal Sanctions of the Copyright Ordinance

Existing offence	Proposed offence
Existing section 118(1) - A person commits an offence if he, without the licence of the copyright owner of a copyright work- … (e) … distributes an infringing copy of the work for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works; … (g) distributes an infringing copy of the work (otherwise than for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works) to such an extent as to affect prejudicially the copyright owner.	Proposed new section 118(8B) - A person commits an offence if the person – (a) without the licence of the copyright owner of a copyright work, communicates the work to the public for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward; or (b) without the licence of the copyright owner of a copyright work, communicates the work to the public (otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward) to such an extent as to affect prejudicially the copyright owner.