



# Newsletter

21COE-WIN-CLS RCLIP

## ❖RCLIP Workshop Series No.5 (12/15/04) “Direction of Copyright Law Revision – Reaction to a Parody Work”

Kensaku Fukui, Attorney at law, Japan and New York, Kotto-Dori Law Firm



In his lecture, Attorney Fukui defined parody in a wider meaning as “a work that, using as its subject matter another work that is already in existence by changing its context or relative meanings, or by adding a different taste or element, brings a new perspective or comic effect into the original work.” Based on this definition, he gave the following four characteristics that distinguish a parody from a plagiarism or a pirate: (1) A parody is usually directed towards an audience that is familiar with the subject being parodied (by knowing the original, an audience can understand the funny aspects of the parody); (2) In many cases, a parody work needs to use a part of the original work to be effective; (3) In many cases, it is difficult to get permission from the copyright owner of the original work for the purpose of using it for a parody, and (4) Apart from most counterfeits, a parody work does not overlap or substitute the original work in the market because its style is different from the original (a parody work does not compete with the original work). Particularly in connection with (4), a counterfeit will hinder the sales of the

original work, but generally a parody cannot substitute for the original because the audience can enjoy it only when they recognize the original. He pointed out that the uniqueness of a parody work existed here.

Attorney Fukui also introduced the case of the Parody Montage Picture (Supreme Court, Japan, 3/28/1980, Minshu 34・3・244) as a case relating to a parody work. The decision of the Supreme Court indicated that it was difficult for such a parody work to meet the following requirements of quotation because the work appeared to be in the shape of a mixture of a quoted work and a quoting work. The requirements of quotation consist of: ①a clear differentiation between a work that quotes an original work and the original work that is quoted, ②a principal and accessory relationship between two works, and ③no quotation that infringes the moral rights of the copyright owner of the original work. Again, he took up the recent case of “Where did the cheese go?” (Tokyo District Court, 12/29/2001) . The decision stated “although a parody, as a way of expression, is permitted in literature, there are always limitations and it is impermissible to infringe the copyright of an original work through a parody”. He criticized that the decision did not make a clear judgment on whether the parody work was an infringement of the copyright or not.

Next, offering legislative examples in foreign countries, Attorney Fukui introduced a so-called parody rule in French Copyright Law and Spanish Copyright Law and referred to the fair-use rule in Section 107 of the Copyright Act of the United States. He made an overview observation of the four fair use factors which are (1) the purpose and character of the use, (2) the

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nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work. Then, he explained how the fair use rule functions for a parody work, describing in detail several related cases including the case of *Walt Disney Productions vs. Air Pirates*, 581 F.2d 751(9th Cir. 1978) where the court affirmed that the Underground Comics using Disney characters such as Mickey Mouse were substantial copies “more than is necessary to ‘recall or conjure up’ the original;” the case of *Rogers vs. Koons*, 960 F.2d 301(2d Cir. 1992) where the court denied fair use claim from defendant who created a sculpture entitled “String of Puppies” after a plaintiff’s photo “Puppies” without plaintiff’s consent, modeling a smiling middle-aged couple with eight puppies and sold as a postcard; and the case of *Campbell vs. Acuff-Rose Music* 510 U.S. 569 (1994) where the court ruled that a parody song called “Pretty Woman” originally composed by Luther Campbell but put into parody by the rap music group “The 2 Live Crew” was fair use of the original famous tune, “Oh, Pretty Woman”.

Lastly, Attorney Fukui presented some recent issues arising in the interpretation of quotation rules and classified quotations into two types; a traditional type and a mutating type, to deal with a parody issue under interpretation of the current law. Then he proposed to determine the legality of a parody, of a mutating type, on the basis of provision itself instead of applying requirements such as clear differentiation or a principal and accusatory relationship. Furthermore, he examined a possible law revision for coping with this issue in a more practical approach, giving three methods: ①adaptation of the rules for a parody work (France and Spain type), ② adaptation of the fair-use rule (U.S. general rule type), and ③revision of quotation rules (which includes a parody work). He also indicated that applying the Copyright Law, 20-2-4 (exclusion from right of preserving the integrity) should be

considered when dealing with the moral rights of the original works for a parody issue. He concluded that a law revision or law interpretation relating to a parody should take into consideration a ①clear explanation of original work’s source to possible readers/audience, ② reproduction of original works from a new perspective, ③no substitutive nature of original works, ④reasonable usage within a limitation necessary for the purpose, and ⑤quite limitative effect on original works in the market.

Following the lecture stated above, opinion exchange actively took place among participants.

(RA Kazuhiro Ando)

### ❖RCLIP Workshop Series No.6 (1/31/05)

#### “Legislative Problems related to Moral Rights”

Tatsuhiro Ueno, Associate Professor of Law, Rikkyo University



The RCLIP invited Associate Professor Tatsuhiro Ueno, Rikkyo University, to present a report entitled “Legislative Problems related to Moral Rights” in front of about 70 participants at the RCLIP Workshop Series No.6. Legislative issues on moral rights are currently a topic of discussion in Japan. Some conditions that exist in the background of the discussion include the higher than minimum protection level of moral rights in Japan from the standards set by the Berne Convention, the uncertain validity of contracts having to do with moral rights, and the changing in the methods of utilizing works made with digital technology. Working off of this background, the Legislation Committees in







