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June 19, 2003

Hon. SIN Chung-kai
Chairman of the Bills Committee
Legislative Council
8 Jackson Road
Central, Hong

Re: Bills Committee on Copyright (Amendment) Bill 2001
and Copyright (Amendment) Bill 2003

Dear Chairman Sin:

Thank you for the above-referenced letter dated 22 May 2003 sent on your behalf. We are pleased to respond to your kind invitation to provide views on the Copyright (Amendment) Bill 2003. ("2003 Bill").

INTRODUCTION

The Motion Picture Association (MPA) is a trade association representing seven of the major international producers and distributors of theatrical motion pictures, home video entertainment, television programming, and digital representations of moving images and sounds. MPA member companies include:

Buena Vista International, Inc.
Columbia TriStar Film Distributors International, Inc.
Metro-Goldwyn-Mayer Studios Inc.
Paramount Pictures Corporation
Twentieth Century Fox International Corporation
Universal International Films, Inc.
Warner Bros. International Theatrical Distribution, Inc.

Hong Kong represents a vital and significant market for MPA's member companies, all of whom do business in the territory and some of whom maintain headquarters for the greater Asia-Pacific region from there. All of MPA's member companies rely on the Copyright Ordinance (Cap. 528) for the protection of their intellectual property rights, which is the cornerstone for the development of adequate business models.

MPA has further maintained a cooperative and effective relationship with Hong Kong SAR Government enforcement agencies grounded in the strong protections provided by the Copyright Ordinance and other relevant legislation.¹

MPA is therefore pleased to provide limited comments on the proposed enactment of the 2003 Bill in order to ensure the continued protection of our member companies' interests, the commercial success of the Hong Kong market, and the Government's reputation as a world leader in intellectual property rights protection.

END-USER LIABILITY IN RELATION TO PARALLEL IMPORTS

In MPA's previous submissions concerning the Copyright (Amendment) Bill 2001², we commented extensively on our member companies' compelling need for parallel import protection due to specific market factors unique to the motion picture industry. We shall avoid repeating those arguments here.

We are gratified that some concerns previously voiced by MPA, as well as assurances received from the Hong Kong SAR Government in response, appear to be reflected within the context of the proposed legislation. We are pleased to note, for example, that the parallel importation of "home video" copies of feature films and television dramas for the purpose of further distribution to the public by means of sale or rental will remain prohibited.

However, inasmuch as the 2003 Bill proposes to remove end-user liability in relation to parallel imported copies while enumerating certain proscribed categories of activity, terminology becomes increasingly important. It is therefore important to distinguish the mere "use" of a copyrighted work (as that term is commonly understood) from its commercial exploitation (as set forth in the Copyright Ordinance).

¹ E.g., the Prevention of Copyright Piracy Ordinance, and amendments to the Organized and Serious Crimes Ordinance addressing copyright piracy, [optical disc law]

² We refer the Committee to MPA's written comments to the LegCo Panel on Commerce and Industry on December 18, 2001 (copy appended) and to MPA's oral testimony before the Council on January 10, 2002

In the case of films, broadcasts, and cable programmes, section 27 of the Copyright Ordinance restricts the performance of such works, as well as their playing or showing in public. These specific, statutory references should in no way be subsumed or compromised within the colloquial notion of “end use” within an individual or business context.

In the case of a cinema operator, for example, the sole business use of a motion picture is its public performance before a consumer audience for their immediate perception and collective enjoyment. The cinema operator does not import the theatrical print of the film for the purpose of further distributing it to the public by way of sale or rental.

It is important to note, therefore, that the end use of a parallel imported film by a cinema is vastly different from, say, the end use of a parallel imported reference text by a law firm in the context of advising a client. The 2003 Bill should not be construed in such a way as to permit the unauthorized commercial exploitation of a work simply because it fits nicely within a purported business use.

Inasmuch as the Council considers it more transparent to set out explicitly the various offending acts (involving parallel imported copies) within the ambit of section 118, we believe that the public performance of a parallel imported work or copy of a film, broadcast, or cable programme should be explicitly restricted³. We respectfully recommend that the Council review this concern with the relevant Government authorities and, if considered necessary, further amend the 2003 Bill accordingly. At the very least, we would seek a statement in the final explanatory material accompanying the 2003 Bill clarifying that the amendments do nothing to detract from the protections extended to certain categories of works under section 27 of the Copyright Ordinance.

TIGHTENING CRIMINAL SANCTIONS AGAINST ILLICIT COPY-SHOPS

Although the issues under consideration within the ambit of proposed amendments to section 118(1)(a) – addressing the unauthorized photocopying of textual material – are not of direct significance to MPA member companies, we are nonetheless faced with a corollary concern regarding ‘made-to-order’ reproductions of filmed entertainment.

Optical disc piracy comes can occur in different forms. Aside from capital-intensive replication facilities involving sophisticated mastering and reproduction lines capable of producing millions of discs per year, the industry is also suffering from the growing pervasiveness of inexpensive

³ It should be further noted that section 27 of the Copyright Ordinance extends the same protections against unauthorized public performances to sound recordings, as well.

commercially-available consumer devices that “burn” digital files onto blank, CD-recordable discs (or CD-Rs). Unauthorized CD-R replication of MPA titles is indeed a problem in Hong Kong, and more of our resources are being devoted in this regard. In 2002, Hong Kong Customs seized a total of 2,479,082 illegal CD-Rs and 1,350 CD-R burners. More than 60% of the pirated MPA titles available in the market are in the CD-R format.

At present, subtly worded advertisements for CD-Rs may be found in local newspapers, offering private delivery of ready-made discs to locations of the customer’s choosing. Alternatively, such CD-R burning “services” are found operating covertly within shops offering commercial duplication services of CD-ROM materials. The Prevention of Copyright Piracy Ordinance does not presently extend coverage to such commercial duplicating facilities.

Although we commend the Council for addressing the argument that operators of photocopying services are merely providing services to customers (and therefore not liable for copyright infringement), we query whether the 2003 Bill’s narrow focus on *reprographic* copies rather than a more expansive proscription against reproduction by any electronic could prove insufficient if the operators of such CD-R services were to become even more pervasive.

Given the problems other copyright industries have experienced with traditional copy shops which the Council now seeks to resolve, the proposed legislation may benefit from a more technologically-neutral approach that would expand upon the specific act of reprography and preclude the emergence of further “service” exceptions to liability for the duplication of filmed entertainment.

We would again recommend that the Council refer this concern back to the Government for its further consideration and for possible amendment of the proposed legislation.

CONCLUSION

We commend the Hong Kong SAR Government once again for its continued vigilance and support for the protection of intellectual property rights in Hong Kong. We are hopeful that the amendments under consideration will not have the unintended effect of undermining or inhibiting the continued growth of this important market.

We are pleased to have shared these views with you and look forward to the participation of MPA's Regional Legal Counsel, Mark Day, in your committee's deliberations on July 4th.

Sincerely,

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cc: Mark Day



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December 18, 2001

Hon. Kenneth TING Woo-shou
Chairman
LegCo Panel on Commerce and Industry
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Re: Review of Certain Provisions of Copyright Ordinance

Dear Chairman Ting:

Thank you for the above-referenced letter dated 23 November 2001 sent on your behalf. We are pleased to respond to your kind invitation to provide views on the consultation document published on 1 November 2001.

INTRODUCTION

The Motion Picture Association (MPA) is a trade association representing seven of the major international producers and distributors of theatrical motion pictures, home video entertainment and television programming. Its member companies include:

Buena Vista International, Inc. (Disney, Touchstone and Hollywood Pictures)
Metro-Goldwyn-Mayer Studios Inc. (MGM and United Artists)
Paramount Pictures Corporation
Sony Pictures Entertainment, Inc. (Columbia and Tristar)
Twentieth Century Fox International Corporation
Universal International Films, Inc.
Warner Bros. (Turner, New Line, Castle Rock)

The MPA works to eliminate unfair and restrictive trade regulations, trade practices and non-tariff barriers and to allow free competition in the international marketplace. The MPA also directs active anti-piracy programs to protect its member companies' motion pictures and television programs through the enforcement of copyright and other laws in 68 countries throughout the world.

COMMENTS

We are grateful for the continued interest and leadership shown by the Hong Kong SAR Government towards intellectual property rights protection. This administration's support on such important issues as the Prevention of Copyright Piracy Ordinance, and the addition of copyright piracy to the Organized and Serious Crimes Ordinance, has created a solid legislative infrastructure for rights enforcement. This has itself contributed to the development of a vibrant, dynamic, and successful industry both for MPA's member companies and local producers and distributors alike.

Hong Kong is rightfully acknowledged as a regional hub of creative cinematic output. Its talented stable of writers, directors, producers, and artistes are known the world over and contribute to the more than 140 theatrical releases produced locally each year. Hong Kong also represents a vibrant, dynamic consumer market for audiovisual entertainment.

Some of the proposals now under consideration would directly affect the continued sustenance and enhancement of our member companies' business interests in the Hong Kong market. MPA is thus pleased to share its views on the more salient of these proposals.

Chapter 1 – Criminal Provisions related to End-User Piracy

MPA supports generally the principle of applying criminal sanctions for the end-use by consumers (particularly in a commercial context) of infringing copies of copyrighted works.

Despite the sincere and persistent efforts of MPA's anti-piracy agents, law enforcement officials and the judiciary, copyright piracy of movies, television programs, and other categories of works remains a significant concern. To illustrate the problem, MPA undertook a total of 2871 raids last year resulting in the seizure of almost four million infringing copies of our member companies' titles. More than 2.2 million pirate copies have been seized part-way through 2001. Although as a practical matter MPA's investigative focus is geared primarily towards the sources of unauthorized manufacture and distribution, the extension of infringement liability to "consumers" reflects, as a matter of social policy, this administration's commitment to the respect of intellectual property rights and Hong Kong's continued development as a world market leader.

As a further note, we find no basis for the distinction in the proposal between copyright works afflicted by "rampant piracy" from any other works, as that term is vague, imprecise and subject to varying interpretation.

Chapter 4 – Permitted Acts related to Free Public Showing or Playing of Broadcast or Cable Program

MPA opposes, as a matter of principle, the proposal to extend current exemptions under the Copyright Ordinance for certain "free" performances of broadcasts or cable programs to other categories of works, as this would effectively lower the bar of protection afforded to copyright owners under the Copyright Ordinance rather than raise it.

With particular reference to the motion picture industry, it is worth commenting that free-to-air broadcast and cable programming markets are based on entirely different revenue models, and that distribution in each format typically occurs at different times in the life cycle of a particular entertainment release.

Whereas commercial advertisers primarily support licensing fees for free-to-air programming, the fees for cable programming paid by cable operators to programming distributors are instead determined entirely by subscriber headcount, i.e., a known and verifiable audience of paid viewers. In the case of cable programming, the proposals now under consideration could

broaden the target audience beyond the scope reasonably anticipated by the contracting parties, detrimentally affecting the revenue expectations of both parties.

We note further that the present test for such an exemption under the Ordinance (i.e., exhibition or performance to an audience who has not paid for admission to the place where the broadcast or programme is shown or played), though objectionable in principle, nonetheless provides a straightforward and easily determinable basis for its application. The proposed test for substitution in its place (i.e., exhibition or performance in a place where goods or services are supplied at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme) is vague, imprecise, and subject to varying interpretation.

Chapter 5 – Parallel Importation of Copyright Works other than Computer Software

MPA strongly opposes the proposed removal of civil and criminal sanctions against parallel importation of, and subsequent dealing in, all types of copyright work other than computer software. As further detailed below, MPA believes the current provisions represent an acceptable compromise of interests that balances protection for both MPA's member companies and licensees and the general public. We find no compelling reason at this point to upset this balance through further legislative amendment.

The case for protection against parallel imports of audiovisual entertainment is grounded in four broad principles. First, the legal nature of copyright law and a comparison with international precedent favors Hong Kong's retention of the present system of protection. Second, market factors specific and unique to the motion picture industry merit particular consideration and protections. Third, parallel import protection conforms with the Government's overall social and economic policy and helps ensure Hong Kong's status as a regional hub for creative development and consumption. Finally, protection against parallel imports reflects this administration's commitment to the eradication of piracy and the protection of legitimate markets.

Copyright owners should be afforded the opportunity to maximize the return from their creative endeavors on an international level. Because copyright law is not supranational, it follows that the exercise of rights in one jurisdiction should not result in the exhaustion of rights in another, unrelated jurisdiction. The exclusive right to authorize or prohibit parallel imports is thus in accordance with the international copyright principle of territoriality. As evidenced by the enclosed chart, a strong majority of countries surveyed by MPA, including the world's major motion picture markets, have various provisions in their copyright laws that provide protection against unauthorized parallel imports.¹ Contrary to the impression conveyed by the consultation paper in this regard, a clear international precedent in favor of parallel import protection instead seems evident.

Throughout the world, motion picture release takes place in a series of media and in a staged process, known as “windows”, which provides for motion pictures to be released in different formats in sequential order. The process starts with theatrical release, which is followed by a hold back period, called a window, before the motion picture is released on home video (videocassette, laser disc, VCD and DVD). After home video, there is typically another window before release on Pay TV. This is followed by another window before exhibition on free-to-air TV. The window period between the conclusion of the release of a motion picture in one medium and its release in another medium varies from motion picture to motion picture and from territory to territory. The order of distribution to these media also can vary in the business judgment of the distributor, if, for example, an early release of the motion picture on free-to-air television is more valuable than the immediate release of that title on Pay TV.

This sequential pattern has been established as a flexible industry practice, providing each media with an exclusive window in which to maximize revenues from that form of distribution and bringing order to the market. The windows system promotes the development of theaters, video outlets, Pay TV operations and broadcasters, while maximizing returns in each

¹ Following the preparation of this chart in November, the New Zealand Government last week announced its intention to introduce legislation within the next six months to re-instate parallel import protections for motion pictures.

medium. As distributors rely on revenue from each of these sequential media to ensure the profitability of each motion picture, the disruption of distribution in one medium by unauthorized distribution in another medium can have a significant negative impact on the overall profitability of the picture.

The sequential release system for films in cinema and video format is a time-tested international strategy in orderly marketing that does not unreasonably prolong the availability of films in video format for the Hong Kong market. Although theatrical cinema exhibition, as a matter of public policy, should be preserved, MPA acknowledges that individuals should have the right to rent or buy films in video format. We believe the current provisions of the Copyright Ordinance strike a proper balance of interests.

Effective protection against unauthorized parallel imports also benefits the local economy by encouraging the growth of businesses related to the distribution of motion pictures, such as local advertising companies and promotional merchandise suppliers, local video duplicators, dubbing studios, and packaging. Not only does this offer consumers wider availability of choices, it adds value to the local economy. Growth of these businesses encourages further investment, provides numerous employment opportunities, and generates tax revenues.

MPA member companies have thus invested heavily in the Hong Kong market by setting up their own offices or appointing exclusive territorial licensees to service the market. This commitment to the market creates jobs in related organizations, including

- Local distributors and wholesalers
- Local merchandising companies
- Local video duplication facilities
- Local advertising executives, including creative and account executives
- Local printers and other promotional suppliers

As a corollary matter, MPA queries whether there is any quantifiable evidence to support the consultation paper's unqualified assertion that the elimination of parallel import protection would benefit consumer choices or

prices, particularly since MPA's research suggests the opposite. As shown below, the average retail prices of home video products in Hong Kong (which presently affords protection against parallel imports) have dropped sharply over the past four years while in New Zealand (which for the past three years has not) prices have stayed at exactly their same levels.

		1998	1999	2000	2001
Hong Kong (HK\$)	VHS	180.00	128.00	115.00	115.00
	VCD	118.00	100.00	45.00	45.00
	DVD	229.00	160.00	160.00	160.00
New Zealand (NZ\$)	VHS	24.95	24.95	24.95	24.95
	VCD	NA	NA	NA	NA
	DVD	39.95	39.95	39.95	39.95

We note further that an ongoing investigation in Australia concerning the retail pricing of music following that country's removal of parallel import protection for sound recordings has thus far discerned no evidence of overall price reduction. The fact is, any savings made on parallel imports are typically retained as profit for the importer and are not passed on to consumers.

In fact, copyright owners rely upon protection against unauthorized parallel imports in order to be more responsive to local concerns such as pricing, piracy, and consumer protection. Market forces that determine price levels differ among countries. Copyright owners generally bear the costs of market development, including advertising and product support and anti-piracy activities that increase local employment opportunities. Parallel importers may take advantage of pricing differentials in order to sell works at lower prices than the market can bear (although retaining their own profit margins), thereby undercutting competition and preventing market entry. Pricing at all levels appropriate for the local market helps to discourage piracy, to protect domestic copyright owners as well as foreign ones, and to encourage investment in new market.

An interesting, and perhaps more compelling comparison is the level of creative output in countries with parallel import protection as compared

to the level of output in so-called “free” markets. As shown on the enclosed and aforementioned chart, in the case of these same two markets, we note that Hong Kong supported more than 144 local theatrical productions last year whereas New Zealand had only 9. Singapore, another market without parallel import protection, supported merely 4 local productions last year.

MPA therefore questions the objective basis, if any, to support the consultation paper’s assurance that the elimination of parallel import protection will in and of itself result in a commensurate reduction of prices. However, it does seem plausible that the same legislative enactment might adversely affect the territory’s creative output in favor of a perceived yet unsubstantiated benefit to the consumer public.

The parallel importer essentially obtains a “free ride” on promotional activities undertaken by the authorized distributor, including advertising, posters and point of sale promotional materials. Parallel importers typically do not make similar investments in promotion. Instead, they “cherry pick” the top grossing motion pictures and concentrate all of their efforts on those high volume titles, ignoring the broader selection of motion pictures that may appeal to the Hong Kong consumer, without supporting the growth of the local industry in any way. In response to parallel importation, authorized video distributors may be forced to forego less profitable movies – making them unavailable to the Hong Kong consumer.

Unauthorized parallel imports thus tarnish long established relationships between retailers committed to sourcing authorized product through local distributors. Whether a film company has established a local subsidiary or contracted an exclusive licensee to distribute video product, retailers depend on local distributors for their inventories. This includes access to a wide variety of titles – the latest releases, special interest videos and catalog product. Parallel imports compromise this important business relationship and may serve as a disincentive for video distributors to provide the wide variety of titles that video retailers currently have available to them.

Protection against parallel imports also addresses consumer concerns as to product integrity and supply; unauthorized distributors generally provide product support such as warranties and updated versions of sales support software, which rarely are available from parallel importers. Because parallel imports are sold as imported (limiting choice to the consumer by offering titles only in the language of origin) they have no value-added impact on the local economy. They effectively cannibalize the retail industry in the long term by stealing jobs from the local production industry and by chipping away at the economies of scale associated with providing local businesses sufficient volume of retailer orders. The opportunity costs of decreasing local volume, employment and community patronage far exceed the cost savings retailers may realize through parallel imports.

Finally, parallel import protection also significantly assists copyright enforcement in Hong Kong. With the advent of new digital technologies, video products are even more susceptible than was previously the case to large-scale illicit manufacture. Illicit copyright pirates have already released hundreds of film titles on DVD and the packaging on some makes it difficult to detect that the product is pirate without close inspection. A lack of control over parallel importation increases the risk of covert import of counterfeit goods. Without such protection, piracy is likely to increase as copies of motion pictures from a wide variety of countries are freely imported into Hong Kong, making it difficult to differentiate legitimate from unauthorized copies. Pirates do use the parallel import channel to bring in clandestine product.

The potential for counterfeit DVDs to slip through Customs will be far greater if there are no controls on parallel imports. In particular, the absence of restrictions on parallel importing leaves open the possibility that counterfeiters may disguise inauthentic imports. Unsuspecting retailers are likely to be duped into believing that the counterfeit product is a cheaper parallel import, when in fact it is a counterfeit.

Chapter 6 – Unauthorized Reception of Subscription Television Programmes

MPA voices strong support in favor of the proposals to apply criminal sanctions and provide civil remedies against the fraudulent reception of subscription television programmes, particularly when such acts involve the commercial distribution of unauthorized decryption devices and/or their use for business purposes.

Signal theft is a significant problem in Hong Kong, with conservative estimates of unauthorized reception well in excess of 100,000 households. The proposals under consideration would help ensure the continued attraction of foreign investment and ensure Hong Kong's continued viability as a regional broadcasting hub, by conveying an appropriate policy statement concerning government's commitment to intellectual property rights protection. Case law from other jurisdictions concerning signal theft reflects international precedent for the proposals now under consideration.

We further agree that it is proper and desirable for the Copyright Ordinance to be reconciled with similar provisions of the Broadcasting Ordinance and in accordance with international treaties.

CONCLUSION

In summary, we recommend no changes to the Copyright Ordinance that might adversely affect the strong and healthy film industry which has reasserted itself in Hong Kong. We do, however, thank your committee for its continued vigilance and support for the protection and enhancement of intellectual property rights in Hong Kong. We are confident that the administration will take all necessary steps to nurture the continued development of this important market.

We are pleased to have shared these views with you and look forward to meeting with your colleagues on January 10th.

Sincerely,

Frank S. Rittman
Regional Director, Asia-Pacific

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