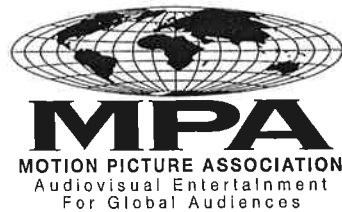


MOTION PICTURE ASSOCIATION – INTERNATIONAL

(a limited liability corporation incorporated in the United States of America)
Under license from Motion Picture Association



Frank S. Rittman
Vice President, Deputy Managing Director
& Regional Policy Officer
Asia-Pacific

ASIA-PACIFIC OFFICE
No. 1 Magazine Road
#04-07 Central Mall
SINGAPORE 059567
TEL: (65) 6253 1033
FAX: (65) 6255 1838
E-mail:
Frank_Rittman@mpaa.org

11 January, 2010

The Motion Picture Association (MPA) thanks the Legislative Council for the opportunity to submit comments to the Panel on Commerce and Industry in response to LC Paper No. CB(1)341/09-10(08) concerning Proposals for Strengthening Copyright Protection in the Digital Environment, and in advance of the Panel's upcoming meeting scheduled for 19 January.

The MPA is a trade association representing six international producers and distributors of filmed entertainment. MPA member companies include:

Paramount Pictures Corporation
Sony Pictures Releasing International
Twentieth Century Fox International Corporation
Universal International Films
Walt Disney Studios
Warner Bros Pictures International

MPA has previously communicated its views concerning the subject matter under consideration to the Hong Kong Government on a number of occasions dating back to 2005¹. On the one hand, it is gratifying to see movement in the form of concrete proposals for legislative amendments addressing these concerns. At the same time, we note the slow pace of progress over the past five years, particularly in comparison with developments elsewhere in the region and throughout the world.

Throughout the 1990s, Hong Kong stood at the forefront of intellectual property rights protection and was among the first territories in Asia to enact strong optical disc legislation, strong anti-camcording legislation, and to classify intellectual property rights crimes as a predicate offence under its organized crime statute. It is thus lamentable that Hong Kong has fallen off pace somewhat with respect to so-called "digital protections," which many other jurisdictions have already enacted.

¹ See, for example, related submissions to the former Commerce, Industry and Technology Bureau and the Commerce and Economic Development Bureau filed on 29 August, 2005; 28 April, 2006; 30 April 2007; 29 August 2008; and 29 April 2009.

While we generally support the Government's present initiative and certain aspects of the Proposals, MPA believes they lack ambition in certain other respects and fall short of the 'best practices' levels of protection to which Hong Kong has historically ascribed. As further detailed below, we believe the Council should take the opportunity to re-assert Hong Kong's leadership role for intellectual property rights protection by revising certain of its recommendations and moving expeditiously for their legislative enactment.

Section (a) Proposals – Recognizing copyright owners' right to communicate their works through any mode of electronic transmission, with criminal sanctions against infringement

MPA has previously advocated support for the protection of copyrighted works communicated to the public in any mode of electronic transmission, including the extension of criminal sanctions against infringement under appropriate circumstances.² We therefore welcome the Administration's recognition of such concern and voice support for the revised proposals, which we believe will help address the concerns of copyright owners.

The film industry has been particularly affected by the convergence of copyright theft and internet technology. There are a variety of contexts in which the assessment of criminal sanctions may be appropriate against the unauthorized distribution of copyrighted works via the Internet, one such example being that of Hong Kong's "Big Crook" case in 2005.³ Unauthorized camcording as the source of copyright piracy has also grown exponentially over the last few years, with films uploaded to the Internet within hours or days of release, triggering an avalanche of illegally distributed copies⁴.

Unauthorized file sharing of copyrighted works via peer to peer networking has a devastating effect on creative industries around the world – including Hong Kong – and stifles the growth of a safe, efficient, and productive online market. Certain P2P technology, most notably BitTorrent, necessarily involves the simultaneous uploading (i.e. the communication) of files to other computers at the same time as a user is downloading files from other computers. We interpret the Administration's Proposal as recognition that criminal sanctions may be appropriate under certain circumstances to address such activity and are gratified by this development.

However, we are concerned by the emphasis and interpretation of the word 'initiate' in the context of the Administration's Proposals and the possibility that criminal sanctions might unacceptably be limited to those who are merely the first individuals to upload or distribute the content without authorization. Paragraph 26 of the Administration's 2008 Preliminary Proposals recognized that other circumstances attendant to file sharing activity, including conduct and the necessary mental element, could prejudicially affect the interest of rights owners. A more appropriate criterion might be that criminal sanctions should be available against those who *engage in* – rather than *initiate* – unauthorized communications of copyrighted works to the public in the course of business conducted for profit, or where it is made to such an extent as to affect prejudicially the copyright owners.

² See in particular MPA's 30 April 2007 submission to the Commerce, Industry and Technology Bureau in response to its December 2006 consultation document entitled "Copyright Protection in the Digital Environment."

³ HKSAR v Chan Nai Ming [2005] 4HKLRD 142 and TMCC 1268/2005.

⁴ Two recent examples from other jurisdictions illustrate the impact that can be inflicted upon rights owners through unauthorized digital transmissions. In April 2009 an Australian court convicted a defendant involved with an international syndicate responsible for distributing illegally camcordered movies via the Internet and on hard goods. In July 2007, another defendant in Australia was convicted for his role in recording an uploading the theatrical release "The Simpsons Movie" onto the Internet where it was illegally replicated more than 100,000 times in less than 72 hours.

Section (b) Proposals – Introducing a statutory limitation of liability regime for OSPs in dealing with online piracy

MPA has previously and consistently supported the need for modern legislation – whether in Hong Kong or anywhere else in the world – to provide a means of encouraging online service providers (OSPs) to cooperate with copyright owners in the fight against copyright infringement taking place on their networks, or through the use of their services. We continue to advocate an appropriate balance of interests that serves to limit OSPs' liability in return for their compliance with certain prescribed conditions.

Our initial observation in response to the Government's Proposals, and in particular to footnote 6 of that document and the absence of any applicable jurisprudence, is therefore the need to clarify with certainty that OSPs can be held liable under the Copyright Ordinance for authorizing infringing activities committed on its service platform. Absent such an explicit clarification of liability, the codification of any explicit *limitation* of such liability is conceptually premature and illogical. In other words, one can only contemplate the introduction of limiting an OSP's liability after first acknowledging conclusively that such a liability exists.

Subject to that caveat, we support the Government's willingness to introduce a notice-and-takedown system for the three categories of activities referenced in footnote 9 of the Proposal document, and a corresponding limitation of liability⁵ for any OSP who conforms to the prescribed system.

However, MPA is disappointed by the Council's conclusion that it "is not an opportune time" to consider the introduction of a so-called "graduated response" program in Hong Kong and we implore the Council to reconsider this determination.

Graduated response programs (GRPs) are premised on an educational, non-litigious process that envisages copyright holders and online service providers working cooperatively in response to identified instances of unauthorized or illegal activity by the ISP's customers. The process educates end-users and at the same time discourages further file sharing. The MPA believes that graduated response is a common sense approach to online piracy that in the long term protects creative ideas and supports the economic growth of the industry. GRPs provide a fair and reasonable outcome that avoids costly and time-consuming litigation against end users and balances the need to protect creative industries while taking into account the responsibilities of OSPs and internet users.

GRPs are very much targeted at 'repeat infringers' and the vast majority of Internet users who do not indulge in unauthorized online file sharing therefore will not be seriously affected. Moreover, under any GRP most users will adjust their behavior well before any form of sanction is required. The MPA is aware of at least eight surveys completed in 2008 and 2009 in five territories which specifically measure consumer attitudes towards the effectiveness of warning notices in preventing unauthorized file sharing. The research confirms that some form of meaningful, effective, deterrent sanction, or at least the threat of such a sanction is required to modify behavior of repeat infringers – a mere warning would be significantly less effective. Across all survey countries, respondents noted that warning notices that are a precursor to penalties can be effective in preventing unauthorized downloading⁶. However, in order to be perceived as an effective deterrent, notices must be associated with penalties, assumed or explicit.

⁵ Such limitations should be limited to limitations on or against monetary relief only and should not in any way preclude the availability of injunctive relief.

⁶ Across all survey countries, 60-82% of all respondents believe that people would permanently stop unauthorized file sharing based on notices that are a precursor to penalties – the mean across all results is 75%.

The Government's suggestion in paragraph 12 of the Proposal document for the contemplation of a mere "notice and notice" system to address transitory digital network communications – rather than the more effective "graduated response" system referenced in paragraph 13 of the document – should therefore be reconsidered⁷. There appears to be nothing in the Government's Proposals that addresses the repeat infringer problem, or that requires OSPs to take any responsibility to address it, or provide any incentive for them to do so. Such a short-sighted approach will be ineffective in dealing with online piracy.

GRPs need not be inflexible in their approach, as evidenced by the many variations now in practice and/or under development or consideration elsewhere in the world. Although the details of such a scheme could be left to further consideration, the attached annexure document identifies the key principles which MPA seeks to ultimately incorporate in any GRP.

Section (c) Proposals – Introducing a copyright exception for temporary reproduction of copyright works by OSPs

Consistent with the position taken in previous submissions to the Government, MPA has no specific objection to the introduction of exemptions for temporary reproduction(s) of copyrighted works, provided that the copyright work itself is legal and that the intended use of the work does not constitute an infringement.

We note the Government's assurance that stakeholders will be engaged in fine-tuning the scope and conditions attached to the proposed exception and remain available to provide further input as and when appropriate.

Section (d) Proposals – Prescribing additional factors for considering the award of additional damages

MPA still believes that introduction of precise statutory damage⁸ is preferential to the proposal set forth by the Government and we refer back to our previous submissions identifying suggested amounts relevant for consideration. The present proposal lacks clarity and it is difficult to imagine that further engagement with stakeholders will result in any useful clarification prior to the introduction of legislation. However, we are gratified by the recognition that the circulation of infringing copies via digital transmissions in the case of internet piracy is particularly harmful to copyright owners.

Section (e) Proposals – Introducing a media shifting exception for sound recordings

MPA has previously provided extensive comments regarding why an exception such as that under present consideration for sound recordings is both inappropriate and unnecessary for the film industry. We are thus gratified that these views appear to have been considered accordingly.

⁷ At a minimum, the legislation should identify a benchmark against which the effectiveness of a "notice and notice" system can be measured (i.e., the reduction of online piracy by 80%). If that benchmark is not met, then the legislation should provide for the implementation of a GRP. This would be consistent with proposed legislation now under consideration in the United Kingdom.

⁸ That is to say the amount or range of damages to be awarded in a copyright infringement action would be fixed by statute.

"Section (f) Proposals – Paragraph 20 confirmations

Though not the subject of requested comments, MPA wishes to retain on record its disappointment with the three policy determinations referenced in paragraph 20 of the Proposals document. In particular, we have previously voiced concern about the need for criminal penalties under certain circumstances for unauthorized downloading and peer to peer file sharing. In this regard and in order to address the Government's concern⁹, we have suggested a possible option to impose criminal liability only in respect of the downloading of those categories of copyrighted works where rampant piracy already exists (which could in fact be enumerated within legislation).

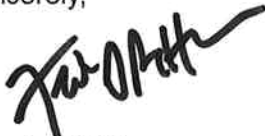
There is no doubt that the net cumulative effect of unauthorized downloading by the public at large, whether for commercial purposes or on a significant scale by individuals, is detrimental to the creative industries. As noted in our previous submissions, a number of other jurisdictions have made policy decisions to deter such behavior through the application of criminal sanctions under certain circumstances. The Government's decision in this regard is therefore discouraging.

However, as noted above and in our previous submissions, participants in certain peer to peer services are both uploaders and downloaders, simultaneously, and the distinction between the act(s) of communication and reproduction becomes blurred by the technology utilized. The focus should properly be on the harm suffered by the rights holder, rather than on the particular activity in question. It is thus difficult to reconcile the Government's more positive policy determination in paragraph 8(b) of the Proposal document against its more negative policy determination in paragraph 20, but we are hopeful that practical minds can sufficiently accommodate rights holders legitimate concerns.

We have also advocated the desirability of introducing disclosure mechanisms alternative to the "Norwich Pharmacal" principles but note the Government's reluctance to do so within the proposed amendments to the Copyright Ordinance. We query what provisions, if any, might be available within the proposed Code of Conduct referenced in paragraphs 12-14 of the Proposal document.

MPA appreciates the opportunity to provide the foregoing comments for the Council's consideration and remains available for any further assistance that the association or its representatives can provide, either during your 19 January meeting or at any point thereafter.

Sincerely,



Frank S. Rittman

⁹ The Government has expressed concern, for example, that if all downloading activities attract criminal liability, any person who downloads articles, photographs or graphics from the Internet without authorization would also render himself liable to criminal prosecution.

PROPOSED LEGISLATIVE APPROACH TO OSP COOPERATION IN HONG KONG

December 2009

The following is a list of elements that the Motion Picture Association believes should be included in any legislative solution (including, but not limited to legislative amendment and/or statutory code of practice) to the problem of online infringement in Hong Kong. These elements address the critical role of OSPs in helping to curb online infringement. Their introduction in Hong Kong would create a balanced approach that encourages cooperation and responsible business practices against abuse of online resources and promotes effective action to combat infringement.

- The law should establish that OSPs may be held responsible for acts of infringement occurring over their networks if they have knowledge of these acts, or where they are aware of facts or circumstances from which the infringing activity is apparent, and do not take steps to prevent or stop the infringement.
- Any limitations on the liability of OSPs for online infringement should apply to monetary relief only; injunctive relief should always remain available.
- The law should require OSPs to implement an effective 'notice and takedown' procedure to deal with infringing content hosted on their servers. This procedure should include an obligation to act expeditiously upon obtaining knowledge of infringement, or upon becoming aware of facts or circumstances from which infringement is apparent. Procedural requirements relating to right holder notices should not be burdensome and should be limited to the minimum necessary to allow for a quick and efficient takedown. Removed content should not be reinstated unless a subscriber provides information sufficient to identify him and a statement that the content was removed as a result of mistake or misidentification and that he is willing to litigate the issue in court.
- The law should establish a mechanism for dealing with acts of infringement where the content does not reside on the OSP's servers, including infringement over P2P networks. This mechanism shall provide for effective solutions such as meaningful technical measures at network level and a graduated response procedure for dealing with repeat infringement that includes warnings and both interim and ultimate deterrent sanctions.
- In order to be an effective alternative to litigation, such a graduated response procedure must be efficient and streamlined. Notices should be processed expeditiously, and the overall timeframe from first notice to potential sanction should not be protracted.
- Significant resources from the rights holders are invested already and will continue to be so within an operating model to ensure that the approach used for the identification and verification of IP addresses for infringers and infringing content is reliable, robust and completely consistent. Also rights holders invest in education and support infrastructure. Payment of fees by rights holders to OSPs for further processing and forward transmission of notices to ISPs customers is therefore both unnecessary and inappropriate.
- Administrative burdens could be minimized by the use of automated systems. One preferred method is via an automated process known as ACNS (Automated Copyright Notice System). The incorporation of ACNS with extensions that address not just the notice itself but also best practice scanning and verification processes ensures that rights holders can provide OSPs with a comprehensive evidence package to support each alleged infringement. One suggestion to better

facilitate the verification of notices by OSPs from rights holders is a 'pre-approved' rights holders system under which the rights' holders (or their agent's) technical setup is validated.

- Where high level automated processes for the gathering, verifying and communicating data related to infringements are used, they will ensure that ISPs will benefit from receiving comprehensive data with every notice, and a reliable and standard method for requesting additional information about a notice should it be needed, as such, there is no need for any indemnification by rights holders.
- We believe that ISPs should be able to manage any infringing subscriber much like they manage subscribers who don't pay their bills – and that implementing automated notice referral and related sanction systems does not have to be either onerous or particularly expensive at the ISP end. The availability of an independent technical resource (similar to that outlined above for rights holder pre-approval) may be helpful in reviewing OSPs' proposals for notice processing infrastructure and for helping to resolve any actual or perceived technical issues.
- The law should provide an obligation for OSPs to preserve for at least one year information relating to right holder notices of infringement and any subsequent action taken by the OSP, including notices or warnings sent to subscribers, sufficient to identify the subscribers responsible for the relevant accounts.
- The law should require OSPs to adopt and implement terms of service sufficient to comply with its obligations under the law and to communicate these terms clearly to subscribers. These terms of service shall expressly prohibit the use of the service for copyright infringement; permit collection and disclosure of subscriber information sufficient to allow the initiation of legal actions without requiring a court order or other formality; and entitle the OSP to suspend accounts identified as being used for repeat infringement.