MOTION PICTURE ASSOCIATION – INTERNATIONAL

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Under license from Motion Picture Association

MPA
MOTION PICTURE ASSOCIATION
Audiovisual Entertainment
For Global Audiences

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November 21, 2011

The Hon. CHAN Kam-lan, SBS, JP
Chairman
Bills Committee on Copyright Amendment (2011) Bill
c/o Secretariat
Legislative Council
Government of the Hong Kong SAR

Dear Sirs/Madam,

On behalf of the Motion Picture Association (MPA), a trade association representing the interests of six international producers and distributors of filmed entertainment[1], I am writing to express concern about the slow progression of the Copyright Amendment Bill (2011), and about recent attempts to divert the government's attention onto unrelated issues not contained in the legislation.

MPA first expressed its views to the administration about the need to modernize Hong Kong's Copyright Ordinance in 2005. Since then, we have provided no less than four sets of written comments to the government in response to various discussion and consultation papers, and have testified on 3 occasions before the Legislative Council. Although we have expressed concern about perceived insufficiencies in the legislation now pending, we are nonetheless generally supportive of it and wish to see these proposals enacted without further delay.

Most recently, the MPA was among the 50+ delegates testifying during the Bills Committee hearing on July 23rd. While we were pleased to provide comments focused on the specific issues under consideration, a great deal of time was devoted to testimony by other representatives about parody, satire, and other issues not presently under consideration. In doing so, certain witnesses incorrectly mischaracterized how parody and satire are treated under U.S. law and jurisprudence.

There is no absolute "right" of parody or satire under U.S. law. Courts in the United States have instead recognized parody and satire as examples of fair use which, depending on the specific facts and circumstances of the situation, do not amount to infringements of copyright.

Section 107 of the Copyright Act of 1976 provides as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including any such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes of criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

1. *The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
2. *The nature of the copyrighted work;*

[1] More specifically, MPA acts on behalf of Walt Disney Studios, Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox International Corporation, Universal City Studios, LLC, and Warner Bros Pictures Entertainment Inc.

3. *The amount and substantiality of the portion used in relation to the copyrighted works as a whole; and*
4. *The effect of the use upon the potential market for or value of the copyrighted work.*

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all of the above factors.

Fair use is therefore a limitation and exception to the exclusive rights granted by the copyright law to the author of a creative work. Under U.S. copyright law fair use is a doctrine that permits limited use of copyrighted material without acquiring permission from rights holders. The fair use provisions of the U.S. Copyright Act have been the subject of extensive litigation and interpretation by U.S. Courts. In Campbell v. Acuff-Rose Music, Inc.[2] – which in particular focused on parody and satire – the Supreme Court of the United States described fair use as an affirmative defense, meaning that in copyright infringement litigation the defendant bears the burden of raising and proving that his use was "fair" and not an infringement.

This means that, under U.S. jurisprudence, fair use is decided on a case by case basis on the entirety of the circumstances. The same act done by different means or for different purposes can gain or lose fair use status. Not every use that may be commonly considered 'fair' is considered fair use under the law. A copyright owner may legitimately disagree that a given use is fair, and may initiate litigation in order for a court to determine whether the fair use provisions are applicable in any given situation. Fair use is not an absolute right, therefore. Indeed, Justice Souter noted in Campbell that:

> "The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioner's suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting is fair. See Harper & Row, 471 U.S., at 561….Accordingly, parody, like any other use, has to work its way through the relative factors, and be judged case by case, in light of the ends of the copyright law."

Both parody and satire have, however, been recognized by courts in the United States as fair use under certain circumstances. Such fair use cases have typically distinguished between parody (i.e. using a work to poke fun or comment on the work itself) and satire (using a work to poke fun or comment on something else altogether and not intrinsically tied to ridicule of a specific work) but the ultimate outcome of the litigation(s) in either circumstance will turn on the application of the four aforementioned fair use factors. It is therefore incorrect to assert, as some have, that there exists a "right" of parody or satire under U.S. law[3] which should be reflected in Hong Kong's Copyright Ordinance.

To the extent the administration wishes to undertake an examination of the current fair dealing provisions under the Ordinance, MPA believes it should be the subject of a separate, later inquiry and initiative, unrelated to the so-called "digital agenda" provisions of the Copyright Amendment Bill (2011) now under consideration. We call on the government to exercise leadership in this regard by resisting attempts to now conflate parody or satire into the legislative mix unnecessarily. The government should instead prioritize its immediate efforts on the specific issues mooted for the past six years, which have already been the subject of careful and deliberate consideration.

Finally, we call upon the administration to confirm earlier assurances given to rights holders by the senior representatives from the Commerce and Economic Development Bureau that a full review and analysis of all legislative and non-legislative means being used internationally to address online infringement would be undertaken before the end of the year. To the best of our knowledge that process has not yet begun.

Sincerely,

Frank S. Rittman

[2] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 578 (1994).

[3] The Supreme Court further noted in Harper & Row v. Nation, 471 U.S. at 560, that "The task is not to be simplified with bright line rules, for the statute, like the doctrine it recognizes, calls for case by case analysis."

cc:

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