

5 September 2014

Ms YUE Tin-po  
Clerk  
Bills Committee on Copyright (Amendment) Bill 2014  
Legislative Council  
Legislative Council Complex  
1 Legislative Council Road  
Central, Hong Kong

Dear Ms Yue,

**Copyright (Amendment) Bill 2014 (Bill)**

The Hong Kong Copyright Alliance consists of 16 organizations from the music, film, broadcasting, comics and animation, software and information technology sectors with over 1,400 member companies. We are broadly representative of the copyright and creative industries regarding copyright protection in Hong Kong.

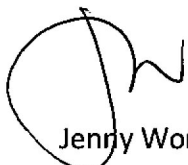
We note the proposed exception for “user-generated content” (*UGC*) advocated by certain interest groups has emerged in the discussion of the Bill. We enclose an article by eminent jurist and former Assistant Director General of World Intellectual Property Organization, Dr Mihály Ficsor, explaining why the UGC exception is unacceptable in Hong Kong. The article was published in *Ming Pao* on 15 August 2014 as well as *Hong Kong Lawyer* (August 2014 issue).

The informed participation of Bills Committee members in the Legislative Council’s committee on the Bill will benefit not only the creative industry but also online service providers as well as the general public.

Hong Kong has been lagging behind in fulfilling its international obligations in safeguarding intellectual property. The early passage of the Bill will mark an important, albeit belated, step in the right direction.

We look forward to working closely with the Bills Committee members in the deliberations of the Bill.

Yours sincerely



Jenny Wong  
Convenor  
Hong Kong Copyright Alliance

Encl.

Members of Hong Kong Copyright Alliance

Business Software Alliance

CASBAA (Cable and Satellite Broadcasting Association of Asia)

Entertainment Software Alliance

Hong Kong Comics and Animation Federation Limited

Hong Kong International Screen Association Limited

Hong Kong Motion Picture Industry Association Limited

Hong Kong Movie Producers and Distributors Association Limited

Hong Kong Recording Industry Alliance

Hong Kong Video Development Foundation Limited

IFPI Asian Regional Office

IFPI (Hong Kong Group) Limited

Motion Picture Association - International

PCCW

Television Broadcasts Limited

Time Warner Inc.

21st Century Fox Inc.

## ANNEX

### **Why the Hong Kong bill on copyright amendments is right on the issue of UGC**

The issue of user generated content (UGC) concerns key aspects of copyright, and governments around the world are diligently working to determine the best approach to it. I was the Assistant Director General of World Intellectual Property Organization (WIPO) in charge of copyright during the negotiation and adoption of the two WIPO “internet treaties.” Moreover, the first thorough interpretation of the “three-step test” for exceptions was made by a WTO panel in which I was the intellectual property expert (see WTO document WT/DS/114/R).

For this reason, I followed with interest the preparation of the Canadian provisions on UGC, and I pointed out the unintended consequences they might create, in particular, the possible conflicts with the WIPO Treaties and the three-step test (see [www.copyrightseesaw.net](http://www.copyrightseesaw.net)). In the meantime, the issue has also been addressed in the framework of the recent European Union consultation on the future of copyright, in which I intensively participated as the chairman of the working group on UGC in my country. I have noted with satisfaction that the draft White Paper recently published by the European Commission summing up the results of the consultation has adopted a prudent approach which accords with our main suggestions. This is why I also follow with attention the preparatory work of the copyright amendments in Hong Kong where the issue of UGC has also surfaced.

There are at least seven reasons for which Hong Kong policy makers are right to follow the judicious European approach rather than rushing to legislate on UGC as a generic concept.

- 1) The first reason is that the Copyright (Amendment) Bill 2014 *does* address the issue of UGC where it is necessary for establishing due balance of interests, for guaranteeing freedom of expression and for providing an adequate legislative basis for flourishing creativity of online users – but only there. The Bill contains provisions on parody, a typical form of UGC creation which truly should not be subjected to authorization by the authors of the “targeted” works because it could unduly restrict the freedom of expression. This has been a concern in the EC as well; the above-mentioned draft EC White Paper points out exactly the availability of exceptions for parody, quotations and incidental use of works when it concludes that no general UGC exception is needed.

The Hong Kong Bill also includes provisions on a quotation exception; this is specifically provided in Article 10(1) of the Berne Convention under strict conditions for certain purposes such as commenting on existing works. In view of this, it is not clear what else the separate exception for “commenting on current events” might mean under the Bill. In order to avoid possible conflicts with the international treaties, it would be advisable to clarify and narrow the

scope of that exception, preferably along the lines of Article 10*bis* of the Berne Convention.

- 2) The second reason is that the concept of UGC is too broad and vague. As a result, a general exception for UGC may hardly meet the first condition (“step”) of the internationally-agreed Berne three-step test, namely, that an exception may only be provided in a special – limited and duly determined – case. This would also be true if the concept were somewhat narrowed to adaptations of existing works by users.
- 3) The third reason is that opening the gates broadly, for any kind of UGC, might also lead to conflicts with authors’ moral right under Article 6*bis* of the Berne Convention to oppose any alteration of their works that would be prejudicial to their honor or reputation.
- 4) The fourth reason is that, in fact, there does not seem to be any real need to legislate on UGC as a general concept. The situation is not different in Hong Kong from the EU, and the above-mentioned draft EC White Paper notes: “There is a lack of evidence that the current legal framework for copyright puts a brake on or inhibits UGC (absence of ‘chilling effect’)”.
- 5) The fifth reason is that the criterion frequently presented as a guarantee to avoid conflicts with normal exploitation of works – namely that a general UGC exception would only be applicable in the absence of commercial purposes – is hardly a true guarantee. If an unauthorized adaptation (see Article 12 of the Berne Convention) is uploaded on the Internet without profit-making purposes, its impact on the normal exploitation of the works concerned (the second part of the “three-step test”) is hardly different from the case where profit is a purpose! (The difference is not in the loss caused to the owners of rights but only in the profit gained by others.) It is notable that even if the adaptation does not generate profit for its creator, the websites on which UGC adaptations are included are themselves usually profit-oriented (based, in general, on advertisement money).
- 6) The sixth reason is that appropriate licensing mechanisms have been developed and are ever more broadly offered by owners of rights and their representative bodies. The EC White Paper mentions this as a fundamental means of facilitating UGC creation. The system outlined on the [www.ugcprinciples.com](http://www.ugcprinciples.com) website and applied in practice on YouTube by Google is also a good example.
- 7) The seventh reason is a genuine “last-but-not-least” one and may also serve as a summary: “Mash-ups”, “memes”, and similar electronically generated secondary productions based on existing works are widespread new forms of creativity which in certain specific cases (such as parody) should be supported by fine-tuned exceptions. However they may not be regarded as being able to come anywhere close to replacing “mainstream” original works requiring serious creative efforts and financial investments. Possible exceptions aimed at

facilitating secondary productions must not endanger the sustainable creation and production of the primary works.

The draft EC White Paper warns that, although new exceptions may result in easier access in the short term to existing works for certain uses, “[t]he economic incentive to create and to invest in new works could weaken, with the dynamic, medium- to longer-term effect being that the production of creative content could be reduced.” This would be a most undesirable outcome; it is a key reason why the EC is not accepting the principle of a broad UGC exception. I believe Hong Kong has solved the freedom of expression issue through the exceptions mentioned above, and implementation of a broad UGC exception by Hong Kong would be unwise, unnecessary and inconsistent with the WIPO system’s rules.

Dr Mihály Ficsor

Chairman, Central and Eastern European Copyright Alliance

Former Assistant Director General of World Intellectual Property Organization

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