MOTION PICTURE ASSOCIATION
Audiovisual Entertainment
For Global Audiences

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By email

Clerk to Bills Committee on Copyright (Amendment) Bill 2014
Legislative Council Secretariat
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To Whom It May Concern:

We are writing in response to the Council's announcement inviting submissions from interested parties in response to the Copyright (Amendment) Bill 2014. The Motion Picture Association[1] (MPA) appreciates the opportunity to provide the following comments in advance of the Bills Committee meeting scheduled for October 25th, which we shall be pleased to attend.

The MPA has followed this issue closely since 2005 and has previously communicated its views on the subject matter now under consideration to the Commerce and Economic Development Bureau and to the Legislative Council on numerous occasions.[2] We do not intend to repeat here all the points already made in our many previous submissions, but shall instead focus on priority concerns. We do, however, wish to reiterate our observation that whereas Hong Kong previously stood at the forefront of intellectual property rights protection in Asia, its failure to amend the Copyright Ordinance over the past ten years to meet the challenges of the digital environment has left Hong Kong at a competitive disadvantage. While we support the Government's present initiatives as long overdue, the proposals still lack ambition in certain respects and fall short of the "best practices" levels of protection to which Hong Kong has historically ascribed. However, it is essential that Hong Kong now takes the first step towards modernizing its legal environment to better protect copyrights in the digital environment.

Subject to the following comments and suggestions (which MPA feels would result in a better legislative outcome) the MPA urges the Legislative Council to move the proposals forward with all deliberate speed.

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[1] The Motion Picture Association represents the interests of six international producers and distributors of filmed entertainment. MPA member companies include The Walt Disney Studios, Paramount Pictures Corporation, Sony Pictures Releasing International, Twentieth Century Fox International Corporation, Universal International Films, and Warner Bros. Pictures International.

[2] See, for example, related submissions to the Legislative Council, the former Commerce, Industry and Technology Bureau and the Commerce and Economic Development Bureau filed on August 29 2005; April 28 2006; April 30 2007; August 29 2008; April 29 2009; January 11 2010; March 16 2011; July 19 2011; March 1 2012; and November 14 2013.

Communication right for copyright owners

As previously mentioned, MPA supports an all-embracing right of communication as part of the Copyright Ordinance and the intention to enact a technical-neutral exclusive right of communication. However, we see no justification for limiting the extension of criminal sanctions merely to unauthorized communications in the course of any trade or business "for profit or reward." Not-for-profit institutions should not be automatically immunized from criminal liability if they engage in widespread unauthorized communications of works to the public in the courses of their business. We would therefore recommend removing the words "for profit or reward" from the wording of the proposed section 118(8B).

We have previously voiced our concern for the proposed exclusion of liability in section 28A(5) for persons or entities who intentionally make knowingly infringing content available by shielding themselves from the ability to determine the exact identity of the content. We therefore recommend again that this provision be deleted.

Criteria for authorization liability

We have on several occasions urged that principles of authorization liability be clarified and therefore support the inclusion of the proposed section 22(2A). However, we would recommend that the word "may" in that section be replaced with the word "must" and the deletion of the word "and" from the proposed section 22(2A)(b) so that the referenced criteria are construed by courts to be read disjunctively rather than conjunctively.

"Safe harbor" for OSPs

MPA notes that the new Division IIIA (proposed new sections 88A to 88I) amendments generally conform to the provisions of the United States' Digital Millennium Copyright Act (DMCA) amendments that protect service providers from monetary liability for infringements occurring on its network of platform. However, a primary deficiency in this respect is that the proposals do not require, as a prerequisite to all safe harbor protection, that service providers adopt and reasonably implement a policy that provides for the termination, in appropriate circumstances, of the accounts of repeat infringers. Such a requirement is consistent with existing legislation in Australia, as well as the United States, and sets a basic minimum requirement without which a service provider cannot benefit from safe harbor treatment. This is particularly important with respect to providers of conduit services, who might otherwise be exposed to only very limited legal incentives for cooperation with right holders. We therefore recommend that such a requirement be explicitly included within the proposed section 88B(2) of the amendments, as well as the Code of Practice referenced in the proposed section 88I.

While recognizing the emotive concerns surrounding internet access suspension or termination, we note that customer service agreements already in place between Hong Kong's online service providers and their customers specifically reference the possibility of such termination under a variety of circumstances, including the violation of intellectual property rights, the use of online services for spamming or other prohibited activity, as well as the simple failure to pay customer service fees.

Although the proposed amendments and the DMCA both deny safe harbor status to service providers that receive financial benefits directly attributable to infringement, the proposed Hong Kong provisions state that such disqualifying financial benefits do not include one-time set up fees or flat periodic payments that the service provider charges all users on a non-discriminatory basis. This is problematic because a service dedicated to infringement could claim safe harbor status even if its business model depends on charging users for participating in infringing activities, so long as those charges are non-discriminatory and are assessed on a periodic (i.e., subscription) basis. This would not be appropriate and we therefore recommend the deletion of the proposed section 88B(4)(b).

The proposed legislation further conditions a service provider's limitation of liability on having taken reasonable steps to limit or stop the infringement as soon as practicable. Taking reasonable steps is achieved by complying with all of the provisions in the code of practice respecting the course of action that a service provider may adopt in limiting or stopping an alleged infringement. However, given that such a code does not presently exist, it is difficult to evaluate the strength of the incentives to cooperation which the safe harbor system provides.[3]

We understand from previous meetings with government representatives that the Administration intends to retain an outside consultant to further analyze various legislative and non-legislative tools to contain online infringement. As previously discussed, we look forward to engaging with the Administration when an outside consultant is retained to further analyze various legislative and non-legislative tools to contain online infringement.

Permitted Acts

We have previously voiced our principled objection to the so-called "media shifting" proposals for sound recordings and maintain our concern here. The provisions should not be construed to permit the circumvention of technological protection measures or digital rights management used by content owners to protect their works.

Award of Additional Damages

We have previously stated our preference for Hong Kong's adoption of statutory damages in lieu of additional damages and maintain that preference for the record.

The foregoing reflects MPA's primary concerns and comments in response to the legislation presently under consideration. We look forward to the opportunity of further discussion during the Bills Committee meeting on October 25th.

Sincerely,

Frank S. Rittman

[3] In contrast, the DMCA specifies that upon obtaining "actual knowledge" of infringement, awareness of "facts or circumstances from which infringing activity is apparent," or receipt of a substantially compliant notices from a rights holder, the service provider must act "expeditiously to remove, or disable access to, the material" in order to benefit from the safe harbor provisions.