

MOTION PICTURE ASSOCIATION



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**MPA Submission on the "Treatment of Parody under the Copyright Regime
Consultation Paper"**

The MPA is a trade association representing six international producers and distributors of theatrical motion pictures, home video entertainment and television programming.

The MPA has previously communicated its views concerning proposals for strengthening copyright protection in the digital environment and the Copyright (Amendment) Bill 2011 ("the 2011 Bill") to the Hong Kong Government on a number of occasions dating back to 2005 and has testified on three prior occasions before the Legislative Council. Although the MPA has previously expressed concern about perceived insufficiencies in the 2011 Bill we were nonetheless generally supportive of it and remain keen to see those proposals enacted.

In response to the current consultation, the MPA invites the Legislative Council to note the following:

1) The MPA considers that it would be a mistake to contemplate any sort of blanket exemption from liability for "parody", "satire", "caricature" or "pastiche". International conventions such as Berne and TRIPS provide a minimum level of protection to copyright owners under the "three-step test". It is difficult to see how a blanket exemption could comply with that test and (i) be confined to a special case; (ii) not conflict with a normal exploitation of the copyright owner's works; and (iii) not unreasonably prejudice the legitimate interests of rights owners. Furthermore, Article 61 of the TRIPS agreement provides that "members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale". Hong Kong should not introduce any exemption that does not comply with these minimum standards. Moreover, care should be taken to ensure that any

proposed legislative amendments will not make it harder for Hong Kong authorities or copyright owners to act against those who make a living out of piracy.

2) There are important distinctions between terms such as parody, pastiche, satire and caricature, which need to be taken into consideration when considering the impact on copyright owners' interests, and care should be taken not to use them interchangeably for the purposes of this inquiry. For example, parodies are generally understood as imitative works which comment on an original work, by using elements of that original work, while a satire uses elements of a work to comment on issues that usually have nothing to do with the original work itself. The MPA would not object to a variant of option 3 for a carefully crafted exception for parody that (a) is limited to true parodies of the work in question which comments on the work itself, and (b) does not supplant or have an adverse effect on the copyright owner's markets or potential markets. The taking of a work to parody another work should not fall within that exception. So, for example, the verbatim taking of a musical work in order to make a parody of the words of a song should not be excepted. The problems for enforcement are far from imaginary, given the need for fact-based assessment of fair dealing factors. J.K.Rowling had to meet this defense in her 2003 action in the Netherlands to prevent the distribution of the "Tanya Grotter" books, as did the Salinger Estate in their 2009 attempt to halt publication of a Swedish author's sequel to "Catcher in the Rye". The MPA does not support the extension of such an exception to the vague categories of "caricature" or "pastiche" and believes this would involve the courts in time-consuming questions of definition and encourage bad-faith defences. Any exception should be limited to parody alone.

3) The MPA is aware that a fourth option, not included in the current consultation document, has been proposed by 'netizens' and other online users. This option seeks to follow the approach to parody recently introduced in Canada. As in the UK and Australia, the Canadian Copyright Modernization Act ("the Act") introduces a fair dealing exception for parody and satire. However, the Canadian Act goes a stage further as it also includes a provision for non-commercial user generated content ("UGC") that effectively creates a legal safe harbour for creators of non-commercial UGC (provided they meet four conditions in the law) and for sites that host such content. This provision has been variously referred to as the "YouTube defence". At this stage, without seeing the full details of what is proposed, the MPA considers that a fair dealing exception based on the Canadian approach would be premature. The Act only came into law in June 2012 so it will be unclear exactly what the scope of "non-commercial purposes" (s. 29.21(1)(a)) or "a substantial adverse effect, financial or otherwise" (s. 29.21(1)(d)) might be for some time to come. The Act also introduces a new concept that any new work should not be "a substitute for the existing one" (s. 29.21(1)(d)). Clearly while these uncertainties exist, users and copyright owners of

existing works will be forced to turn to the courts to seek judicial interpretation of these terms. If 'netizens' are seeking clarity on which parodies might attract civil or criminal liability, the MPA considers that the approach put forward in this 'fourth option' defeats that purpose.

Throughout the 1990's, Hong Kong stood at the forefront of intellectual property rights protection but with the failure of the 2011 Bill to reach its second reading in 2012, Hong Kong is now falling far behind with respect to the so-called "digital protections" which many other jurisdictions have already enacted. The treatment of parody under the copyright regime was not a subject that the 2011 Bill sought to address and it is disappointing that attention has been diverted to this unrelated issue. To the extent the Administration wishes to undertake any examination of the fair dealing provisions under the existing Copyright Ordinance, the MPA believes it should be the subject of a separate initiative, unrelated to the "digital agenda" provisions which underscore the 2011 Bill.

The MPA is hopeful that this consultation process can now be swiftly concluded so that attention can be returned to the very real concerns expressed by rights owners for the past eight years about the need for the Copyright Ordinance to properly address online infringement.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matthew Cheetham', with a stylized flourish at the end.

Matthew Cheetham
Regional Legal Counsel (Asia Pacific Region)