



## MOTION PICTURE ASSOCIATION ASIA PACIFIC

May 28, 2020

### **Ministry of Communications & Information**

140 Hill Street #01-01A,  
Old Hill Street Police Station,  
Singapore 179369

Dear Sirs

**RE: RESPONSE TO PUBLIC CONSULTATION ON THE DRAFT PERSONAL DATA PROTECTION (AMENDMENT) BILL**

#### 1. **INTRODUCTION**

1.1 The Motion Picture Association ("**MPA**") refers to the Ministry of Communications and Information ("**MCI**") and the Personal Data Protection Commission's ("**PDPC**") "Public Consultation Paper: Draft Personal Data Protection (Amendment) Bill, including Related Amendments to the Spam Control Act" ("**Consultation Paper**") which was released as part of MCI/PDPC's ongoing efforts to review the Personal Data Protection Act 2012 (No. 26 of 2012) ("**PDPA**") to ensure that Singapore's data protection regime keeps pace with the evolving technological and business landscape while providing effective protection of personal data in the digital economy.

1.2 The film and television industry creates, licenses and distributes content in a rapidly evolving marketplace. Indeed, streaming, which was once only a small part of the film and television industry, is becoming an increasingly large part of the film and television industry's future. As our research indicates, the digital market makes up 48% of the combined theatrical and home/mobile entertainment market in 2019.<sup>1</sup>

1.3 MPA supports a privacy regime that balances the need for organisations to collect, use and disclose personal data for legitimate and reasonable purposes, and the protection of individuals' personal data, and that provides opportunities for market growth in an increasingly challenging digital environment. We are grateful for the opportunity to discuss the latest proposed changes to the PDPA and set out in detail below some areas for consideration and further consultation.

1.4 This response will focus on some of MPA's key thoughts in relation to the following:

- (a) the proposed data portability obligation;

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<sup>1</sup> <https://www.motionpictures.org/wp-content/uploads/2020/03/MPA-THEME-2019.pdf>.

- (b) the proposed legitimate interest exception; and
- (c) the proposed business improvement exception.\

## 2. **STATEMENT OF INTEREST**

2.1 The MPA represents the interests of six international producers and distributors of filmed entertainment. MPA represented studios include:

- Walt Disney Studios Motion Pictures
- Netflix Studios, LLC.
- Paramount Pictures Corporation
- Sony Pictures Entertainment Inc.
- Universal City Studios, LLC
- Warner Bros. Entertainment Inc.

("Represented Companies").

2.2 These Represented Companies are primarily providers of film entertainment and television programming for more than one hundred and forty different markets around the world, including Singapore, and either offer, or are making plans to offer, direct-to-consumer curated video on demand services to consumers.

## 3. **DATA PORTABILITY OBLIGATION**

3.1 It has been proposed in the Consultation Paper and the draft Personal Data Protection (Amendment) Bill 2020 ("Bill") that a new data portability obligation will be introduced to where an organisation must, at the request of an individual, transmit certain of his/her personal data that is in the organisation's possession or under its control to another organisation in a commonly used machine-readable format ("**Proposed Data Portability Obligation**").<sup>2</sup>

3.2 We welcome MCI/PDPC's decision to introduce various exceptions to Proposed Data Portability Obligation to *inter alia* protect the organisation's commercially sensitive information as well as the organisation's business innovation and investments, and in particular:

- (a) the "confidential commercial information" exception, where organisations would be able to reject any data portability requests in relation to data which, if disclosed, would reveal confidential commercial information that could harm the competitive position of the organisation ("**Confidentiality Exception**");<sup>3</sup> and
- (b) the "derived personal data" exception, where organisations would be able to reject any data portability requests in relation to personal data about an individual that is derived by an organisation in the course of business from other personal data (except for data that is derived by the organisation using simple sorting nor common mathematical functions like averaging and summation) ("**Derived Personal Data Exception**").<sup>4</sup>

3.3 We note that under the Bill, section 4(6)(b) of the PDPA provides that the provisions of other written law shall prevail to the extent that any provision of Parts III to VIB is inconsistent with the provisions of that other written law. Our understanding is that with the suggested amendment in section 4(6)(b), the position in Singapore would be similar to that under Article 20(4) of the General Data Protection Regulation (EU) 2016/679 ("GDPR"), which provides that the data

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<sup>2</sup> Paragraph 43 to 52 of the Consultation Paper, and Clauses 13 and 16 of the Bill.

<sup>3</sup> Paragraph 48 of the Consultation Paper.

<sup>4</sup> Paragraph 49 of the Consultation Paper.

subject's right to data portability "shall not adversely affect the rights and freedoms of others", which may include trade secrets or intellectual property and, in particular, the copyright protecting the software<sup>5</sup>.

- 3.4 Further, as recognised in paragraph 47(c) of Consultation Paper, there exist several potential data porting request models which may serve different scenarios or business models. However, we would like to highlight that the B2B data porting "push" or "pull" models to facilitate the porting of data between organisations may not be entirely suitable for all industries and/or services, and alternative models such as B2C data porting models may be more appropriate in certain situations<sup>6</sup>.
- 3.5 Some of our members currently offer subscription video on demand (SVOD) services, and more of our members may offer SVOD in future. Our members wish to point out that SVOD services employ different technology from services that only provide data storage. This means that data portability details, coding and interoperability will vary from industry to industry. In order for SVOD services to enable data portability and effectively achieve the objective of providing "consumers greater autonomy over their personal data", we put forward for your consideration the introduction of porting users' personal data from the business directly to users in machine-readable formats, to enable them to move their data easily to other SVOD service providers.
- 3.6 We also understand that the Proposed Data Portability Obligation will only come into effect with the issuance of regulations that will prescribe requirements that apply to the porting of specific datasets, and PDPC will work with the industry and relevant sector regulators to develop these requirements. In keeping with developments globally, we would request that such regulations not create an obligation on organisations which collect, use and disclose personal data to adopt or maintain processing systems which are technically compatible<sup>7</sup>.
- 3.7 We would be happy to engage further with PDPC on the development of these industry requirements and will file a more detailed submission during such subsequent engagements.

#### 4. **LEGITIMATE INTERESTS AND BUSINESS IMPROVEMENT EXCEPTIONS**

- 4.1 It was proposed in the Consultation Paper and the Bill that a new general legitimate interests exception will be introduced to enable organisations to collect, use or disclose personal data in circumstances where it is in the legitimate interests of the organisation and the benefit (including any economic, social or security benefit) to the public (or any section thereof) is greater than any adverse effect on the individual ("**Proposed Legitimate Interests Exception**").
- 4.2 In particular, before collecting, using or disclosing the individual's personal data, the organisation must first conduct an assessment, and inform the individual, in any reasonable manner, that it is collecting, using or disclosing personal data (as the case may be) under the Proposed Legitimate Interest Exception. Additionally, we note that the Consultation Paper also expressly provides that the Proposed Legitimate Interests Exception must also not be used for sending direct marketing messages to individuals.<sup>8</sup>
- 4.3 It was also proposed in the Consultation Paper and the Bill that a new business improvement exception will be introduced to make clear that organisations may use personal data (that was

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<sup>5</sup>Article 29 Data Protection Working Party confirmed in the Guidelines on the right to data portability (as last revised and adopted on 5 April 2019) at page 12.

<sup>6</sup> See Section 1798.100(d) of the California Consumer Privacy Act.

<sup>7</sup> See Article 20 of the EU General Data Protection Regulations, read with Recital 68.

<sup>8</sup> Paragraph 40 of the Consultation Paper, and Clause 31 of the Bill.

collected in accordance with the PDPA) without consent for the following business improvement purposes, if such purposes cannot reasonably be achieved without the use of the personal data in an individually identifiable form and the use of the personal data by the organisation does not have any adverse effect on the individual to whom the personal data relates:

- (a) to improve or enhance any goods or services provided by the organisation, or develop new goods or services;
- (b) to improve or enhance the methods or processes, or develop new methods or processes, for the operations of the organisation;
- (c) to learn about and understand the behaviour and preferences of the individual or any other customer of the organisation in relation to the goods or services provided by the organisation; and/or
- (d) to identify goods or services provided by the organisation that may be suitable for the customers of the organisation other than individual customers.

4.4 The MPA respectfully suggests that having a “legitimate interest exception” separate from the “business interests exception,” as opposed to adopting a single legitimate interest basis for processing consistent with the GDPR approach unnecessarily complicates the analysis for businesses (starting with which exception to use) in a way that provides no obvious benefit to individuals, and potentially allows for gaps in covering business activities that should reasonably be expected by individuals and which should be subject to a consent exception.

- (a) Article 6(1)(f) of the GDPR states: “processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”
- (b) Under Article 6(1)(f) of the GDPR, the balancing exercise only requires the controller to assess whether the legitimate interest pursued by the controller or by a third party is overridden by the individual's interests, rights or freedoms. This allows for the flexibility to cover the activities anticipated in the Consultation Paper for both the Legitimate Interest and Business Interests exceptions. It has the further benefit of clarifying that the legitimate interests are not limited only to the organisation in question, but also any third party, including a third party individual. Additionally, the balancing exercise balance only requires the balancing of the identified legitimate interests pursued against such individual's interests, rights or freedoms.<sup>9</sup>
- (c) Aligning a unified Legitimate Interest basis for processing personal data will help avoid uncertainty as well as additional compliance costs for organisations who are regulated by the GDPR as well as the PDPA regimes.
- (d) We also respectfully suggest that there is no compelling reason for excluding the sending of direct marketing messages to individuals from the scope of a Legitimate Interests exception (consistent with the GDPR approach<sup>10</sup>). Please see our further points below at 4.5(b).

4.5 In the alternative, in the event this “bifurcation” of a legitimate interests and business interests exception stays in place, the MPA encourages strong consideration of the following:

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<sup>9</sup> See <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/legitimate-interests/what-is-the-legitimate-interests-basis/>.

<sup>10</sup> See Recital 47, *Overriding Legitimate Interest*, which states in part: “The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.”

- (a) If the Proposed Legitimate Interests Exception only applies where the organization's legitimate interests and public benefit together outweigh any adverse effect on the relevant data subjects, we would encourage an interpretation of "public benefit" that allows for an expansive view of what serves as a social benefit<sup>11</sup>, including reasonable expectations of members of society as to what can constitute a social benefit. The examples cited in the Consultation Paper for security and prevention of fraud and other illegal activities are excellent. Another example might be the use of information to promote inclusion and diversity.
- (b) We are of the view that there is no compelling reason for excluding the sending of direct marketing messages to individuals from the scope of the Proposed Legitimate Interests Exception. In particular, we would highlight that given the comprehensive safeguards under the Proposed Legitimate Interests Exception, which requires organisations to *inter alia* conduct an assessment before the collection, use and disclosure of personal data as well as to inform the individual of the organisation's reliance of the Proposed Legitimate Interests Exception for such collection, use or disclosure of personal data, these are adequate safeguards for the collection, use and/or disclosure of personal data for the purposes of sending of direct marketing messages to individuals.
- (c) MPA further respectfully submits that the Proposed Business Improvement Exception should be expanded to include the collection, use and/or disclosure of personal data amongst the organisations' affiliates and/or third-party service providers for the aforementioned business improvement purposes.
- (i) While paragraph 40(b) of Consultation Paper provides that the intention is for the Proposed Business Improvement Exception to apply to a group of companies (e.g. subsidiaries of the organisation), there is a lack of clarity over as to whether a group of companies would be able to take advantage of the Proposed Business Improvement Exception under Clause 32 of the Bill. In particular, we note that paragraph 2 of Part 2 of the Second Schedule only allows organisations (and not the group of companies) to use the personal data without consent for the specified purposes (and organisations are not entitled to disclose the personal data under this same exception to the other organisations in the group).<sup>12</sup>
- (ii) The Proposed Business Improvement Exception should explicitly take into account practicalities in the existing data analytics market where personal data is often collected, used and disclosed amongst the organisations' affiliates and/or third-party service providers to derive such business insights for innovation in the development and delivery of products and services in the film and television industry.
- (iii) Similarly, MPA is of the view that the Proposed Business Improvement Exception ought to be expanded to include the collection, use and/or disclosure of personal data to such third-party service providers for such business improvement purposes. There are adequate safeguards given such that the organisations still bear the burden of demonstrating that the purpose for which the organisation processes the personal data cannot reasonably be achieved without the collection, use or disclosure of personal data in an individually identifiable form, and such processing of personal data by the organisation does not have any adverse effect on the individual to whom the personal data relates.

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<sup>11</sup> We note that "public or any section of the public" could reasonably be interpreted to include a single individual.

<sup>12</sup> Clause 8 of the Bill provides that under the amended Section 17 of the PDPA, an organisation may use personal data about an individual without the consent of the individual, in the circumstances or for the purposes, and subject to any condition, in the First Schedule or Part 2 of the Second Schedule.

We would be grateful if MCI/PDPC could take into account our concerns as set forth above. We would be happy to further discuss any questions or comments MCI/PDPC may have.

Yours faithfully

A handwritten signature in black ink that reads "Trevor Fernandes". The signature is written in a cursive style with a large initial 'T'.

**Trevor Fernandes**

Vice President, Government affairs, Asia Pacific

O (65) 6253-1033

M (65) 9108-9959

E [Trevor\\_Fernandes@motionpictures.org](mailto:Trevor_Fernandes@motionpictures.org)

**MOTION PICTURE ASSOCIATION**