To: Tan Kan Cheong

From: DPP Team TG-1

Date: 25 October 2011

File No: Sissy Kwong

Re: Obscenity, Films Act

ISSUES

1. Would the nature of Kwong's film be assessed subjectively (by allowing a judge to decide) or objectively (by using a community standard established by the Media Development Authority [MDA]) under s 2(1) of the *Films Act* (Cap 107, 1998 Rev Ed Sing) [*Films Act*]?

2. Would Kwong's film tend to deprave or corrupt a significant proportion of persons with monochromatic vision who are likely to see or hear it, thus resulting in her violating s 30(1) of the *Films Act*?

BRIEF ANSWER

It is unlikely that Kwong would be convicted.

1. In Singapore, the nature of the film would likely be assessed objectively by using a community standard as established by the MDA.

2. The court would likely hold that, under the MDA guidelines, the film would not deprave or corrupt a significant proportion of persons with monochromatic vision, who are likely to see or hear it, under relevant circumstances, as long as they are above the age of 21.

FACTS

Kwong's latest project is a film which is two movies in one. To the ordinary-sighted, it would be appear as a mixture of colour and movement. To someone with monochromatic vision, it would show a man and woman dancing a traditional waltz in the nude. Kwong wanted to show this to a small group at a private showing. Police obtained information about it and seized the film before it could be shown.

The case would be heard before District Judge Thomas, who is especially conservative on questions of sex and nudity. It may be assumed that if Judge Thomas applies his own opinion, the black and white "version" of Kwong's film would be considered 'obscene'.

DISCUSSION

Kwong is unlikely to be convicted. A Court will interpret the statute according to the *Interpretation Act* (Cap 1, 2002 Rev Ed Sing), s 9A [*Interpretation Act*], which allows for a purposive interpretation and the use of extrinsic materials.

In determining whether a film is 'obscene' under s 2(1) of the *Films Act*, it is likely that an objective approach using community standards would be adopted, as per Parliament's intention. Applying this approach to the question of whether a significant proportion of persons with

monochromatic vision, who are likely to see or hear the film, would be depraved or corrupted, the courts are likely to hold that they would not. It is also possible that the class of persons with monochromatic vision may be so numerically negligible that they are excluded from consideration. In all, Kwong would not be liable for possessing an obscene film under s 30(1) of the *Films Act*.

1) Would the nature of Kwong's film be assessed subjectively or objectively?

Kwong's film will likely be assessed objectively using community standards as set out in the MDA guidelines.

Whether a film is 'obscene' will be ascertained objectively using community standards (Board of Film Censors, *Classification Guidelines*, online: Media Development Authority <http://www.mda.gov.sg/Documents/Classification_Guidelines_15072011.pdf> [MDA Guidelines]; *Public Prosecutor v Tan Hiap Hua*, [2010] SGDC 322 [*Tan*]; *Public Prosecutor v Mohamed Hanafi Bin Abdol Hamid*, [2007] SGDC 247 [*Hanafi*]; *United States v Kennerley*, 209 F 119 at 121 (SDNY 1913) [*Kennerley*]).

Before we turn to Parliament's intention behind the Films Act, a plain reading of 'obscene' is given as "Extremely offensive under contemporary community standards of morality and decency; grossly repugnant to the generally accepted notions of what is appropriate" (*Black's Law Dictionary*, 9th ed, *sub verbo* 'obscene'), which lends support to an objective approach based on community standards.

Furthermore, Parliamentary intention behind *Films Act* suggests that it is likely that a community standard based on MDA Guidelines will be used to decide whether a film is 'obscene'. The Board of Film Censors [BFC] under MDA regulates films using its Classification Guidelines, which aims to reflect community standards while ensuring that due consideration is given to the film's artistic, educational or literary merit. This was supported in the Parliamentary Debates over the *Films (Amendment Bill)* in 1998, where BG George Yong-Boon Yeo stated that the same consultative process between BFC and the film industry will continue and that any uncertainty over whether a film will infringe censorship guidelines should be brought to the censors (*Parliamentary Debates Singapore*: *Official Report*, vol 68 at col 516 (27 February 1998)). Likewise in the Parliamentary Debates over the *Undesirable Publications (Amendment) Bill* in 1998, BG George Yong-Boon Yeo acknowledged that 'obscene' is an arbitrary term and mentioned that Parliament had addressed this subjectivity by establishing "committees of jurymen" to provide advice (*Parliamentary Debates Singapore: Official Report*, vol 68 at col 350 (19 February 1998)). He further mentioned that it was not Parliament's intention to "tighten our standards so as to make it more difficult for artists and creative individuals to explore new possibilities" (*ibid*, at col 351).

The approach adopted in case laws seems to be divided between the subjective standard of allowing a judge to decide and the objective standard of using community standards. In Singapore, the concept of objectively ascertaining the nature of films based on community standards was reflected in the procedures of *Tan* and *Hanafi*, where the allegedly 'obscene' films were sent to BFC for assessment. Likewise in *Kennerley*, the US court disapproved the Hicklin test and established the concept of community standard (*Kennerley* at 121). On the other hand, there

are cases from foreign jurisdictions that adopt the subjective approach of allowing a judge to decide. In these jurisdictions (UK and Malaysia), the test for obscenity has, as in Singapore, been adopted from Cockburn J's dicta in *R v Hicklin*, (1868) LR 3 QB 360 at 371. Additionally, in UK, the *Obscene Publications Act,* 1959 (UK), 7 & 8 Eliz 2, c 66, s 1(1) is also *in pari materia* with s 2(1) of *Films Act*, giving greater relevance to the English cases. The courts in *Olympia Press Ltd v Hollis*, [1973] 1 WLR 1520 at 1523-1524 and *Thomson v Chain Libraries Ltd*, [1954] 1 WLR 999 at 1003-1004 held that it was the duty of justices to read the materials themselves and pass judgement on it. Similarly, the Malaysian case of *Mohamed Ibrahim v Public Prosecutor*, [1963] MLJ 289 applied *R v Reiter*, [1954] 2 QB 16 at 20 and held that the correct way of applying the *Hicklin* test of obscenity was to have the judge read it for himself and decide. However, in the separate UK case of *R v Martin Secker & Warburg Ltd,* [1954] 1 WLR at 1139, the court directed the jury to consider whether the film was obscene based on contemporary standards, thus reflecting diverging judicial perspectives over the way a film should be ascertained in the UK.

Taken as a whole, it would appear that most of the materials support using community standards in determining obscenity. Parliament's intent concurs with the plain reading of 'obscene' in applying community standards. Likewise for case law, the procedures adopted in local cases reflect the conceptual approach of using community standards based on MDA Guidelines. As for cases in foreign jurisdictions, they seem to be divided between the two approaches, although the uncertainty within UK over which approach to adopt would tilt case law on the whole over to the side of objectively ascertaining obscenity using community standards.

Hence, in deciding whether a film is obscene, the court will likely adopt an objective approach based on community standards by referring to the MDA guidelines.

Applying this rule to the present factual matrix, Kwong's film will be submitted to the BFC for assessment. The significance is that with an objective assessment of the film, it would not be *prima facie* regarded as 'obscene', as it would have been if it were to be decided by District Judge Thomas, who is of the view that mere full frontal nudity is obscene.

On this note, the primary contentious part of the film is its representation of full frontal nudity. Referring to the section on 'Nudity' under MDA Guidelines, the R21 rating states, "Full nudity is permitted but should not be excessive. Close ups of genitalia should be contextually justifiable". The term 'excessive' is further defined under the Glossary of Terms in MDA Guidelines to be "Beyond reasonable limits, especially in terms of detail, duration or frequency". Given that 1) the context of Kwong's film of challenging audiences to re-examine their prejudices and assumptions of persons with monochromatic vision, 2) BFC considers a film's artistic merit, and 3) the dancing of traditional waltz in the nude does not seem "excessive", it is likely that the R21 classification would protect her film from being considered as 'obscene'.

Hence, Kwong's film would not be considered 'obscene', based on community standards, to persons above 21 years of age.

<u>2) Would Kwong's film tend to deprave or corrupt a significant proportion of persons with monochromatic vision who are likely to see or hear it?</u>

Persons with monochromatic vision may be so numerically negligible that they would be excluded from consideration.

A film which tends to deprave or corrupt a significant proportion of persons likely to see or hear it, under relevant circumstances, would be considered 'obscene' (*R v Calder & Boyars Ltd*, [1969] 1 QB 151 [*Calder*]; *Director of Public Prosecutions v Whyte*, [1972] AC 849 [*Whyte*]; *R v Perrin*, [2002] EWCA Crim 747 [*Perrin*]).

The question of what the Films Act meant by "persons who are likely, having regard to all relevant circumstances, to see or hear the film" under s 2(1) can draw clarification from *Calder*, *Whyte* and *Perrin*. Although in these cases the materials in question were not films, the principles used in defining 'persons' can be similarly applied.

In *Calder*, the court held that 'persons' who are likely to read the book refers to a significant proportion of these persons, and that what a proportion constitutes is a question for the jury to decide (*Calder* at 168[E]). In *Whyte*, the court further clarified that persons falling within other categories should not be excluded for they may also be 'likely' readers and that they may be excluded from consideration only if they are numerically negligible (*Whyte* at 869[D]). Therefore, in some cases, the *de minimis* principle may be applied. Finally, in *Perrin*, the court affirmed *Calder* and *Whyte* and held that it "was necessary for more than a negligible number of persons to be likely to see the material" (*Perrin* at [31]).

Applying the rule to the facts, it appears that the class of persons with monochromatic vision may be so numerically negligible that it will be excluded from consideration. Statistics on persons with monochromatic vision are rare and the only available estimate of its prevalence is 1:30,000 in the general population (Jules Francois, *Heredity In Ophthalmology* (St Louis: Mosby, 1961); Karl R Gegenfurtner & Lindsay T Sharpe, eds, *Color Vision: From Genes to Perception* (Cambridge: Cambridge University Press; 1999) at 3-52). Assuming that the ratio has not changed significantly, an extrapolation of this statistical estimate on to Singapore, which has a population of approximately 5 million, will give the number of persons with monochromatic vision to be around 166. The unlikeliness of all these persons turning up must be weighed against the possibility that a specialised movie made just for this class of persons would likely draw many of them to the private showing. In *Calder*, it was considered that a book would be 'obscene' if the jury had believed that "it tended to corrupt and deprave perhaps only four or five of the 13,000 persons who bought it" (*Calder* at 168[F]). In the present case, taking into account the considerations made, even if only a small percentage of persons with monochromatic vision were to watch the film, it is unlikely to be fewer than 'four or five'. Therefore, the *de minimis* principle would not apply. However, in the event that there is a *de minimis*, this class of persons would be excluded from consideration and the charge under s 30(1) of *Films Act* will fail.

Having identified the class of persons to be protected and finding them likely to be numerically non-negligible, the next step would be to apply the community standards using MDA Guidelines on the film. From the conclusion set out in the first issue, it is unlikely that Kwong's film would be considered obscene, based on community standards, to persons above 21 years of age. Even if persons with dichromatic or anomalous tri-chromatic vision could see variants of the abstract

mélange, the classification rating would still cover this. Hence, the only scenario where Kwong might be liable would be if a significant proportion of persons with monochromatic vision who are likely to see or hear the film is under 21.

CONCLUSION

Kwong is unlikely to be convicted under s 30(1) of *Films Act* because an application of community standards using MDA Guidelines in determining whether her film is 'obscene' to a significant proportion of persons with monochromatic vision, who are likely to see or hear the film, under s 2(1) of *Films Act*, would lead to the conclusion that it is not, unless this significant proportion of persons fall under 21 years of age.

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