



December 21, 2007

**VIA ELECTRONIC MAIL AND FACSIMILE**

Division 3  
Commerce Industry and Tourism Branch  
Commerce and Economic Development Branch  
Level 29, One Pacific Place,  
88 Queensway, Hong Kong  
ATTN: Mr. Bill Li

**Re: Consultation Paper on the Provision of Additional Exemptions on Circumvention of Technological Measures**

Dear Mr. Li:

The International Intellectual Property Alliance (“IIPA”) appreciates this opportunity to provide its views on the Consultation Paper on the Provision of Additional Exemptions on Circumvention of Technological Measures (“Paper”).

About IIPA

IIPA is a coalition of seven trade associations (listed below) representing the U.S. copyright-based industries – including the business and entertainment software, audio-visual, sound recording, music publishing and book publishing industries – in bilateral and multilateral efforts to improve international protection of copyrighted works. Both directly and through our member associations, IIPA has a long history of involvement in the development of copyright law and enforcement policy in Hong Kong, including involvement in the development of Hong Kong’s policies regarding technological protection measures.

General Observations

IIPA supports the overall approach taken in the Paper to the implementation of Section 273H of the Copyright Ordinance, which empowers the Secretary for Commerce and Economic Development (“the Secretary”) to recognize further exceptions to the recently enacted statutory prohibitions regarding technological protection measures. In particular, we commend the Secretary for his conclusion that any exceptions recognized in this proceeding should be confined to the prohibitions on the act of circumvention itself, and that they must “*not* extend to persons who are engaged in dealing in circumvention devices or providing circumvention

services.” Paper, Par. 7 (emphasis in original). As spelled out in the Paper, the appropriate exceptions to the latter prohibitions are already provided for in the statute, and any more expansive approach “could easily lead to abuse.” Id.

IIPA also supports the Consultation Paper’s recognition that any exemptions recognized “should be narrow in scope and focused on the problems identified,” and that a general exemption allowing circumvention in order to carry out “any or all of the permitted acts allowed under [Hong Kong’s] copyright law would be too broad and therefore inappropriate.” We agree that such a general exemption must be avoided “to minimize the risk of abuse.” Paper, Par. 12.

Before addressing specific proposed exemptions, IIPA stresses an important question of process. We commend the Secretary for initiating this public consultation, and welcome the opportunity to comment on whether any of the exemptions recognized in the U.S. or Australia, or under consideration in Singapore, should be adopted in Hong Kong. However, since the Paper invites interested parties to propose any additional exemptions they believe are warranted, we urge the Administration to make public any such additional proposals which it wishes to consider, along with any modifications it wishes to consider to the potential exemptions listed in the Annex to the Paper, and to provide a second opportunity for public comment on any such new or modified proposals. A transparent consultation process such as this will enable interested parties to react to all the specific proposals under consideration.

We also recommend that any exemptions recognized in this proceeding have a defined life span and be subject to review and reconsideration after a stated period, such as three or four years. Such a review is mandated under the laws of all the other jurisdictions in question, but even though Hong Kong’s law does not require it, it is a matter of common sense that the Secretary should avail himself of this flexibility. The criteria set out by the Secretary in paragraphs 11 and 15 of the Paper depend to a great extent upon the current state of technology and markets for copyright works. Both the technology and the markets are characterized by rapid change, and a conclusion reached today with regard to the need for any exemption, and if so its scope, could easily be rendered obsolete in three or four years’ time. Reconsideration in this time frame will help ensure that no exemption, even if justified today, runs afoul later of the criteria in Section 273H: notably, that the exemptions not lead to infringement of copyrights or neighboring rights.<sup>1</sup>

### Specific Proposed Exemptions

IIPA is not aware of any situation in which the application of technological measures to copyright works is preventing non-infringing uses of such works within Hong Kong in a manner that calls for the recognition of any exemptions in addition to those already established in the Copyright Ordinance. Accordingly we do not have any exemptions that we wish to propose to

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<sup>1</sup> See Paper, Par. 11(d). In this regard, the results of the most recent rulemaking in the United States indicate that the need for certain exemptions is not perpetual. See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472 (Nov. 27, 2006), available at <http://www.copyright.gov/fedreg/2006/71fr68472.html> (discontinuing the blocked internet locations exemption).

the statutory prohibition on circumvention of technological measures.<sup>2</sup> We offer the following comments on some to the specific exemptions listed in the Annex to the Consultation Paper. We ask that these comments be treated as provisional and look forward to the opportunity to provide further input on new or modified proposed exemptions as these are suggested or refined in the course of this proceeding.

1. Computer Programs or Video Games in Obsolete Formats With “Original Only” Access Controls (Exemption (2) of the Annex): The current version of this exemption in the U.S. was narrowed from the formulation previously recognized so that it only applies “when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive.” Annex, p. 2. This qualification provides a useful safeguard against potential abuse of the exemption, for example, its potential to interfere with the thriving and growing market in “legacy” videogames that were originally distributed for use on platforms that are now “obsolete.” If the Secretary determines that a similar exemption is needed in Hong Kong, we urge that this qualification be included. To the extent that such a limitation is not included in the version of the exemption proposed in Singapore, IIPA believes that proposal is unnecessarily broad.
2. Lists of Blocked Internet Locations (Exemption (4) of the Annex): As noted in the Consultation Paper (Annex, p. 5), the U.S. has discontinued this exemption due to a lack of evidence regarding a need for its existence. We are unaware of any evidence of need for it in Hong Kong, and unless a compelling record of such a need is demonstrated, we urge the Secretary not to create a similar exemption.
3. Educational Use of Audio Visual Works in Clip Compilations (Exemption (5) of the Annex): The recognition of this exemption in the U.S. was based on an extensive evidentiary record about the practices of college and university film and media studies professors. Such an exemption should be recognized in Hong Kong only on the basis of a similar record about such practices in the SAR’s tertiary educational institutions. If such a showing is made, IIPA urges the Secretary to limit the scope of the exemption in the following ways to conform with the existing U.S. exemption and the record underlying it, and to safeguard against the real potential for abuse.
  - First, the exemption should be limited to tertiary educational institutions (colleges and universities).

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<sup>2</sup> We note that Hong Kong’s law prohibits the act of circumvention of copy controls as well as of access controls, and that the exemptions that are recognized in this proceeding could be applied to immunize either act from liability under specified circumstances. See Paper, Par. 11(a). Of course, under the laws of the other jurisdictions in question, the act of circumvention is prohibited only with respect to access controls, and thus the consideration and recognition of exemptions arose only in that context. Similarly, the following comments are focused on the potential impact of proposed exemptions to the prohibition on the act of circumventing access controls in Hong Kong.

- Second, the exemption should reflect that circumvention may only be carried out by film and media studies professors themselves, or by college or university staff employees acting on the specific instructions of professors. This would help to forestall the risk of the development of an uncontrolled marketplace in offering circumvention services, and would conform to the U.S. exemption, which the Register of Copyrights described in her recommendation as “permitting circumvention only by college and university film and media studies professors.”<sup>3</sup>
  - Third, the exemption should only apply where the only digital version of a film available is a DVD protected by the Content Scrambling System (“CSS”). None of the evidence presented in the US rulemaking proceeding demonstrated any need for the exemption except in this specific technological context.<sup>4</sup> Any exemption recognized in Hong Kong should be explicitly limited to circumvention of CSS on DVDs.
  - Finally, the exemption should be limited to the situation in which circumvention is accomplished for the *sole* purpose of making compilations of portions of audio visual works for educational use in the classroom. None of the evidence from the U.S. rulemaking involved any other purpose.
4. Computer Programs that Enable Connectivity to Wireless Telephone Networks (Exemption (6) of the Annex): As noted in the Consultation Paper (Annex, p. 8, n. 26), it is unlikely that a similar exemption is necessary in Hong Kong given present market conditions.<sup>5</sup> However, if the Secretary concludes that a similar exemption is necessary in Hong Kong, IIPA urges the Secretary to conform it with the U.S. exemption, by applying it only where “circumvention is accomplished for the *sole* purpose of lawfully connecting to a wireless *telephone* communication network.” Annex, p. 7. Otherwise, there is an unacceptable risk that circumvention will lead to unauthorized access to other copyright works that reside within, or that are accessed via, a wireless telephone handset or similar device. In addition, the exemption should only apply when consumers have no alternative to circumvention to achieve the goal of connecting their phones to new wireless telephone networks.

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<sup>3</sup> Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies at 19 (Nov. 17, 2006), available at [http://www.copyright.gov/1201/docs/1201\\_recommendation.pdf](http://www.copyright.gov/1201/docs/1201_recommendation.pdf). See also id. (discounting the likelihood that “such a specialized use by such a focused class of users would result in the circulation of large numbers of unprotected copies of their movies”).

<sup>4</sup> See id. at 12 (stating that “proponents of exemptions to the prohibition on circumvention of access controls raised concerns regarding the Content Scrambling System (CSS) on DVDs containing motion pictures and other audiovisual works”); id. at 13 (proponents asserted the “need to be able to create compilations of portions of motion pictures distributed on DVDs protected by CSS for purposes of classroom performance,” and that “they must circumvent CSS in order to extract the portions of motion pictures or audiovisual works necessary for their pedagogical purposes”) (emphasis added).

<sup>5</sup> As noted in the Paper, a similar conclusion was reached in Singapore.

5. Sound Recordings Protected by Technological Measures that Compromise the Security of Personal Computers (Exemption (7) of the Annex): As discussed in the Consultation Paper (Annex, p. 10), this U.S. exemption resulted from a specific set of factual circumstances which are not present in Hong Kong and which, in our view, are unlikely to repeat themselves there. For this reason, there seems to be no evidentiary basis for recognizing an exemption in this area in Hong Kong. In addition, also as noted in the Paper, Section 273D(2) “should be wide enough to cover problems similar to those caused by installation of the XCP and MediaMax software [that gave rise to the U.S. exemption].” Annex, p. 10, n. 32. Thus, any additional exemption would appear unnecessary.

Nevertheless, if the Secretary concludes otherwise, IIPA urges the Secretary to reject the “much broader” (Annex, p. 9) approach taken by Australia. The Australian approach is seriously flawed, and is inconsistent with Section 273H because its wide scope fails to take the measures necessary to ensure that the exemption will not lead to infringement of copyrights or neighboring rights. For example, the lack of definitions in the Australian exemption makes it susceptible to overly broad interpretations that would allow circumvention based on subjective impressions of when a technological measure “interferes with or damages a product” or what repairing or preventing damage to a product means. If the Secretary concludes that a exemption in this area is necessary and justified by the evidence presented, the U.S. model is far preferable. However, IIPA recommends that the Secretary consider clarifying: (a) that the exemption is limited to circumvention to deal with a security flaw or vulnerability, and does not apply to the extent that it enables otherwise unauthorized access to copyright material; and (b) that the exemption only applies when the consumer has no other means of access to the copyright material other than through a device that is threatened by the technological protection measure in question.

6. Circumvention by Libraries to Reproduce for Patrons Portions of Works for Research or Private Study (Exemption (8) of the Annex): It is difficult to conceive of a circumstance in which a library would need to circumvent a technological measure to provide (consistent with Sections 47- 49 of the Copyright Ordinance) a patron with a copy of a portion of a periodical or literary, dramatic or musical work that is already in the collection of the Library or archive, since authorization to access the work would ordinarily be acquired along with the copy. Given that no similar exception exists in the U.S. or Singapore, and that the evidentiary record supporting the Australian exemption was thin at best,<sup>6</sup> IIPA opposes the recognition of an exemption in this area.
7. Circumvention Related to Broadcasting or Cable Programming (Exemption (9) of the Annex): Similar to Exemption (8) above, there does not appear to be any need for an exemption in this area. It is very unlikely that the acts permitted by Section 77 in relation

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<sup>6</sup> See *Review of Technological Protection Measures Exceptions* by the House of Representatives Standing Committee on Legal and Constitutional Affairs at 4.132 – 4.137 (Feb. 2006), [available at http://www.aph.gov.au/HOUSE/committee/laca/protection/report.htm](http://www.aph.gov.au/HOUSE/committee/laca/protection/report.htm).

to licensed broadcasting or cable programming activities will ever be prevented by a technological measure, given that the purpose of Section 77 appears to be to allow broadcasters and cable providers to record the programming they are broadcasting or transmitting under license from the right holder, and to retain such recordings for a limited time. No such exemption should be recognized in the absence of strong evidence that licensed broadcasters or cable programmers in Hong Kong are unable to obtain the permission of the right holder to make the ephemeral copies need in this situation.<sup>7</sup>

8. Circumvention to Gain Access to Copyrighted Material (Exemption (10) of the Annex): This Australian exemption is far too broad and is inconsistent with Section 273H because it could easily lead to infringement of copyrights and neighboring rights. Although the Australian exemption is supposedly based on the U.S. “dongles” exemption<sup>8</sup> (Exemption (1) listed in the Annex), it is much more expansive than its purported U.S. counterpart. For example, the Australian exemption applies to all “copyrighted material” rather than only to computer programs; it covers all access controls rather than only dongles; and it allows circumvention even when the malfunctioning technological measure is repairable. In addition, the Australian exemption lacks definitions of key terms (e.g., “not operating normally”), and arguably allows circumvention to access copyrighted material even when the malfunction at issue does not prevent access. IIPA urges the Secretary not to adopt this exemption for Hong Kong.
9. Computer Programs for the Purpose of Interoperability (Exemption 11 of the Annex): IIPA agrees with the Consultation Paper that Section 273D(1) “should be adequate for the purpose and further exemptions on interoperability are not required.” Annex, p. 14, n. 42.
10. Educational Copying (Exemption (12) of the Annex): IIPA suggests that an exemption in this area should be rejected for the same reason that the Consultation Paper rejects granting a broad exemption covering circumvention to allow any and all permitted acts. Paper, Par. 12. As noted in the Consultation Paper, the educational copyright provisions in Hong Kong “are more flexible [than in Australia] and cover a wide range of works and activities.” Annex, p. 15, n. 48. Such a broad exemption is prone to “the risk of abuse,” Paper, Par. 12, including the risk that copyright materials that are placed “in the clear” through an act of circumvention will be subject to far more widespread distribution than is permitted or justified by the permitted acts provisions for educational uses. The U.S. approach is far preferable: to examine particular instances of educational use to determine whether the prohibition on circumvention of access controls is substantially impeding such a use, and if so, to tailor a focused exemption accordingly. See, for example, Exemption (5) of the Annex, discussed above.

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<sup>7</sup> We note that under the provision of U.S. copyright law analogous to Section 77 of the Copyright Ordinance, circumvention is allowed only to the extent that the copyright owner fails to provide the licensee the means to make the necessary ephemeral copies. See 17 U.S.C. 112(a)(2). To our knowledge this circumstance has not occurred in the U.S. since this provision was enacted in 1998.

<sup>8</sup> See the Australian legislative committee report, supra note 6, at 4.182.

11. Circumvention by Organizations Providing Assistance to Persons with Print Disabilities (Exemption (13) of the Annex): This is another area in which Hong Kong should consider specific, targeted exemptions (along the lines of those described in Exemption (3) of the Annex), rather than a blanket exemption for this entire category of permitted uses.
12. Articles or Published Works for Provision By One Library to Another Library In Specified Circumstances (Exemption (14) of the Annex): IIPA agrees with the Consultation Paper that Section 273D(8) “should be adequate for this purpose,” and thus no additional exemption is needed. Annex, p. 17, n. 55.
13. Circumvention by Libraries or Archives in Certain Circumstances (Exemption (15) of the Annex): To the extent that this exemption involves circumvention for the sole purpose of making copies for preservation or replacement purposes, IIPA agrees with the Annex that Section 273D(8) “should be adequate for this purpose.” Annex, p. 19, n. 59. To the extent that the exemption would cover activity allowed under Section 52, such an exemption is unnecessary and inconsistent with Section 52 because that section only applies when a copyright owner of an unpublished work has not prohibited copying, to the librarian’s or archivist’s knowledge. Where a copyright owner has utilized a technological measure in relation to an unpublished work, it is fair to attribute to the librarian or archivist the knowledge that the copyright owner prohibits copying.
14. Sound Recordings Subject to Compulsory License (Exemption (16) of the Annex): Given that Hong Kong “do[es] not currently have a similar permitted act” (Annex, p. 16, n. 62) to Australia’s Section 109, an exemption in this area is unnecessary.
15. Computer Programs Where Key Code is Lost (Exemption (17) of the Annex): This Singapore proposed exemption is far too broad and has no counterpart in U.S. law, nor the law of any other country to our knowledge. The exemption is inconsistent with Section 273H because it could easily lead to infringement of copyrights and neighboring rights and interfere with established market practices and licenses. As the U.S. Register of Copyrights recognized in a similar circumstance, the alleged loss of a mechanism that allows legitimate access to a copyrighted work is “a claim that is easy to assert and virtually impossible to disprove.”<sup>9</sup> The Register noted that recognizing a similar exemption would “unfairly prejudice copyright owners, who have no way of ascertaining whether the [mechanism] was in fact lost or stolen, or whether it has been passed on to another user along with an unauthorized copy of the software, while the original user obtains a replacement by claiming the original [mechanism] was lost.”<sup>10</sup> For these

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<sup>9</sup> Recommendation of the Register of Copyrights in 2003 Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, at 37, n. 63 (Oct. 27, 2003), available at <http://www.copyright.gov/1201/docs/registers-recommendation.pdf>.

<sup>10</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556, 64566 (Oct. 27, 2000), available at <http://www.copyright.gov/fedreg/2000/65fr64555.pdf>.

reasons, an exemption should not be created in this area. However, if the Secretary concludes that such an exemption is necessary, IIPA urges that the exemption should be narrowly crafted such that important terms like “key code” are clearly defined. It is also essential, in order to minimize interference with market practices, that the exemption should only operate prospectively, i.e., that it not apply to existing software licenses entered into before the exemption was recognized.

Thank you in advance for your consideration of these comments. If there are any questions or if further information is needed, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/

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on behalf of IIPA

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