



April 26, 2006

VIA ELECTRONIC MAIL AND FACSIMILE

Ms. Sharon Chan
Clerk, Bills Committee
Legislative Council
Hong Kong

RE: Copyright (Amendment) Bill 2006

Dear Ms. Chan:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to submit its views on the Copyright (Amendment) Bill 2006 (the Bill).

Introduction

IIPA represents the U.S. copyright industries as a coalition of seven trade associations with the common goals of reducing copyright piracy and improving copyright law and enforcement around the world. IIPA has been actively involved in promoting these goals in Hong Kong for many years. IIPA members include:

Association of American Publishers (AAP)
Business Software Alliance (BSA)
Entertainment Software Association (ESA)
Independent Film & Television Alliance (IFTA)
Motion Picture Association of America (MPAA)
National Music Publishers' Association (NMPA)
Recording Industry Association of America (RIAA)

This submission presents IIPA's views in summary form. In many instances, more complete analyses of aspects of the Bill are being provided in the submissions of other copyright industry organizations, and we commend these to the Committee's attention.

As a general matter, IIPA commends the HKSAR Administration for its efforts to bring Hong Kong's copyright law up to date with evolving international standards, and for its consultative approach in the preparation of this legislation. We believe the Bill contains many important improvements to current law. However, it also raises serious concerns in a number of areas. These are summarized below. These comments follow the organization of the outline of the bill attached to your letter inviting submissions.

1. Business end-user liability

Several years ago, Hong Kong legislators enacted the sound principle that businesses that depend upon pirated copies of copyright works for their operations ought to face criminal liability. However, soon thereafter, the LegCo suspended the application of this principle for some works, notably published text materials. Unfortunately, this Bill reflects a decision to make this discriminatory treatment a permanent feature of Hong Kong's law, at least with regard to the offense of possession of infringing copies for use in a business. This is both disappointing and of questionable validity in light of Hong Kong's obligation under the TRIPS Agreement to criminalize all willful copyright piracy on a commercial scale. It certainly sends the wrong signal to the creators, publishers and business community of Hong Kong, and indeed to the rest of the world.

We recognize that the Bill also includes a new criminal offense for businesses that engage in infringing acts of copying or distribution of books or academic journals under some circumstances. As CITB candidly acknowledges, this new offense fills the gap only to a limited extent. The anticipated safe harbor provisions (Annex C to the LegCo brief) would allow much regular, systematic business copying of copyrighted books and journals to escape criminal sanctions altogether – even though the copying is carried out with a clearly commercial motivation. This flaw and others must be corrected before the new offense can be counted upon to provide a meaningful deterrent to commercial piracy of these works by business end-users.

The Bill would also introduce a new defense for certain classes of professionals and employees in criminal end-user piracy cases. IIPA does not support this change. It is unnecessary in light of the fact that the law already provides a complete defense to anyone (including an employee) who does not know and has no reason to believe that the copyright work provided to him or her was in fact an infringing copy. It would also put Hong Kong out of step with the statutes of comparable jurisdictions. At a time when business end-user piracy levels in Hong Kong remain far too high, especially in comparison to jurisdictions such as Japan, Singapore, Taiwan, Australia and New Zealand, introduction of this defense would only exacerbate the problem and make it harder to reduce end-user piracy levels in Hong Kong.

We commend the Bill's introduction of directors' and partners' criminal liability for end-user piracy. This will strengthen corporate accountability and responsible governance, and will enhance enforcement in Hong Kong by providing an effective remedy to a problem that current law does not adequately address. Directors and partners should be held accountable if they authorize or condone infringing acts by their company or partnership, respectively. The Bill's inclusion of factors for consideration by the courts is also constructive, since this will provide guidance to directors or partners who wish to limit their exposure and rebut the presumption of liability. In this regard we commend your attention to the refinements suggested by the Business Software Alliance in its submission.

2. Circumvention and rights management information

Technological protection measures (TPMs) are critical tools for copyright owners as they increase the volume and pace of digital distribution of copyright material, including via the Internet. IIPA is pleased that the Bill enhances legal protections for TPMs in several ways, such as by creating civil liability for some acts of circumventing TPMs, and criminal liability for some forms of trafficking in circumvention products or services. However, the Bill falls short in many important respects of creating the optimal legal regime for TPMs in Hong Kong, or even of bringing Hong Kong law into line with global minimum standards, as embodied in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and reflected in the laws of many other countries. Improvements to the Bill are particularly needed in the following areas:

- Coverage of access control technologies: all such technologies should be accorded protection (Section 273(3)(b))
- Prohibition against the act of circumvention: the requirement to prove actual or constructive knowledge that the act would “induce, enable, facilitate infringement” imposes an onerous and unnecessary barrier to enforcement (Section 273A(1)(b))
- Failure to criminalize the act of circumvention under any circumstances, even when there is a commercial motive and a clearly unlawful purpose
- Civil liability for trafficking in circumvention tools should be outlawed regardless of proof of knowledge of connection to infringement, and should cover knowing distribution of circumvention tools even if carried out otherwise than in the context of a “trade or business” (section 273B(1))
- Criminal liability for trafficking in circumvention tools is unduly restricted. It should apply to high-volume trafficking with the requisite intent, even if no money changes hands, and certainly when carried out within the context of any trade or business. (Section 273C) Criminal liability should also apply equally to all circumvention devices covered by the civil liability provisions (Section 273B(2)).
- Statutory exceptions are too broad in many cases. Exceptions to the prohibition on the act of circumvention should not routinely be extended to the trafficking prohibitions, lest an uncontrolled market be fostered in circumvention tools that are disseminated for the ostensible purpose of exercising those exceptions. Furthermore, as a general matter, behavior should not benefit from an exception if it also constitutes an infringement of copyright, or where it is carried out with respect to an infringing copy of a work.
- We note with particular concern two proposed exceptions that have few if any counterparts in the comparable laws of other jurisdictions. The first (Sections 273D(7), 273F(11)) would allow circumvention of any access control TPM that has a “purpose of controlling market segmentation,” and would also permit trafficking in tools to accomplish such a circumvention. Such an exception could undermine Hong Kong’s statutory regime regarding parallel importation, and its scope is dangerously uncertain, since many TPMs could, in principle, be defined as playing a role in market segmentation. The second novel exemption (Section 273F(12)), to decriminalize trafficking in circumvention tools that facilitate time-shifting of broadcasts or cable programmes, would discourage right holders from exploring new channels of digital distribution, and could restrict consumer choice by, in effect, dictating that time-shifting must be allowed for all broadcasts. This could make it economically infeasible to provide lower-cost programming designed for viewing at a specified date and time. These exceptions should certainly be re-examined.
- While some procedure for recognizing additional exceptions is advisable in the interest of flexibility, IIPA has serious concerns about the “further exceptions by notice” system spelled out in the Bill (Section 273H). The scope of the power conferred on the secretary would be seemingly unbounded; his decisions would have permanent effect; and the provision does not require him to take into account the benefits of TPMs in facilitating non-infringing uses of copyright materials. These provisions should be tightened considerably in order to achieve a stable and predictable environment for the further evolution of legal protections for TPMs.

3. Rental rights for films and comic books

We refer the Committee to the submission of the Motion Picture Association on this topic.

4. Copyright exemptions

While IIPA commends efforts to update and simplify the Hong Kong law's provisions on exceptions to copyright protection, all such efforts must respect Hong Kong's international obligations (notably the "three-step test" for permissible exceptions and limitations under TRIPS Article 13) and should take into account marketplace and technological developments. We question whether all the proposals in the Bill to expand copyright exceptions would pass these tests.

In particular, if the courts are to fairly and equitably apply open-ended new "fair dealing" provisions with regard to education and public administration, they may need more guidance than this bill provides. For instance, the viability of markets for copyright works among public sector agencies could be unduly prejudiced depending upon the interpretation given to the undefined terms "urgent business" and "efficient administration." Numerous examples of potential abuses of the new education fair dealing exceptions could be provided, such as in foreign language instruction, in which legitimate markets for instructional materials, and even for commercially released foreign language films and television programs, could be profoundly damaged if adequate safeguards are not provided.

With respect to educational uses, IIPA is quite concerned about the proposed repeal of the existing provision (section 45(2)) that limits the scope of exceptions when a licensing scheme is in place. Voluntary licensing ought to be the preferred mechanism for managing uses of copyright material in the educational environment (as in other sectors). The proposed repeal would completely undermine the prior efforts of government, right holders and users to implement equitable licensing mechanisms that provide certainty and clarity about permitted and unpermitted conduct. The fact that existing licenses would remain valid would be of little comfort once the law had changed in a way that eliminates any incentive for their renewal. We urge that this aspect of the Bill be reconsidered.

5. Liberalization in the use of parallel imports

Hong Kong's current system of banning parallel imports of copyright works during the first 18 months after their initial release provides essential benefits to Hong Kong-based producers and distributors, and through them to the local economy. The Bill proposes to shorten this period to 9 months and to sharply curtail the liability of businesses that use parallel imported products. IIPA does not believe that either change is justified, and that this aspect of the Bill will undermine the Government's efforts to promote development of vibrant creative industries in Hong Kong. The viability of such industries depends to a great extent on their ability to expand to serve Chinese markets outside Hong Kong. Such expansion is threatened by weakening protections against an influx of parallel imported product from those markets back into Hong Kong. The balance struck in the law on this issue just a few years ago, after intensive negotiations, should be preserved.

6. Improving enforcement efficiency and effectiveness and operation of the Ordinance

While IIPA does not have detailed comments to offer on these aspects of the Bill, we commend the effort to simplify and remove unnecessary and burdensome procedural obstacles from the path of efficient enforcement actions. Hong Kong should consider further reforms such as the recognition of U.S. (and other foreign) copyright registration certificates in the context of compliance with affirmation requirements.

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Please convey to Bills Committee members IIPA's thanks in advance for their consideration of our comments. If the Committee or any of its members have any questions about this submission, or if IIPA can assist the Committee in any other way, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Steven J. Metalitz". The signature is fluid and cursive, with the first name being particularly prominent.

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