



March 13, 2007

VIA ELECTRONIC MAIL AND FACSIMILE

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

Re: Copyright (Amendment) Bill 2006 – proposed Committee Stage Amendments

Dear Ms. Chan:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to provide its views on the proposed Committee Stage Amendments (CSAs) to clauses 55 and 56 of the Copyright (Amendment) Bill 2006. These provisions concern the treatment of technological protection measures (TPMs), and the prohibitions against circumvention of those measures and the trafficking in circumvention products or services.

IIPA provided its views on the original provisions of the Copyright (Amendment) Bill regarding TPMs in a submission made on April 26, 2006. As noted in that submission, IIPA is a coalition of seven trade associations (listed below) that represent the common interests of the U.S. copyright industries in improving copyright law and enforcement around the world.

IIPA is pleased to see that several of our suggestions have been incorporated in whole or in part in the CSAs. For example, under Section 273B(1), proof of knowledge of the use of a circumvention device or service would no longer be required in order to impose civil liability for trafficking in such a tool, and distribution of such devices would be prohibited even if not in the course of a trade or business if on a scale sufficient to affect prejudicially the owner of a copyright (which we assume would cover all trafficking on a commercial scale). We are also glad to see that the act of circumventing a TPM will attract liability without requiring proof of a link to infringement, albeit subject to the possibility of an affirmative defense under Section 273A(1A) if it is proven that the circumvention was carried out solely to perform a non-

infringing act.¹ These changes will make Hong Kong's legal regime in support of TPMs more effective.

However, the legislation as proposed to be amended by the CSAs still contains several significant flaws. The principal concerns are summarized below. We urge the Legislative Council to ensure that these flaws are corrected before the Copyright (Amendment) Bill is approved.

1. Coverage of access controls

Access controls play a critical and irreplaceable role in enabling the distribution of copyrighted materials in digital formats on an economically sound basis and with at least some degree of assurance that piracy, hacking, and misappropriation will be made more difficult. Because of the importance of access controls for e-commerce in copyright works, they should be protected, whether or not the circumvention of those controls is directly linked to the unauthorized exercise of an exclusive right. This point was apparently well understood by the drafters of the WIPO Treaties (the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) a decade ago. The effective technological measures that adherents to the Treaties must protect include all those "that restrict acts in respect of" copyrighted materials, including the act of gaining access to the material. WCT Article 11; WPPT Article 18.

While the amended definition of "technological measure" in Section 273(3) would be broader than under current law and could include some access control measures, it fails to cover access control technologies generally. A technology would be left unprotected unless it could be shown that it was designed for "the prevention or restriction of acts which are done without the licence of the copyright owner of the work and are restricted by copyright in the work." Section 273(3)(b). This unnecessarily restrictive definition could leave pirates free, for instance, to hack through technological barriers intended to limit access to paid subscribers, since unauthorized access by non-subscribers would not necessarily involve acts that "are restricted by copyright in the work." To close this gap, all technologies used by right holders to control access to their works should be explicitly included in the definition of "technological measure."

2. Scope of Criminal Prohibitions

The CSAs failed to broaden the unnecessarily restrictive provisions of Section 273C(1)(e) and (f). Under these provisions, someone distributing circumvention devices in the course of a trade or business (or possessing such devices with a view to distribution) would

¹ We note there are still significant unresolved questions about this new defense, including (1) why it should apply to circumvention of access controls on one work in order to make non-infringing use of another, and (2) why it should apply when the circumvention has the effect of facilitating infringement, even if that was not the purpose for doing so.

evade criminal liability so long as the trade or business did not “consist of dealing in circumvention devices.” This provision would invite pirates to camouflage their trafficking with other business activities. Any trafficking in circumvention tools on a commercial scale, and certainly any such activity in the course of any trade or business, ought to attract criminal liability.

3. Statutory Exceptions

The CSAs have somewhat narrowed the novel exceptions in the Bill that allow circumvention of otherwise protected TPMs if they have the effect of “preventing or restricting access to the work for the purpose of controlling market segmentation.” We commend the changes which recognize that this exception (1) should apply only to technologies embodied in a physical article and (2) should apply only to technologies that achieve market segmentation on a geographic basis. However, the exception still applies to any TPM that has a geographic market segmentation effect, regardless of whether it was designed or intended for that purpose. Combined with the lack of any definition of “market segmentation,” this means that the range of TPMs that could potentially be circumvented without liability remains uncertain. Furthermore, the exception continues to undermine Hong Kong’s legal regime on parallel imports because it immunizes acts of circumvention of certain TPMs that are carried out on copies of works that have been parallel imported in violation of Hong Kong law (section 273D(7)((d)(ii)). Finally, the CSAs introduce a new exception (section 273E(10)(1A)) immunizing from civil liability the trafficking in devices intended to circumvent TPMs that contain region coding or other technologies with a geographic market segmentation effect. So long as such a device has the “sole purpose” of overcoming the technology that has a geographic market segmentation effect, it is beyond the reach of the law, even though it may have the effect of circumventing other TPMs that have nothing to do with geographic market segmentation. These flaws should be corrected before final action on this legislation.

The so-called time shifting exception in this part of the Bill has also been narrowed by Section 273F(12A), which makes it clear that there is no immunity from criminal liability for trafficking in a tool that circumvents to allow unauthorized copying of on-demand broadcasts or cable programmes. However, such an immunity is still conferred on tools for enabling unauthorized copying of pay-per-view broadcasts, subscription TV, or cable programmes that are transmitted at pre-determined times. In effect, the time -shifting exception would reduce incentives to offer programming through these channels, or at a minimum would tend to increase the price of such services, since they would have to be offered on the assumption that the programming would be copied for later viewing; either outcome would be to the detriment of Hong Kong consumers. IIPA urges that the scope of the exception be further narrowed to exclude these tools.

As a general matter, activity should not qualify for an exception to circumvention prohibitions if it also amounts to an infringement of copyright. While the CSAs made changes to ensure that this principle is reflected in some of the exceptions, others lack this safeguard, notably the exceptions for security testing, preventing surreptitious collection of personal

information, or controlling access by minors. We urge that circumvention activity in these areas be ineligible for an exception if it involves infringement of copyright. Similarly, circumvention of technological measures applied to a copy that the circumventor obtained unlawfully should be excluded from any exception; this is not currently the case with regard, for example, to the exceptions for cryptographic research.

Finally, while most of the exceptions to the trafficking provisions apply only when the trafficker is “working collaboratively with” someone who is qualified to exercise the corresponding exception to the prohibition on the act of circumvention, some trafficking exceptions lack this safeguard, notably those involving collection of personal information or protection of minors, and thus are more likely to lead to the growth of an uncontrolled market in circumvention tools that are supplied for the ostensible purpose of exercising these exceptions. The “working collaboratively” requirement should be included in these exceptions as well.

4. Recognition of additional exceptions

IIPA notes that no changes have been made by the CSAs to section 273H, the “further exceptions by notice” provision. We reiterate our serious concerns that this section confers seemingly unbounded power on the secretary to recognize, on a permanent basis, an unpredictable range of additional exceptions, without necessarily taking into account the benefits delivered to Hong Kong consumers through the deployment of TPMs. While we understand that some provision may be made for LegCo review of the determinations made by the secretary under this provision, the section still needs to be tightened considerably in order to achieve the stable and predictable environment that is needed for the further evolution of legal protection for TPMs in a sound manner.

Thank you for your consideration of the views of IIPA. Please do not hesitate to contact me if members of the Committee have any questions or if I can provide any further information.

Respectfully submitted,



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on behalf of IIPA

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