

MPA SUBMISSION ON COPYRIGHT (AMENDMENT) BILL 2006

The Motion Picture Association (MPA) is grateful for the opportunity to submit the following comments to the Bills Committee in response to the proposed Copyright (Amendment) Bill 2006.

The MPA is a trade association representing seven international producers and distributors of theatrical motion pictures, home video entertainment, and television programming, MPA Member Companies include:

Buena Vista International, Inc.
Metro-Goldwyn-Mayer Studios Inc.
Paramount Pictures Corporation
Sony Pictures Releasing International
Twentieth Century Fox International Corporation
Universal International Films, Inc.
Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

Summary

The Copyright (Amendment) Bill 2006 introduces many welcome improvements within the scope of its proposed provisions; however, the MPA notes that some of the proposals require further revision to ensure compatibility with present internationally accepted norms and evolving standards.

Of particular concern to the MPA is the proper implementation for the protection of technological protection measures (TPMs). We commend the Hong Kong SAR Government for its initiative to update current law in this area, and for the consultative approach it has adopted in the development of amendments to the Copyright Ordinance. This initiative appears to reflect a recognition that effective protections for TPMs used by copyright owners to manage access to, and use of, copyrighted materials will facilitate the development of innovative new channels for making these materials available to the public in Hong Kong. The Government's efforts also reflect a laudable desire to bring Hong Kong's law into closer alignment with evolving global minimum legal standards in this area, including those embodied in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

MPA strongly encourages Hong Kong to adopt the so-called "three – step test" with regard to any contemplated exceptions to exclusive rights. As the Committee is no doubt aware, the three – step test is the traditionally accepted requirement for exceptions to exclusive rights afforded rightsholders reflected in the Berne Convention, the WCT and the WPPT. Adherence to the test is an essential component for a modern copyright law.

MPA also urges the Committee to maintain strong protection against parallel imports. The current standards of protection are essential to protect both local producers (and foreign investors, including some of our members, in local productions) and distributors.

The proposals regarding rights management information (RMI) are, in MPA's view, flawed for the reasons detailed in this submission.

In contrast, MPA supports the proposals for improving enforcement efficiency and effectiveness and we applaud the Government's initiatives to ensure an appropriate infrastructure for the prosecution of offences.

MPA's detailed comments on the Copyright (Amendment) Bill 2006 are set forth below and ordered for reference in accordance with their presentation in the accompanying Legislative Council Brief (File Ref.: CIB CR 07/09/16) for the proposed legislation.

We close our submission by offering additional comments on certain issues not addressed in the Copyright (Amendment) Bill 2006 but nonetheless considered by MPA to be essential components for adequate and effective copyright protection in the twenty-first century.

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Comments in response to enumerated provisions of the Copyright (Amendment) Bill 2006

(a) Business end – user criminal liability

The MPA has no comment on this provision at this time.

(b) Directors'/ partners' criminal liability

MPA has no comment on this provision at this time.

(c) Defence for Employees and exemptions for certain professionals in respect of business end user criminal liability

MPA has no comment on this provision at this time.

(d) Civil Remedies for circumvention of effective technological measures

(e) Criminal liability relating to circumvention activities

(f) Exceptions to the civil and criminal provisions

MPA applauds several aspects of these provisions of the Bill, including some broadening of the range of TPMs that will enjoy legal protection in Hong Kong, and the extension of civil liability in Hong Kong for the act of circumventing TPMs in some circumstances. The proposals to extend criminal liability under certain circumstances to those persons who traffic in tools of circumvention, or provide circumvention services, are also welcomed. These improvements to current law will enhance the protections accorded to many TPMs, and will help discourage efforts to undermine or nullify them. Enactment of these changes should benefit Hong Kong's consumers of copyright materials, as well as those who make these materials available to the public in innovative ways.

At the same time, however, MPA is concerned that certain provisions of the Bill fall well short, in several important respects, of fully addressing the need to update Hong Kong law with respect to TPMs. Additional changes will be needed if the full benefits of world-class protection for these technologies are to be achieved and if Hong Kong's law is to be harmonized with WCT and WPPT standards. These changes include in particular the broadening of the terms of civil and criminal liability; the narrowing of some proposed statutory exceptions; the clarification of the ongoing authority to recognize further exceptions through notice; and the overall definition of TPMs that fall within the scope of the law's protection. Many of these issues question the proper relationship between copyright infringement on one hand, and the distinct and separate civil wrong and criminal offence relating strictly to TPM circumvention. For convenience, we address these issues in the order in which they appear in the Bill itself.

I. Proposed Amended Section 273: Definitions

The Bill broadens somewhat, but not sufficiently, the class of TPMs that would be covered by Hong Kong's legislation. Instead of merely covering so-called "copy controls", as presently provided in § 273 of the Ordinance, TPMs would be covered if they "prevent ... or restrict ... acts which are done without the licence of the copyright owner of the work and are restricted by copyright in the work."¹ In other words, technologies that control the exercise of any exclusive right, not just the reproduction right, would benefit from protection. However, protection would be denied to access control technologies unless it could be proven that they were intended to control an exclusive right; access controls per se would remain outside the scope of protection.

This approach falls short of full compliance with the WCT/WPPT standard. As WIPO's authoritative Guide to the Copyright Related Rights Treaties Administered by WIPO explains, "There are two basic forms of restricting (making conditional) acts: first, restricting access to works; and second, restricting the carrying out of certain acts in respect of works. **The obligations of Article 11 [of the WCT] cover both of these basic forms.**"² . Notably,

¹ Proposed sections 273(3)(b); 273(2)

² WIPO Guide paragraph CT-11.8 (emphasis added)

neither the U.S. nor the E.U., in implementing the WCT and WPPT, have excluded from legal protection those access controls that had not been shown to have been intended to control the exercise of an exclusive right.³

This fundamental shortcoming in the Bill could be cured by amending the language in proposed Section 273(3)(b) to reflect either of the following alternatives:

(b) the reference to protection of a copyright work is to the prevention or restriction of unauthorized access to the work or of acts which are done without the licence of the copyright owner of the work and are restricted by the copyright in the work

(b) the reference to protection of a copyright work is to the prevention or restriction of acts which are done without the licence of the copyright owner of the work and which consist of access to the work or are restricted by the copyright in the work

The definition of circumvention in proposed Section 273(1) is somewhat circular and could perhaps be made clearer through the addition of examples of mechanisms by which circumvention is accomplished. See, for instance, the following formulation, which is drawn from the aforementioned WIPO Guide (para. CT-11.10):

(1)"circumvent," in relation to an effective technological measure, means to avoid, bypass, remove, deactivate, impair, or otherwise to circumvent the measure.....

II. Proposed Section 273A: Act of Circumvention

As noted above, prohibiting the act of circumvention is a positive feature of the Bill. But in its current form this provision is unlikely to achieve its intended result, because as a practical matter it would be very difficult to invoke its protections. Under the Bill, there would be no liability for circumventing a TPM unless it could also be proven that the defendant knew or had reason to believe that his act of circumvention "will induce, enable, facilitate or conceal an infringement of the copyright in the work."⁴ Proposed § 273A(1)(b). There is no warrant in the WCT for imposing this additional hurdle to enforcement; indeed, it seems to be drawn from a wholly different provision of the treaty, Article 12 (dealing with rights management information) rather than Article 11(which deals with TPMs). One who knowingly strips protection from a copyright work and thus leaves it vulnerable to acts of piracy ought to be liable without the necessity of adducing proof regarding his state of knowledge with respect to copyright infringement.

³ See 17 USC §1201(a) of the United States Copyright Law and EU Copyright Directive Article 6.3

⁴ Proposed §273A(1)(b)

This is the approach taken in the U.S. and European legislation⁵ and could be accomplished by simply deleting proposed § 273A(1)(b).

Another serious flaw in the Bill is the lack of any criminal liability for committing the act of circumvention, even in cases in which the defendant acts from a commercial motivation and for a clearly improper purpose. This gap is probably best filled by further amendment to proposed § 273C.

Proposed section 273A(2)(c) could be read to confer standing to sue to enforce the anti-circumvention prohibition on an unauthorized distributor of a copyright work, even a pirate. While we are sure this result was not intended, we suggest that this provision be clarified by inserting the underlined words:

(c) any other person who, pursuant to the authority of the copyright owner, --

III. Proposed Section 273B: Civil Liability for Trafficking in Circumvention Devices or Services

This proposed section expands somewhat on existing law, but still falls short of providing an adequate and effective legal remedy against dealing with the tools of circumvention, in two main respects.

First, proposed § 273B(1) imposes a significant and unjustifiable roadblock in the path of liability for trafficking by requiring that it be proven not only that the trafficker knew or reasonably should have known that the device or service would be used to circumvent, but also that the circumvention would be done “to induce, enable, facilitate or conceal an infringement.” This knowledge requirement is in our view even more inappropriate than the one proposed for § 273A (although both proposals share a complete lack of warrant in the WIPO Treaties and a lack of any corresponding provision in the relevant statutes in the U.S., Europe, or many other jurisdictions.).

Consider the case of a defendant who makes a circumvention device (a “relevant device” within the meaning of proposed § 273B(2)). By definition, this device may have some uses other than circumvention (even if those uses are only of limited commercial significance). The maker of the device usually will not know at the time of its manufacture who will buy or acquire the device, nor even exactly to whom it will be marketed. Yet this manufacturer would escape any liability unless the plaintiff could show that he knew or reasonably should have known that the (unknown) party to whom it would be sold would use it to circumvent, and that the particular act of circumvention to be carried out by that unknown purchaser would stand in a certain relationship to an act of copyright infringement. Carrying this burden of proof would be virtually impossible in some cases, and extremely burdensome in far more cases. The usefulness of the civil remedy

⁵ See 17 USC §1201(a) (1)(a) of the United States Copyright Act and EU Copyright Directive Article 6.1

would be correspondingly undermined. This outcome could be avoided were proposed § 273B(1) to conclude with subparagraph (c).

Second, proposed § 273B(1)(b) outlaws distribution of a “relevant device,” even if with the requisite knowledge, only if this is done “for the purpose of or in the course of any trade or business.” The provision is seemingly deficient in its coverage of gratuitous trafficking in circumvention devices, especially over the Internet. It must be acknowledged that this type of non-commercial activity is at least as common (and just as objectionable) with respect to circumvention devices and programs as it is with infringing copyright material itself. There is no justification to immunize this conduct from any liability if the plaintiff is unable to prove that the defendant’s voluntary activities, in which no money changes hands, constitute a “trade or business.” The words “for the purpose of or in the course of any trade or business” should be stricken from proposed § 273B(1)(b).

Two additional changes to Section 273B are respectfully suggested. First, we note that the title of this section is somewhat misleading. A “device ... designed to circumvent” is, indeed, a “relevant device” within the meaning of proposed section 273B(2)(c), but the other two prongs of that definition are equally important; and even a device not so designed is covered by this section if it is promoted for a circumvention purpose (section 273B(2)(a)) or if it has only limited commercially significant purposes or uses other than circumvention (section 273B(2)(b)). A more appropriate title might be “Rights and remedies in respect of circumvention devices and services.” Finally, as noted in the preceding section, copyright infringers should not be able to invoke this remedy, so proposed Section 273B(3)(c) should be changed to read:

(c) any other person who, pursuant to the authority of the copyright owner --

IV. Proposed Section 273C: Criminal Liability

MPA applauds the introduction of criminal liability for trafficking in circumvention devices or services, but the proposals in this section seem to us unduly narrow in several respects.

For example, there would never be any criminal liability for trafficking in a circumvention device that is not “primarily designed, produced or adapted” for circumvention purposes, even if it has only limited commercially significant purposes or uses other than to circumvent, and/or even if it is marketed or promoted as a circumvention tool. This is because the definition of “relevant device” in Section 273C(2) inexplicably omits two of the three tests in the definition of the same term in Section 273B(2). MPA recognizes that not all instances of trafficking in circumvention devices are worthy of criminal punishment; but the dividing line ought not to be drawn arbitrarily, based upon which of the three criteria for a prohibited device is satisfied, but rather upon the scope, character and impact of the trafficking behavior itself. For example, a

defendant who runs a massive, high-volume, for-profit business in devices with minimal legitimate uses, which he promotes solely for their circumvention capabilities, could be immune from prosecution under the Bill as currently drafted. This anomaly should be addressed by making the definitions of “relevant device” and “relevant service” in the civil provisions (§ 273B) apply to the criminal provisions (§ 273C) as well.⁶

Moreover, there would be criminal liability for distribution of prohibited devices only if such distribution takes place “for the purpose of or in the course of any trade or business which consists of dealing in circumvention devices.”⁷ Criminal liability for possession of the devices with a view to distributing them would be similarly limited.⁸ These limitations could arguably be read to exculpate a large-scale commercial distributor of circumvention devices so long as he also distributes any other items. The phrase “which consists of dealing in circumvention devices” should be deleted from these two provisions.

Even were that done, there would also remain the problem of high-volume trafficking in known circumvention devices, with all requisite evil intent, but without money changing hands and in circumstances in which it may be difficult to prove that the defendant’s extensive activity amounts to a “trade or business” of any kind. This loophole in criminal liability for trafficking in circumvention devices should be closed and in our view could be achieved by adding to the provisions cited in the previous paragraph the phrase “or on a commercial scale.” In other words, section 273C(1)(e) and (f) would read as follows:

(e) exhibits in public or distributes any relevant device for the purpose of or in course of any trade or business, or on a commercial scale;

(f) possess any relevant device with a view to

....

(ii) its being exhibited in public or distributed by any person for the purpose of or in the course of any trade or business or on a commercial scale

Finally, as noted above, Hong Kong’s legal regime for TPMs cannot be considered “adequate and effective” as long as there is no criminal liability for the act of circumvention under any circumstances. Curing this deficiency would be consistent with the approach taken in the U.S. and in Singapore as well as in

⁶ This change would also make the Bill’s provision of an affirmative defense in Section 273C(4) more sensible. In its current form, prosecution for providing a “relevant service” requires proof that the service was “performed for the purpose of enabling or facilitating” circumvention. Proposed Section 273C(2)(c). The defense that the defendant “did not know and had no reason to believe that the ... relevant service ... enabled or facilitated circumvention” seems by definition inapplicable in such a case. However, if the full definition of “relevant service” were applied to the criminal as well as the civil prohibition, it is at least possible that under certain circumstances the defense of lack of knowledge could be applicable.

⁷ Proposed section 273C(1)(e)

⁸ Proposed section 273C(1)(f)(ii)

other countries. It could be achieved by adding as a new paragraph 273C(1)(h) the following:

(h) circumvents the measure for the purpose of or in the course of any trade or business, or on a commercial scale

V. Proposed Sections 273D – 273F: Statutory Exceptions

The next three sections of the Bill set out exceptions to the prohibitions against the act of circumvention and the civil and criminal prohibitions on trafficking in circumvention devices and services.

MPA submits that any effort to incorporate exceptions into a TPM legal regime should observe certain safeguards. Statutory exceptions or limitations should be focused narrowly enough to preserve the adequacy and effectiveness of the anti-circumvention prohibitions. Thus, exceptions should be considered only when required to remove concrete impediments to conduct of overriding social importance; they should be applicable only in specifically delineated factual circumstances in which the impediment exists; and they should displace only those specific aspects of the anti-circumvention prohibitions that constitute the impediment. In particular, legislation should omit any proposed exception that threatens to lead to the public availability of circumvention devices or services in the market, since such an outcome would render the prohibitions wholly inadequate and ineffective. It is not clear to us whether such an analysis underlies the exceptions put forward in the Bill, but MPA believes that the final version of this legislation should reflect such a methodical and comprehensive approach.

Applying this analysis to the Bill reveals one overarching concern. Generally, Sections 273E and 273F provide that whenever a party traffics in a circumvention device or service “for the purpose of enabling” another party to carry out any act of circumvention that is exempted from liability under Section 273D, the trafficker can also claim an exemption from liability under sections 273B or 273C for making, importing, selling, distributing, or otherwise dealing in the device or service. In other words, the underlying policy seems to be that all exceptions to the prohibition on the act of circumvention should also extend to acts of trafficking. Clearly this policy runs an unacceptably high risk of legitimizing a general marketplace in circumvention devices or services which are ostensibly provided for the purpose of allowing others to exercise legal acts or circumvention but which are in fact generally available for illegal circumvention as well. Such an outcome would certainly undermine the effectiveness of the legal regime against trafficking in circumvention devices or services, and with it the ability of Hong Kong to meet the “adequate and effective” standards of the WCT and WPPT.

We note that in some cases the exceptions in Sections 273E and 273F apply only if the party in question “works collaboratively with” the person who is actually carrying out the act of circumvention that falls within a Section 273D exception (see, e.g., Section 273E(6)(a)); however, in other cases, “collaboration” is not a prerequisite for an exception that allows trafficking (see, e.g., Section 273E(8)), and in any case the phrase “works collaboratively with” is nowhere defined. MPA urges that the policy be re-examined and that any exceptions to the prohibition on making, importing, or otherwise dealing with circumvention devices or providing circumvention services be narrowly crafted in line with the general approach outlined above.

With this in mind, MPA raises the following observations in response to the specific exceptions proposed in the Bill and referenced in paragraphs 25 and 26 of the Legislative Council Brief, despite acknowledging at the outset that not all of the proposed exceptions may necessarily affect MPA member companies’ present interests.

- Interoperability exception (Proposed Section 273D(1))

While the Bill commendably provides that the starting point for a permitted act of circumvention for interoperability purposes must be a non-infringing copy, it should also be a copy to which the circumventor has authorized access, and the act of identification or analysis which the circumvention enables should also not involve any infringement of copyright. These changes could be reflected in this section as follows:

(d) the copy of a computer program in relation to which the act is done is not an infringing copy, and the person performing the act is authorized by the copyright owner to have access to that copy

(e) the identification or analysis referred to in subparagraph (b) is carried out without infringing copyright in the computer program.

- Security testing (Proposed Section 273D(2))

This exception as well should only apply when the activity the circumvention enables is non-infringing. To do this, a new subparagraph should be added as follows:

(c) the testing, investigating or correcting referred to in subparagraph (b) is carried out without infringing copyright in any work.

- Cryptography research (Proposed Section 273D(3) and (4))

This exception appears to sweep very broadly, especially when the research is being carried out outside the environment of an educational institution (proposed § 273D(3)(b)). In that circumstance, any research-related act of circumvention seems to be permitted, so long as the act or the dissemination of information derived from the act “does not affect prejudicially the owner of the copyright.” It is puzzling that a free-lance cryptographic researcher, unaffiliated with any legitimate educational or research institution and perhaps qualified as a researcher only in his own mind, is given greater freedom to circumvent than a researcher whose activities are clearly limited to those needed for teaching or sanctioned educational research; the opposite should be the case. Any exception in this field would also benefit from a definition of “the field of cryptography.” Furthermore, any exception should only apply to research carried out on a copy which the researcher has lawfully obtained; circumvention should be allowed only when it is essential to the research objective; and the researcher should be required to make a good faith effort to obtain authorization for circumvention before proceeding without it. Finally, the exception should not extend to research activities which involve infringement of copyright. Without these changes, the boundaries of the exception may be too uncertain to determine whether they remain within the bounds of an adequate and effective TPMs regime.

- Surreptitious collection of personally identifying information (proposed Section 273D(5))

This exception also would benefit greatly from definitions of key phrases, notably “personally identifying information.” Additionally, in many instances in which personal data is collected or disseminated in conjunction with the use of technological protection measures, users are provided options to avoid such collection or dissemination. Any exception allowing circumvention should apply only when the TPM does not otherwise provide the user with such a capability. Otherwise, the provision may invite circumvention which is unnecessary to achieve the privacy protection goal and which will be disruptive to systems for the secure distribution of copyright material. Also, since the goal of this exception is to protect privacy, rather than enable unauthorized access, the exception should not apply to any case in which the act of circumvention confers on anyone the capability to gain access to a work which he is otherwise not authorized to access.

Finally, since this exception (unlike the preceding ones) could potentially be exercised by any user, it is a particularly poor candidate for extension to the trafficking prohibitions. Proposed section 273E(8) would legitimize an open market in circumvention devices or services so long as these were labeled as having the “sole purpose” of identifying or disabling TPM features that collect PII, whether or not they had other uses. Indeed, that section extends even to the disabling of such features that are fully disclosed to, and explicitly accepted by, users. Such information collection features form an integral part of many new

means for disseminating copyright works (e.g., they can be used to facilitate personalization of a website which a user visits in order to begin a legitimate download). Permitting an open market for devices to circumvent such TPMs could not possibly be consistent with the establishment of an “adequate and effective” legal regime in this area.

- Protection of minors (proposed § 273D(6))

This exception requires further clarification in our view. It is certainly legitimate to the extent that, for example, filtering software installed on a home computer to control children’s access to material may need a component that decrypts an attachment to an e-mail in order to determine whether or not to permit the attachment through the filter. However, it should be made clear that the exception does not extend to the use of a device that would itself meet one or more of the criteria for a “relevant device” under proposed section 273B(2). In other words, circumvention is permitted when incidental to a device’s function of protecting minors, but not to legitimize use of a device that is aimed at circumvention as an end in itself. This could be achieved by adding at the end of subparagraph (6)(a) the words “which is not a ‘relevant device’ within the meaning of section 273B(2).”

- “Market segmentation” exception (proposed section 273D(7))

The Bill would allow the circumvention of a TPM that “contains regional coding or otherwise has the effect of restricting access to the work for the purpose of controlling market segmentation,” and would immunize from criminal liability all trafficking in tools for accomplishing such circumvention⁹. MPA does not believe that such provisions are compatible with the requirements of the WCT and WPPT to the extent that such TPMs effectively control access to, or the exercise of exclusive rights in, copyright works. Certainly these exceptions would render largely ineffective the familiar regional coding system now employed on some DVDs to enable the orderly and sequential roll-out of audio-visual titles in different markets, a policy which Hong Kong law has long recognized and approved by outlawing the parallel importation of current titles during an 18-month period after initial release.¹⁰ However, because the exceptions are not well-defined, their impact could extend far beyond regional coding.

Almost any technological protection measure could be characterized as having the purpose of “controlling market segmentation,” (terms that are nowhere defined in the Ordinance or proposed Bill). For example, a movie made available during a Video on Demand window will often be accompanied by a technological protection measure to prevent recipients from making a permanent copy, thus “segmenting” the market between those entitled to view the movie in a streaming

⁹ Proposed §§ 273D(7), 273F(11)

¹⁰ This point is not affected by the proposal to reduce this window from 18 to 9 months, a move that MPA strongly opposes.

format now, and those who will be entitled to obtain a permanent copy (whether via download or during a conventional video window) at some point in the future. Certainly someone with the desire and the means to circumvent the TPM used during the VOD window, in order to make a permanent copy, would be able to argue that to do so would fall within the exception; and the party providing that means would claim immunity from criminal prosecution. The proposed exceptions thus threaten to open a huge gap in legal protection of TPMs, making vulnerable any such measure that is used to discriminate between those currently authorized to access a work in a particular way, and those whose access will be authorized later, in a different medium, or at a different price.

In addition to the uncertainty about the range of TPMs that “control market segmentation,” this proposed exception has other serious flaws, including the following:

Regional coding is often closely integrated with other forms of technological protection (e.g., copy or access controls) in a single TPM system. To the extent that this integration is a technological fact, a tool that circumvents regional coding may disable all other protections as well, thus eliminating the full value of the TPM for all purposes, and leaving the underlying work vulnerable to uncontrolled access and unlimited copying. Proposed § 273D(6)(c) makes the exception applicable only where “the sole purpose of the act [of circumvention] is to overcome the restriction which controls market segmentation so as to gain access to the work”; but even if that is the act’s sole purpose, it may not be its sole effect. In no event should an act of circumvention be legitimized that would render the underlying work readily accessible in unprotected form. Furthermore, this formulation is problematic because even the specific user who overcomes region coding may nonetheless lack authorization to access a work (e.g., she may not be a valid subscriber to the online portal from which she wishes to download the film).

The exception to proposed § 273C is far broader than the proposed exception to § 273A in this area. While the act of circumventing region coding (or other “market segmentation” TPMs) is allowed only if that is its “sole purpose,” it appears that proposed § 273F(11) exempts from criminal liability any act of trafficking in any product or service that is capable of circumventing region coding, even if it is also designed, intended or capable of circumventing other TPMs. The scope of this exception must be re-examined.

To the extent that region coding is used to enforce the exclusivity period against parallel imports of new audio-visual titles which Hong Kong law recognizes, it is counterproductive to immunize the act of circumvention of region coding on copies of the title during the period of exclusivity. Yet this is precisely the effect of proposed § 273D(7)(d)(ii). This provision should be eliminated.

- Time-shifting (proposed section 273F(12))

This proposed exception has no counterpart in the laws of other any major markets in which MPA member companies conduct business. It would eliminate all criminal liability for trafficking in devices or services that circumvent TPMs that prohibit real-time copying of broadcasts or cable programmes, or that prohibit all time-shifting of such recordings. MPA believes this proposal is ill-advised and urges that it be re-examined.

As currently drafted, this exception would cover not only free-to-air terrestrial broadcasts, but also encrypted broadcasts available on a subscription basis, video-on-demand services, subscription cable services of all kinds, and even streaming of audio-visual works and other copyright materials over the Internet or other computer networks. The exploitation of all these varied media to disseminate films and other copyright material to the public depends upon the ability of the right holder to sequence the marketing of the work through various windows, in which, for instance, a video-on-demand presentation would chronologically precede the broadcast of the same film free-to-air. The consumer benefits from this because he may choose whether to pay to view the film at an earlier date, or wait to enjoy a free showing of it later.

This sophisticated distribution system is becoming even more nuanced with the addition of windows during which consumers may view the film via Internet streaming, or (usually later) download it to personal computers or other devices. The use of TPMs as part of digital rights management systems is of course indispensable to this sequenced distribution system, and to the consequent expansion of the range of choices available to consumers. Improved technology for digital rights management makes it possible for consumers to time-shift with the authorization of the copyright owner, and to do so with reduced risk that the scope of authorization will be exceeded. In this way, consumers with differing demands for access can all be served with maximum efficiency and at a price point most closely matched to their needs.

A statutory exception for trafficking in tools to circumvent TPMs that manage time-shifting would, in effect, amount to a dictate that time-shifting must be allowed in all circumstances. This would threaten to stop this dynamic market development in its tracks. If, for example, all pay-per-view broadcasting had to be priced on the assumption that a subscriber would be able to time-shift when and how often she would view the program, the price for this service would inevitably rise. The consumer's option to choose between a "real-time" broadcast or cable performance, and one that she could watch repeatedly, would disappear, since the former would effectively be rendered impossible. It is questionable whether, in the long run, consumers would benefit from the proposal to allow trafficking in the products and services that would lead to this result. It seems inescapable that such an enactment would hamper the responsiveness of the market to consumer demands for greater flexibility and choice in enjoying television and cable programming.

- Further Exceptions by Notice (Proposed Section 273H)

This provision of the Bill would grant broad authority to the Secretary for Commerce, Industry and Technology to create further exceptions to the prohibitions regarding TPMs by publishing a notice in the Gazette. MPA appreciates the need for flexibility to adapt the law to technological developments and unanticipated consequences, but believes that the proposed mechanism for doing so is far too sweeping and unbalanced. Our main concerns with the proposal relate to its scope of authority, permanence, process, and standards.

The secretary would be granted the power to exempt from any prohibition any subject matter of protection or any “class of devices, products, components, means or services.” In effect, his power to annul the entire enactment would be plenary and almost unbounded. In particular, giving the Secretary the authority to annul any or all of the anti-trafficking provisions of the legislation carries a grave risk of fostering the development of an uncontrollable market in circumvention products and services. Decisions of this magnitude and import ought to be made by legislators.

The justification for according this law-changing authority to the Secretary rests largely on the need to respond to unanticipated technological developments, or to address unforeseen consequences expeditiously and on an interim basis until the Legislative Council can act upon them. The authority accorded to the Secretary to make permanent excisions from the legislation far exceeds this justification. The changes made by notice should expire after a relatively brief period (we note, for example, that under the roughly congruent provision of U.S. law, 17 USC § 1201(a)(1), exceptions created in the rulemaking proceeding expire in three years).

Nothing in the legislation requires the Secretary to give notice of his intention to impose an exclusion from the application of the legislation, to solicit and consider the views of interested parties, or to follow any rules of transparency in making and justifying his decision. The proposal also fails to specify whether the proponent of the exception has the burden of proof, and if so under what standard. These procedural shortcomings will inevitably undermine the credibility of any actions taken pursuant to proposed § 273H, and should be remedied.

The test by which the Secretary is to determine whether to impose an exclusion from the application of the legislation seems extremely lax. Virtually any technological protection measure could have some adverse effect on some non-infringing use of a work protected by the TPM, in some circumstance. The finding of such an adverse effect seems to be enough to empower the Secretary to permanently render any and all provisions of the legislation inapplicable to the work in question, to the TPM in question, to the circumvention tool that would be used to circumvent the TPM, or to a broader class of works or tools within which

those specifically involved in the Secretary's decision may fall. There seems to be no recognition that the deployment of TPMs, and the legal protections they are accorded under the legislation, may well have the effect of encouraging or facilitating non-infringing uses of copyright materials; and consequently there is no requirement that the Secretary evaluate the impact of the law on a "net" basis – i.e., does a particular TPM-related prohibition, on balance, adversely impact non-infringing uses? The result is that an exception may be imposed even though its net effect is to make other non-infringing uses (or other ways of making that non-infringing use) more difficult.

While MPA does not object to the concept of some administrative authority to make temporary adjustments to some aspects of the legislation on a time-limited basis and after a transparent process of consideration, Section 273H in its current form puts all the potential benefits of this aspect of the Bill at risk. In an environment in which legal protections for TPMs can be undermined or even eliminated entirely by administrative fiat and upon such a lax standard, the predictability and reliability of the legislation is jeopardized. Investment in new distribution channels that depend upon TPMs would be discouraged, to the detriment of Hong Kong consumers who would be denied new legitimate means of access to copyright works and other protected materials. MPA urges that this provision be re-examined and overhauled to increase predictability, stability and transparency, while retaining the flexibility that is its legitimate goal.

(g) Rights management information and allowing copyright owners and exclusive licensees to seek civil remedy

The rights management information (RMI) provisions currently allow those who provide RMI to seek civil remedies against anyone who interferes with it (e.g. removes or alters it).

The draft Bill contains a proposal that would significantly weaken Section 274 of the Copyright Ordinance with the addition of a standard that a person interfering with the RMI would not be civilly liable unless he or she knows that such interference will lead to copyright infringement. This change is untenable for copyright owners and users of RMI as it benefits those who chose to not inquire as to the status of the works for which the RMI has been altered. If effectively removes any teeth in the provision by shifting a burden of proof to the provider of RMI. The efforts and resources that must be dedicated to proving knowledge places an unreasonable requirement on the provider of RMI. Moreover, creating longer and more complex proceedings would further stretch the use of judicial resources. This proposed formulation does not comport with Article 12 of the WCT and Article 19 of the WPPT and by incorporation, the Berne Convention, and the requirements therein for providing adequate and effect legal remedies.

MPA strongly urges the Committee to delete this draft amendment and maintain the current level of protection.

(h) Rental Rights for films and comic books and providing civil remedy against violations

The proposed amendments are welcome introductions, as copyright owners will now be able to avail themselves of civil remedies against the unauthorized use of a work.

(i) Incorporation of the World Intellectual Property (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty requirements

MPA welcomes implementation and adherence to the WCT and WPPT. As the list of proposed amendments in the Committee's report concern sound recordings, the MPA respectfully declines comment on this section at this time.

(j) Fair Dealing for education and public administration and improvements to the permitted acts for education

While the efforts to formulate a flexible law that can grow with new technologies is an admirable approach by the Committee, the minimum standards set forth in the WIPO Treaties must be observed. The minimum level of protection that can be afforded copyright holders under Berne, TRIPS, WCT, and WPPT is found in the application of the so called "three-step test" to all possible exceptions and limitations to economic rights. The three-step test - which MPA maintains should be adopted verbatim into the Copyright Ordinance - requires that (i) an exception or limitation only cover a limited, special case; (ii) it must not conflict with a normal exploitation of works and objects of related rights; and (iii) it must not unreasonably prejudice the legitimate interests of owners of rights. Article 9 (2) of the Berne Convention first introduced this test and applied it only to exceptions and limitations to the reproduction right. Later, TRIPS Article 13 extended the test's application to all economic rights of copyright holders. Article 10 of the WCT and Article 16 of the WPPT have further extended the test's application to all of the economic rights that are protected within their provisions.

The MPA believes that whenever possible, the exceptions should apply only to copying portions of works. Allowing the copying and communication to the public of whole works would be incompatible with the three-step test.

We are particularly concerned with the introduction of "fair dealing" for the purposes of giving and receiving instruction provided by an "educational establishment". While we acknowledge that new and innovative teaching methods are increasingly popular, we disagree with the government's apparent conclusion that the legal solution lays in giving education institutes what amounts to an unrestricted license to use copyright works. It is generally accepted established that a licensing scheme should be preferred whenever possible, the main reasons being:

- i. A copyright owner will not be notified of any such uses and even when such potential abuses are discovered, the only way to seek remedies is by first investigating the acts of using the copyright works, and then through the court to determine whether the acts are infringing;
- ii. As there are no proper guidelines on what may or may not constitute fair dealings, it will bound to, as mentioned earlier, not only create confusions among educational establishments that seek to use copyright works legitimately and equitably, it will open the door for abuses as anyone can hide behind this exemption by offering copyright works commercially without authorization or reimbursement and thereby diluting the value¹¹ of the copyright works used;
- iii. The effect of any abuses of Section 41A is further magnified by the increasing popularity of online and other non-traditional teaching methods.

An important example is the uses of films and television programs, dramatic or otherwise, in foreign languages among institutes that offer language courses. The current proposed amendment (Clause 12), which seeks to introduce the new Section 41A, is so extensive that it will allow potential abuses that can include examples that we have discovered in other countries: (i) developing and offering “teaching materials” that would otherwise request authorization from copyright owners, (ii) making available such materials online with access restricted to only paying “members”, which any users can sign up as “students” of online interactive “courses.

Exceptions to a finding of an infringement create concern where there is any broadening of existing exemptions as this could result in encouraging unauthorized uses which are not relevant to the course of study in educational establishments. Any expansion of educational exceptions should be carefully considered to ensure that any such exception introduced might be invoked only in certain limited cases that comply with the three-step test. Further clarification as to what constitutes “urgent business” for purposes of this provision is also needed. The current proposal is far too vague in order to ensure that any such exception does not have a prejudicial impact on existing markets for copyrighted materials among governmental bodies.

¹¹ The “effect of the dealing on the potential market for or value of the market” is only one of the determining factors in the proposed Section 41A.

The Committee's explanatory note accompanying the draft amendments states that the same "flexible" type of fair dealing exceptions will be applied to other exceptions such as research and private study. The MPA advocates that for clarity and consistency, these exceptions must also be subject to the three – step test.

The draft Bill proposes to amend three separate existing permitted uses, two of which are of concern to MPA Member Companies; public performance (Section 43) and recordation of broadcasts by educational establishments (Sections 44 and 45). Each of these proposed expansions on the exception to exclusive rights is potentially harmful to rightsholders ability to receive remuneration from their works. In particular, the deletion of Section 45 (2), which limits the scope of exceptions when a licensing scheme is in place, appears to undermine established and successful business practices, which educational institutions and rightsholders have operated under for some time. There is great benefit in a system such as the current licensing regime. It provides certainty for the user and the licensor as to what constitutes permitted use and where the line of infringement is crossed.

(k) New permitted acts for persons with a print disability

MPA has no comment on this provision at this time.

(l) New permitted act for playing sound broadcast in vehicles

MPA has no comment on this provision at this time.

(m) Liberalization in the use of parallel imports

As the Committee notes in the explanatory memorandum, it is currently a criminal offence to deal in, or to import otherwise than for private and domestic use, any parallel imported copyright work if the work has been published anywhere in the world for 18 months or less. MPA has previously communicated its views on this issue to the Bureau and the Legislative Council, and our views have no changed. MPA strongly favors the retaining the status quo and not relaxing current parallel import protection.

The window of time that parallel import protection provides for the motion picture industry is unique to the creative industries. The reason for such a window is to allow a motion picture to be released in different media at different times in a particular sequence. This carefully planned sequence of windows ensures that each release, whether theatrical, VHS video, DVD or television, achieves its maximum creative and economic potential.

The lack of parallel import protection in other jurisdictions has contributed to decreases in cinema attendance and box office revenue. When a parallel imported DVD or VHS copy of a film is available for purchase or rental on the same day, or even prior to the film's domestic theatrical release, cinema attendance will inevitably decrease. There is little incentive to attend the cinema when the same film can be rented and viewed in the home.

Maintaining an 18-month window of time, beginning from the date of a motion picture's first international release and uninterrupted by parallel imports would encourage growth, stability and development of Hong Kong's film industry, from film producers to provincial cinema exhibitors. An effective window of time helps protect the carefully planned releases of an audiovisual work in various media. After the sequence of windows has passed, parallel importation would be permitted under the current terms of Hong Kong's Law. We believe the current provisions of the Copyright Ordinance strike a proper balance of interests. The proposal to shorten the criminal liability period from the existing 18 months to nine months (Clause 7(2)) is particularly troubling.

Effective protection against unauthorized parallel imports also benefits the local economy by encouraging the growth of businesses related to the distribution of motion pictures, such as local advertising companies and promotional merchandise suppliers, local video duplicators, dubbing studios, and packaging. Not only does this offer consumers wider availability of choices, it adds value to the local economy. Growth of these businesses encourages further investment, provides numerous employment opportunities, and generates tax revenues. MPA member companies have thus invested heavily in the Hong Kong market by setting up their own offices or appointing exclusive territorial licensees to service the market. This commitment to the market creates jobs in related organizations, including

- Local distributors and wholesalers
- Local merchandising companies
- Local video duplication facilities
- Local advertising executives, including creative and account executives
- Local printers and other promotional suppliers

Parallel importers essentially obtain a "free ride" on promotional activities undertaken by the authorized distributor, including advertising, posters and point of sale promotional materials. Parallel importers typically do not make similar investments in promotion. Instead, they "cherry pick" the top grossing motion pictures and concentrate all of their efforts on those high volume titles, ignoring the broader selection of motion pictures that may appeal to the Hong Kong consumer, without supporting the growth of the local industry in any way. In response to parallel importation, authorized video distributors may be forced to forego less profitable movies – making them unavailable to the Hong Kong consumer.

Unauthorized parallel imports thus tarnish long established relationships between retailers committed to sourcing authorized product through local distributors. Whether a film company has established a local subsidiary or contracted an exclusive licensee to distribute video product, retailers depend on local distributors for their inventories. This includes access to a wide variety of titles – the latest releases, special interest videos and catalog product. Parallel imports compromise this important business relationship and may serve as a disincentive for video distributors to provide the wide variety of titles that video retailers currently have available to them. Protection against parallel imports also addresses consumer concerns as to product integrity and supply; authorized distributors generally provide product support such as warranties and updated versions of sales support software, which rarely are available from parallel importers.

Because parallel imports are sold exactly as they are imported (i.e., limiting choice to the consumer by offering titles only in the language of origin) they have no value-added impact on the local economy. They effectively cannibalize the retail industry in the long term by stealing jobs from the local production industry and by chipping away at the economies of scale associated with providing local businesses sufficient volume of retailer orders. The opportunity costs of decreasing local volume, employment and community patronage far exceed the cost savings retailers may realize through parallel imports.

Parallel import protection also significantly assists copyright enforcement in Hong Kong. With the advent of new digital technologies, video products are even more susceptible than was previously the case to large-scale illicit manufacture. Illicit copyright pirates have already released hundreds of film titles on DVD and the packaging on some makes it difficult to detect that the product is pirate without close inspection. A lack of control over parallel importation increases the risk of covert import of counterfeit goods. Without effective protection, piracy is likely to increase as copies of motion pictures from a wide variety of countries are freely imported into Hong Kong, making it difficult to differentiate legitimate from unauthorized copies. Pirates do use the parallel import channel to bring in clandestine product.

The current levels of protection are therefore essential to protect both local producers (and foreign investors, including some of our members, in local productions) and distributors. Shortening the period would appear to endorse a view that is contradicting the government's drive to revitalize the local film industry by increasing the financial risk of producers, thereby discouraging not only local but foreign investment in production. Meanwhile, MPA notes that the proposal to reduce the period during which parallel imports would attract criminal liability to 9 months after public release (from 18 months), starkly contrasts with the CITB's prior recommendation that the Legislature maintain the status quo

with respect to the existing 18-month restriction. The MPA strongly opposes any weakening of this area of law.

(n) Time limit for prosecutions

MPA endorses this amendment as proposed by the Committee.

(o) Proof of absence of license from copyright owner

MPA endorses this amendment as proposed by the Committee, which we believe would be extremely helpful in prosecuting infringement cases. The MPA further suggests that the amendment also include a clarification that recognizes U.S. copyright registration certificates and allows their substitution in lieu of copies of the genuine article. This would greatly reduce the burden on copyright owners and expedite compliance with the affirmation requirements. MPA hopes that the Hong Kong government will soon adopt the measures necessary to recognize foreign copyright registries for this purpose.

(p) Particulars of the author in affidavit evidence

MPA welcomes this change to the Copyright Ordinance amending section 121(b) to clarify the requirements of what the affidavits under this provision must contain (Clause 27(1)-(3)).

Section 121(1) of the current Copyright Ordinance allows the submission of affidavits under specified conditions as prima-facie evidence of copyright subsistence and ownership by copyright owners in infringement proceedings. According to section 121(1)(b), such affidavits must contain the name, domicile, residence or right of abode of the author of the work. In a previous court case [HKSAR v Elegant Technology Limited], the Court of Appeal did not accept that “the domicile, residence or right of abode of the author” under section 121(1)(b). The affidavit was held to be defective due to the fact that the places of residence of the authors were omitted from the affidavit filed in the case. MPA and other rightsowners associations have corresponded previously with the Government on the need for legislative amendment in this regard.

(q) Powers of Copyright Tribunal members

MPA has no comments on this provision at this time.

(r) Deletion of “in connection with”

MPA has no specific comments on this proposal at this time.

(s) Definition of “business”

MPA has no comments on this provision at this time.

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The foregoing comments have been offered in response to the specific proposals included in the Copyright (Amendment) Bill 2006 and supported by discussion in the accompanying Legislative Council Brief. However, we feel constrained to also comment to the Bills Committee on certain other subject matter that MPA believes is ripe for consideration and action in order to truly conform Hong Kong’s Copyright Ordinance with emerging international standards for copyright protection in the twenty-first century. It seems unfortunate that the present legislative initiative has not taken the opportunity to address the issues set forth below:

Copyright Term Extension

Although the proposed amendments do not contain provisions extending the term of copyright protection, the MPA strongly believes that Hong Kong should bring its Copyright Ordinance into line with the growing regional and global trend by enacting a 20-year extension of the term of copyright protection.

The general movement to extending the term of copyright protection has taken place over a considerable period. Although Hong Kong’s Copyright Ordinance adheres to the minimum standard protections set forth in the Berne Convention, the 1971 Paris Text of the Treaty merely reflected the position in a majority of countries at that time. This is no longer the case and sixty-eight countries throughout the world now provide terms of protection in excess of the Berne minimum of 50 years *post mortem auctoris* protection. The United States, for example, extended its term of protection by an additional twenty years such that most categories of works are now protected for a 70-year p.m.a. term of protection.¹² A list of the countries providing terms of protection in excess of 50 years is attached as an annex to this submission.

The MPA submits that it is now appropriate that Hong Kong should harmonize its laws with the international community and provide a term of protection, which is consistent with those countries that are major producers of copyright works, and other subject matter protected by copyright. We note that of Hong Kong's significant trading partners, the United States, the EU, Singapore, Australia and Japan have all extended or are in the process of extending the term of copyright protection for films to 'life plus 70' or equivalent. In addition, approximately 65

¹² Under the U.S. law, works made for hire (which typically extends to audiovisual works, including MPA Member Company products) are protected for a term of 95 years beyond the work’s initial publication.

countries provide a term of protection for audiovisual works of at least 70 years – whether it be “life plus” 70 or 70 years following publication.

Hong Kong’s failure to similarly extend the term of protection provided under its law places creators at a competitive disadvantage in the international marketplace. Term extension will enable Hong Kong’s copyright industries to obtain the benefits of extended protection domestically and internationally, through the practical operation of international copyright treaties. The “rule of the shorter term” allows countries with longer terms of protections to apply to Hong Kong works in their jurisdictions the (shorter) copyright term that the work would otherwise receive under Hong Kong copyright law.

Harmonizing copyright terms with its significant trading partners will provide increased revenue streams to Hong Kong creators. If Hong Kong does not harmonize, the rule of the shorter term – applied in most countries – would prevent Hong Kong authors and copyright owners from getting the full benefit of a foreign copyright term when distributing Hong Kong works abroad. This discriminatory effect deprives Hong Kong of revenue that could be realized from the exportation of the products of its copyright-based industries.

Extending copyright terms for all categories of works will also support other individuals and businesses to create new culturally significant works of creative expression by providing today’s film companies and performers with a further incentive to invest time and talent in releasing culturally significant material into the marketplace.

Term extension further provides incentives to preserve or restore older works and the reissue of such works with improved quality and in new formats. Market development for local businesses directly benefits from copyright term extension through the generation of additional corporate and individual income taxes from businesses and individuals engaged in all sectors of distribution including theatrical, home video, television and online for the duration of the protection.

Other considerations supporting an extension of the term of copyright protection, aside from international harmonization, enhancing the value of exports, and benefits to local businesses and consumers, including fostering the creation of new works, increasing the production of derivative works, and benefiting the heirs of copyright owners.

For these and other reasons we would be pleased to detail further, MPA recommends that the Committee take the opportunity of its current review of copyright related issues to expand subject matter under consideration to include an extension of the term of copyright protection. We believe that there is similar interest among other copyright owners for such an initiative and look forward to discussing this suggestion with you in further detail at the appropriate time.

Copyright Protection in the Digital Environment

MPA has previously noted to the CITB its concern regarding the need to ensure adequate protection for the transmission of copyrighted works through the Internet.

The Internet and modern telecommunication technologies offer growth and opportunity for creative industries and benefits to consumers on a global scale. Technological developments and market changes have brought people throughout the world to the threshold of an exciting future in which their access to entertainment, information, education and productivity tools will be more extensive, less expensive, and more convenient than ever before.

However, these benefits will only accrue if intellectual property rights are properly protected. Digital piracy threatens to severely curtail the growth of this new marketplace. Modern legislation must therefore restrain persons from making copyrighted products available via electronic means (e.g., via the Internet) without authorization from the copyright owner. Such restrictions should be without regard to any minimum 'commercial scale' or 'for profit' test, but should focus instead on the injury and potential injury to rightsowners.

The unauthorized "file sharing" of music, movies, and other media by means of "peer to peer" (P2P) applications is particularly appropriate for consideration in this context. P2P networks, at least in their most common form, are computer systems that enable Internet users to: (1) make files (including motion pictures) stored on each user's computer available for copying by other users; (2) search for files stored on other users' computers; and (3) transfer exact copies of files from one computer to another via the Internet. Typically, P2P transmissions involve four sets of parties:

- An "Uploader", meaning a person who makes a digital copy of a copyrighted work available for access on his or her computer;
- One or more "Downloaders", meaning persons who wishes to obtain a copy of the work in question and does so by means of access, via the Internet, to the Uploader's computer system;
- The "Platform Provider", meaning the person or entity responsible for creating and/or operating software applications and/or networking programs (typically featuring a search and indexing facility by means of which Uploaders and Downloaders can access one another);
- The "Internet Service Provider" (ISP), meaning the entity responsible for providing individuals with connectivity to the Internet.

Generally speaking, P2P refers to individual users who are carrying out activities concerned for pleasure rather than for monetary reward (notwithstanding that the creators of the software applications upon which such file sharing is dependent sometimes charge fees for the use of such software). In such situations,

rightsholders are injured regardless of whether an infringing copy is made available for a commercial purpose. Where infringing copies of audiovisual works are given away or made available (for free or for profit) via the Internet, injury has been sustained by rightsholders, distributors, and retailers the same as if such works were distributed by means of an optical disk or otherwise. In addition, when copyrighted materials are widely available for free, governments forego the collection of reasonable customs duties, value-added taxes, or sales taxes.

MPA has already noted a significant rise in Internet-based piracy –particularly in the realm of P2P activity - in Hong Kong and throughout the Asia-Pacific region. In 2005, Hong Kong saw the first conviction for copyright violations involving the illegal distribution of motion pictures through the Internet and the first criminal case in the world against a Bit Torrent user¹³. In 2004, Japanese courts convicted two individuals for illegally distributing motion pictures through the Internet, in violation of Japan’s Copyright Law. Korean courts have likewise ruled that operating music streaming services offered to users free of charge (without the authorization of the copyright owners) is an infringement of the Korea’s Copyright Act. As the legitimate (and illegitimate) distribution of copyrighted works continues to migrate towards the Internet, it is essential that legislatures take steps to ensure adequate and effective legal infrastructures, consistent with internationally accepted standards and norms, to ensure continued protection. The four issues on which the Bureau has requested views fall squarely within that remit.

Whether a technologically neutral right of communication should be introduced for copyright owners

An essential component of effective protection for copyrighted works and objects of related rights in a digital environment is an exclusive right for creators and rights owners to authorize the transmission of their works through the Internet. In contemplating the harmonization of international protection in this regard, signatories to the 1996 WIPO Copyright Treaty (WCT) recognized that, without prejudice to other existing rights, “authors of literary and artistic works shall enjoy the right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works *in such a way that members of the public may access these works from a time and at a place individually chosen by them.*” (emphasis added). This latter function of interactivity, rather than passive linear reception, is the hallmark of P2P activity.

¹³ BitTorrent allows much faster copying of large files than earlier P2P networks and has become one of the preferred systems for illegally copying and distributing large, copyrighted video files, such as movies and television programs. Currently, the BitTorrent network offers individuals around the world perfect digital copies of any movie they desire for free – including unauthorized copies of movies that have not yet been released in theaters.

When this provision was discussed by the delegates to the diplomatic conference resulting in the WCT, it was stated that treaty signatories these rights of communication to the public and making available to the public “might be implemented in national legislation through application of any particular exclusive right, also other than the right of communication to the public or the right of making available to the public, or combination of exclusive rights, as long as the acts described in those Articles were covered by such rights.”¹⁴

It is therefore recognized this so-called “umbrella solution” permits sufficient flexibility for national legislatures to implement their treaty obligations. Article 26 of Hong Kong’s Copyright Ordinance presently meets WCT levels of protection in this regard by defining the right to make available of copies to the public to mean “making available copies of the work, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the work from a place and at a time individually chosen by them (such as the making available of copies of works through the service commonly known as the INTERNET)”.

MPA questions, therefore, whether the introduction of a technologically neutral right of communication might be redundant with, or somehow interpreted as in contravention to, the present right of the copyright owner under Article 26 of the Ordinance to make available copies of his or her work to the public. However, we look forward to further elaboration of the proposal under consideration following the release of the Bureau’s consultation document.

How to facilitate copyright owners to take civil actions against infringing activities on the Internet

As previously indicated, there are potentially four sets of interested parties involved with the facilitation of P2P file sharing. In contemplating suitable means of civil redress against one or more sets of such parties, it would seem upon a casual review that sufficient liability exists under the Ordinance against both Uploaders and Downloaders. However, it is questionable whether civil actions against such individuals are feasible or otherwise cost-effective and it is therefore necessary to also consider the extension of attendant liability under certain circumstances to both Platform Providers and Internet Service Providers. Regardless of the particular defendant, there remain present disincentives, relating to both jurisdiction and procedure, to the initiation of civil proceedings in Hong Kong as a sufficient remedy for P2P piracy.

Suitable guidance may perhaps be found by a comparative reference to legislation enacted in the United States and European Union regarding Internet Service Provider liability. In the United States, prior to the adoption of the Digital Millennium Copyright Act (DMCA) in 1998, U.S. copyright law already included well-established doctrines (such as contributory and vicarious infringement) for

¹⁴ See Records of the 1996 Geneva conference, p 675, para 301.

determining when one party could be held legally liable for infringing acts of another. The DMCA confirmed that these principles remained fully applicable in the online environment, but provided further incentives for cooperation between copyright holders and Internet Service Providers by limiting the legal remedies otherwise available – ruling out monetary relief and specifying the nature of available injunctions – against Internet Service Providers who cooperate in specified ways.

The so-called “notice and takedown” provisions of the DMCA are a good illustration of the incentives for such cooperation and the availability of legal limitations on relief in the course of such cooperation. More specifically, under U.S. law an Internet Service Provider who learns of infringing material or activity on its system can enjoy the full benefits of remedial limitation only if it moves promptly to remove or cut off further access to the offending material. It must be properly understood that the notice and takedown provisions of the DMCA function against a backdrop of rules for determining responsibility for infringements. The risk of liability for infringement is the key incentive for service providers to cooperate with notifications. Simply enacting a notice and takedown requirement in a legal environment which lacks well-established doctrines of indirect liability for infringement falls short of effective relief.

The E.U. Electronic Commerce Directive,(the EU Directive) adopted in 2000, follows a similar approach but does not contain an explicit “notice and takedown” procedure, leaving it up to individual Member States to implement their own respective procedures, but nonetheless requires remedies against qualified Internet Service Providers for infringements to be limited in connection with specific online functions. Both the DMCA and EU Directive share the common characteristic of avoiding complete legal immunities for Internet Service Providers. No new immunities, or defense, or changes in the standards of liability were created: merely limitations on available remedies. Neither the DMCA nor the EU Directive absolve service providers of responsibility for all infringements simply because they lack actual knowledge of the infringements, nor can one party avoid responsibility on the grounds that another party was the first infringer. Courts retain the power to issue appropriate injunctive orders.

With respect to so-called Platform Providers, the United States Supreme Court has recently confirmed similar theories of inducement liability under U.S. law extending to anyone who provides a product or service (or other assistance) to infringers and intends to foster infringement. Thus, the current situation in the United States is that the industry of people and companies who support P2P networks – whether for profit or not – are at some risk of liability, depending on the evidence that they intend to foster infringement.

As a threshold issue for the facilitation of infringement proceedings under the Ordinance, the Bureau should therefore review, extend, or clarify as necessary the application of jurisdictional liability for copyright infringement to Platform Providers and Internet Service Providers alike.

Procedural impediments to civil litigation under the Ordinance in a P2P context generally concern the ability of the aggrieved party to identify the individual(s) responsible for the infringement, the availability of an expedient means to prevent further infringement, and the cost effectiveness of recovering adequate compensation for the infringement.

Copyright owners in the United States have frequently used the subpoena processes provided in the Federal Rules of Procedure and the DMCA to obtain the name of infringers from Internet Service Providers or other entities. Typically, such a subpoena to an ISP would include an Internet Protocol (IP) address and a date and time on which the IP address was first observed in allegedly infringing activity. In some instances, providing the IP address alone to the Internet Service Provider has been enough to enable the ISP to identify the infringer. Once provided with the IP address, plus the date and time of the infringing activity, the infringer's Internet Service Provider quickly and easily can identify the computer from which the infringement occurred (and the name and address of the subscriber that controls the computer), sometime within a matter of minutes, using logs that Internet Service Providers maintain that match IP addresses with particular subscribers. Since 1998, copyright owners in the United States have sent thousands of such subpoenas to learn the names, addresses, telephone numbers, and e-mail addresses of infringers for the purpose of bringing legal actions against those infringers.

At present, there is no formalized notice and takedown procedure codified within the Ordinance, nor does Hong Kong law provide any automatic right for an Internet Service Provider to take action against any person using the ISP's services to facilitate copyright infringement by means of a P2P file distribution utility. There are no statutory provisions within the Ordinance setting out the information that must be provided to an ISP in the case of a takedown request. An ISP cannot be required to forward a copyright infringement notification to an end user. Because there are no equivalent procedures under Hong Kong law to the DMCA counter notice provisions (i.e., in the event that the user claims innocence), requiring rights owners to make application for Norwich Pharmacal disclosure to determine the identity of individual Uploaders and Downloaders and then take specific civil action against those individuals.

Finally, the lack of "statutory damages" or damages which are otherwise fixed by reference to a scale within the Ordinance is a further disincentive to civil litigation in a P2P context and we refer to our comments below for additional clarification.

Whether statutory damages for civil infringements should be introduced

Article 45 of the Agreement on Trade-Related Aspects of Intellectual Property (the so-called “TRIPs Agreement”) authorizes courts to order the recover of profits and/or payments of statutory pre-established damages, in lieu of compensatory damages at the option of the rights holder.

As noted above, there is presently no concept in Hong Kong law of “statutory damages,” or damages that are otherwise fixed by reference to a scale. In strict legal terms, the measure of damage is “the depreciation caused by the infringement to the value of the copyright as a chose in action.” This raises an interesting query in relation to the unauthorized pre-theatrical distribution of feature film. MPA Member Companies spend, on average, more than US\$100 million to make, distribute, and market each of their feature releases. Only one out of every ten such releases recoups its original investment from domestic box office receipts. Six out of ten releases never recoup their investments, even following sequential distribution in various theatrical, home video, and televised formats throughout the world.

It is therefore difficult to quantify the strict measure of damages provided for under Hong Kong law in the case of individuals who distribute motion pictures without authorization over the Internet. Since it is often difficult to prove the exact amount of actual damages that result from copyright infringement, the Ordinance should provide a standard amount of statutory damages that may be awarded without any proof of any actual damages.

Although Hong Kong legislation provides that an award of additional damages may be awarded once liability for infringement has been established, it is unclear whether such additional damages would be available against individuals involved with peer-to-peer infringement. Even making an application for normal damages bears some concern in this context, as it would invariably require revealing sensitive information (such as profit margins, etc.) which may be necessary to obtain an award of damages. The recovery of compensation for infringement in this context is therefore questionable.

MPA therefore recommends that, consistent with TRIPs Article 45, the Ordinance be amended to empower courts to award statutory damages in lieu of compensatory damages, at the choice of the right holder, in order to provide an alternative remedy in cases where it is difficult to prove actual damages.

The role of the Internet Service Providers in the fight against Internet Piracy

With internet growth, providers of online services are directly involved in transactions dealing with copyrighted material. As a threshold issue and as more fully detailed above, MPA believes that Internet Service Providers (ISPs) should be held responsible for copyright infringement in certain circumstances.

Although the aforementioned WCT does not specifically require national legislation to address this topic the benefits of international consistency on the principles of ISP liability are certainly relevant to copyright protection in the digital environment.

As set forth in greater detail above, MPA believes modern legislation should seek to provide a means of encouraging Internet Service Providers (ISPs) to cooperate with copyright owners in the fight against copyright infringement taking place on their networks, or through the use of their services. Creating blanket immunities for ISPs must be avoided. Laws should require that once an ISP has notice of infringing content that is available via its service, it should be required to act promptly to remove that content or at least disable access to it. “Infringing content” should be defined to include content that manifests traditional copyright infringement (e.g., Internet download of copyrighted movies without authorization), as well as the content that provides the means to circumvent technological protection measures. Notice” should be imputed upon delivery of notice by a rights holder (or those acting on its behalf) of the existence of infringing material. Failure of an ISP to respond in accordance with such laws should subject the ISP to civil liabilities.

It is vital that procedures for “notice and takedown” of infringing content provide for an expeditious response. The damage caused by infringing content that is available online is closely related to the length of time it is available. Any requirement of lengthy legal proceedings or intervention by third parties prior to takedown of infringing content is problematic. Any notice and takedown procedure, whether imposed by statute or undertaken voluntarily, should be streamlined, easy for rights holders to invoke, and capable of handling a high volume of notices.

Beyond these minimum criteria, a cooperative role for ISPs, as stakeholders in emerging legal Internet based services offering films to consumers, might reasonably envisage the following undertakings on their part:

Communication/PR

- To publicize only legal services in any media, and to remove references and links to sites or services that do not respect the copyrights of rights holders;
- To communicate to their existing and new subscribers, through banners and appropriate links, the importance of respecting copyright and the potential legal consequences of illegal file trading and to make it clear that ISPs will not allow subscribers to use their services for intellectual property infringements;
- To refrain from advertising on or through sites or services that are used substantially for illegal file sharing or downloading;
- To cooperate in cross-industry anti-piracy publicity and public education campaigns.

Model Provisions for Subscriber Contracts

- To include in subscriber contracts clear clauses prohibiting subscribers from engaging in illegal file trading and notifying them that illegal file-sharing activities can result in civil and criminal sanctions and termination of services;
- To include clear terms outlining the graduated response to notices of infringements and to have those terms specifically agreed to by the subscribers;
- To require subscribers to consent in advance to the disclosure of their identity in response to a reasonable complaint of intellectual property infringement by an established right holder defense organization or by right holder(s) whose intellectual property is being infringed.

Enforcement Facilitation

- To establish dedicated and reliable channels of electronic communication for notification of intellectual property infringements, including passing-on of information received from rights holders;
- To develop, together with rights holders, prototype instant messaging language directed at infringers; such notifications will explain the illegal nature of the activity, request that such activity cease immediately and explain the consequences of continuing to engage in such illegal acts;
- To facilitate implementation of a graduated contractual response to infringers, beginning with instant messaging, followed by a temporary suspension of services and fines, and culminating for recidivists in termination of services (and where allowed and appropriate, could also trigger criminal proceedings);
- To develop workable procedures permitting the identification of infringers to established right holder defense organizations in a timely fashion, with due respect for data privacy considerations;
- To develop techniques for identifying and taking action against repeat infringements including keeping track of notices and preserving data/evidence necessary to enforce copyright with respect to the conduct giving rise to the notices.
- To enforce terms of service that prohibits a subscriber from operating a server, or from consuming excessive amounts of bandwidth where such consumption is a good indicator of infringing activities.

Implementation by ISPs of Filtering Technologies

- To test, evaluate and implement available filtering technology(ies) to block infringing activities and sites that are substantially dedicated to illegal file sharing or download services;

Representations to Government/Judicial Authorities

- To work jointly with rights holder representatives to resolve legal/administrative obstacles to effective solutions to address content theft on the internet.

No interference with technical systems of protection and identification

- To not interfere with and to work cooperatively to develop and implement technical measures that are used by copyright owners to identify or protect copyrighted works.

Conclusion

MPA appreciates the opportunity to provide its perspectives on the Copyright (Amendment) Bill 2006 and other issues concerning adequate and effective copyright protection. We look forward to our continued participation in the legislative process.

MPA TERM OF COPYRIGHT PROTECTION SURVEY

Worldwide Master Chart

Country	Literary, Musical and Artistic Works	Audiovisual Works
Albania	70 years p.m.a.	70 years Following first publication
Andorra	70 years p.m.a.	70 years p.m.a.
Argentina	70 years p.m.a.	50 years p.m.a.
Aruba	50 years p.m.a.	50 years Following first publication
Australia	70 years p.m.a.	70 years Following first publication
Austria	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Bahamas	70 years p.m.a.	70 years Following first publication
Bahrain	50 years p.m.a.	50 years Following first publication
Bangladesh	60 years p.m.a.	60 years Following first publication
Barbados	50 years p.m.a.	50 years Following first publication
Belgium	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Bolivia	50 years p.m.a.	50 years Following first publication
Bosnia & Herzegovina	70 years p.m.a.	70 years p.m.a.
Botswana	50 years p.m.a.	50 years Following first publication
Brazil	70 years p.m.a.	70 years Following first publication
Brunei	50 years p.m.a.	50 years Following first publication
Bulgaria	70 years p.m.a.	70 years Calculation modeled after the EU Copyright Term Directive
Burkina Faso	70 years p.m.a.	70 years Following first publication

MPA TERM OF COPYRIGHT PROTECTION SURVEY

Worldwide Master Chart

Country	Literary, Musical and Artistic Works	Audiovisual Works
Cambodia	50 years p.m.a.	75 years Following first publication
Canada	50 years p.m.a.	50 years p.m.a.
Chile	70 years p.m.a.	70 years p.m.a.
China	50 years p.m.a.	50 years Following first publication
Colombia	80 years p.m.a.	50 years Following first publication
Costa Rica	70 years p.m.a.	70 years Following first publication
Croatia	70 years p.m.a.	70 years Following first publication
Cyprus	70 years p.m.a.	70 years Calculation modeled after the EU Copyright Term Directive
Czech Republic	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Denmark	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Dominican Republic	50 years p.m.a.	70 years Following first publication
Ecuador	70 years p.m.a.	70 years Following first publication
Egypt	70 years p.m.a.	50 years p.m.a.
El Salvador	50 years p.m.a.	50 years Following first publication
Estonia	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Fiji	50 years p.m.a.	50 years Following first publication
Finland	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive

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Worldwide Master Chart

Country	Literary, Musical and Artistic Works	Audiovisual Works
France	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Gabon	50 years p.m.a.	50 years Following first publication
Georgia	70 years p.m.a.	70 years p.m.a.
Germany	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Ghana	70 years p.m.a.	70 years Following first publication
Greece	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Guatemala	75 years p.m.a.	75 years Following first publication
Guinea	80 years p.m.a.	80 years Following first publication
Holy See (Vatican City)	70 years p.m.a.	70 years Calculation modeled after the EU Copyright Term Directive
Honduras	75 years p.m.a.	75 years Following first publication
Hong Kong	50 years p.m.a.	50 years Calculation modeled after the EU Copyright Term Directive
Hungary	70 years p.m.a.	70 years p.m.a.
Iceland	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
India	60 years p.m.a.	60 years Following first publication
Indonesia	50 years p.m.a.	50 years Following first publication
Irish Republic	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Israel	70 years p.m.a.	70 years p.m.a.

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Worldwide Master Chart

Country	Literary, Musical and Artistic Works	Audiovisual Works
Italy	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Ivory Coast	99 years p.m.a.	99 years Following first publication
Jamaica	50 years p.m.a.	50 years Following first publication
Japan	50 years p.m.a.	70 years Following first publication
Jordan	50 years p.m.a.	50 years Following first publication
Kenya	50 years p.m.a.	50 years Following first publication
Korea (South)	50 years p.m.a.	50 years Following first publication
Kuwait	50 years p.m.a.	50 years Following first publication
Latvia	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Lebanon	50 years p.m.a.	50 years Following first publication
Liechtenstein	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Lithuania	70 years p.m.a.	70 years Calculation modeled after the EU Copyright Directive
Luxembourg	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Macau	50 years p.m.a.	50 years Following first publication
Macedonia	70 years p.m.a.	70 years Following first publication
Malaysia	50 years p.m.a.	50 years Following first publication
Malta	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive

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Worldwide Master Chart

Country	Literary, Musical and Artistic Works	Audiovisual Works
Mauritius	50 years p.m.a.	50 years Following first publication
Mexico	100 years p.m.a.	100 years p.m.a.
Micronesia	50 years p.m.a.	75 years Following first publication
Morocco	50 years p.m.a.	50 years Following first publication
Netherlands	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Netherlands Antilles	50 years p.m.a.	50 years p.m.a.
New Zealand	50 years p.m.a.	50 years Following first publication
Nicaragua	70 years p.m.a.	70 years Following first publication
Nigeria	70 years p.m.a.	50 years Following first publication
Norway	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Pakistan	50 years p.m.a.	50 years Following first publication
Panama	50 years p.m.a.	50 years Following first publication
Papua New Guinea	50 years p.m.a.	50 years Following first publication
Paraguay	70 years p.m.a.	70 years Following first publication
Peru	70 years p.m.a.	70 years Following first publication
Philippines	50 years p.m.a.	50 years Following first publication
Poland	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Portugal	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive

MPA TERM OF COPYRIGHT PROTECTION SURVEY

Worldwide Master Chart

Country	Literary, Musical and Artistic Works	Audiovisual Works
Qatar	50 years p.m.a.	50 years Following first publication
Romania	70 years p.m.a.	70 years p.m.a.
Russia	50 years p.m.a.	50 years p.m.a.
Samoa (Western)	75 years p.m.a.	75 years Following first publication
Saudi Arabia	50 years p.m.a.	50 years Following first publication
Serbia & Montenegro	50 years p.m.a.	50 years p.m.a.
Singapore	70 years p.m.a.	70 years Following first publication
Slovakia	70 years p.m.a.	70 years p.m.a.
Slovenia	70 years p.m.a.	70 years Following first publication
South Africa	50 years p.m.a.	50 years Following first publication
Spain	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Sri Lanka	70 years p.m.a.	70 years Following first publication
Sweden	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
Switzerland	70 years p.m.a.	70 years p.m.a.
Taiwan	50 years p.m.a.	50 years Following first publication
Thailand	50 years p.m.a.	50 years Following first publication
Trinidad & Tobago	50 years p.m.a.	75 years Following first publication
Tunisia	50 years p.m.a.	50 years p.m.a.
Turkey	70 years p.m.a.	70 years Following first publication

MPA TERM OF COPYRIGHT PROTECTION SURVEY

Worldwide Master Chart

Country	Literary, Musical and Artistic Works	Audiovisual Works
Ukraine	70 years p.m.a.	70 years p.m.a.
United Arab Emirates	50 years p.m.a.	50 years Following first publication
United Kingdom	70 years p.m.a.	70 years Calculated as required under the EU Copyright Term Directive
United States	70 years p.m.a.	95 years Following first publication
Uruguay	50 years p.m.a.	50 years p.m.a.
Venezuela	60 years p.m.a.	60 years Following first publication
Vietnam	50 years p.m.a.	50 years Following first publication

Countries providing
more than 50 years

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69