



May 9, 2007

VIA ELECTRONIC MAIL

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

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

Dear Ms. Chan:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to provide its views on the new Committee Stage Amendments (CSAs) to clauses 55 and 56 of the Copyright (Amendment) Bill 2006, as well as Document CB(1)1497/06-07(04) (hereafter referred to as Document 1497). These comments supplement our submissions of March 13, 2007, and April 26, 2006, on the treatment of technological protection measures (TPMs), and the prohibitions against circumvention of those measures and the trafficking in circumvention products or services. As noted in previous submissions, IIPA is a coalition of seven trade associations (listed below) that represent the common interests of the U.S. copyright industries in improving copyright law and enforcement around the world.

Once again, IIPA appreciates the fact that several of the concerns raised in previous submissions have been addressed in the latest CSAs. However, serious concerns remain about some rather fundamental aspects of the legislation in its current form. These include the following:

1. Coverage of access controls (section 273(3)): this provision remains unchanged from the first iteration of the Bill. The administration asserts that its restrictive definition of access controls is “on par with the international norm for anti-circumvention provisions.” Document 1497, at 2. With respect, IIPA disagrees. As Document 1497 itself notes, the law most recently adopted on this topic in the Asia-Pacific region (Australia’s amendments to its Copyright Act) provides much broader coverage than Hong Kong proposes. Article 10(1) of the Australian law defines “access control technological protection measure” to include any access control technology that a right holder has “used in connection with the exercise of the copyright.” This is significantly broader than the current formulation in the Hong Kong legislation, which requires a direct link to the prevention of copyright infringement. We urge Hong Kong to

emulate the definition recently adopted by Australia, which also tracks the operative language of the WIPO Internet Treaties.¹

2. Recognition of additional exceptions (Section 273H): The new CSAs make only one small change to this provision, and it does not address the main problem of its excessive scope. Document 1497 asserts, at page 18, that Section 273H “is modeled along the formulations of the Singapore proposal”; but this overlooks one fundamental difference. The Singapore law (section 261D(2) of the Copyright Act) provides for the recognition of new exceptions only to one prohibition: the ban on the act of circumvention (section 261C(1)(a) of the Singapore law, which correlates to section 273A of the Hong Kong Bill).² The Hong Kong proposal, by marked contrast, empowers the Secretary to recognize, on a permanent basis, exceptions not only to section 273A, but also to sections 273B (civil remedies against trafficking in circumvention devices or services), 273C (criminal remedies against such trafficking), and 273G (application of all prohibitions with respect to performances). The extraordinary sweep of this authority significantly undermines Hong Kong’s effort to provide a stable and predictable legal environment in which technological protection measures can be rationally deployed in a manner that maximizes their potential to deliver benefits to Hong Kong consumers. Right holders will be reluctant to invest in the development of new distribution channels in Hong Kong for their works if they know that the Secretary, by a stroke of the pen, can expose carefully calibrated digital rights management mechanisms to attack – with impunity -- from those who make it their business to provide hacking tools to the public. IIPA urges the administration to modify Section 273H by limiting its impact to section 273A.

3. Bringing Section 273A – and exceptions -- into force: In Document 1497, at pages 4-5, the administration spells out its intention to “put on hold the commencement of section 273A until the first list of exceptions has been drawn up and enacted after consultation with copyright

¹ WIPO’s authoritative Guide to the Copyright and Related Rights Treaties Administered by WIPO explains that all access control technologies used in connection with copyright works must be protected. See para. CT-11.8, page 216, entitled “The meaning of technological measures ‘used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention’”:

[T]he Treaty leaves it to authors – and, of course, “authors” also means other owners of copyright – whether or not they apply technological measures, and, if they do, what kind of measures. *The obligation to provide “adequate protection and effective legal remedies” exists, however, as soon as such measures are applied.* (emphasis added)

See also *id.* at para. CT-11.8, page 217 (“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.*”) (emphasis added).

² The same is true of the corresponding provision of the U.S. law, 17 U.S.C. section 1201(a)(1), to which Document 1497 also refers.

owners and users”.³ We note that a similar approach was taken in the U.S. with respect to section 1201(a)(1) of Title 17. While this strategy has some advantages, it also made it more difficult (in the U.S.) for the Copyright Office to carry out its first rulemaking proceeding, since it had of necessity to predict the likely impact of a legal prohibition that had not yet come into force.⁴ Furthermore, the U.S. legislation came into force (and the exceptions recognized in the rulemaking became operative) on a date certain spelled out in the legislation (2 years after the date of enactment). IIPA urges Hong Kong to take the same approach, specifying the date that section 273A will come into force. By this means, the possibility of unnecessary delay in concluding the section 273H proceeding on the “first list of exceptions” will be foreclosed.

Thank you for considering the views of IIPA. Since the new CSAs and Document 1497 were only made public a few days ago, IIPA asks that this submission be treated as provisional and that, if the legislative timetable permits it, IIPA be accorded the opportunity to expand upon this submission at a later time.



Respectfully submitted,

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³ In this regard, it is difficult to understand why the administration proposes in the new CSAs a new and unvetted set of additional statutory exceptions to section 273A (see proposed section 273D(7A)). Rather than an unseemly rush to legislate on only a few days’ notice, it would be far more appropriate to consider possible exceptions to section 273A in favor of librarians or archivists in the first exercise of the rulemaking powers of the secretary under section 273H.

⁴ The U.S. Register of Copyrights described this exercise as “necessarily speculative.” 65 Federal Register 64556, 64563 (Oct. 27, 2000).