

Submissions by various organizations on the Copyright (Amendment) Bill 2006
after the Administration's introduction of the proposed Committee Stage Amendments
(as of 30 April 2007)

(IV) Anti-circumvention provisions			
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4.1	<p><u><i>International Association of Scientific, Technical & Medical Publishers (STM)</i></u> <i>(16 April 2007)</i></p> <p><u><i>International Federation of the Phonographic Industry (Worldwide) Ltd.</i></u> <i>(14 March 2007)</i></p> <p><u><i>International Intellectual Property Alliance (IIPA)</i></u> <i>(13 March 2007)</i></p> <p><u><i>Entertainment Software Association (ESA)</i></u> <i>(10 April 2007)</i></p>	<p><u>Meaning of effective technological measure at Section 273</u></p> <p>STM comments that the examples listed under section 273(2) are incomplete as they do not include user-identification and passwords for clients of on-demand or other e-commerce businesses. It suggests that the definition should fully reflect such technologies.</p> <p>IFPI (Worldwide) considers that the general reference at section 273(3) to the protection of "measures that prevent or restrict acts which are done without licence...and are restricted by the copyright in the work" is unclear and might be interpreted as applying protection to copy-control measures only. It is concerned that the wording at section 273(3), which provides for a link between protection measures and restricted acts, could result in limited coverage of access control measures in practice.</p> <p>IIPA opines that section 273(3) may not cover technological measures used to control access (e.g. by restricting access to a work to paid subscribers only). It suggests that all</p>	<p><u>Meaning of effective technological measure at Section 273</u></p> <p>Article 11 of WIPO Copyright Treaty and Article 18 of WIPO Performances and Phonograms Treaty (collectively known as the "Internet Treaties") require contracting parties to provide adequate legal protection and effective legal remedies against circumvention of effective TPMs used by authors/performers <i>in connection with the exercise of their rights</i> under the international treaties and which are not authorized by them or permitted by law.</p> <p>The technological protection measures (TPMs) that are required to be protected are those used by authors/performers in connection with the exercise of their rights under the Internet Treaties and the Berne Convention. Under our Ordinance, copyright owners have the exclusive rights to do certain acts that are restricted by the copyright in the work. Performers are also given certain rights in relation to their performances. We take the view that the reference to "prevention or restriction of acts restricted by copyright in the work"</p>

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		<p>access-control technological measures should be included in the definition of “technological measures”, regardless of whether the measure is designed for the prevention or restriction of acts which are restricted by copyright in the work. ESA expresses the same view.</p>	<p>or “rights in performances” is in line with the requirements of the Internet Treaties. We also note that the definition in the proposed section 273 is similar to that in the UK. Furthermore, Australia requires that the TPM is either a device that prevents, inhibits or restricts the doing of an act comprised in the copyright or one that is used in connection with the exercise of the copyright. We believe that the proposed section 273 is on par with the international norm for anti-circumvention provisions.</p> <p>As regards the question of whether user-identification measures and password controls for on-demand services or other e-commerce businesses would be covered under the meaning of TPMs, it depends on the use and operation of the technological measures, i.e. whether such measures are applied in relation to copyright works for the protection of copyright. The examples cited under section 273(2) (i.e. “encryption, scrambling and any other transformation of the work”) are not meant to be exhaustive.</p>
4.2	<p><u>Joint Industry Response</u></p> <ul style="list-style-type: none"> ● Hong Kong Cable TV Ltd. ● Television Broadcasts Ltd. ● International Federation 	<p><u>Defence provision under section 273A</u></p> <p>The Administration proposed to make CSAs to delete reference to “knowledge of copyright infringement” under sections 273A and 273B. Instead, a defence provision under section 273A is</p>	<p><u>Defence provision under section 273A</u></p> <p>We have had various meetings with the copyright owners to discuss the issue. We understand that copyright owners are mainly concerned that the defence provision would be</p>

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<p>of the Phonographic Industry (HK Group) Ltd.</p> <p><u>Hong Kong Cable Television Ltd.(11 April 2007)</u></p> <p><u>International Intellectual Property Alliance (IIPA)(13 March 2007)</u></p> <p><u>Entertainment Software Association(ESA) (10 April 2007)</u></p> <p><u>International Federation of the Phonographic Industry (Worldwide) Ltd. (14 March 2007)</u></p> <p><u>Hong Kong Video Foundation Ltd (HKVDF) (13 March 2007)</u></p> <p><u>Cable and Satellite Broadcasting Association of Asia (CASBAA) (12 April 2007)</u></p>	<p>proposed so that a user may absolve his liability if he can establish to the court's satisfaction that the act of circumvention is done for the purpose of carrying out a non-infringing act.</p> <p>The Joint Industry Response objects to the proposed defence provision which in its view would create loophole for hackers' activities.</p> <p>Cable TV refers to the Joint Industry Response dated 17 July 2006 and reiterates its concern on the linkage between circumvention liability and copyright infringement.</p> <p>IIPA commends the removal of the requirement on the plaintiff to prove "knowledge of copyright infringement". However, it states that there are still unresolved questions about the new defence provision, namely (1) why it should apply to circumvention of access controls on one work in order to make non-infringing use of another; and (2) why it should apply when the circumvention has the effect of facilitating infringement, even if that was not the purpose for doing so. ESA shares this view.</p> <p>IFPI (Worldwide) and HKVDF, while welcoming removal of the requirement on the plaintiff to prove "knowledge of copyright infringement", urge for the removal of the</p>	<p>abused by hackers. In our recent meetings with them, they have given us new information for consideration. For instance, it transpires that the music recording industry is developing new e-business models which may allow customers to access a website and listen to musical works without allowing the users to download the works. The industry is concerned that a hacker might claim there has been no copyright infringement in the circumstances. Once a TPM has been circumvented, the entire e-business system which requires heavy investment would then be broken and all the works might be subject to piracy activities.</p> <p>The proposed defence provisions have been carefully crafted to deal with hackers' activities. In our view, they would not create the loophole as alleged by copyright owners. That said, copyright owners' concerns are understandable given the heavy investments that they have put in to develop TPMs, and the serious loss the industries will suffer if the information on cracking the TPMs becomes widely available.</p> <p>On the other hand, we remain of the view that users' legitimate interest in using copyright works under permitted acts should not be prejudiced by the anti-circumvention provisions. In particular, the education and</p>

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<p><u><i>Joint Submission from</i></u></p> <ul style="list-style-type: none"> ● <u><i>Hong Kong Publishing Federation Ltd.</i></u> ● <u><i>HKVDF</i></u> ● <u><i>IFPI(HK Group)</i></u> ● <u><i>Television Broadcasts Ltd</i></u> <p><u><i>(4 April 2007)</i></u></p> <p><u><i>International Association of Scientific, Technical & Medical Publishers (STM)</i></u></p> <p><u><i>(dated 16 April 2007)</i></u></p>	<p>proposed defence provision as they consider that the defence provision would weaken the effectiveness of the prohibition against circumvention. CASBAA shares the view.</p> <p>HKVDF raises the following points -</p> <p>(a) Given that digital piracy could pose a serious problem to the copyright industry, the threat of serious loss caused by digital piracy is sufficient to justify the deprivation of the user to commit an act of circumvention for fair dealing of a digital work. This is because most of the acts of circumvention would infringe copyright;</p> <p>(b) there is no need to provide defence for the act of circumvention for non-infringing purposes. This is because prohibition of circumvention will not affect fair dealing of copyright works as users can still exercise fair dealing in relation to the work available in analogue forms;</p> <p>(c) protection for TPM should be de-linked from copyright infringement as a matter of principle;</p> <p>(d) it considers that, with the defence provision included, the revised provision would require proof of copyright infringement for an act of circumvention and it is difficult to prove copyright infringement in the network environment.</p>	<p>library sectors have reflected to us that libraries and archives have an important function to preserve copyright works for knowledge dissemination and preservation. If the sole purpose of hacking a TPM is to carry out a permitted act under the Copyright Ordinance for archival and preservation related activities, they should not be held liable under the new section 273A. They are concerned that the removal of the defence provision would unduly affect their activities for archival and preservation purposes.</p> <p>Having further deliberated the matter, we propose to adopt a remedial approach to protect users' interests by providing exceptions under section 273H instead of providing a general defence provision as proposed in the CSAs earlier. This remedial approach is in line with the practice in other jurisdictions including Singapore and the US.</p> <p>Specifically, we will remove the defence provision under section 273A. This will make the act of circumventing any effective TPM civilly liable under the law. If the application of section 273A is likely to cause or has caused undue encroachment on users' legitimate interests, we will provide exceptions to the relevant provisions (in the form of subsidiary legislation made under section 273H) should</p>

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	<p>The Joint Submission (from HK Publishing Federation, HKVDF and IFPI (HK Group)) objects to the proposed defence provision and comments that –</p> <ul style="list-style-type: none"> (a) if a hacker cracks TPM-protected materials which contain copyright works as well as works in the public domain or which fall within the scope of fair dealing, he would not be liable; (b) the defence provision will require the copyright owners to prove that (i) the defendant circumvents the TPMs <i>and</i> (ii) the defendant has committed an act of copyright infringement, otherwise the investigative and enforcement efforts will be wasted if the defendant raise the defence later. As it is difficult to get quality evidence in the digital environment, the cost of investigation and enforcement will be prohibitively high. The proposed anti-circumvention provisions are therefore of no practical use. (c) it is very costly to develop TPM standard format for a particular industry. The industries will suffer serious loss if the information on cracking becomes widely available and is used by individuals at home under the cloak of fair dealing; (d) there is no need for users to circumvent in order to exercise fair dealing because they can exercise fair dealing use in relation to works in the analog hard copy form; 	<p>copyright owners fail to address users' concerns using voluntary measures. To safeguard users' interests, we will put on hold the commencement of section 273A until the first list of exceptions has been drawn up and enacted after consultation with copyright owners and users. In response to the education and library sectors' concerns, we consider it reasonable to provide an express exemption provision under section 273D so that section 273A would not apply to a specified library or a specified archive if the sole purpose of its act of circumvention is for the doing of the permitted acts under the Ordinance for preservation-related activities of libraries and archives. For details of the proposed CSAs, please refer to the paper on "Outstanding Committee Stage Amendments".</p>

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		<p>(e) other leading jurisdictions provide protection for TPMs per se without any linkage with copyright infringement.</p> <p>STM shares that view that the defence provision would pose a heavy burden for enforcement action and could be abused under the cloak of fair dealing. It suggests replacing the defence provision with a right to beneficiaries of exceptions to request information that would allow access.</p>	
4.3	<p><u><i>International Association of Scientific, Technical & Medical Publishers (STM)</i></u> <u><i>(16 April 2007)</i></u></p>	<p><u>Criminalization of the act of circumvention</u></p> <p>STM suggests introducing criminal liability against the act of circumvention of TPMs on a commercial basis.</p>	<p><u>Criminalization of the act of circumvention</u></p> <p>Article 11 of WCT and Article 18 of WPPT only require the contracting parties to provide adequate legal protection and effective legal remedies against circumvention of effective TPMs used to protect the copyright in works and the rights in performances.</p> <p>We propose that commercial dealing of circumvention devices and the provision of commercial circumvention services should be a criminal offence whereas the act of circumvention should be subject to civil liability. We believe that the proposed framework strikes a reasonable balance between the need to combat circumvention activities and the community's grave concern that the anti-circumvention provisions should not have</p>

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			undue adverse impact on consumers' legitimate use of copyright works, advancement in technology and research activities. This approach is in line with the practice in the UK.
4.4	<p><u><i>International Federation of the Phonographic Industry (Worldwide) Ltd.</i></u> <u><i>(14 March 2007)</i></u></p> <p><u><i>International Intellectual Property Alliance (IIPA)</i></u> <u><i>(13 March 2007)</i></u></p>	<p><u>The "trade or business purposes" element at section 273B(1)(b) and 273C(1)(e)&(f)</u></p> <p>IFPI(Worldwide) considers that the requirement that the act of distribution should be done for the purpose of or in the course of trade or business in section 273B(1)(b) would create problems in enforcement as traders would disguise their actions by selling small quantities of circumvention devices at a time. It will be difficult for right holders to prove the "trade or business" element. Such low-scale distribution of circumvention devices would render the protection against circumvention ineffective.</p>	<p><u>The "trade or business purposes" element at section 273B(1)(b) and 273C(1)(e)&(f)</u></p> <p>The formulation in section 273B(1)(b) which provides that a person would incur liability if he "distributes" circumvention device in a business context is in line with section 31(1)(c) of the Copyright Ordinance in relation to distribution of infringing copies of copyright works. It should be noted that "business" could include non-commercial or non profit-making activities. We do not consider it appropriate to delete the reference "for the purpose of or in the course of any trade or business" as this would mean that distribution or exhibition in public of a very small number of circumvention devices in a casual or private context may incur liability.</p> <p>However, we acknowledge copyright owners' concern that extensive distribution of circumvention devices might prejudicially affect their interests and remedies should be provided to them against such activities. We have therefore proposed earlier that a CSA should be made to amend section 273B so that any person who distributes (otherwise than for the purpose</p>

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		<p>IIPA considers that the requirement that “business” should consist of dealing in circumvention devices” at section 273C(e) and (f)(ii) would create a loophole whereby pirates camouflage their trafficking of circumvention devices with other business activities.</p>	<p>of or in the course of any trade or business) any circumvention device to such an extent as to affect prejudicially the owner of the copyright may attract civil liability.</p> <p>On IIPA's comments, it should be noted that the requirement that the trade or business should consist of dealing in circumvention devices does not require that the only goods traded by the defendant are circumvention devices. As long as his business consists of trading in such prohibited articles, his acts will come within the scope of the offence.</p>
4.5	<p><u><i>International Federation of the Phonographic Industry (Worldwide) Ltd. (14 March 2007)</i></u></p>	<p><u>“Prejudicial distribution of circumvention device at section 273B(1)(c)</u></p> <p>IFPI(Worldwide) opines that it would be unreasonably burdensome on right holders to prove prejudicial effect under the proposed section 273B(1)(c). The element of “prejudicial effect” could also be misinterpreted as allowing circumvention in all cases that do not have any clear and significant impact on the right holder, hence weakening the protection against circumvention.</p>	<p><u>“Prejudicial distribution of circumvention device at section 273B(1)(c)</u></p> <p>The formulation of section 273B(1)(c) is in line with the existing section 118(1)(f) [or the new section 118(1)(g) after amendment], which has been used to combat distribution of infringing copies over the Internet platform. Indeed, a number of successful convictions have been resulted. We understand that copyright owners are concerned that distribution of circumvention devices on the Internet platform would affect their interests. We trust that the new section 273B(1)(c) should be able to address such concerns and remedies will be available to them against such activities.</p>

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4.6	<u><i>International Intellectual Property Alliance (IIPA)(13 March 2007)</i></u>	<p><u>Exceptions for research into cryptography; security testing; protection of privacy; and protection of minors</u></p> <p>IIPA comments that exception for research into cryptography should not apply to copies which were obtained unlawfully. On the exceptions for security testing, protection of privacy and protection of minors, it suggests that these exceptions should not be available if the circumvention involves copyright infringement. On the exception to section 273C, IIPA notes that the exceptions for protection of privacy and protection of minors do not have the requirement of “working collaboratively” which exists for the exception for research into cryptography. It suggests including this requirement into the two exceptions to prevent the growth of a market in circumvention devices that are supplied for the ostensible purpose of exercising these exceptions.</p>	<p><u>Exceptions for research into cryptography; security testing; protection of privacy; and protection of minors</u></p> <p>The exception for research into cryptography seeks to ensure that the anti-circumvention provisions would not hinder technological development and advances in the state of knowledge in the field of cryptography. We have proposed CSAs to require that the exception may apply only if the research does not constitute an infringement of copyright and that it is necessary for the act of circumvention to be done in order to conduct the research. We do not think that a researcher who uses an infringing copy of a work for the purpose of conducting a cryptography research would be able to rely on the exception as he would not be able to satisfy the condition that the research does not constitute an infringement of copyright (sections 273D(3)(a)(i) and 273D(3)(b)(i)).</p> <p>On IIPA's suggestion to include the “no copyright infringement” requirement in the exception for security testing, we have pointed out in our previous response that there are practical difficulties for IT professionals who perform security testing for their clients to ascertain if the computer programs involved are non-infringing copy or whether their clients are lawful users of the programs. The suggestion</p>

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			<p>of IIPA would place an onerous burden on such IT professionals and may affect the normal operation of the IT professionals engaged in the field of security testing.</p> <p>The exceptions for protection of privacy and protection of minors under section 273F aim to ensure that traders and sellers of genuine anti-spyware or filtering software would not be caught under section 273C. The exceptions enable consumers to acquire such products in the market to protect privacy or to prevent their minors from gaining access to harmful materials on the Internet. The exceptions are carefully crafted with the "sole purpose test" to prevent possible abuse. In other words, only devices which have the sole purpose of protecting privacy or minors would fall within the exception. The inclusion of the "no copyright infringement" requirement for the two exceptions will be out of context. As regards the "working collaboratively" requirement, it is only relevant to the exceptions which permit software development activities to achieve interoperability or for purposes relating to computer security and research into cryptography. The intention is to allow a person who is working jointly with another person on the above projects (relating to interoperability of computer programs, computer security testing or research into</p>

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			<p>cryptography) to make or supply specific circumvention devices to the second-mentioned person to enable him to carry out the project. Anti-spyware or filtering software are usually commercially available products and hence the concept of “working collaboratively” is not applicable to the two exceptions.</p>
4.7	<p><u><i>International Intellectual Property Alliance (IIPA)(13 March 2007)</i></u></p>	<p><u>Exceptions at sections 273D(7) and 273E(10A)</u></p> <p>IIPA made the following comments –</p> <p>(a) the lack of definition for “market segmentation” would mean that the range of TPMs that could potentially be circumvented without attracting liability remains uncertain;</p> <p>(b) the exception at section 273D(7) allows act of circumvention in relation to parallel imported copies which were imported in violation of Hong Kong’s law;</p> <p>(c) section 273E(10A) would exclude circumvention device so long as such a device has the “sole purpose” of overcoming the technology that has a geographic market segmentation effect, even if the device may have the effect of circumventing other TPMs that have nothing to do with geographic market segmentation.</p>	<p><u>Exceptions at sections 273D(7) and 273E(10A)</u></p> <p>In the light of the concerns about the meaning of “market segmentation”, we have earlier proposed that “on a geographical basis” will be added after “market segmentation” for clarity.</p> <p>All along there is no liability under the Copyright Ordinance for any person to import parallel-imported copyright works for private and domestic use. Parallel imports of computer programs have been fully liberalized in our Copyright Ordinance since 2003. Furthermore, the Bill seeks to liberalize importation and/or use of parallel imported copies of all types of copyright works by business end-users (except for commercial dealing purposes; and for movies, TV dramas, musical sound or visual recordings, the liberalization does not apply if these works are used for public playing purposes). The exception which allows users to gain access to</p>

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			<p>parallel-imported copies is necessary. Otherwise, domestic end-users who are hitherto able to use parallel imported copyright works without incurring any liability would be prohibited under the new provision from doing so where regional coding is applied to a copyright work. Also, business end-users would not be able to benefit from the liberalization measures for parallel imports.</p> <p>It must be noted that the exception at section 273E(10A) is restricted by the "sole purpose test". That is, only those circumvention devices or services the sole purpose of which is to overcome regional coding or other TPMs with a similar effect would fall within the exception (e.g. all-area-code DVD players would be covered by this exception). In effect, devices that are capable of circumventing regional coding measures as well as copy-protection measures will not fall within the exception.</p>
4.8	<p><u>Joint Industry Response</u></p> <ul style="list-style-type: none"> ● Hong Kong Cable TV Ltd. ● Television Broadcasts Ltd. ● International Federation of the Phonographic Industry (HK Group) Ltd. 	<p><u>Rights of the creators of technological protection measures</u></p> <p>The Joint Industry Response comments that the Administration fails to provide protection for the rights of the creators of technological protection measures (TPMs) as reflected by the proposed amendments to the new section 273(1), section 273D(1) and 273D(3). It considers that their rights must also be included for the proper</p>	<p><u>Rights of the creators of technological protection measures</u></p> <p>The anti-circumvention provisions aim to protect copyright rather than TPMs <i>per se</i>. In line with this objective, persons having the rights to seek remedies under section 273A and 273B are the copyright owner, the exclusive licensee of the copyright owner, and any other person who, with the concerned copyright owner's authority, issues</p>

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		protection of TPMs.	or makes available copies of the copyright work to the public, or broadcasts or includes the work in a cable programme service. As regards the exceptions at section 273D(1) (achieving interoperability of independently created computer programs) and section 273D(3) (research into cryptography), they seek to ensure that legitimate activities which do not infringe copyright should not be impaired by the new provisions. Similar exceptions are also found in the copyright laws of the US and Singapore. Indeed, our proposed amendments to section 273D(1) and (3) are made in response to some owners' suggestion to tighten up the exception provisions.
4.9	<p><u>Joint Industry Response</u></p> <ul style="list-style-type: none"> ● Hong Kong Cable TV Ltd. ● Television Broadcasts Ltd. ● International Federation of the Phonographic Industry (HK Group) Ltd. <p><u>International Federation of the Phonographic Industry (Worldwide) Ltd. (14 March 2007)</u></p> <p><u>International Intellectual Property Alliance (IIPA)(13</u></p>	<p><u>Exception to section 273C for time-shifting purpose</u></p> <p>The Joint Industry Response is of the view that broadcast stations should be allowed to employ TPMs which allow one-time viewing only for the purpose of time-shifting. Any further copying and distribution of the recordings will be prohibited by the TPMs. In this way, the purposes of time-shifting will not be defeated while safeguards against unauthorized copying or distribution are provided.</p>	<p><u>Exception to section 273C for time-shifting purpose</u></p> <p>The proposed exception aims to ensure that users' legitimate interests in recording broadcast and cable programmes for private time-shifting purposes would not be jeopardized.</p> <p>In response to the Joint Industry Response, we wish to point out that the new section 273F(12) only excludes TPMs which prohibit recording upon its reception or which prohibits <i>in all circumstances</i> the subsequent viewing or listening of a recording made upon its reception. In other words, TPMs that allow one-time copying and viewing (but which prohibit further copying or distribution of</p>

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<p><u>March 2007)</u></p> <p><u>Hong Kong Cable Television Ltd.(11 April 2007)</u></p> <p><u>Cable and Satellite Broadcasting Association of Asia (CASBAA) (12 April 2007)</u></p>	<p>CASBAA strongly objects to the exception for time-shifting. CASBAA comments that the proposed CSA (i.e. the exception will not apply if the TPM in question is applicable solely to a broadcast or cable programme provided via a video-on-demand service) will not address the industry's concerns for the following reasons –</p> <p>(a) the same TPM may be applied across a variety of products and services. Hence the hacking of a TPM ostensibly for time-shifting purposes could destroy protection for a variety of services;</p> <p>(b) the global content industry is moving towards adoption of common TPMs that may be used</p>	<p>the recordings) will remain protected by the criminal provision against anti-circumvention.</p> <p>The broadcasting industry earlier questioned the justifications for applying the exception to TPMs applied in relation to programmes provided via video-on-demand/pay-per-view services since users could choose to view these programmes at a time convenient to them. In response, the Administration proposes to make a CSA so that the exception would not apply if the TPM in question was applied solely to a broadcast or cable programme provided via a video-on-demand service.</p> <p>We understand that, despite the CSA, the industry still has grave concern over the exception. Having re-considered the new information available to us, including the industry's practices of using TPMs to protect broadcast and cable programmes and the underlying works (e.g. films), we agree that the exception may indeed pose problems given the practical situation facing the industry. At the same time, in our meetings with the broadcasters, we were assured that the broadcasting industry generally appreciated users' legitimate interests in recording broadcast and cable programmes for private time-shifting purposes. TPMs might likely be used to control the use of their digital programmes in a way which allowed recording upon reception by viewers, but</p>

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	<p>across all transmission platforms. The loophole created by the exception would allow piracy syndicates to develop and sell circumvention systems in Hong Kong. Should that happen, developers of DRM systems and sellers of premium content will avoid distributing their products in Hong Kong.</p> <p>(c) once an individual broadcaster chooses to restrict recording of a TV programme (i.e. denying private time-shifting altogether), it would give hackers an open invitation to circumvent the TPM protecting it. Under the exception provision, commercial dealing of the concerned circumvention device would not attract criminal liability. The piracy syndicates would exploit this loophole, rendering the entire DRM system no longer usable for protecting digital content delivered by other means. This would have the effect of penalizing the entire industry for the decision of a single broadcaster.</p> <p>CASBAA suggests that, instead of providing an exception provision now, the Administration could follow the approach adopted by Singapore, i.e. to take action only if a problem arises in future. Singapore has a mechanism in place to provide new exemptions in relation to the act of circumvention when the need arises. Another alternative is to require broadcasters not to use</p>	<p>controlled the subsequent copying and distribution of the recorded programmes by digital means. In view of the above, we propose to remove the entire exception and delete section 273F(12) in the Bill (and section 273F(12A) proposed in the CSAs).</p> <p>We would like to point out that the proposed section 273H provides a mechanism under which SCIT may (by way of notice published in the Gazette) exclude from the anti-circumvention provisions any work, device or service if the use of such work, device or service has been seriously impaired as a result of the anti-circumvention provisions although their use does not lead to copyright infringement. If users' legitimate interests in recording broadcast and cable programmes for private time-shifting purposes are seriously impaired in future, we hope that the industry could come up with suitable voluntary arrangements to address users' concerns. Failing that the mechanism under section 273H may be invoked. Any TPM that is so excluded would no longer be protected by the criminal provisions against circumvention.</p>

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		<p>digital rights management (DRM) systems to interfere with time-shifting.</p> <p>IFPI(Worldwide) considers that the exception for private time-shifting as revised is still very broad and calls for the removal of the entire exception.</p> <p>IIPA comments that the exception as revised still applies to pay-per-view broadcasts, subscription TV or cable programmes that are transmitted at pre-determined times and would in effect reduce incentives to offer programmes through these channels or would tend to increase the price of such services as they would have to be offered on the assumption that the programmes would be copied for later viewing. IIPA urges that the scope of the exception be further narrowed to exclude these services from the exception.</p> <p>Cable TV and CASBAA welcome the Administration's proposal to remove the exception for private time-shifting.</p>	<p>The comments raised by IFPI(Worldwide) and IIPA have been overtaken by events since we have proposed to remove the exception at section 273F(12) (see above).</p> <p>Noted.</p>
4.10	<p><u>Hong Kong Video Foundation Ltd (HKVDF) (13 March 2007)</u></p> <p><u>International Intellectual Property Alliance (IIPA)(13</u></p>	<p><u>Section 273H</u></p> <p>HKVDF criticizes that the introduction of section 273H will only serve and maximize the self-interests of a small number of people who are in research and/ or academic position at the</p>	<p><u>Section 273H</u></p> <p>Section 273H confers rule-making power on SCIT so that possible abuses arising from the use of TPMs to the detriment of legitimate users of copyright works could be prevented. Before</p>

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<p><u>March 2007)</u></p>	<p>expense of social costs without bringing net social benefit to Hong Kong. That said, HKVDF comments that the mechanism under the proposed section 273H serves as a good cushion for dispute or claim on the scope of the permitted acts among stakeholders.</p> <p>IIPA was concerned that section 273H would confer seemingly unbounded power on SCIT to recognize an unpredictable range of additional exceptions without necessarily taking into account the benefits delivered to consumers through the deployment of TPMs. It suggests tightening up the section considerably.</p>	<p>exercising the rule-making powers, SCIT would consider submissions of both copyright owners and users and all the facts and circumstances of the case in order to strike a reasonable balance between conflicting interests. The relevant stakeholders will be consulted and given the opportunity to make submissions before a decision is made.</p> <p>We do not agree that section 273H confers unbound power to SCIT as the section stipulates that SCIT may make the regulation only if (a) he is satisfied that any use of or dealing with the work or performance, class of works or performances, or class of devices, products, components, means or services, as the case may be, does not constitute or lead to an infringement of copyright or the rights in performances, and (b) that any such use or dealing has been adversely impaired or affected as a result of the application of the anti-circumvention provisions. The notice to be made by SCIT is a piece of subsidiary legislation subject to negative vetting of the Legislative Council.</p> <p>Section 273H provides a mechanism under which future exceptions to the anti-circumvention provisions might be made by subsidiary legislation and will help to cater for future technological developments. A similar</p>

(IV) Anti-circumvention provisions			
	Organizations / Individuals	Views / Concerns	Administration's Response
			mechanism is also found in the copyright laws of the US and the Singapore. Indeed, section 273H is modeled along the formulation of the Singapore provision.
4.11	<u>Hong Kong Institute of Certified Public Accountants (HKICPA)</u>	HKICPA considers that criminalizing commercial dealers of circumvention tools or providers of associated services a more acceptable approach than criminalizing unauthorized domestic reception of subscription television programmes. It therefore finds the proposals in clause 56 broadly acceptable, given the various exceptions to the offences that are provided for.	Noted.

(V) Parallel Importation			
	Organizations / Individuals	Views / Concerns	Administration's Response
5.1	<p><u>Trade organizations</u></p> <ul style="list-style-type: none"> ● Federation of Hong Kong Industry (FHKI) ● Hong Kong Retail Management Association (HKRMA) <p><u>Hong Kong Institute of Certified Public Accountants (HKICPA)</u></p> <p><u>Hong Kong Record Merchants Association Ltd (8 March 2007)</u></p>	<p>FHKI expresses regrets over the Administration's proposal to put the criminal sanction period for parallel importation at 12-15 months, rather than reducing it to 9 months as originally proposed. It was concerned that such a lengthy ban would overly protect the interests of exclusive licensees at the expense of local consumers' interests. It recommended that the ban be gradually phased out in 18 months.</p> <p>HKRMA supports shortening of the ban on parallel imports of copyright works. In its view, the phasing out of the criminal sanction will encourage competition, demolish trade barriers, and increase consumers' choices.</p> <p>HKICPA supports complete liberalization of parallel importation. It comments that the liberalization measures in the Bill are moving in the right direction towards liberalization but do not go far enough.</p> <p>Hong Kong Record Merchants Association Ltd pointed out that the local optical disc retail sector has been declining seriously. This is because people are attracted to go to the Mainland to purchase the cheaper optical disc there, while the local retailers are prohibited by the law to sell parallel imported copies. The Association suggests removing the entire</p>	<p>We note users' request for further liberalization of parallel importation. In considering the extent of liberalization, we also need to balance the interests of copyright owners.</p> <p>Please see our response above.</p>

(V) Parallel Importation			
	Organizations / Individuals	Views / Concerns	Administration's Response
		<p>criminal sanction period, or at least reducing it considerably (such as to 2 months).</p> <p>The Association also opines that copyright owners have not responded actively to alleged infringing cases and do not provide easy-to-use service for enquiry on copyright issue. It suggests copyright owners to provide an easy-to-use service for public enquiry on the legitimacy of certain products.</p> <p>The Association supports the new provisions which seek to facilitate proof of copyright subsistence and proceedings related to copyright.</p>	<p>We urge copyright owners to provide convenient and responsive service in handling public enquiries on whether certain parallel imported copyright works could be imported and sold.</p> <p>Noted.</p>
5.2	<u>Heads of Universities Committee (HUCOM)</u>	<p>HUCOM stresses that it is important and necessary to liberalize parallel importation for use by educational establishments and libraries. It explains that the universities in Hong Kong have to purchase library items through major international academic library book vendors and cannot afford to check with local agents on the availability of exclusive licensees for supplying the required items before placing orders with vendors because –</p> <p>(a) unlike international academic book vendors who specialise in dealing with academic materials, local book publishers do not have the capacity to sell materials from publishers</p>	<p>We note the concerns of the libraries of universities in Hong Kong. We fully recognize the importance of giving greater flexibility and wider choices for educational establishments and libraries in sourcing materials for educational and library purposes. We do not intend to make any CSA to alter our original proposal to remove the civil and criminal liability pertaining to the educational and library use of parallel imports of copyright works by libraries and educational establishments.</p>

(V) Parallel Importation			
	Organizations / Individuals	Views / Concerns	Administration's Response
		<p>worldwide and provide the extensive range of value-added professional specialist services such as pre-processing of the books and provision of out-of-print or obscure foreign titles. Besides, many local sellers are not interested in supplying scholarly books to university libraries as they find it non-profitable;</p> <p>(b) many items are purchased via “approval plans”, i.e. universities convey its academic requirements to the vendor who would then air-freight books immediately upon publication to the library on a sale or return basis. Such services are vital to secure valuable, relevant academic research titles the soonest possible;</p> <p>(c) scholarly books are very limited in supply and seldom reprinted. Prior enquiry with local agents will cause undue delay to the procurement of the needed items which may be out of print and unavailable anywhere by the time universities receive, from the local sellers, notification that they do not supply the items;</p> <p>(d) universities need to import copies of multimedia products from overseas suppliers since the contents of the imported copies may be different from local editions. Some of the overseas editions may not be available from local suppliers and could only be imported.</p>	

(V) Parallel Importation			
	Organizations / Individuals	Views / Concerns	Administration's Response
5.3	<p><u>Publication industry</u></p> <ul style="list-style-type: none"> Hong Kong and International Publishers' Alliance (HKIPA) <i>Joint submission from</i> <ul style="list-style-type: none"> <i>– Hong Kong Book & Stationary Industry Association</i> <i>– Educational Booksellers' Association</i> <i>– Hong Kong Book & Magazine Trade Association</i> <i>(30 March 2007)</i> <p><u>Joint Industry Response</u></p> <ul style="list-style-type: none"> Hong Kong Cable TV Ltd. Television Broadcasts Ltd. International Federation of the Phonographic Industry (HK Group) Ltd. <p><u>Hong Kong Comics and Animation Federation</u></p> <p><u>Motion Picture Industry Association (MPIA) (4 April 2007)</u></p>	<p><u>Criminal sanction period</u></p> <p>HKIPA opines that there is no need to change the law in this area and suggests the Government to withdraw the proposal to shorten the criminal sanction period.</p> <p>The Joint Industry Response considers the reduction of the criminal sanction period from the existing 18 months to 12-15 months unacceptable. In its view, such a proposal is highly detrimental to the legitimate interest of the right owners. It suggests maintaining the existing period as 18 months, if not extending it to 24 months.</p> <p>The Hong Kong Comics and Animation Federation reiterates the need to retain the 18-month criminal sanction period, taking into account the lead time needed to obtain licence from the Japanese licensors and to arrange translated comic titles. The Federation opines that 15-month period is only acceptable if the Administration is determined to relax the existing restriction against parallel importation and in view of the Administration's proposal to facilitate enforcement against parallel imports.</p> <p>The joint submission from three publishing associations opines that reduction of the criminal sanction period would lead to influx of cheap parallel imported copies, which will seriously harm the business environment for</p>	<p><u>Criminal sanction period</u></p> <p>We understand the copyright owners' grave concerns about the proposed shortening of the criminal sanction period for parallel importation. On the other hand, we should not ignore the demands in the community for liberalization of parallel imports.</p> <p>Having further deliberated the matter, we now decide to introduce a CSA to the new section 35(4)(b) to change the criminal sanction period to 15 months (as opposed to maintaining the existing 18-month period as strongly demanded by the copyright owners). A consequential amendment will be made to the new section 35B(5)(a). For a more detailed account of our deliberations and the wording of the concerned CSAs, please refer to the paper on "Outstanding Committee Stage Amendments".</p>

(V) Parallel Importation			
	Organizations / Individuals	Views / Concerns	Administration's Response
		<p>the retailers of published works. As the influx of parallel imports will make it easier for pirated copies to disguise as parallel imported copies, retailers may fall into the criminal net inadvertently. Besides, to stop parallel imports at source, copyright owners may refuse to grant licence to an area which exports parallel imported copies to its neighboring areas, hence resulting in unavailability of products to the public. The Joint Submission strongly objects to removal or any reduction of the criminal sanction period.</p> <p>MPIA opines that the suggestion to reduce the criminal sanction period to 2 months would lead to cutthroat price competition, hence wiping out the local licensing industry which is one of the major distribution windows and revenue sources of local film producers. It points out that the business hardship faced by the local video retail sector are not caused by the criminal sanction period, but by a combination of piracy, BT downloading and difficulties in enforcement against parallel importation. The removal or reduction of the criminal sanction period is not a solution to the retailers as it will not stop people from going to the Mainland to buy cheaper optical discs. MPIA reiterates its position to retain the 18-month criminal sanction period.</p>	

(V) Parallel Importation			
	Organizations / Individuals	Views / Concerns	Administration's Response
		<p><u>Enforcement Facilitation Measures</u></p> <p>One of the proposed enforcement facilitation measures is the introduction of a presumption, namely that any optical disc which does not bear a licensed manufacturer's code will be presumed to be an imported copy. The Joint Industry Response is concerned that this presumption might be in breach of the national treatment and most favoured nation treatment of the World Trade Organization as the right owners always have the right to have their products made anywhere in the world.</p> <p>On the facilitating measures, the Hong Kong Comics and Animation Federation agrees with the wordings of the proposed facilitating provisions. It however suggests clarifying that the presumption should also apply to the place of publication or printing, in such a way that it shall be presumed to be imported copy if the copy contains a description of the manufacturer, publisher or printer whose address is not located in Hong Kong.</p>	<p><u>Enforcement Facilitation Measures</u></p> <p>The effect of the proposed CSA is that the absence of a Hong Kong SID code on an optical disc will give rise to a presumption that the copy of copyright work stored in the disc concerned is imported. The purpose is to facilitate proof of importation. It does not have the effect of conferring differential treatment on copyright owners from different jurisdictions. Hence, we believe there is no question of inconsistency with the national treatment and most favoured nation treatment requirements under the WTO TRIPS Agreement.</p> <p>On the Comics and Animation Federation's specific comments on the presumption provisions, we wish to point out that the presumption will apply where a label or marking on a book indicates that it was printed in a place outside Hong Kong. The address of the printer or manufacturer will be a piece of relevant information that the court will consider in determining whether the description satisfies the elements of the presumption provisions. Whether a particular description is an indication sufficiently clear for the presumption to apply is a matter for the court to determine having regards to the facts of the specific case.</p>

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<p><u>Hong Kong Institute of Certified Public Accountants (HKICPA)</u></p>	<p><u>Incorporation of requirements of the World Intellectual Property Organisation (WIPO) Internet Treaties</u> HKICPA suggests clarifying that the protection of moral rights of a performer in relation to “derogatory treatment” of his performance would not undermine freedom of expression through parody, satire, etc.</p>	<p><u>Incorporation of requirements of the World Intellectual Property Organisation (WIPO) Internet Treaties</u> The main purposes of introducing performers’ right to object to “derogatory treatment” is to bring the Copyright Ordinance in line with the latest international standards as contained in the WIPO Internet Treaties.</p> <p>Under the proposed section 272E, a performer would only be entitled to object to any addition to, deletion from, alteration to or adaptation of his performance if such acts amount to distortion, mutilation or other modification that is prejudicial to the reputation of the performer. Only aural performances are covered by the section. Furthermore, where the treatment made is consistent with normal editorial purpose or for the purpose of reporting current events, the performer would have no right to object to such treatment (proposed section 272G). Accordingly, the mere fact that a person parodies or satirises a performance does not necessarily mean that the performer has a right to object to the parody or satire. We consider that the addition of the performer’s right to object to “derogatory treatment” of his performance would not undermine freedom of expression through parody, satire, etc.</p>

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	<p><u>Time limit for prosecutions</u> HKICPA is not convinced of the need to extend the time limit for prosecution and suggests retaining the existing limit.</p> <p><u>Proof of absence of licence from copyright owner</u> HKICPA opines that there must be strong evidence to support the use of affidavits to prove elements of the offence. It asks whether affidavits are generally accepted as proof by courts in similar circumstances overseas.</p>	<p><u>Time limit for prosecutions</u> The proposal to pitch the time limitation period at three years from the date of commission of the offence is predicated on the basis of enforcement experience. With the frequent need to obtain evidence from overseas right-owners, the growing complexity of copyright-related offences and possible involvement of triad and syndicate elements, the Customs and Excise Department (C&ED) found it increasingly difficult to complete investigation into these offences to enable prosecution actions to proceed within the existing time limit.</p> <p><u>Proof of absence of licence from copyright owner</u> When prosecuting a criminal act under section 118 (e.g. making, selling or distribution of infringing copy) of the Copyright Ordinance, the prosecution has to prove, among other things, that the offending acts were done without the licence of the copyright owner. Although we understand from copyright owners that they do not license selling or distribution of infringing copies in general, they may need to give evidence personally in court if this element of the offence is challenged by the defendant. Where the concerned copyright owners are residing overseas, it may not be easy to obtain the owners' undertaking to fly to Hong Kong to appear before the court to testify.</p> <p>In view of the above, we propose to introduce new provisions to section 121 of the Copyright Ordinance so that an affidavit may be sworn stating on behalf of</p>

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		<p>the copyright owner that the copyright owner has not licensed the defendant to do the infringing acts. Such a statement, subject to certain specified conditions, would be admitted in court without further proof in the proceedings under section 118. This facilitation measure obviates the need to require the copyright owner to give evidence personally in court to establish that the defendant's act was not done with the licence of the copyright owners. We would like to point out that if the court (whether on its own motion or upon the application of the defendant) considers that there is a genuine dispute on whether a licence has been granted, it may require the deponent to attend before the court and give evidence. We are not aware of other jurisdictions providing for the use of affidavit to prove the absence of licence from copyright owner.</p>