



**SUBMISSION OF INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
on COPYRIGHT (AMENDMENT) BILL 2004**

August 18, 2004

The International Intellectual Property Alliance (“IIPA”), the private sector coalition representing the copyright industry associations listed below, appreciates this opportunity to submit its comments on the Copyright (Amendment) Bill 2004 (“the Bill”).

IIPA and its members have been working for stronger copyright laws and enforcement around the world for the past two decades. IIPA has participated actively in debates concerning the development of copyright law in Singapore throughout this period. IIPA members currently include the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (I.F.T.A.), the Motion Picture Association of America (MPAA), and the Recording Industry Association of America (RIAA).

I. INTRODUCTION

In the following submission, IIPA concentrates on those changes needed to the Copyright Act in order for Singapore to fully comply with its obligations under the United States-Singapore Free Trade Agreement (“FTA”). IIPA and its members have actively supported the FTA and commend the drafters of the Bill on their efforts to bring Singapore law into compliance with it.

We note that there are many provisions in the Bill which are in no way required by the FTA. We have done our best to comment on these provisions as well. We have also identified some provisions of the Copyright Act that are not addressed by the Bill but that we believe may require amendment in order to achieve full FTA compliance. However, we do not consider our survey of these unamended provisions to be comprehensive.

Due to the complexity of the Bill, as well as of some of the issues presented by the FTA itself, we hope that you will consider these comments as preliminary. We would welcome the opportunity to supplement them. This would include, but not be limited to, preparing proposed specific amendatory language for those aspects of the bill where we have been unable to do so in the short time period provided by the current public comment exercise.

Where current law, or the provisions of the Bill, include separate and parallel provisions regarding works, on the one hand, and other subject matter of copyright protection, on the other, we have endeavored to reference both sets of provisions. Where, however, we have failed to do

so, we request that our comments concerning provisions regarding works also be applied to the parallel provisions elsewhere in the Bill (or the current Act, as the case may be).

In part II of this submission, we address provisions of the Bill (and some unamended aspects of current law) dealing primarily with exclusive rights and with exceptions to and limitations on those rights. Part III deals with some specific issues peculiar to the Bill's treatment of exclusive rights in sound recordings as contrasted with works. Part IV concerns provisions for enforcement of copyright, particularly criminal offenses and statutory damages. Part V addresses the liability of Internet service providers (ISPs). Part VI comments on the Bill's provisions on technological protection measures (TPMs) and rights management information (RMI).

II. RIGHTS, EXCEPTIONS, AND RELATED PROVISIONS

A. Reproduction right – and exceptions

IIPA is pleased to note that the Bill broadens existing provisions on the reproduction right to make it clear that it covers digitization (item 4, amending Section 15) and storage in a medium from which a work can be reproduced (item 6, amending Section 17). However, the Bill also includes a new exception for “temporary reproduction made in the course of a communication” (item 12, enacting new Section 38A, for works; item 24, enacting new Section 107F, for “audio-visual items,” including sound recordings). In IIPA’s view, this exception is not necessary, and it is certainly not required in order for Singapore to bring its law into conformance with the FTA obligations. The liability of intermediaries and similar parties for temporary copies made in the course of a communication is better handled by remedial limitations (such as those recognized in items 43 and 47 of the Bill) than by declaring certain unauthorized copies per se non-infringing. We urge that these provisions be deleted from the Bill.

At a minimum, these new provisions should be narrowed to reflect the fact that many unauthorized communications of protected materials received in Singapore will originate outside the jurisdiction, and therefore will not be caught by new Sections 38A(2) and 107F(2), which deny the exception to copies made in the course of a communication whose “making itself constitutes infringement.” As discussed in the next point of this submission, there could be circumstances in which a communication is clearly unauthorized but no one in Singapore (or within the reach of Singapore law) can conclusively be determined to have “made” the communication. The making of temporary copies in the course of such a communication should not be declared non-infringing. Sections 38A(2) and 107F(2) should cover unauthorized communications originating outside Singapore on the same basis as infringing communications.

The Bill also fails to correct the excessively broad exception to the reproduction right contained in Section 193E of existing law, for so-called “user caching.” Unauthorized transient or incidental copies made by users of material available on a network should be defined as non-infringing, if at all, only to the extent that their making is technically necessary for use of a lawful authorized copy of the material.

B. Communication right

The Bill creates an exclusive communication right for works, including (and subsuming) the existing broadcast and cable program rights, and adding a making available right (item 2(b), amending Section 7). However, the Bill also specifies (item 5, amending Section 16) that “the person responsible for determining the content of the communication at the time the communication is made” is the person deemed to have exercised this right. As noted above, this amendment would lead to the situation in which an unauthorized communication of a work occurs in Singapore but no one in Singapore can be considered to have made it, regardless of their state of knowledge that the communication contains infringing material. This not only undermines the communication right but also erodes the incentives for cooperation between ISPs and copyright owners to combat online piracy (as discussed more fully in a later section of this submission). IIPA recommends that item 5 be deleted from the Bill.

C. Authorisation liability

As noted in more detail in a later section of this submission, Singapore appears to be relying in great part on its doctrine of authorisation liability to provide the legal incentives that it are required by FTA Article 16.9.22.a. In this regard, it is noteworthy that the Bill does not include any provisions codifying or strengthening authorisation liability, but does include several that detract from it, or, more precisely, that rule out the imposition of authorisation liability in certain circumstances.¹ These immunities from liability are not required in order to comply with the FTA, and IIPA urges that they be deleted from the Bill and made the subject of further study before they are enacted. If this is not done, IIPA urges that these immunities be drawn more narrowly.

Specifically, item 3 (amending Section 9) immunizes one “who provides any facility for doing or facilitating” an infringing act from any authorisation liability “merely because” someone uses that facility to infringe.² It should be made clear that this immunity does not extend to any claim beyond that in which authorisation liability is premised solely upon the fact that the other party commits an infringement using the facility. For example, an authorisation infringement claim against a copyshop owner based on the fact that photocopying machines in a copyshop are left unsupervised should not be barred by this immunity. Certainly any element of actual or constructive knowledge, notice, negligence, or financial benefit to the provider of the facilities should be sufficient to dispel the immunity under proposed Section 9(3).

Item 22 (enacting new Section 105A) is a more targeted provision dealing with copies of audio-visual items made on machines (specifically including computers) installed in libraries and archives. While this provision is not required by the FTA, we recognize that it is proposed in order to complement Section 34 of existing law (which applies to works). We note that it applies only to the reproduction right and is phrased more narrowly as providing an immunity only against a claim that the library or archives is liable “by reason only that the copy was made on that machine.” This provision could be a useful model for a narrower version of item 3.

D. Exceptions to protection

The Bill expands exceptions to protection in four main areas:

- (1) Fair Dealing: Items 10 and 11 (amending Section 35 and repealing Sections 36 and 37) consolidate existing provisions that allow for fair dealing for the purpose of research, private study, criticism, review, or news reporting. (Items 25 and 26 make parallel changes for fair dealing in subject matter other than works.) Item 10(e) also adds to the current list of four factors for consideration in fair dealing cases (which closely track the U.S. law’s fair use

¹ See for example proposed Section 193DA(6), discussed in the section of this submission on ISP liability.

² It should be noted at the outset that this amendment sweeps far more broadly than can be justified under the Agreed Statement to Article 8 of the WIPO Copyright Treaty (WCT), which concerns only the right of communication. Proposed Section 9(3) as added by the Bill is an immunity from all authorisation liability, not solely from authorisation of infringement of the communication right.

factors) a fifth factor: “the possibility of obtaining the work or adaptation within a reasonable time at a reasonable price.”

IIPA notes that nothing in the FTA requires Singapore to make these changes to its law, and that they may have complex and unforeseen consequences. Accordingly, we recommend that they be dropped from this legislation and given further study. While we do not object in principle to the consolidation of existing fair dealing provisions, we must object strenuously to item 10(e), which appears to embody the implication that a copyright owner’s pricing and distribution decisions could somehow convert an infringement into a fair dealing. We seriously doubt whether such a proposition is consistent with international copyright law standards to which Singapore has long been subject, and urge that this proposition not be enacted into law without considerable further study of its impact on Singapore’s international obligations.

(2) Educational uses: Item 2 (amending Section 7) expands the existing definition of “educational institution,” while another provision of the same item modifies the existing definition of a “reasonable portion” of a work in electronic form that can be copied (in some circumstances) within educational institutions: instead of less than 10% of the “total number of bytes,” the boundary becomes “10% of the content.” (The “reasonable portion” criterion applies to some other statutory exceptions as well.) Additionally, item 8 of the bill amends Section 23 to provide that exempt performances of works may be carried out not only by students but by the educational institution itself. The impact of these expanded exceptions on right holders is uncertain, and IIPA recommends that these provisions, none of which are required by the FTA, be dropped from the Bill while their impact is studied further.

(3) Libraries: Item 16 amends Section 45 to allow libraries to make digital items in their collection “available online within the premises” so long as users “cannot, by using equipment supplied by the library or archives,” make electronic copies or communicate the material. Another provision of the same item specifies that libraries can provide patrons with electronic copies (of hard copy material) upon request under the same circumstances in which they can furnish (e.g.) photocopies, so long as appropriate warnings are communicated.

While these changes (none of which is required by the FTA) might be desired by users, they might well be achieved in the marketplace through negotiation of license terms between libraries and copyright owners. Unless and until these marketplace solutions appear to be unavailable, IIPA urges Singapore’s legislators to stay their hand. Furthermore, allowing libraries to network and digitize materials in their collection without authorisation or license creates a significant risk of abuse. If an exception along the lines of proposed Section 45(7A) were to be implemented as proposed in item 16 of the Bill, it should be preceded by transparent and enforceable standards for determining when a library’s system meets the criterion of making protected materials available “in such a manner that

users cannot” use library-provided equipment to make or disseminate copies. Only when a library had demonstrated to an appropriate technical arbiter that it had fulfilled this criterion should it be privileged to put its collection online within its premises without even seeking the permission of the copyright owner.

(4) Software- and database-specific exceptions: Item 13 of the Bill creates new exceptions specific to computer programs for (1) decompilation for interoperability (proposed Section 39A); (2) “observing, studying, and testing” (proposed Section 39B); and (3) error correction and other “copying or adapting necessary for lawful use” (proposed Section 39C). There is also a provision allowing a lawful user of a database to do “anything necessary for the purposes of access to and use of” the database (proposed Section 39D).

None of these new exceptions is required for FTA compliance, and all would benefit from further study. IIPA’s initial impression is that the most problematic of the software exceptions appears to be proposed Section 39C, since “error correction” is not defined and the exception is extremely open-ended. Proposed Section 39D raises concerns because it could be read to allow unauthorized access (or at least access in excess of the authorisation in a license) to a database. Indeed, since this provision (unlike proposed Section 39C) cannot be contracted around (see proposed Section 39D(2)), it would appear to make it problematic for a copyright owner to seek to enforce a license term that provides for less than complete and total access to a database, even though such more limited licensing might otherwise be available to users on more attractive terms. This provision clearly needs more thought and study before it is enacted.

E. Additional problematic provisions of existing law

While IIPA has not comprehensively surveyed each provisions of current Singapore law for compliance with obligations of the FTA, we have identified certain provisions which appear problematic in terms of FTA compliance, yet which are not directly addressed by the Bill. We urge the drafters to give further consideration to ways to correct the following apparent deficiencies³:

(1) Section 199 immunizes parties who make unauthorized public performances or cable re-transmissions of works included in authorized broadcasts or cable programs. While in item 44 the Bill helpfully clarifies that this immunity is not applicable to making works available over the Internet, the underlying provision remains problematic. Specifically, Section 199(3) may violate Singapore’s obligation under Berne and TRIPS to recognize an exclusive right to control re-transmissions of works, or at a minimum to provide a right of equitable remuneration for such uses, and the rest of the section represents a serious encroachment on the public performance rights granted under Berne

³ The first three provisions listed may run afoul of FTA Article 16.4.10. The last one may implicate FTA Article 16.9.7.

to owners of copyright in works contained in broadcasts (including the audio-visual works treated in Singapore as "cinematograph films").

(2) Section 114 of the Act provides a blanket exception for copying of any work (including sound recordings and cinematograph films) contained in a radio or TV broadcast or cable transmission for "private and domestic use." This exception appears to apply to librarying as well as to time-shifting; to subscription or scrambled transmissions as well as those received "in the clear"; to unauthorized as well as authorized broadcasts or cablecasts; and to digital as well as analog copying (of either digital or analog transmissions or broadcasts). Furthermore, the scope of "private and domestic use" is not clearly defined. For example, making a copy of a work (or of other protected material) available on a non-commercial basis for further copying might not be inconsistent with "private and domestic use" status. Indisputably, such activity, when carried out over digital networks, could have a devastating impact on normal exploitation of these materials and the legitimate interests of right holders. The growth of digital broadcast and transmission technologies, as well as the growing ubiquity of digital home recording systems of all kinds, call out for re-examination of the impact of this exception; but the Bill leaves this section unchanged.

(3) Section 198 of the Act provides a very broad exception to protection for any use of a protected work "done for the service of the Government," a status that may be determined retroactively and that even may be bestowed upon a licensee otherwise obligated to pay the copyright owner for such use. This exception may not only run afoul of Berne Article 9.2 and TRIPS Article 13, but also exceeds the conditions on government compulsory licensing contained in TRIPS Article 31, which, by the terms of TRIPS Article 44.2, must be observed whenever (as seems to be the case with Singapore) the government's liability for unauthorized use is limited to payment of remuneration. The Bill does not propose to change Section 198.

(4) The plaintiff in a case involving suspected piratical imports (e.g., under Section 104 for subject matter other than works) has the burden of proving the country in which the imported materials were manufactured and that the materials were not made with the authorisation of the owner of copyright in that country, as required by Section 25(3) of the Act. Because this burden cannot be met without considerable expenditure of time and resources in investigations outside Singapore, this requirement sharply diminishes the ability to obtain effective remedies against importation of piratical sound recordings into Singapore, in contravention of Article 41.1 and 41.2 of TRIPS. Singapore should place the burden upon the defendant, who seeks to import the goods, to prove the country in which they were manufactured and the authorisation of the right owner (as defined in Section 25(3)) to make them. However, the Bill makes no changes in this regard.

III. EXCLUSIVE RIGHTS FOR PRODUCERS OF SOUND RECORDINGS

Perhaps no single sector of the copyright industries has yet been more profoundly affected by the growth of the digital networked environment than the sound recording sector. IIPA urges Singapore to strive to create the legal environment most conducive to the authorized delivery of recorded music through the widest possible range of media, from distribution of traditional tangible copies, through all forms of broadcasting and webcasting to fully interactive services. A key ingredient in this legal framework would be to recognize on behalf of the producers of sound recordings the exclusive right to control communications of their recordings to the public.

IIPA recognizes, of course, that the FTA does not require Singapore to accord sound recording producers an exclusive public communication right. However, since (as previously noted) the Bill includes a number of provisions that are not required for compliance with the FTA, we urge the Government of Singapore to give serious consideration to a more expansive and far-sighted approach. We believe that the recognition of such a right would be in the best interests of consumers as well as of producers, since it would provide much greater incentives for producers to utilize all possible channels for delivery of their product to the public. It would also be consistent with the approach that Singapore law would take after enactment of the Bill, not only with respect to authors, but also with respect to other beneficiaries of related rights, such as broadcasters and cablecasters. See items 20 and 21 of the Bill, which would amend Sections 84(1)(d) and 85(1)(d) to provide a full-fledged public communication right in broadcasts and cable programmes. In this context, denying a full public communication right to the producers of sound recordings that may be essential features of these broadcasts and cable programmes appears invidiously and inexplicably anomalous.

The Bill itself takes a much more restricted approach, which appears to attempt to align Singapore law with respect to the rights of sound recording producers with the current law in the United States. It is difficult to evaluate precisely the extent to which the drafters of the Bill have achieved this goal. Primarily, this uncertainty follows from the lack of definition of key terms used in the legislation, beginning with fundamental concepts such as “making available” and “transmission.” It is also impossible to apply key distinctions made in the legislation without further definition of terms. For example, whether or not a delivery mechanism is an “interactive service,” or whether or not a broadcast is made on a “subscription” basis, may determine (under proposed Section 107B) whether or not the producer of a sound recording has the exclusive right to control dissemination of his recording using these media; but in neither case is the critical term defined in the Bill. (By contrast, these are defined terms in U.S. law: see 17 USC § 114(j)(7), (9) and (14).)

Several of the Bill’s provisions in this area also appear to contradict one another. For example, proposed Section 82(3)(b) flatly states that the exclusive right to “make available” a sound recording does not cover broadcasting of the sound recording. However, proposed Section 107B goes on to identify certain acts of broadcasting of a sound recording that are non-infringing, leaving the clear implication that unauthorized broadcasting not meeting the criteria of that provision – e.g., subscription digital sound broadcasts, or digital broadcasts as part of an interactive service – may be infringing. A similar confusion arises between proposed Sections

82(3)(c) and 107B(b): the former declares that inclusion of a sound recording in a cable programme service is never an infringement of the making available right, while the latter declares only a narrower category of transmissions or re-transmissions to be non-infringing. In short, at least these two provisions of proposed Section 82(3), far from succeeding in the stated objective of “avoidance of doubt,” in fact create doubt about the scope of the new making available right, and should be stricken. Furthermore, these provisions create a divergence between Singapore and U.S. law, since under the latter, at least some acts of broadcasting and cablecasting of sound recordings are subject to the exclusive rights of producers.

Proposed Section 107D makes “non-interactive transmissions” of sound recordings non-infringing if equitable remuneration is paid to the owner of copyright. It is impossible to evaluate how closely this provision is aligned with U.S. law, not only because of the lack of definition of key terms such as “interactive,” but also because it is impossible to predict the extent to which negotiations among the parties (or, in default of an agreement, the determination of the Copyright Tribunal) would parallel the numerous conditions imposed on the statutory license created under § 114(d)(2) of U.S. law. Fulfillment of these conditions is critical in minimizing the degree to which services that benefit from the statutory license displace the legitimate sale of sound recordings (and therefore, the degree to which the denial of exclusive rights may be said not to conflict with the “normal exploitation” of the recording, and thus to meet the international standards for exceptions to the making available right established by Article 16(2) of the WIPO Performances and Phonograms Treaty (WPPT), cf. Articles 16.4.2.a and 16.4.10 of the FTA). Furthermore, the terms of proposed Section 107D appear inconsistent with other provisions, such as proposed Section 107B, which excuse certain non-interactive transmission from infringement liability even if compensation is not paid.

It is also difficult to harmonize proposed Section 107E with proposed Section 107F.⁴ In many or even most cases, the “incidental or transient copy” of a sound recording made in the course of making available a sound recording in a digital audio transmission covered by proposed Sections 107B, 107C, or 107D will also be a “temporary copy” of the recording (in its character as an “audio-visual item” within the meaning of Section 102) made “as part of the technical process of making or receiving a communication.” In these cases, it is unclear which provision applies, or whether both do.⁵ In any event, proposed Section 107E, at least, is another area of inconsistency between Singapore and U.S. law, since in the field of digital audio transmissions the latter does not generally make so-called “ephemeral” copies non-infringing, but instead subjects them to a compulsory license (i.e., a system of equitable remuneration) (see generally 17 U.S.C. § 112(e)).

⁴ To the extent that the former provision is intended to extend into the non-broadcast environment the exception recognized by section 107 of current law, it is not clear why it does not also include the equitable remuneration provisions contained in paragraph (3) of the current Section 107.

⁵ See also IIPA’s comments on the substance of proposed section 107F elsewhere in this submission.

IV. ENFORCEMENT PROVISIONS

The Bill includes many valuable improvements to Singapore's regime for enforcement against copyright piracy, both at the border and within the territory of the country. However, further changes appear to be needed in order to meet all FTA obligations in two critical areas: definition of criminal offenses, and statutory damages.⁶

A. Criminal Copyright Offenses

To fully implement the US-Singapore Free Trade Agreement (USSFTA), Singapore needs to criminalize (1) all willful commercial infringements, as well as (2) non-commercial willful infringements that are "on a commercial scale" or "significant." See generally FTA Article 16.9.21.

The Bill proposes (in item 34) to achieve both these goals through the enactment of a single new provision, proposed Section 136(3A). IIPA submits that this provision may not suffice to fulfill either prong of the FTA requirements.

On the commercial side, paragraph (3A)(c) would criminalize willful infringements only if they inflict a "substantial prejudicial impact" on the copyright owner. But the FTA requires that all willful commercial infringements be made criminal offenses, not just "substantial" ones. Of course, existing law (unchanged by the Bill) already outlaws a number of infringing activities when carried out in a commercial context, but not all infringements are covered by these provisions. For instance, Section 136(1)(a) criminally punishes the making of infringing copies, but only when the copies are made "for sale or hire"; this provision does not reach a business that makes infringing copies for internal use (as in the case of end-user software piracy).

On the non-commercial side (or, to use the FTA language, with regard to "infringements ... that have no direct or indirect motivation of financial gain,") the FTA requires that "significant willful infringements" be criminally punished. Proposed subsection (3A) covers all willful infringements, but requires proof of two additional facts: substantial prejudicial impact on the right owner, and occurrence "on a commercial scale." This approach is not consistent with the FTA, since it would leave some "significant" (because inflicting "substantial prejudice") infringements unpunished criminally because "commercial scale" has not been proven, and some infringements on a commercial scale unpunished criminally because they do not inflict "substantial prejudice" (and thus, apparently, are not treated as "significant").

IIPA urges Singapore to consider a different approach. To satisfy its obligation with regard to commercial infringements, Section 136(1) should be amended to cover "mak[ing] [infringing copies] for use in the course of or in connection with a trade or business," and Section 136(2) should be amended to cover possession of infringing copies "for use in the course of or in connection with a trade or business." In addition the reference to "articles" should be removed from these sections as this implies the requirement for a physical medium – making or possessing infringing copies should be the gravamen of the offense. On the non-commercial side, existing Section 136(3)(b) provides a good starting point for fulfilling FTA obligations;

⁶ In addition, some critical FTA provisions apparently need to be implemented by changes to laws other than the Copyright Act. See, e.g., Side Letter Point 1, which seems to anticipate amendments to the Criminal Procedures Code, or at least to practices thereunder.

this provision should not be eliminated, as the Bill proposes, but expanded, so that not only “distribution” (a term which remains undefined under Singapore law) but also “making or communicating to the public” infringing copies “to such an extent as to affect prejudicially the owner of the copyright” would be criminally punishable. Again this would require a change from “articles” to “infringing copies”. Authorized punishments under Section 136(3) would also need to be increased to come into line with those under Sections 136(1) and (2).

If, on the other hand, Singapore is committed to using new Section 136(3A) to fulfill its FTA obligations, IIPA suggests the following changes:

- (1) The term “willfully” in paragraph 3A(b) should be replaced by “knowing or having reason to know that the act is an infringement of copyright in the work.” This would be consistent with the usage of this term in proposed Section 261B(5) and (6), and also with the mens rea required for other criminal offenses in Section 136.
- (2) The unclear double hurdle imposed by proposed paragraph 3A(c) and (d) must be eliminated as it is not consistent with the FTA. The best way to do this may be track the language of the FTA, i.e.:
 - “(c) the infringing act is on a commercial scale, being either
 - (i) a significant infringement of copyright that has no direct or indirect motivation of financial gain; or
 - (ii) an infringement for the purpose of commercial advantage or financial gain”

Since the FTA terminology (“commercial advantage or financial gain”) may be unfamiliar to Singapore law, consideration should be given to adding a definition of the term, such as “including any conduct engaged in with the hope or expectation to receive anything of value, or to save money or obtain any other benefit by avoiding or omitting the payment of a license fee.”

Another approach would be to make the proposed paragraphs (c) and (d) alternatives rather than cumulative requirements, i.e., a prosecution could be based either on proof that the willful infringement inflicted a substantial prejudicial impact on the right holder, OR that it was on a commercial scale. This approach would only be workable if it were made clear (as the FTA provides) that any infringement carried out for the purpose of commercial advantage or financial gain qualifies as an infringement on a commercial scale.

- (3) While proposed Section 136(6A) lists factors that the court should consider in deciding whether the “commercial scale” factor has been met, it leaves the meaning of “commercial scale” unclear and open to a wide range of interpretations, a state of affairs that does not well serve copyright owners or users. Singapore should consider a more quantitative and bright-line approach, similar to the provisions of the NET Act under U.S. law (17 USC Section 506(a)(2)). For instance, it could be provided that for the purposes of Section 3A the court shall presume that an infringement is “significant” (and thus on a

“commercial scale” if the decision is made to track the FTA language in Section 3A) if the total retail value of the work or works infringed exceeds S\$1000.

(4) Whichever of the above approaches is chosen, the following additional changes are recommended to fulfill FTA requirements:

- (a) Assuming that proposed Section 3A is retained in some form, the penalties for a violation should be increased to come into line with those applicable for other copyright piracy offenses (e.g., 5 years’ imprisonment and S\$10,000 per infringing copy or up to S\$100,000, as in Section 136(1)). In this regard, the FTA Article 16.9.21.a.i requires that criminal penalties be set at deterrent levels.
- (b) The search warrant provision in Section 136(9) should be extended to cover the proposed new offense under Section 136(3A). See FTA Article 16.9.21.a.ii. For that matter, search warrants should be made available in the investigation of all offenses defined by Section 136.
- (c) Finally, to achieve adequate deterrence, the law should provide that officers and directors of a corporation may be personally liable if they have actual or constructive knowledge of the infringement. This will discourage infringers from deliberately hiding behind the corporate form of business organization in order to avoid individual liability.

B. Statutory damages

IIPA commends the inclusion of items 28 (amending Section 119) and 48 (amending Section 253) to provide the option of statutory damages in all civil enforcement cases. We suggest the following additional changes to cure the main flaw in the system proposed by the Bill.

The statutory damage levels in the Bill do not fulfill the FTA requirement for “pre-established damages ... in an amount sufficiently high to constitute a deterrent to future infringements.” FTA Article 16.9.9. While statutory damages should be available in all cases, they are most necessary in cases of willful commercial piracy, in which defendants commonly produce massive numbers of copies of a single work (which, under proposed Section 253(2C), would include a single music CD containing multiple songs) or a small number of works.⁷ As proposed in the Bill, such massive commercial piracy operations might be exposed to as little as S\$10,000 in statutory damages. Furthermore, the deterrent value of statutory damages will be strengthened by the possibility of enhanced awards when the infringement is willful. Third, in order for statutory damages to provide the necessary certainty (both for plaintiffs and for potential defendants), a per work floor as well as ceiling must be provided. Finally, the deterrent

⁷ To address this problem, Singapore could also consider calibrating statutory damages based on the number of infringing copies as well as the number of works infringed. The Bill currently takes only the latter approach, and this is reflected as well in our proposed redline.

value of statutory damages in cases involving massive piracy is undermined by the creation of a per-action cap on the total award. In this regard, we note that the Trade Marks (Amendment) Act provides a much higher cap on statutory damages (S\$1 million) than is proposed by the Bill, and even this cap is not applicable in all cases. The better solution is to eliminate the cap altogether.

The redline below incorporates the changes which IIPA believes would assist in meeting the FTA requirement for deterrent statutory damage awards. It tracks Section 119(2); similar amendments would be needed to Section 253(2).

Amendment of Section 119

28. Section 119 of the Copyright Act is amended —

(a) by deleting subsection (2) and substituting the following subsections:

“(2) Subject to the provisions of this Act, in an action for an infringement of copyright, the types of relief that the court may grant include the following:

- (a) an injunction (subject to such terms, if any, as the court thinks fit);
- (b) damages;
- (c) an account of profits;
- (d) where the plaintiff elects for an award of statutory damages in lieu of damages or an account of profits, statutory damages of —

- (i) at least \$1500 but not more than \$20,000 for each work or subject-matter in respect of which the copyright has been infringed; or
- (ii) not more than \$100,000 for each work or subject-matter infringed by a defendant who knew or ought reasonably to have known that the act was an infringement of copyright.

Deleted: 1

Deleted: in respect of each action,

Deleted: whichever is the lower.

V. SERVICE PROVIDER LIABILITY

FTA Article 16.9.22, while extensive, boils down to two key propositions. First (Article 16.9.22.a), the law in Singapore (and in the U.S.) must provide strong legal incentives for Internet service providers (ISPs) to cooperate with copyright owners to deter and deal with online piracy. Second (Article 16.9.22.b), the law in Singapore (and the U.S.) must limit, in specified ways, the remedies available against service providers for their role in infringements they do not control, direct or initiate.

Singapore has apparently taken the approach that its current law – including both statutory provisions, and judicial glosses on those provisions, such as the doctrine of “authorisation liability” bottomed on Section 9(2) of current law – is sufficient to fulfill the first obligation, at least when combined with the proposed repeal by the Bill of certain existing statutory provisions that risk undermining the required incentive. IIPA notes that some benefits in terms of certainty and clarity could flow from a statutory codification of those aspects of Singapore law that provide these incentives but that are currently uncodified. However, we understand that Singapore has chosen not to do so, and are not now arguing that the FTA requires such a codification, so long as the legal incentives as a whole remain adequate.

While the second obligation is discharged under U.S. law by statute (specifically, 17 U.S.C. § 512), the relevant provisions of the Bill – item 43 in respect of works, and item 47 in respect of other protected subject-matter – fall well short of implementing all Singapore’s obligations in this regard. We assume that many of the remaining gaps can be filled by regulation, and note that proposed Section 193DE would broadly authorize the issuance of regulations. In the remainder of this section of our submission, we attempt to address first those inconsistencies with Singapore’s FTA compliance that appear to require textual changes to the Bill, and then to identify inconsistencies that probably could be resolved through regulation. However, we urge the Government of Singapore to seriously consider incorporating all the needed changes by statute. This approach would avoid any questions about whether these issues are amenable to resolution by regulation.

A. Impact on existing liability principles

Before turning to how Singapore has implemented the remedial limitations for ISPs that are required by the FTA, we must point out one provision of the Bill which is not only internally inconsistent with other provisions, but which also risks weakening the legal incentives which the FTA requires Singapore to provide. Although proposed Section 193A(2) disclaims any intention to change current statutory law “in relation to determining whether copyright has been infringed,” proposed Section 193DA(6) appears to make just such a change, by decreeing that the receipt of a takedown notice cannot be taken into account in determining whether a service provider has “notice or knowledge” of infringing activity “for the purposes of determining if an Internet service provider has authorised a person to do any act.” In other words, while an ISP who received a notice today might be considered to have acquired knowledge (or at least “notice”) of infringement, which could impact his liability under the authorisation doctrine as well as under other theories of liability, that will no longer be the case once this Bill is enacted.

The impact of this provision would at best be mischievous and at worst quite destructive of the legal incentives for cooperation that Singapore is obligated to provide. IIPA urges that proposed Section 193DA(6) be eliminated, or at a bare minimum that it be changed to a rule against conclusively presuming that an ISP that receives a takedown notice has authorized the infringing activity covered by the notice.

B. Conditions for remedial limitation on hosting/providing information location tools

Proposed Section 193D, which sets conditions on the availability of the remedial limitation in the hosting situation, falls short in several respects of the requirements of FTA Article 16.9.22.b.v. These deviations appear significant and harmful and should be corrected in the statute. The problems include:

(1) Financial benefit: While proposed Section 193D(4)(a) closely tracks FTA Article 16.9.22.b.v.A, a separate provision (proposed Section 193D(7)) puts a restrictive gloss on the term “financial benefit.” Particularly troubling is proposed Section 193D(7)(b), which imports a requirement that the ISP cannot be considered to have received a direct financial benefit unless it “knew or ought reasonably to have known at the time of the receipt of the benefit that an infringement of copyright was involved.” There is no basis in the FTA text for requiring the right holder to prove actual or constructive knowledge in order to deny remedial limitations to an ISP that is directly profiting from infringement, and imposing such a requirement would significantly compromise the overall incentives for cooperation. We urge that Section 193D(7) be deleted.

(2) The knowledge/“red flag” test: Conversely, and perhaps more significantly, the Bill (proposed Section 193D(4)(b)) totally ignores the FTA principle (Article 16.9.22.b.v.B) that if an ISP has “actual knowledge of the infringement or becomes aware of facts or circumstances from which the infringement was apparent,” it must conduct an expeditious take down, or else it forfeits protection against monetary relief. The FTA text goes on to give receipt of a notification as an EXAMPLE of how an ISP might arrive at this knowledge or awareness threshold (“such as through effective notifications”); but the Bill treats notification as the ONLY way in which the obligation to take down can be triggered. To take an extreme example, if the primary infringer tells the ISP that infringing material is being hosted, the ISP can still claim the remedial limitation unless and until the right holder finds out about it and sends an effective notification. Proposed Section 193D(4)(b) should be amended to provide that actual knowledge or awareness, as well as receipt of a takedown notice, triggers the requirement for an expeditious takedown in order to preserve the remedial limitations.

(3) Expeditious takedown: The FTA requires that the ISP “expeditiously remove or disable access” to infringing material on its system or network in order to remain within the safe harbor. The Bill (proposed Section 193D(4)(b)) requires only that the ISP “expeditiously take reasonable steps to remove or disable

access;” a good try is apparently enough, even if the infringing material is never removed or made inaccessible. The Bill should be amended to track the FTA provision.

The same shortcomings exist in the provisions regarding remedial limitations for ISPs that provide information location tools to reach infringing materials (proposed Section 193D(5)). In addition, proposed Section 193D(5)(b) does not require the ISP to take down the offending link or other location tool, but only to remove or disable access to the material that is linked or pointed to, if that material resides on its own network. Here too, the FTA language should be more closely followed.

C. Injunctive relief

Proposed Section 193DB(1)(a) directs a court considering injunctive relief against an ISP to consider “the harm that has been caused to the plaintiff,” but does not refer to harm that could be inflicted in the future or that is threatened if the injunction does not issue. Cf. proposed Section 193DB(1)(e), a forward-looking provision for the benefit of the service provider. Of course a court may consider any other relevant matters (proposed Section 193DB(2)) but this imbalance in the statutorily required considerations should be eliminated. Such a step would also be more consistent with the FTA’s reference to “harm to the copyright owner” as a factor for the court to take into consideration. FTA Article 16.9.22.b.viii. The Bill also makes no provision for the issuance of ex parte injunctive relief to preserve evidence (cf. FTA Article 16.9.22.b.viii, last sentence). Unless some other provision of Singapore law covers this, it should be included in the Bill.

D. Knowing material misrepresentation

FTA Article 16.9.22.b.ix requires Singapore to “provide for monetary remedies against any person who makes a knowing material misrepresentation in a notification or counter-notification that causes injury...”. The Bill proposes to go beyond this in Section 193DD(1), by (1) imposing criminal as well as civil liability and (2) imposing both species of liability for statements the speaker “has reason to believe” are false. The experience of IIPA members with similar provisions in U.S. law is that civil remedies are sufficient, and that liability should be limited to circumstances in which the affiant actually knows of, or believes in, the falsity of the representation. We urge that Section 193DD(1)(a) be stricken, and that in Section 193DD(1) the words “has reason to believe” be changed to “believes”.

E. Identification of infringing subscriber

FTA Article 16.9.22.b.xi requires Singapore to provide an expeditious “administrative or judicial procedure” through which right holders can learn the identity of infringers who are the subject of a notice. The Bill provides no such procedure. IIPA urges that the Bill be amended to provide for a simple administrative procedure for this purpose.

F. Response to counter-notice

Proposed Section 193DA(3) directs an ISP that receives a counter-notice to “expeditiously take reasonable steps to restore” the complained-of material. By contrast, FTA Article 16.9.22.b.x states that the material should only be restored if the right holder does not “seek judicial relief within a reasonable time.” The provision in the Bill could mean that the infringing material becomes accessible again even if the right holder is moving promptly to bring an infringement action against the subscriber. The Bill should be amended to more closely track the FTA text by providing that initiation of enforcement action should halt a put-back.

G. General pre-conditions on remedial limitations

FTA Article 16.9.22.b.vi. imposes preconditions on all ISP remedial limitations: (a) adoption and reasonable implementation of repeat infringer termination policy, and (b) accommodation and non-interference with standard technical measures. These pre-conditions do not appear anywhere in the Bill, although they are potentially significant features of the incentives for cooperation which is the goal of the FTA provision. We note that proposed Section 193DE(2)(b) specifically authorizes regulations that prescribe additional preconditions for ISPs, and urge that these be included in the regulations if they are not added to the Bill itself.

H. System Caching

Proposed Section 193B omits three conditions required by the FTA before ISPs can take advantage of the caching remedial limitation (Article 16.9.22.b.iv.A-C): honoring access limitations imposed at the original site, complying with industry standards re cache refreshment, and not interfering with technology that reports on usage patterns. These should be included in regulations if they are not incorporated into the Bill itself.

I. Hosting/providing information location tools: requirement to designate agent to receive notice

FTA Article 16.9.22.b.v.C requires that ISPs “publicly designate” an agent to receive notifications of infringement regarding material they store at the request of a subscriber or to which they provide links or other information location tools. Footnote 2 of the ISP Liability Side Letter (see <http://www.ustr.gov/new/fta/Singapore/final/16%20ipr%20enf.PDF>) explains what is minimally required in order to be “publicly designated.” Nothing in the Bill requires that ISPs make a public designation in order to claim remedial limitations for these functions, yet this is clearly a logical pre-requisite to the operation of any effective notice and takedown system. This omission could be filled by regulation if it is not addressed directly in the Bill.

J. Counter-notice contents

The prescribed contents of an effective counter-notice (proposed Section 193DA(4)) lack several required elements. Chief among these are the identification of the alleged infringer and the submission of the infringer to the jurisdiction of a court so that the copyright owner may initiate an infringement action. The latter point is referenced in FTA Article 16.9.22.b.x (ISP

safe harbor from liability for a takedown applies only if the alleged infringer “makes an effective counter-notification and is subject to jurisdiction in an infringement suit”), and spelled out in point (b) (5) and (6) of the ISP Liability Side Letter (see also point (b)(1) for the requirement that the subscriber provide its identity and contact information). These points should be reflected in the Bill, or failing that, in implementing regulations.

VI. TECHNOLOGICAL PROTECTION MEASURES AND RIGHTS MANAGEMENT INFORMATION

IIPA commends the drafters of the Bill for their efforts to adapt into statutory language the provisions of the FTA (Article 16.4.7) regarding technological protection measures (TPMs). While we believe these efforts have largely been successful, we suggest below several critical changes which are necessary in order for Singapore to achieve full compliance with this key section of the FTA. For convenience, we present these in the form of a redline version, with brief explanations of the changes (and, in a few instances, comments on provisions that have been left unchanged) contained in footnotes. Naturally, these are presented in the order in which they appear in the text. In particular, we would call the drafters' attention to the material corresponding to footnotes –

- 6: full coverage of access controls;
- 7: limitation of trafficking offenses to commercial activity;
- 18: limited duration of administrative exceptions; and
- 19: proposed trafficking exception not supported by FTA.

With regard to the provisions in items 52 and 53 of the Bill on protection of rights management information (RMI), IIPA believes that for the most part these fulfill Singapore's obligations under Article 17.4.8 of the FTA. We raise questions for consideration by the drafters in two areas, however:

(1) As with the corresponding provision on TPMs, it is not clear that the relief available in a civil suit under Section 261 as amended would include an award of court costs and attorneys' fees. Unless some more general provision of Singapore law is applicable and would provide this, this remedy should be specified in order to comply fully with FTA Article 16.9.5.c.

(2) As with the corresponding TPMs provisions, criminal penalties in amended Section 260(3) are lighter than for most infringement offenses and (for willfully removing or altering RMI) include no possibility of jail time. These penalties should be re-examined to ensure that they deliver the deterrent impact required for an adequate and effective system of protection of RMI.

New Part XIII A

54. The Copyright Act is amended by inserting, immediately after section 261, the following Part:

"PART XIII A CIRCUMVENTION OF TECHNOLOGICAL MEASURES

Preliminary

261A.—(I) In this Part-

"circumvent" means to avoid, bypass, remove, deactivate, or otherwise impair¹;

Deleted: descramble (where the copy is scrambled), decrypt (where the ¶ copy is encrypted)

"copy", in relation to any work or other subject-matter or any performance, means a copy of the work or subject-matter or of a recording of the performance, and includes the original version of the work or subject-matter or a recording of the performance;

"encryption technology" means technology for scrambling and descrambling information using mathematical formulae or algorithms;

"non-profit" means not operated or conducted for profit;

"performance", "protection period", "recording", "unauthorised recording" and "unauthorised use" have the meanings given to those expressions in Part XII;

"personally identifying information" means information which can be used to identify natural persons using a network²;

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Deleted: persons

"technological access control measure" means any technology, device or component that, in the normal course of its operation, effectively controls access to a copy of a work or other subject-matter or performance³;

Deleted: but excludes such ¶ technology, device or component as the Minister may ¶ prescribe;

"technological measure" means a technological access control measure or a technological protection measure;

"technological protection measure" means any technology, device or component that, in the normal course of its operation, effectively prevents or limits the doing, in relation to a copy of a work or other subject-matter or performance, of any act comprised in the

¹ It is potentially confusing to refer to descrambling or decrypting a TPM, and to refer to whether a "copy" is scrambled or encrypted in definition of "circumvent." The object of this verb is a TPM, not a copy.

² The exception authorized in FTA Art. 16.4.7.f.ii refers to online activities of "natural persons." "Person" in Singapore law frequently encompasses legal entities. "Individual" or "natural person" should be substituted.

³ The FTA contains no authority to administratively exempt a particular TPM from coverage, only the act of circumvention of particular classes of works.

copyright in the work or subject-matter, or an unauthorised use of the performance⁴;

Deleted: but ¶
excludes such technology, device or
component as the ¶
Minister may prescribe.

(2) Nothing in this Part affects any act done in relation to a work or other subject-matter in which copyright no longer subsists, or in relation to a recording of a performance the protection period of which has expired.

(3) Nothing in this Part affects —

- (a) any copyright subsisting in a work or other subject-matter;
- (b) any right in relation to a performance or a recording thereof;
- (c) any limitation on copyright in a work or other subject-matter, or on a right in relation to a performance or a recording thereof; or
- (d) any defence to an action for infringement of copyright, or for an unauthorised use of a performance,

under any provision of this Act.

Circumvention of technological measures

261B.—(1) This section applies where a technological measure is applied to or used in connection with a copy of a work or other subject-matter or performance⁵—

- (a) by or with the authorisation of the owner of the copyright in the work or subject-matter or the performer of the performance; and
- (b) in connection with the exercise of the copyright or any right in the performance⁶.

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measure is a technological access
control measure — ¶
10 (i)

(2) Subject to sections 261C and 261D, a person shall not do any of the following without the licence of the owner of the copyright or the performer of the performance:

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¶
(ii) in a way that prevents or limits
the doing of any unauthorised
act comprised in the copyright or an
unauthorised use of the
performance

- (a) any act which he knows or ought reasonably to know circumvents the technological measure, being a technological access control measure;
- (b) makes, sells, lets for hire, offers or exposes to the public, by way of trade

Deleted: for sale or hire

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⁴ See previous footnote.

⁵ In the online and digital environment it may be ambiguous to restrict protection to those TPMs that are “applied to copies”. “Used in connection with” is more technology-neutral. See also FTA Art. 16.4.7.a (“use in connection with the exercise of their rights”).

⁶ Proposed Sec. 261B(1)(b)(ii) should be deleted. Nothing in the FTA allows Singapore to deny protection to access controls unless it can be proven that these controls are “applied ... in a way that prevents or limits” copyright infringements. So long as they control access, these measures must be covered. See FTA Art. 16.4.7.b.

- exhibits in public, or imports any device, product or component which⁷ —
- (i) is promoted, advertised or marketed for the purpose of circumventing the technological measure;
 - (ii) has only a limited commercially significant purpose or use other than to circumvent the technological measure; or
 - (iii) is primarily designed or made for the purpose of enabling or facilitating the circumvention of⁸ the technological measure;
- (c) offers to the public any service which —
- (i) is promoted, advertised or marketed for the purpose of circumventing the technological measure;
 - (ii) has only a limited commercially significant purpose or use other than to circumvent the technological measure; or
 - (iii) is primarily performed for the purpose of enabling or facilitating the circumvention of⁹ the technological measure.
- (3) An action may be brought by the owner of the copyright or performer of the performance against a person who contravenes subsection (2).
- (4) Where a person contravenes subsection (2)—
- (a) wilfully; and
 - (b) for the purpose of obtaining a commercial advantage or private financial gain¹⁰, he shall also be guilty of an offence and shall be liable on conviction to—
 - (i) in the case of an act referred to in subsection (2)(a), a fine not exceeding \$20,000, or to imprisonment for a term not exceeding 2 years¹¹; or
 - (ii) in the case of an act referred to in subsection (2)(b) or (c), a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 5 years, or to both¹².
- (5) For the purposes of subsection (4), a person shall not be treated as having

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⁷ There is no basis in the FTA for restricting the trafficking prohibitions (Art. 16.4.7.a.ii) to those carried out in a commercial or trading context. Hence the proposed deletions to proposed 261B(2)(b).

⁸ The redlined language tracks FTA Art. 16.4.7.a.ii.c. A product may be prohibited even if it does not itself directly circumvent, so long as it was primarily designed or made in order to facilitate or enable circumvention.

⁹ See preceding footnote

¹⁰ The proposed new language tracks FTA Art. 16.4.7.a for criminal liability. (Note the Bill substitutes “profit” for “private financial gain” but does not define “profit.”)

¹¹ The Bill proposes no jail term for a criminal violation of the prohibition on the act of circumvention. The issue is whether this penalty is sufficient to provide deterrence.

¹² This conforms the penalty for trafficking offenses to the criminal penalty for most infringement offenses (\$50-100K and 3-5 years). Arguably it should be even more stringent, since trafficking in a circumvention device or service may enable a vast number of subsequent infringements.

contravened subsection (2)(b) wilfully unless—

- (a) in the case of a device, product or component referred to in subsection (2)(b)(i), he had ¹³promoted, advertised or marketed it for the purpose of circumventing the technological measure or knew or had reason to believe¹⁴ at the time of the contravention that it had been so promoted, advertised or marketed;
- (b) in the case of a device, product or component referred to in subsection (2)(b)(ii), he knew or had reason to believe at the time of the contravention that it had only a limited commercially significant purpose or use other than to circumvent the technological measure; or
- (c) in the case of a device, product or component referred to in subsection (2)(b)(iii), he knew or had reason to believe at the time of the contravention that it was primarily designed or made for the purpose of circumventing the technological measure.

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(6) For the purposes of subsection (4), a person shall not be treated as having contravened subsection (2)(c) wilfully in respect of a service referred to in subsection (2)(c)(i) or (ii) unless—

- (a) in the case of a service referred to in subsection (2)(c)(i), he had himself promoted, advertised or marketed it for the purpose of circumventing the technological measure or knew or had reason to believe at the time of the contravention that it had been so promoted, advertised or marketed; or
- (b) in the case of a service referred to in subsection (2)(c)(ii), he knew or had reason to believe at the time of the contravention that it had only a limited commercially significant purpose or use other than to circumvent the technological measure.

(7) Subsection (4) shall not apply to any act done by or on behalf of a non-profit library, a non-profit archives, an educational institution, an institution assisting

¹³ Criminal liability should be imposed even if the defendant delegated to another the job of promotion, advertising or marketing, so long as the defendant had the requisite mental state.

¹⁴ Regarding the test of “had reason to believe” in this and subsequent paragraphs of subsections 5 and 6: the corresponding standard for criminal infringement actions is “ought reasonably to have known,” see, e.g., existing sec. 136(1). If there is any substantial difference between these two tests, Singapore should consider employing the more familiar test of existing law for these new criminal provisions.

handicapped readers, an institution assisting intellectually handicapped readers, or such public, non-commercial broadcasting organisation as the Minister may prescribe.

(8) This section does not affect the import or sale of a device that does not render effective a technological measure whose sole purpose is to control market segmentation for access to [authorized copies of](#)¹⁵ cinematograph films, if the import or sale does not otherwise contravene any written law including this Act.

Exceptions to prohibition on circumvention

261C.—(1) Section 261B(2)(a) is not contravened by the doing of any of the following:

- (a) an act that is done to enable a non-profit library, a non-profit archives, an educational institution, an institution assisting handicapped readers, or an institution assisting intellectually handicapped readers to have access to the work, subject matter or recording of the performance which is not otherwise available to it, for the sole purpose of determining whether to acquire a copy thereof;
- (b) an act that is done for the sole purpose of identifying and disabling a technological measure that has the capability to collect or disseminate personally identifying information to reflect the manner of use of a network by [natural persons](#), without providing conspicuous notice of such collection or dissemination to those [natural persons](#),¹⁶ provided that the act does not affect the ability of any person to gain access to any work or other subject-matter or a recording of any performance;
- (c) an act that is done in relation to a work, subject-matter or performance that is prescribed by the Minister under subsection (2);
- (d) an act that is done for the sole purpose of achieving interoperability of an independently created computer program with another computer program, provided that the act is done—
 - (i) in good faith;
 - (ii) in relation to a copy of a computer program that is not an infringing copy; and
 - (iii) [in relation to particular elements of the computer program that were not otherwise readily available to the person doing the act.](#)¹⁷
- (e) an act that is done when undertaking research on any encryption

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¹⁵ The suggested change brings this text closer to the text of Side Letter Point 7 (which uses the term “legitimate copies”).

¹⁶ See earlier footnote: the FTA exception applies only to PII of “natural persons.”

¹⁷ The suggested change aligns the provision more closely with the interoperability exception contained in the FTA, Art. 16.4.7.e.i.

technology, provided that —

- (i) the person doing the act is one who is engaged in a legitimate course of study in the field of encryption technology or is employed or appropriately trained or experienced in that field, or is one who is doing so on behalf of a person so engaged, employed, trained or experienced;
 - (ii) the act is necessary to conduct such research;
 - (iii) the act is done in good faith and in relation to a copy of the work or subject-matter that is not an infringing copy thereof or a copy of the performance that is not an unauthorised recording thereof; and
 - (iv) the person doing the act has made a reasonable effort to obtain the licence of the owner of the copyright in the work or subject-matter or the performer of the performance to do the act;
- (f) the inclusion of a component or part in any technology, product, device or service for the sole purpose of preventing access by minors to work on the Internet, provided that the technology, product or device is not one referred to in section 261B(2)(b)(i), (ii) or (iii), or (as the case may be) the service is not one referred to in section 261B(2)(c)(i), (ii) or (iii);
- (g) an act that is done by or under the authority of the owner of a computer, computer system or computer network for the sole purpose of testing, investigating, or correcting a security flaw or vulnerability of that computer, computer system or computer network;
- (h) an act carried out by the Government or by any person authorised by the Government for the purpose of law enforcement, intelligence, national defence, essential security or other similar purpose.

(2) The Minister may, by order published in the *Gazette*, suspend, for a period not to exceed four years,¹⁸ the operation of section 261B(2)(a) in relation to a specified work or other subject-matter or performance, or a specified class of works or other subject-matters or performances, if he is satisfied that any dealing with the work, subject-matter or performance or with the class of works, subject-matters or performances, being a dealing which does not amount to an infringement of copyright therein or an unauthorised use thereof (as the case may be), has been adversely impaired or affected as a result of the operation of this section.

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(3) Subsection (1) does not apply if—

¹⁸ Failure to sunset the administrative exceptions to prohibition on act of circumvention contravenes the proviso to FTA Art. 16.4.7.f.iii.

- (a) in the case of an act referred to in paragraph (b), (e) or (g) of that subsection, the act violates a provision of any written law other than this Act;
- (b) in the case of an act referred to in paragraph (c), (d), (e) or (g) of that subsection, the act infringes the copyright in the work or subject-matter or amounts to an unauthorised use of the performance; or
- (c) in the case of an act referred to in paragraph (a) of that subsection, the act leads to an infringement of the copyright in the work or subject-matter or to an unauthorised use of the performance, or otherwise violates a provision of any other written law.

Exceptions to prohibition on making, etc., circumventing device and offering circumventing service

261D.—(1) Section 261B(2)(b) and (c) is not contravened by the doing of any of the following¹⁹:

- (a) the making of a device, product or component to carry out an act referred to in section 261C(1)(d);
 - (b) the making of a device, component or product to carry out an act referred to in section 261C(1)(e);
 - (c) the making of a component or part referred to in section 261C(1)(f);
 - (d) the making of a component, device or product to carry out an act referred to in section 261C(1)(g);
 - (e) an act carried out by the Government or by any person authorised by the Government for the purpose of law enforcement, intelligence, national defence, essential security or other similar purpose.
- (2) Subsection (1)(b), (c), and (d), only applies if the technological measure is a technological access control measure.
- (3) Subsection (1) does not apply if—

Deleted: the selling or letting for hire to, or the import for the purpose ¶ of selling or letting for hire to, a non-profit library, a non-¶ profit archives, an educational institution, an institution ¶ assisting handicapped readers, or an institution assisting ¶ intellectually handicapped readers, of a device, product or ¶ 15 component to enable an act referred to in section 261C(1)(a) ¶ to be carried out; ¶ (b)

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¹⁹ Proposed Sec. 261D(1)(a) has no justification in the FTA and would open up the market to sell circumvention devices/services to libraries, etc., on the pretext that they might need it to examine a work. It would likely prove impossible to confine the market to the statutory beneficiaries of the exception.

(a) in the case of an act referred to in paragraph (a) of that subsection, the circumvention referred to in that paragraph infringes the copyright in the work or subject-matter or amounts to an unauthorised use of the performance; or

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(b) in the case of an act referred to in paragraph (b) or (d) of that subsection, the circumvention referred to in that paragraph infringes the copyright in the work or subject-matter or amounts to an unauthorised use of the performance, or otherwise violates a provision of any other written law.

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Relief which court may grant

261E.—(1) In an action brought under section 261B(3), the court, if satisfied that the defendant has contravened section 261B(2), may grant the plaintiff an injunction (subject to such terms, if any, as the court thinks fit) or damages, or both.

(2) In addition to the relief referred to in subsection (1), the court may order —

(a) that any article —

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(i) by means of which, or in relation to which, the act referred to in subsection 261B(2) was or is being carried out; and

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(ii) which is in the possession of the defendant or before the court,

be delivered up to the plaintiff or destroyed; and

(b) that the defendant pay all the plaintiff's court costs and fees, including a reasonable attorney's fee²⁰.

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(3) For the purpose of subsection (1), damages include any profits that are attributable to the act and that have not been taken into account after computing the actual damage.

(4) In an action brought under section 261B(3), the plaintiff may elect to recover in place of the damages provided in subsection (1), an award of statutory damages for claims in the action a sum of not more than \$20,000 with respect to each action.²¹

(5) For the purpose of determining the amount for the award in subsection (4), the court shall have regard to—

²⁰ The suggested change implements FTA Art. 16.9.5.c. If some other general provision of Singapore law provides for awards of costs and attorneys' fees in civil cases brought under the new TPM provisions, this change may not be necessary.

²¹ This statutory damage figure appears insufficient to provide deterrence. The figure employed should be at least as large as the statutory damages that can be awarded for infringement of copyright, since a violation of the TPM provisions may enable a flood of infringements.

- (a) the nature or purpose of the act concerned, including whether the act was of a commercial nature or otherwise;
- (b) the flagrancy of the act;
- (c) whether the defendant acted in bad faith;
- (d) any loss that the plaintiff has suffered or is likely to suffer by reason of the act;
- (e) any benefit shown to have accrued to the defendant by reason of the act;
- (f) the conduct of the parties before or during the proceedings;
- (g) the need to deter other similar acts; and
- (h) all other relevant matters.

22

261F If information is given upon oath to a court that there is reasonable cause for suspecting that there is in any premises any article or document which is evidence that an offence under section 261B(4) has been committed, the court may issue, either unconditionally or subject to such conditions as the court thinks fit, a warrant authorising a police officer to enter and search the premises for the articles and documents which are specified in the warrant, and to seize such articles and documents found at the premises.²³

* * * * *

²² Proposed Sec. 261E(6) and (7) would deny all damages in civil cases if it could not be proven that the defendant knew or had reason to believe that the circumvention device or service in which he was trafficking met one or more of the statutory definitions. There is no justification for this in the FTA, which appears to impose strict liability for these violations in the civil realm. While arguably there would be a weak case for significant statutory damages in these circumstances (under the criteria set out in Sec. 261E(5)), plaintiff should not be denied all compensation in these cases. Accordingly, proposed subsections (6) and (7) should be deleted.

²³ This suggested provision, modeled on existing Sec. 136(9), is essential if criminal enforcement of the TPM provisions is to be effective.

Deleted: (6) Notwithstanding subsections (1) and (4), where, in an action for ¶ a contravention of section 261B(2)(b), such contravention is ¶ 10 established but it is also established that — ¶

¶ (a) in the case of a device, product or component referred to in section 261B(2)(b)(i), the defendant did not himself ¶ promote, advertise or market it for the purpose of ¶ circumventing the technological measure, nor did he know ¶ 15 or have reason to believe at the time of the contravention ¶ that it had been so promoted, advertised or marketed; ¶

¶ (b) in the case of a device, product or component referred to in section 261B(2)(b)(ii), the defendant did not know or have reason to believe at the time of the contravention that it had ¶ 20 only a limited commercially significant purpose or use other ¶ than circumventing the technological measure; or ¶

¶ (c) in the case of a device, product or component referred to in section 261B(2)(b)(iii), the defendant did not know or have reason to believe at the time of the contravention that it was ¶ 25 primarily designed or made for the purpose of ¶ circumventing the technological measure; ¶

¶ the plaintiff shall not be entitled to any damages or statutory damages ¶ against the defendant for the contravention. ¶

¶ (7) Notwithstanding subsections (1) and (4), where, in an action for ¶ 30 a contravention of section 261B(2)(c) in respect of a service referred to in section 261B(2)(c)(i) or (ii), such contravention is established ¶ but it is also established that — ¶

¶ (a) in the case of a service referred to in section 261B(2)(c)(i), ¶ the defendant did not himself promote, advertise or market it ¶ 35 for the purpose of circumventing the technological measure ¶

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nor did he know or have reason to believe at the time of the contravention that it had been so promoted, advertised or marketed; or ¶

¶

Thank you in advance for your consideration of IIPA's comments on the Copyright (Amendment) Bill 2004. We stand ready to answer any questions you may have, and, as noted above, would welcome the opportunity to supplement these comments in any way that would be helpful to the drafters.

Respectfully submitted,

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