



August 8, 2005

Legislative Council  
Legislative Council Building  
8 Jackson Road  
Central, Hong Kong

Attn: Ms Debbie Yau, Clerk to Panel

**PANEL ON COMMERCE AND INDUSTRY**  
**FOLLOW-UP TO MEETING ON 19 JULY 2005**

Dear Sirs:

Thank you for your letter dated 22 July 2005 inviting the Entertainment Software Association ("ESA") to provide a written response in view of a question from the Honourable Mr Sin Chung Kai during the meeting before the Panel on Commerce and Industry on 19 July 2005.

We understand that Mr Sin asked for ESA's reasons for proposing that S273 of the Copyright Ordinance should be expanded to cover both copy protection (or copy controls) and access controls (with reference to ESA's submissions by way of letter dated 11 July 2005). Mr. Sin queried whether hacking activities can already be dealt with under S161 (Access to computer with criminal or dishonest intent) of the Crimes Ordinance.

We consider S161 of the Crimes Ordinance to be directed at activities different in nature to Commerce Industry and Technology Bureau's proposal June 2005 for expansion of S273 of the Copyright Ordinance ("CITB's Proposal"). In summary:

1. Access control measures do not specifically pertain to preventing illegal access to a computer. Rather, access controls prevent gaining illegal access to a copyright work

which may be stored in many different types of media (e.g. an optical disc), and protected by a technological protection measure; and

2. S161 of the Crimes Ordinance is a criminal remedy whereas the CITB proposal to amend S273 of the Copyright Ordinance is to provide civil remedies for the specific act of circumventing either a copy control or an access control.

We set out in more detail our reasons below.

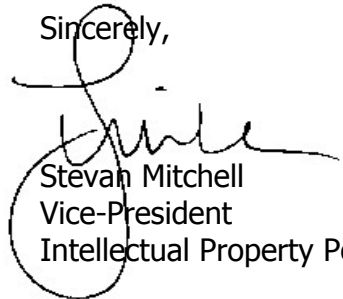
S161 of the Crimes Ordinance provides that it is an offence to obtain unauthorized access to a computer in a variety of circumstances (similar to S27A of the Telecommunications Ordinance). The element which must be proved for these offences to be made out is the unauthorized access to a computer. In contrast, the CITB proposal is directed at circumvention (or hacking) of copy protection measures or access control measures used by copyright owners to protect their copyright works, which can be accomplished through tools which can either be hardware- or software-based. Such "hacking" may not necessarily involve obtaining access to a computer, but rather to gain unauthorized access to the copyright work contained on either the carrier medium or a server through which the copyright work may be made available. For example, a publisher of PC games may implement various access and copy controls to ensure that the game can only be played with an original disc placed in the computer's disc drive. Circumvention of these technological protection measures need not entail unauthorized access to the computer used to play such games, but rather modification of the software code. Alternatively, a console game publisher may protect its copyright works (i.e. the console game) by restricting game play on a legitimate and unmodified console to legitimate copies of the video game software, and thereby prohibiting access to unauthorized software. Hacking the built-in access controls of the console machine through the use of a modification or circumvention device does not necessarily involve illegal access to a computer. Rather, the hacking results in by-passing the access controls that limit game play on the consoles to authentic or legitimate games.

Moreover, the dealing in devices which allow access to copyright works (by the circumvention of copy protection measures or access control measures) also does not necessarily involve access to a computer.

Finally, CITB's proposal for expanding the protection of effective technological measures to include access control measures is by way of providing civil remedies for the act of circumvention. We expect such remedies to include damages and court injunctions. S161 of the Crimes Ordinance does not provide similar remedies for copyright owners.

If you have further queries, please do not hesitate to contact either Monique Woo of Lovells, our legal representative in Hong Kong, or the staff here at the ESA.

Sincerely,



Stevan Mitchell  
Vice-President  
Intellectual Property Policy