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IFPI Submission on the Implementation of Protection for Technological Measures Under the Copyright (Amendment) Bill 2006 (As revised by the Committee Stage Amendments)

March 2007

IFPI thanks the CITB and Bills Committee for the opportunity to submit comments on the updated version of the Copyright (Amendment) Bill 2006 ("the Bill"), as revised by the Committee Stage Amendments. Our comments below focus on issues related to the provisions dealing with the protection of technological measures (TPMs).

At the outset, we find the new version of the Bill to be considerably improved, with some of the problematic issues highlighted in our previous submissions either removed or amended. However, several key issues we identified as shortfalls in earlier drafts of the Bill remain unchanged and need to be addressed. We urge the committee to further consider these issues, which we detail below, and to take this opportunity to introduce amendments that would ensure an effective regime for the protection of TPMS in Hong Kong.

1. THE "TRADE OR BUSINESS" PURPOSES REQUIREMENT FOR THE LIABILITY ASSOCIATED WITH DISTRIBUTING CIRCUMVENTION DEVICES SHOULD BE REMOVED (ARTICLES 273B(1)(b) and 273C(1)(e) and (f))

The requirement that the distribution of circumvention devices be "for trade or business purposes" in order to be subject to civil or criminal liability (art. 273B(1)(b) and 273C(1)(e)-(f), respectively) remains one of the major shortfalls of the Bill. Prohibiting only distribution of devices on a commercial scale would allow devices to enter the market through small scale distribution, barter deals or distribution on a non-profit basis. Distributors would therefore find it easy to disguise their actions by selling small quantities of circumvention devices at a time, with right holders bearing the burden of proof that such distribution took the form of a business or trade. Allowing such low-scale distribution to take place would ultimately take away the effectiveness of the protection against circumvention altogether, as devices will freely enter the market. Proving the "trade or business purposes" is also cumbersome and jeopardises the effective application of these prohibitions, discouraging right holders from bringing legal actions against persons trafficking in circumvention devices. It is therefore not only inadequate, but also inconsistent with the obligation to provide "adequate legal protection and effective legal remedies" against circumvention under the WIPO treaties.

We note that a new subsection 273B(1)(c) was inserted to introduce liability for anyone who distributes circumvention devices "to the extent that prejudicially affects the copyright owner". We consider this new subsection insufficient to remedy the shortfalls of the problematic "trade or business purposes" requirement. Establishing prejudicial effect on the right holder raises similar concerns to those arising in the context of the "trade purposes" requirement: it would be unreasonably burdensome on rights holders to prove prejudicial effect, because of the obvious difficulty in proving loss of sales or other economic harm resulting from the distribution of particular circumvention devices. Rights holders are not in a position to prove the extent to which such devices were used for actual circumvention. Such a requirement could also be misinterpreted as allowing circumvention in all cases that do not have any clear and significant impact on the right holder, significantly weakening the effectiveness of protection against dealing with circumvention devices.

2. THE DEFENCE FOR CIRCUMVENTION FOR NON-INFRINGEMENT PURPOSES SHOULD BE DELETED (ARTICLE 273A (1A))

The removal of the requirement of "knowledge of copyright infringement" for liability for the act of circumvention is a welcome amendment to the Bill's section 273A(1). But this requirement was replaced with a newly proposed defence for circumvention which is done for the "sole purpose" of doing a non-infringing act. This new defence weakens the effectiveness of the prohibition against circumvention and should be deleted. It would allow defendants to argue that every act of circumvention, even of measures that require authorisation to access works, was done for the purposes of doing one of the long list of excepted acts recognised under the Copyright Ordinance. We therefore urge that his newly proposed defence be omitted from the Bill.

3. THE EXCEPTION FOR RECORDING OF BROADCAST WORKS SHOULD BE DELETED

We call for the removal from the Bill of the article 273F(12) exception on devices enabling the recording of broadcast works. Although the new language added by the committee significantly improves this provision by clarifying that it does not apply to devices that enable recordings from Interactive transmissions (273(12A)), the exception still remains overly broad. For example, it is unclear whether the current language exempts from criminal liability the distribution of devices intended to facilitate circumvention of a broad range of protected non-interactive digital transmissions, such as digital audio broadcasts. Enabling circumvention of such protected broadcasts could undermine the efforts of right holders to prevent further unauthorised distribution of protected works in digital formats, including illegal distribution over the internet. It could also deter right holders from licensing certain broadcasts of their works for the fear that these broadcasts can be circumvented and recordings made from them illegally distributed.

4. COVERAGE OF ACCESS CONTROLS SHOULD BE CLARIFIED

Proposed article 273(2)(a) clearly includes protection of access control measures (including encryption and scrambling controls), thereby representing a significant improvement to existing law that at present only protects copy control measures. However, the general reference in article 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-controls only. While it is obviously the intention of article 273(2)(a) to cover access-controls we are nevertheless concerned that the language in article 273(3)(b) could result in limited coverage of access controls in practice, by creating a link between protection measures and restricted acts.

We previously highlighted the importance of protecting access controls under the new provisions, and we urge the committee to clarify the language in article 273(3)(b) so that its application in practice does not end up denying such protection.

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