



**entertainment
software
association**

CB(1)1339/06-07(01)

April 10, 2007

VIA ELECTRONIC MAIL AND FACSIMILE

Ms. Sharon Chan
Clerk
Bills Committee
Legislative Council
Hong Kong

Subject: Copyright (Amendment) Bill 2006 - proposed Committee Stage Amendments

Dear Ms. Chan:

The Entertainment Software Association (ESA) appreciates the opportunity to again provide the Bills Committee with its views on the proposed Committee Stage Amendments to the Copyright (Amendment) Bill 2006, which provisions concern the treatment of technological protection measures and the trafficking in circumvention products and services.

The Bills Committee has no doubt already received the March 13, 2007 comments provided by the International Intellectual Property Alliance (IIPA), of which the ESA is a member. ESA wishes to reiterate the views expressed therein by IIPA, noting in particular our continuing concerns with the unresolved questions arising in relation to the creation of an affirmative defense to the charge of circumvention of a technological protection measure (TPM) (Section 273A(1A)). IIPA noted in its comments that it was “glad to see that the act of circumventing a TPM will attract liability without requiring proof of a link to infringement, albeit subject to the possibility of an affirmative defense under Section 273A(1A) if it is proven that the circumvention was carried out solely to perform non-infringing act.”¹ ESA agrees that this change will make Hong Kong’s legal regime in support of TPMs more effective. We do, however, also echo IIPA’s concerns with respect to the unresolved questions regarding this new defense, to wit: “(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,”² as set out in the aforementioned draft Section 273a(1A).

ESA would also like to reiterate IIPA’s comments on the amendments’ failure to cover access controls generally. As noted in the letter, though the amended definition of “technological measure” in Section 273(3) would be broader than current law, it would leave a technology unprotected “unless it could be shown that it was designed for the ‘prevention or restriction of acts which are done without the license of the copyright owner of the work and are restricted to copyright in the work.’ Section 273(3)(b).”³ As worded, this definition is

¹ IIPA Submission of March 13, 2007.

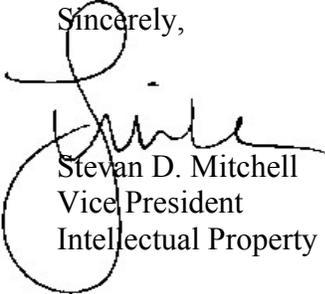
² Id.

³ Id.

“unnecessarily restrictive” and could leave “pirates free, for instance, to hack through technological barriers intended to limit access to paid subscribers, since unauthorized access by non-subscribers would not necessarily involve acts that ‘are restricted by copyright in the work.’”⁴ Thus, ESA also urges the Committee to include within the definition of “technological measure” all technologies used by right holders to control access to their copyrighted works.

We again thank the Committee for its consideration of ESA’s views. If we can be of further assistance, please do not hesitate to contact us either directly or through our counsel, Monique Woo.

Sincerely,



Stevan D. Mitchell
Vice President
Intellectual Property Policy

⁴ Id.