

CB(1)1626/06-07(01)



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

14 May 2007

IFPI thanks the Hong Kong SAR government for the opportunity to submit comments on the latest version of the Copyright (Amendment) Bill 2006 ("the Bill"), as revised by the Committee Stage Amendments and published on 7 May 2007.

IFPI has been actively involved in this consultation from its very early stages. We are pleased to see that many of our major concerns have been dealt with, and several important changes were introduced to the Bill. In particular, we commend the government's decision to remove the defence for circumvention for non-infringing purposes and the elimination of the exception for distribution of "time shifting" devices. These amendments significantly improve the Bill and contribute to its effective application. The Bill, however, still contains several shortfalls which could hinder meaningful protection against circumvention. We concentrate below on the remaining issues that need to be addressed and urge the Hong Kong Government to revise the Bill before it proceeds to the second and third reading:

1. COVERAGE OF ACCESS CONTROLS SHOULD BE CLARIFIED

Our previous submissions highlighted the importance of protection for access controls generally. The reference in proposed article 273(3)(b) 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 may result in limited coverage of access measures by creating a causal link between protection measures and restricted acts. We urge that the language in article 273(3)(b) be clarified so that a broad coverage of all access controls that are used by right holders "in connection with the exercise of their rights", as required under the WIPO treaties (WPPT article 18), is implemented.

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

We previously highlighted the shortfalls of introducing a requirement that distribution of circumvention devices be "for trade or business purposes" in order to be subjected to civil or criminal liability (art. 273B(1)(b) and 273C(1)(e)-(f), respectively). Prohibiting only distribution of devices which is for business purposes would create a loophole in the protection against circumvention, allowing devices to enter the market through distribution on a non-profit basis. For example, non-profit distribution of circumvention devices for ideological reasons by individuals interested in encouraging illegal circumvention could be devastating to rights holders and cause the same serious harm caused by any commercial distribution. As a result of the "business purposes" requirement, distributors could find it easy to disguise their actions and, consequently, such devices would freely enter the market, taking away the effectiveness of the protection against circumvention altogether. The "trade or business purposes" requirement for distribution liability does not exist in

other jurisdictions and is inconsistent with the obligation under the WIPO treaties to provide adequate protection against circumvention.

Subsection 273B(1)(c), which introduced liability for non-business distribution that "prejudicially affects the copyright owner" is not enough to remedy this deficiency as a practical matter. Proving either "trade or business purposes" or "prejudicial effect" of distribution would be unreasonably burdensome on rights holders, because of the obvious difficulty in proving loss of sales or other economic harm resulting from distribution of circumvention devices. Further, for obvious reasons, rights holders are not in a position to prove the extent to which such devices were used for actual circumvention. We therefore urge to remove the "trade or business purposes" requirement from articles art. 273B(1)(b) and 273C(1)(e)-(f) of the Bill.

3. DEFERRED COMMENCEMENT OF THE PROHIBITION AGAINST THE ACT OF CIRCUMVENTION (SECTION 273A) SHOULD BE AVOIDED

Following the de-linking of civil liability for the act of circumvention from copyright protection (by removing the defence for circumvention for "non-infringing purposes") it is our understanding that the government now proposes to put on hold the commencement of the prohibition against the act of circumvention (section 273A) until the first list of exceptions to this prohibition has been enacted. Although a similar approach was taken in the US, we urge the Hong Kong government to follow the UK precedent and give effect to section 273A simultaneously with the coming into force of the other prohibitions against circumvention. Adopting this approach would enable proper evaluation of any proven need for exceptions and would enable the tailoring of detailed exceptions following appropriate consideration. Most importantly, it would prevent a situation where the entry into force of the prohibition is significantly delayed by multiple requests for exceptions during which time continued harm can be done to the security of works in digital form. Indeed, as the UK experience shows, exceptions to the prohibition against circumvention will rarely be proved necessary in practice and there is therefore no need to delay immediate and effective protection against the act of circumvention.

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