

June 13, 2007

The Hon. Sin Chung Kai, JP
Chairman, Bills Committee on Copyright (Amendment) Bill 2006
Hong Kong Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

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Dear Hon. Mr. Sin and members of the Committee,

As a representative of the creative industry, we are writing to express our concerns regarding the proposed definition of "effective technological measure" (ETMs) in the Copyright (Amendment) Bill 2006 (the Bill).

During the drafting process we have provided input to the Government and appreciate that some of the concerns expressed have been taken into account. However, there are still aspects of this draft legislation that if adopted, would be detrimental to Hong Kong's objectives to foster its creative industries. We feel it is important that this proposal be examined more closely as part of the Committee's review process, as it clearly fails to provide adequate protection for authors, publishers, producers and distributors of copyright works.

The proposed definition of ETM in section 273(2) would jeopardize protection for a range of access controls used in connection with the provision of digital services and products in Hong Kong and elsewhere. This is because the language in Section 273(3)(a) and (b) would require showing, *inter alia*, that an ETM protects uses of a copyright work that "are done without the license of the copyright owners *and restricted by the copyright in a work*" (our emphasis), and also that protection does not extend to protection by ETMs of uses of copyright works which are "outside the scope of the acts restricted by copyright in the work". While this may seem like a technical point, it has far reaching effects by excluding protection for a significant range of products and services which benefit consumers as well as creators.

Distributors and creators of copyright works and services "make works available" to the public by using technological measures to control and specify the conditions under which access may be granted to them (access controls). If such controls are circumvented – for whatever purpose – such works and services are left vulnerable to massive copying and redistribution. Just as important as providing protection for works, these access controls give a greater range of choice to consumers. The mode of exploiting and making available copyright works is shifting from the distribution of tangible copies to enabling users to experience works directly through the internet, made possible by the employment of access controls. This is a positive development for consumers and is an important distinction.

Access controls manage the way consumers are able to capture a copyright work directly, without needing a physical copy, in some cases without directly implicating the exercise of copyright by the user. For example, a service may offer consumers the choice of having access to a film for a

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day, a week, a month or longer, each for different prices to suit the consumer's budget and preference. If a user of a digital service has paid to have access to a film for a day, the access control ensures the user can watch the film for a day. The price point provided for this access would be appropriate to the service provided, and would be less than if access was granted for a week or to make a permanent copy. However, if the consumer now wishes to watch the film again after a week without paying, the current wording of the proposed Section 273 would not allow this differentiation and would exclude protection of this access control because the mere "watching of the film" is not necessarily an act restricted by copyright in the work. This is only one example of the kind of service that would be impacted. If the security of such services is jeopardized, choices for consumers will inevitably shrink. This has been clearly recognized in the laws of the United States, European Union, and Australia to name a few, which do not require the link between circumvention of an ETM and infringement as is currently required in Section 273.

We understand that concerns have been raised regarding the impact of the protection against circumvention of ETMs on non-infringing use of copyright works. Narrower protection for ETMs would run counter to those concerns by hampering the ability of industry to explore new and innovative ways to distribute and make content available. We believe that such concerns would be better addressed through Section 273H which proposes a mechanism whereby specific exceptions could be recognized, where they are warranted.

We respectfully request that the Committee consider amendments to the proposed Section 273 to exclude the direct link with infringement, so that we as creators, producers and distributors can continue to explore new ways to allow consumers to interact with and gain access to works in the digital environment. We respectfully submit a suggestion for such an amendment in the attached schedule, and would be happy to discuss it further with you.

Best regards,



for Alvin Lee
Director, International Relations
and Public Policy, Asia Pacific

.attachment - Schedule

.cc Ms. Sharon Chan, Clerk, Bills Committee, Hong Kong Legislative Council

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Schedule

"273. Interpretation of sections 273 to 273H

(1) In sections 273A to 273H, "circumvent" (....), in relation to an effective technological measure, means to circumvent the measure without the authority of the copyright owner of the copyright work in relation to which the measure has been applied.

(2) For the purposes of this section and sections 273A to 273H, where a technological measure has been applied in relation to a copyright work, the measure is referred to as an effective technological measure if the use of the work is controlled by the copyright owner of the work through—

(a) an access control or protection process (including the encryption, scrambling and any other transformation of the work) which achieves the intended protection of the work in the normal course of its operation; or

(b) a copy control mechanism which achieves the intended protection of the work in the normal course of its operation.

(3) In subsection (2)—

(a) "technological measure" (.....) means any technology, device, component or means which is designed, in the normal course of its operation, to protect any description of copyright work.