



Bills Committee on Copyright Amendment Bill 2006
Legislative Council
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Dear Sirs

Copyright (Amendment) Bill 2006

We thank the Committee for the opportunity for the Entertainment Software Association ("ESA") to submit its views on the Copyright (Amendment) Bill 2006 (the "Bill").

The ESA

The ESA is the U.S. association dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the \$7 billion in entertainment software sold in the U.S. in 2005, and billions more in export sales of U.S.-made entertainment software.

Comments on the Bill

A. On circumvention of effective technological measures

On Sections 55 and 56 of the Bill, we have the following comments:

1. Under the proposed S273A on civil liability for the act of circumvention of effective technological measures, the plaintiff is required to prove that the defendant knows or has reason to believe that he is doing an act which circumvents the measure and that the act will induce, enable, facilitate, or conceal an infringement of the copyright in the work.

It will be difficult for a plaintiff to find positive evidence to show that a defendant knows his act of circumvention will further induce, enable, facilitate or conceal infringement of copyright in the work. Under the circumstances, it is unclear what the double knowledge requirement seeks to achieve or who it seeks to protect. Moreover, such a requirement would place an unduly onerous burden of proof on the plaintiff. We therefore suggest the deletion of S273A(1)(b).

2. Under the proposed S273B on civil rights and remedies in respect of devices and services designed to circumvent effective technological measures:

2.1 Again, the plaintiff is required to prove that the defendant knows or has reason to believe that he is dealing in a device or providing a service which will be used to circumvent the measure to induce, enable, facilitate, or conceal an infringement of the copyright in the work. This is difficult to prove and encourages circumvention businesses to promote an atmosphere of deliberate ignorance to avoid potential liability. We therefore suggest the deletion of the words "to induce, enable, facilitate or conceal an infringement of the copyright in the work" at the end of S273B(1).

2.2 A major defect to this section is that exhibiting in public and distribution of a relevant device only attracts liability if it is done for the purpose of or in the course of any trade or business. However, it is not uncommon for hackers to overcome technological protection measures for non-commercial purposes (e.g. in competition with other hackers) or to distribute such devices or otherwise make available relevant information on the internet. Copyright owners should be given the right to stop the exhibition of such devices in public places whether or not the exhibition is done in a commercial context. Under the provisions of the Bill, there is nothing a copyright owner can do to remedy this situation. We therefore suggest that the words "for the purpose of or in the course of any trade or business" be deleted from S273B(1)(b).

3. We note that under the proposed S273D(6), S273A does not apply to an act which circumvents an effective technological measure if:

"the measure contains regional coding or otherwise has the effect of preventing or restricting access to the work for the purpose of controlling market segmentation; and

the act is done for the sole purpose of overcoming the restriction which controls market segmentation so as to gain access to the work; and

the copy of the work in relation to which the act is done is not an infringing copy; or if it is an infringing copy, is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made."

- 3.1 We note with concern the above language which would allow circumvention of technological protection measures whose purpose is to control market segmentation. It should be noted that region control codes are employed for market segmentation reasons that also benefit the consumer. For instance, region codes are employed to facilitate localization of the product, ensuring that the product sold in the market is available in the vernacular (where feasible) and is appropriate to the cultural tastes and preferences of the region's or country's consumers.
4. Under the proposed S273C on criminal liability for circumvention of effective technological measures:
- 4.1 We note that the definitions of "circumvention device" and "relevant device" are restricted essentially to any device, product, component or means which is primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of effective technological measures. This definition is narrower compared to the definition of "relevant device" under S273B(2) which also extends to include any device, product, component or means which is promoted, advertised or marketed for the purpose of the circumvention of the measure or which has only a limited commercially significant purpose other than to circumvent the measure. It is suggested that the same broader definition be used for S273C for the following reasons:
- (a) It would be difficult to prove that a circumvention device is primarily designed, produced or adapted for the purpose of facilitating the circumvention of a measure. It is likely to involve evidence from experts on complex technical facts and will take up a significant amount of time and resources on the part of both the prosecution and the copyright owner. Furthermore, a primary purpose test is irrelevant if the device is being specifically marketed as capable of performing a prohibited circumvention function.

- (b) Trial of cases involving complicated technical facts at the Magistrate court level (where most criminal cases are tried) may not be suitable.
- (c) On the other hand, it is much simpler and effective to prove that a device is promoted, advertised or marketed for the purpose of the circumvention of the measure or has only a limited commercially significant purpose other than to circumvent the measure.

4.2 We note that S273F(11) provides the following exceptions to S273C:

"S273 does not apply to an effective technological measure--

- (a) which has been applied in relation to a copyright work issued to the public in a physical article; and
- (b) which contains regional coding or otherwise has the effect of preventing or restricting access to the work for the purpose of market segmentation."

4.3 The above exception is extremely problematic. Even if the Administration is open to proposals for limiting the scope of this exception so that the exception is only applicable to exclude devices purportedly designed to circumvent region coding on entertainment software playable on video game consoles, creating such an exemption would present significant enforcement difficulties as it would be impossible to detect, without forensic testing, whether the device in question was capable of exercising only the intended exception (i.e. to bypass measures that control market segmentation). Furthermore, even if such devices were intended only to circumvent region coding when sold, they can be "flashed" (ie made "fully functional") or recorded with required cracking software to achieve the desired functionality (eg to play pirate video game discs).

4.4 Furthermore, the wide availability and exceedingly low retail price of circumvention devices in Hong Kong is a key contributor to the proliferation of pirated games in the territory and the region (as pirated games cannot be played without the use of circumvention devices). This exception would remove the potential for the offence created under S273C to reduce video game piracy in Hong Kong in any meaningful way, and would in fact contribute to greater piracy as defendants would now have a plausible argument for the supposed legality of the devices they make available in the market. The video game industry is the only industry which has litigated under the existing S273 of

the Copyright Ordinance in attempt to reduce the availability of circumvention devices in Hong Kong. Despite the resources spent on civil action, circumvention devices continue to be widely available in Hong Kong, at prices significantly lower than those of other markets.¹ The imposition of criminal sanctions for trafficking in such devices is essential to reducing the availability of such devices in the Hong Kong market.

5. Works collaboratively" exceptions

- 5.1 S273E(2), (4), (6) and S273F(2),(4),(6) provide that it is an exception for persons to deal in relevant devices or to provide relevant services ("supplier") if they are working collaboratively with another person to enable that other person to do any relevant act (i.e. exempted acts). These exceptions do not make clear how such matters can be proved, and may provide potential Defendants with bogus defences so as to make litigation more lengthy and costly.

B. On Affidavit Evidence

6. We support S27 of the Bill which amends the existing S121 of the Copyright Ordinance for facilitating the proof of copyright subsistence and ownership in legal proceedings.

C. On Criminal Liability for making or dealing with infringing articles etc

7. We refer to S22(1) of the Bill which proposes a new S118(1) (e) and (f)(ii) relating to the exhibiting in public and distribution of infringing copies, and possession of infringing copies for these purposes. We suggest adding the phrase "or part of which includes" after the word "consists of" so that the section will read:

"(e) exhibits in public or distributes an infringing copy of the work for the purpose of or in the course of any trade or business which consists of or part of which includes the dealing in infringing copies of copyright works

(f) possesses an infringing copy of the work with a view to---....

(ii) its being exhibited in public or distributed by any person for the purpose of or in the course of any trade or business which consists of or part of which includes the dealing in infringing copies of copyright works;..."

¹ For instance, an ESA market survey found that circumvention devices in Hong Kong are available for as little as HK\$17 (or US\$2.21) – at 1/10th to 1/20th of the prices of these same devices in other markets.

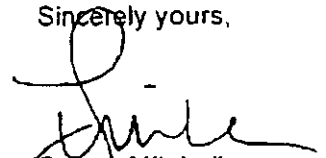
The purpose of this suggestion is to clarify that the offence applies so long as part of the trade or business is dealing in infringing copies.

D. On presumptions against corporate directors and partners in a partnership

- 8. We support S22(4) of the Bill which introduces certain presumptions against directors of a body corporate or partners in a partnership relating to acts of infringement by the body corporate or partnership, as the case may be.

If you have any queries on the above comments, please contact our legal representative in Hong Kong, Ms Monique Woo of Lovells at 2840 5075.

Sincerely yours,



Stevan Mitchell
VP, IP Policy

cc: Commerce Industry & Technology Bureau