



July 11, 2005

**Clerk to Panel on Commerce & Industry
Legislative Council Secretariat**

3/F Citibank Tower
3 Garden Road, Central
Hong Kong

Subject: ESA Response to CTIB's Preliminary Proposals on Various Copyright-related Issues

Dear Sirs:

The Entertainment Software Association (ESA) is the U.S. trade association serving the business and public affairs needs of companies that publish interactive games for video game consoles, handheld devices, personal computers, and the Internet. Our association has had various opportunities to provide our views to you and we again appreciate your affording us an opportunity to convey our comments and recommendations on the preliminary proposals on various copyright-related issues. We specifically address the proposals relevant to the circumvention of technological protection measures for copyright protection (Proposal Sections 32-36). The ESA and its members are joined by Sony Computer Entertainment Inc. (SCEI) in these comments.

The ESA, through counsel, Monique Woo of Lovells Hong Kong, also requests the opportunity to appear at the Legislative Council's Panel meeting on July 19, 2005 to provide additional oral testimony.

ESA offers the following points with respect to amendments to Section 273:

1) *Provide civil remedies for the act of circumvention.* In some cases, the act of circumvention will be carried out by an individual in the privacy of his home or office where enforcement will be difficult, if not impossible. It should certainly be the case that an individual who makes widely available copyright material from which the copy protection or access control measures have been stripped should face liability for this act. Otherwise, those who seek to gain from hacking or cracking activities, through perhaps a barter or exchange of copyright works from which technological protection measures have been stripped, would be free to do so without fear of any legal consequences for their actions.

The report of proposals/consultation document released by CITB on June 21, 2005 proposed civil remedies against "manufacture of, dealing in, or possession for use in business devices, products or components which circumvent effective technological measures (including both copy protection measures and access control measures) used by

copyright owners to protect their works against copyright infringements." ESA and its members find this proposal to be acceptable.

2) Criminalize trafficking in circumvention devices. In the above referenced report/consultation document, CITB proposed the introduction of a "new criminal offense against any person who manufactures for sale or deals in services, products or components which circumvent effective technological protection measures applied to a copy of copyright work, or who provides services on a commercial scale to enable or facilitate the circumvention of such effective technological measures." ESA strongly supports this proposal. As the CITB already recognizes, the "sale of modified game consoles installed with modifying chips is rather prevalent in Hong Kong." Effectively addressing this problem can only be done through the creation of real deterrence against commercial enterprises engaged in the business of manufacturing or distributing circumvention devices and services. Such deterrence can only be achieved through the imposition of criminal penalties for trafficking in circumvention devices.

As these are preliminary proposals, we would request an additional opportunity to comment on the draft legislation that will seek to codify these proposals into law, upon its release by the LegCo. We believe that we will be better able to comment on whether proposed language in the draft legislation adequately captures the LegCo's intent as indicated in these preliminary proposals. However, we also make the following recommendations which we hope the LegCo and the CITB will take into consideration in drafting the amendments.

First, we would suggest that in amending Section 273 to add a criminal offense for trafficking in circumvention devices, that the CITB use language that is already extant in the Copyright Ordinance and thus well-defined under Hong Kong law. We note that in the above quoted language, the CITB introduces the adjective "effective" before "technological protection measures" – in reference to the language used in the WIPO Internet Treaties. We posit that the introduction of the term "effective" is unnecessary given the already defined scope of "copy-protection" in Section 273(4) of the Copyright Ordinance, to wit: "References in this section to copy-protection include any device or means **specifically intended** to prevent or restrict copying of a work." (Emphasis supplied.) "Effective" is defined by Dictionary.com as "having an *intended or expected effect*," and this meaning is clearly envisioned under Section 273(4).

We note that the above quoted language would propose to include "commercial scale" as a criterion for imposing criminal liability for the provision of circumvention services. We believe such to be an adequate formulation provided that it is construed to cover the multiplicity of scenarios in which circumvention devices and services are offered as business incentives, regardless of quantity, including when such are offered through barter or exchange. It is not uncommon, for example, to find circumvention devices installed and circumvention services offered as "bonus" accompaniments to the purchase of other legitimately acquired products, such as game consoles. All such activities should be understood to be undertaken for profit or in the course of business, and should be

subsumed within sufficiently broad language (such as “on a commercial scale”) to convey this sense.

Finally, we also note that in the commercial dealing aspect of the trafficking provision, the above quoted language does not appear to address “possession” in large quantities of circumvention devices, where such possession is clearly intended “for the purpose of trade or business.” We therefore recommend that an additional prong, that of “possession for the purpose of trade or business” be included within the scope of the criminal offense of trafficking in circumvention devices.

3) *Expand the scope of Section 273 to cover both copy protection (or copy controls) and access controls.* As currently written, Section 273 only applies to “copy-protection” measures. (Cf. Section 273 (4): “References in this section to copy-protection include any device or means specifically intended to prevent or restrict copying of a work or fixation of a performance or to impair the quality of copies or fixations made.”) Full implementation of Article 11 of the WIPO Copyright Treaty requires coverage of both copy and access controls, to wit: “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are *used by authors in connection with the exercise of their rights under this Treaty* or the Berne Convention **and** that *restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.*” (Underscoring supplied.)

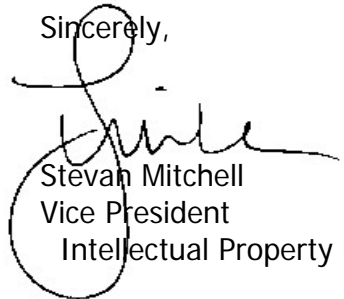
The CITB proposal would expand coverage to both copy protection measures and access control measures. ESA and its members strongly support this proposal. (Cf. CITB proposal, p. 14 creating civil remedies against “the manufacture of, dealing in, or possession for use in business devices, products or components which circumvent effective technological measures *(including both copy protection and access control measures)* used by copyright owners to protect their works against copyright infringements.”) (Emphasis supplied.)

4) *Separate the prohibition against acts of circumvention and trafficking in circumvention devices and services from the question of whether there is an underlying infringement.* Countries choosing to implement the WCT obligations must protect measures that “restrict acts in respect of” copyright materials. Under this requirement, it should not be necessary to prove that a prohibited act of circumvention constitutes, specifically furthers, or is undertaken with the intent to commit copyright infringement (for instance, unauthorized copying or some other infringing act). Requiring proof of copyright infringement (as is provided by Section 273(2), to wit, “... a person who, knowing or having reason to believe that it will be used to make infringing copies...”) effectively guts the anti-circumvention obligation. It would leave pirates free to hack through technological protection measures designed to limit access to those who have acquired legitimate copies of video games or to those who are legitimate subscribers to an online game. Similarly, an individual who provides the tools for another to decrypt, without authorization, an encrypted copyright work should not be allowed to escape liability by simply arguing that what the recipient of the decryption tools did with the decrypted work

has not been proven to be an infringement of an exclusive right of the copyright owner. In virtually all cases, the act of circumvention pre-supposes that an act of infringement will follow. Indeed, if a statutory anti-circumvention provision requires proof of an underlying infringement, this requirement effectively vitiates the statutory purpose of making the act of circumvention illegal as it becomes a wholly predicate offense.

If we can be of further assistance, or further clarification of the points made above is necessary, please do not hesitate to contact us either directly or through our counsel, Monique Woo.

Sincerely,



Stevan Mitchell
Vice President
Intellectual Property Policy