



**Submission by
Cable and Satellite Broadcasting Association of Asia (CASBAA)
to the Bills Committee on the Copyright (Amendment) Bill 2006
Hong Kong S.A.R. Legislative Council**

This submission is made on behalf of the Cable and Satellite Broadcasting Association of Asia (CASBAA); we thank the Committee for the opportunity to present our organization's views.

Headquartered in Hong Kong, CASBAA is an industry association with members and activities in 14 Asia Pacific markets. The Association is dedicated to the promotion of multi-channel television via cable, satellite, broadband and wireless video networks across the Asia-Pacific region and represents some 110 corporations, which in turn serve more than 3 billion people. Member organizations include I-Cable, Galaxy Satellite Broadcasting, PCCW's now Broadband TV, HK Broadband Network, Celestial Pictures, STAR Group, Time Warner, Turner Broadcasting International Asia Pacific, Sony Pictures Television International, Discovery Networks Asia, National Geographic Channel Asia, HBO Asia, MTV Networks Asia-Pacific, AsiaSat, APT Satellite, IBM, Nokia, Sun Microsystems, HSBC, Standard Chartered Bank, PricewaterhouseCoopers and Boeing Space Systems.

Hong Kong is a hub of the Asian broadcasting industry. The industry's ongoing growth and development brings major economic benefits to the SAR. We estimate that the industry is responsible for creating around 2,000 high-paying posts in the international sector and another 8-9,000 jobs in the local distribution platforms. With a forecast average growth of about 13% per annum over the next five years, this is a dynamic, high-tech industry that will continue to make a very important contribution to Hong Kong's economic growth for the foreseeable future – as long as the SAR continues the policies, including inter alia strong intellectual property protection, which have favored the industry's growth.

Because of the importance of our industry to Hong Kong and because of Hong Kong's role in the forefront of intellectual property law and practice in the Greater China region, the Association takes a particular interest in Hong Kong's policies and practices in this regard. CASBAA participated actively in the Administration's review of copyright-related issues, and provided our views to the Commerce, Industry and Technology Bureau on several different aspects of questions it posed. We warmly welcome Hong Kong's review of its copyright law, and its proposals to update its legislative framework to take account of the rapid technological changes affecting distribution of television content in the modern, increasingly digital, environment.

In particular, the bill's recognition that technological measures are increasingly used – and increasingly necessary – to protect digital content from unauthorized duplication and distribution is an important step forward. The Association applauds Hong Kong's intention to introduce civil and criminal penalties against circumvention of these technological measures. We urge the Administration and the Legislative Council to make these measures truly effective in preventing hacking and circumvention of technical protection devices and systems. In this connection, we strongly suggest that the Legislature revise certain provisions of the Administration's draft bill, which risk creating large loopholes for certain types of hacking that are clearly within the scope of activities that are covered by the government's own anti-circumvention goals.

Importance of Technical Protection Measures to the pay-Television industry

Television content can be distributed to consumers “free”, in a business model fully supported by advertising, or in a “pay-TV” environment, where consumers pay directly for part or all of the cost of the programming, either on a subscription basis or in a “pay per view” system. In any case, programming has substantial value, and can be used more than once and in more than one business model. Thus, programming made for distribution on a pay-TV system can later be sold for distribution on a free-to-air channel. Conversely, programming made and distributed on free-to-air broadcasts can at other times and in other markets be distributed on a subscription or pay-per-view basis. Prominent examples of the latter practice include conversion by programming organizations such as the BBC, TVB and the Philippine ABS-CBN network of domestic free-to-air programming into pay programming for sale in overseas markets. American TV networks have announced plans to convert some of their programming initially broadcast on a free-to-air basis for digital download and sale.

The point is that all programming has value. Copyright on these works is designed to protect that value, even where the works are widely distributed, by allowing the rights holder to make it available subject to agreed commercial terms. Protecting that value ensures appropriate remuneration to the talented people who make it, the investors who finance it, and the advertisers who use it to convey messages to consumers. Perhaps more fundamentally, the protection afforded by copyright and anti-circumvention measures is a prerequisite for maintaining the incentives that support the creation of new content, and the availability of that content in the digital environment. If the protections are reduced, the incentives for investment are similarly reduced.

That value can be destroyed by unauthorized distribution of the programming. Over the years, efforts by broadcasters such as TVB to sell their programming in other markets have been dramatically injured by piracy of their content, by means such as illegal reproduction in the form of videocassettes and DVDs, and also by signal piracy. Consumers, even of “free” TV programming, have always faced limitations on their rights to use that programming. In Hong Kong, for example, they have had the right to view the programming, and make a copy “for the purpose of enabling it to be viewed or listened to at a more convenient time” (Sec. 79 of the Copyright Ordinance), but no consumer has had the right to use free-to-air programming to make thousands of videocassettes or compact disks, and distribute them for commercial gain.

In the increasingly digital environment of the television industry, it is becoming easier and cheaper to steal programming, reproduce it perfectly, and distribute it efficiently to millions of consumers. The example of the recorded music industry shows that unrestrained duplication and distribution of unauthorized copies results in severe

damage to the industry and all who are supported by it, and depresses the creative environment. In the area of audio-visual content, the risks posed by unauthorized digital distribution are substantial, particularly given the massive upfront investment that is required for the creation of programming.

As discussed above, Hong Kong draws substantial benefits from hosting a prosperous international pay-TV industry in the SAR, and it has every reason to view the prospect of unrestricted digital piracy with concern.

As digital distribution of television content increases, so do efforts to use technological measures to protect that content. In the pay-TV industry, two types of digital rights management (DRM) systems are common: access control measures prevent unauthorized persons from receiving or viewing the programming, and measures which identify the rights attached to a specific work operate with reproduction and transmission devices to ensure respect for the limits of those rights.

Examples of the latter type of DRM system are the “broadcast flag” system developed for use in the United States, and a parallel system, the DVB Content Control and Copy Management (CPCM) system now under development in Europe. These systems allow content producers to attach information to the digital streams containing their product, which describe the permitted range of acts that consumers can do with that product. At the receiving end, devices and systems used to handle the product recognize that information and act on it. Thus, the system might recognize that a “free-to-air” program might be available for unlimited recording and reproduction. Or the consumer might be limited to making a single copy for his own use. With these or other DRM systems, pay-TV programming might enable a multiplicity of choices for the consumer; a consumer might choose the option that allows him to watch the programming for a specified period of time (say, a week) or he might choose, (as in the case of a video on demand system), to actually watch the program at a time of his own choosing. In short, the application of technological protection measures increases the number of product offerings for consumers, allowing for business models that accommodate various pricing options to further enhance consumer choice.

These systems are vital to protecting the value of the programming that is the basis of this industry. They are also vital to the rollout of innovative new methods of digital program distribution. With these systems, consumers in Hong Kong will have earlier, more flexible and more personal demand-driven choices of programming available to them. Conversely, without secure digital rights management systems, content owners will be reluctant to permit digital distribution of the works they own, which would place licensed cable, satellite and broadband TV providers in Hong Kong at a substantial disadvantage, leaving consumers with fewer programming and service choices. We regard it as essential for the health of the cable, satellite and broadband TV market that these vital technological protection measures receive the benefit of protections against circumvention as well as a prohibition on the devices and services that facilitate that activity. We warmly commend the Administration’s attempts to address these issues in the Copyright (Amendment) Bill, but have a number of significant concerns, outlined below.

The Copyright (Amendment) Bill 2006

The draft bill recognizes the importance of technological protection measures, and levies civil and criminal penalties on various kinds of activities aimed at circumventing them. This is an important modernizing feature of the legislation, and it is in synchrony with the efforts by the international community, through the World Intellectual Property Organization (WIPO) to legislate against circumvention activities, especially those which may facilitate unauthorized distribution on a commercial scale.

WIPO however, in a 2003 study, warned that the question of exemptions and limitations to this type of legislation is of critical importance. The WIPO authors believed it essential “that exceptions and limitations be drafted carefully. It is vitally important that only certain legitimate activities be defined to fall within the exceptions.” In this area, the draft bill has lacunae, that our industry urges be remedied before passage by the legislature.

1. We harbour grave concerns that the bill’s exemptions from prohibitions against trafficking in circumvention devices or services may eviscerate the protection afforded by earlier parts of the Bill. Our principal concern is contained in the draft bill’s section 273F(12), which exempts from the law’s circumvention sanctions any technological protection measure which prohibits the making of a recording of a broadcast or a cable programme upon its reception.

As a matter of principle, we believe this exemption creates an unwarranted “second-class” status for content based on how it is conveyed to the consumer (over a broadcast or cable system). Content conveyed in that manner, according to the draft, is not accorded the same legal status or effective protection afforded to other content. This is arguably not consistent with Hong Kong’s WIPO obligations.

We believe this provision is intended to make it possible for consumers to engage in “time shifting” – the practice of recording a programme at the moment of its transmission to view it at a later time. This practice, with regard to broadcasts of linear programme streams (where the consumer has no control over the timing of the programme’s transmission) is widespread, accepted by most content providers, enshrined in the inter-industry content protection technology licensing agreements that govern development of these technologies, and is specifically recognized in section 79 of the Hong Kong Copyright Ordinance.

However, the language of the draft amendments creates an exemption that would protect not only legitimate time-shifting activities, but activities aimed at circumventing a whole host of digital rights management systems, including those applicable to programming that is not intended or permitted by law to be copied and viewed at a later time. To give two examples: because these systems respond to a variety of codes embedded in the digital stream, the same system which can allow the recording of a program broadcast as part of a linear stream of free-to-air programming, can prohibit recording of a program sold as a pay-per-view video-on-demand system where the consumer has already chosen the time of transmission and has no legitimate need to record the program (i.e. video-on-demand). The same system which can allow or prohibit a consumer’s making of a copy of a program can also be coded to prevent transfer of that copy outside the closed system made up of the cable/broadband platform’s conditional access system. (In such a system the consumer is allowed to

watch a copy on his own TV/recorder, but not transfer it to others and specifically not onto the Internet.)

If the technological protection system can be defeated, its provisions prohibiting transfer onto the Internet and/or commercial-scale reproduction of the program content will be voided, creating great damage to the industry. It must be noted that circumvention devices are purpose-neutral by nature. A device that the law permits for a single intended purpose can be used to circumvent DRM systems for other purposes as well.

By creating an exemption for commercial sales of circumvention devices and services aimed at attacking such systems, the draft legislation virtually invites creation of a large and sophisticated market in Hong Kong for devices and services which would have the sham purpose of defeating recording restrictions, but the real purpose of allowing massive transfers, distribution, and reproduction of copyrighted content contained in the program stream. As such infringing content would be virtually certain to find its way onto the Internet and pollute the markets in overseas jurisdictions, this would place Hong Kong in violation of its international commitments. The wide availability of circumvention devices in Hong Kong could provide conditions for making Hong Kong a hub of piracy, which could not be controlled as a result of the bill's loopholes allowing for the sale of certain circumvention devices.

This would be a highly damaging outcome, for our industry and for Hong Kong. The provisions in question are not only unwise, but also unnecessary. We see no need for a specific exemption for circumvention activities, to protect time-shifting. We are not aware of any other WIPO member that has included such an exemption in its legislation. This is a solution proposed where there is, quite simply, no problem: there is in practice no effort anywhere in the world to interfere with consumers' time-shifting of linear programme streams and, given the provisions of the industry licensing agreements governing rights management technologies which specifically provide for allowing time-shifting, there is little likelihood of any such effort developing. In the absence of any threat to consumer's ability to time-shift, creating a broad exemption such as that in 273F(12) is unwarranted and – given the probable negative spillover of the exemption language included in the current draft – likely to create significant long-run damage to our industry.

Moreover, DRM systems are constantly evolving, becoming more versatile and adaptable – to the benefit of content owners and consumers alike. An exemption such as the one proposed may severely hamper development activities by undermining the legal basis for protection.

A far better approach would be to delete proposed section 273F(12), and – if in the future there appears to be a real need for an exemption to permit sales of devices or systems for time-shifting linear programme streams -- the government could use the Secretary's exemption authority provided in 273H to create the necessary narrowly tailored exemption.

If the government believes that providing explicit permission for time shifting of linear programming streams is necessary, we submit that alternative means of accomplishing this goal would be far preferable than creation of a major loophole in the Copyright Ordinance's anti-circumvention provisions. It would be possible, for instance, to include in alternative or subsidiary legislation, provisions denying broadcasters the

right to place encoding in DRM systems that would prevent consumers from making time-shifting recordings. Provisions parallel to this have been included in U.S. FCC regulations (see **bold language** in the attached appendix), and we see no obstacle to Hong Kong's using its planned revision of the Broadcasting Act and subsidiary legislation to accomplish that purpose.

As noted above, there is no urgency to the "time shifting" question, and no urgent need to take legislative action in this revision of the Copyright Ordinance. (Indeed, use of an exemption to the Copyright Ordinance to accomplish this public purpose through the "back door" of activities of hackers and infringers is a route unworthy of modern Hong Kong. The straightforward and transparent approach of regulating anti-time-shifting encoding by broadcasters is a far better targeted, straightforward and honourable way to accomplish the public policy goal in question.) We also note that the regulatory approach we are suggesting permits a differentiated treatment of content delivery modes such as pay-per-view and video-on-demand from linear broadcasts, and is for this reason highly preferable to the recklessly broad exemption now contained in the draft amendments, which covers all modes of delivery of cable TV content.

2. We are also concerned by the requirement in sections 273A(1)(b) and 273B(1)(c) that a circumventer must know that the act he is doing will induce, enable, facilitate or conceal an infringement of copyright in the work. This provision sets an unworkably high knowledge standard, in our view, which would be extremely difficult to overcome, in all but the most obvious of cases. The rights owner, to achieve judicial protection of his rights, will also need to prove that the circumventer had an understanding of copyright law – and a simple assertion that the circumventer thought his actions would not result in infringement could provide a defense, thus rendering the provision virtually useless. A far better standard is that adopted in directives of the European Union, which simply require that the perpetrator know or have reason to believe that he is pursuing circumvention of a protection system (and not necessarily of copyright violations.) The prohibitions against circumvention, and the prohibitions against copyright infringement should remain unconnected. A standard that requires proof of infringement, or that fails to recognize the act of circumvention itself as an independently prohibited act would fall short of the standards required for effective protection of digital works, in accordance with international copyright standards.

3. We do not agree with inclusion in the Act of Section 273C(2)(b), which exempts from the law's purview cable television set-top boxes. The administration has argued that such devices should be excluded from this portion of the copyright law because they are included in the Broadcasting Ordinance. However, we believe that their inclusion in both places is necessary and appropriate, both to clarify for the community that such devices are in fact technological measures for the protection of copyrighted works, and to ensure that rights owners can use the Copyright Ordinance to achieve judicial protection of their works even where it might not be possible to use the Broadcasting Ordinance. (Hong Kong's Broadcasting Ordinance does not prohibit, and OFTA does not enforce, strictures against commercial display of copyrighted television programming pirated from overseas sources – even where the same acts are prohibited under the Broadcasting Ordinance if the programming comes from a Hong Kong-licensed television provider. Use of the Copyright Ordinance has so far proven to be the only modestly effective way for rights owners to control distribution of their programming in the SAR. Indeed, our Association continues to believe that Hong Kong should join the ranks of the developed markets in Asia-Pacific (including Japan, Korea, Singapore, Malaysia and Australia) who have criminalized end-user

possession/use of “hacked” set-top boxes whose technical protection measures have been circumvented.)

The Administration’s argument that this coverage of some crimes under two sections of law would result in duplicative enforcement efforts is not a strong one: all enforcement agencies are under the Administration’s control and duplicative efforts can easily be avoided by administrative arrangements. We do not find this to be a cogent argument for withholding the protection of the law from this particular set of technical protection measures.

4. Minor textual changes:

-- We suggest replacing the circular definition of “circumvent” in 273(1) with a more precise definition: “...’circumvent’ in relation to an effective technological measure, means to avoid, bypass, remove, deactivate or impair the measure without the authority...”

-- We suggest clarifying section 273(2) by adding reference to authorized distributors: “...if the use of the work is controlled by the copyright owner of the work or by the authorized licensee or distributor of the work through....”

-- We suggest clarifying section 273A (2)(c) to avoid infringers claiming to have rights to impede enforcement activities because they broadcast the work to others. Subsection (c) should read: “any other person who pursuant to the authority of the copyright owner (i) issues to the public copies of the work (ii) makes available to the public copies of the work or (iii) broadcasts the work, or includes the work in a cable programme service.”

-- Similarly, section 273B(3)(c) should read ““any other person who pursuant to the authority of the copyright owner (i) issues to the public copies of the work (ii) makes available to the public copies of the work or (iii) broadcasts the work, or includes the work in a cable programme service.”

-- We suggest clarifying section 273C(e) to make it quite clear that a circumventor’s business does not need to consist entirely of dealing in circumvention devices for the business to be illegal. Suggested new language: “(e) exhibits in public or distributes any relevant device for the purpose of or in the course of any trade or business which includes dealing in circumvention devices.

Conclusion

Hong Kong's effort to update its copyright legislation deserves praise. Given the SAR's central role in Asian broadcasting, it has every reason to adopt measures likely to promote the growth and vitality of that industry. With elimination of the broad exceptions for recording devices and set-top boxes, and adjustment of a few other specific textual provisions, the SAR can have world-class legislation on circumvention of technical protection measures. This would be in keeping with its leading role in Asian broadcasting and its regional leading role on intellectual property issues. We strongly urge that these changes be made, and that the overall legislation be enacted by the Legislative Council as soon as possible.

Appendix

Excerpt from the U.S. Code of Federal Regulations

Subpart W – Encoding Rules

Sec.

76.1901 Applicability.

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§76.1901 Applicability

(a) Each multi-channel video programming distributor shall comply with the requirements of this subpart.

(b) This subpart shall not apply to distribution of any content over the Internet, nor to a multi-channel video programming distributor's operations via cable modem or DSL.

(c) With respect to cable system operators, this subpart shall apply only to cable services. This subpart shall not apply to cable modem services, whether or not provided by a cable system operator or affiliate.

§76.1902 Definitions

(a) Commercial Advertising Messages shall mean, with respect to any service, Program, or schedule or group of Programs, commercial advertising messages other than: (1) advertising relating to such service itself or the programming contained therein, (2) interstitial programming relating to such service itself or the programming contained therein, or (3) any advertising which is displayed concurrently with the display of any part of such Program(s), including but not limited to “bugs,” “frames” and “banners.”

(b) Commercial Audiovisual Content shall mean works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied, transmitted by a Covered Entity and that are: (1) not created by the user of a Covered Product, and (2) offered for transmission, either generally or on demand, to subscribers or purchasers or the public at large or otherwise for commercial purposes, not uniquely to an individual or a small, private group.

(c) Commercially-Adopted Access Control Method shall mean any commercially-adopted access control method including digitally controlled analog scrambling systems, whether now or hereafter in commercial use.

(d) Copy Never shall mean, with respect to Commercial Audiovisual Content, the Encoding of such content so as to signal that such content may not to be copied by a Covered Product.

(e) Copy One Generation shall mean, with respect to Commercial Audiovisual Content, the Encoding of such content so as to permit a first generation of copies to be made by a Covered Product but not copies of such first generation of copies.

(f) Copy No More shall mean, with respect to Commercial Audiovisual Content, the Encoding of such content so as to reflect that such content is a first generation copy of content Encoded as Copy One Generation and no further copies are permitted.

(g) Covered Product shall mean a device used by consumers to access Commercial Audiovisual Content offered by a Covered Entity (excluding delivery via cable modem or the Internet); and any device to which Commercial Audiovisual Content so delivered from such Covered Product may be passed, directly or indirectly.

(h) Covered Entity shall mean any entity that is subject to this subpart.

(i) Defined Business Model shall mean Video-on-Demand, Pay-Per View, Pay Television Transmission, Non-Premium Subscription Television, Free Conditional Access Delivery and Unencrypted Broadcast Television.

(j) Encode shall mean, in the transmission of Commercial Audiovisual Content, to pass, attach, embed, or otherwise apply to, associate with, or allow to persist in or remain associated with such content, data or information which when read or responded to in a Covered Device has the effect of preventing, pausing, or limiting copying, or constraining the resolution of a Program when output from the Covered Device.

(k) Encoding Rules shall mean the requirements or prohibitions describing or limiting Encoding of audiovisual content as set forth in this Rule.

(l) Free Conditional Access Delivery shall mean a delivery of a service, Program, or schedule or group of Programs via a Commercially-Adopted Access Control Method, where viewers are not charged any fee (other than government-mandated fees) for the reception or viewing of the programming contained therein, other than Unencrypted Broadcast Television.

(m) Non-Premium Subscription Television shall mean a service, or schedule or group of Programs (which may be offered for sale together with other services, or schedule or group of Programs), for which subscribers are charged a subscription fee for the reception or viewing of the programming contained therein, other than Pay Television, Subscription-on-Demand and Unencrypted Broadcast Television. By way of example, "basic cable service" and "extended basic cable service" (other than Unencrypted Broadcast Television) are "Non-Premium Subscription Television."

(n) Pay-Per-View shall mean a delivery of a single Program or a specified group of Programs, as to which each such single Program is generally uninterrupted by Commercial Advertising Messages and for which recipients are charged a separate fee for each Program or specified group of Programs. The term Pay-Per-View shall also include delivery of a single Program as described above for which multiple start times are made available at time intervals which are less than the running time of such Program as a whole. If a given delivery qualifies both as Pay-Per-View and a Pay Television Transmission, then, for purposes of this Rule, such delivery shall be deemed Pay-Per-View rather than a Pay Television Transmission.

(o) Pay Television Transmission shall mean a transmission of a service or schedule of Programs, as to which each individual Program is generally uninterrupted by Commercial Advertising Messages and for which service or schedule of Programs subscribing viewers are charged a periodic subscription fee, such as on a monthly basis, for the reception of such programming delivered by such service whether separately or together with other services or programming, during the specified viewing period covered by such fee. If a given delivery qualifies both as a Pay Television Transmission and Pay-Per-View, Video-on-Demand, or Subscription-on-Demand then, for purposes of this Rule, such delivery shall be deemed Pay-Per-View, Video-on-Demand or Subscription-on-Demand rather than a Pay Television Transmission.

(p) Program shall mean any work of Commercial Audiovisual Content.

(q) Subscription-on-Demand shall mean the delivery of a single Program or a specified group of Programs for which: (1) a subscriber is able, at his or her discretion, to select the time for commencement of exhibition thereof, (2) where each such single Program is generally uninterrupted by Commercial Advertising Messages; and (3) for which Program or specified group of Programs subscribing viewers are charged a periodic subscription fee for the reception of programming delivered by such service during the specified viewing period covered by the fee. In the event a given delivery of a Program qualifies both as a Pay Television Transmission and Subscription-on-Demand, then for purposes of this Rule, such delivery shall be deemed Subscription-on-Demand rather than a Pay Television Transmission.

(r) Undefined Business Model shall mean a business model that does not fall within the definition of a Defined Business Model.

(s) Unencrypted Broadcast Television means any service, Program, or schedule or group of Programs, that is a further transmission of a broadcast transmission (i.e., an over-the-air transmission for reception by the general public using radio frequencies allocated for that purpose) that substantially simultaneously is made by a terrestrial television broadcast station located within the country or territory in which the entity further transmitting such broadcast transmission also is located, where such broadcast transmission is not subject to a Commercially-Adopted Access Control Method (e.g., is broadcast in the

clear to members of the public receiving such broadcasts), regardless of whether such entity subjects such further transmission to an access control method.

(t) Video-on-Demand shall mean a delivery of a single Program or a specified group of Programs for which: (1) each such individual Program is generally uninterrupted by Commercial Advertising Messages; (2) recipients are charged a separate fee for each such single Program or specified group of Programs; and (3) a recipient is able, at his or her discretion, to select the time for commencement of exhibition of such individual Program or specified group of Programs. In the event a delivery qualifies as both Video-on-Demand and a Pay Television Transmission, then for purposes of this Rule, such delivery shall be deemed Video-on-Demand.

§76.1903 Interfaces

A Covered Entity shall not attach or embed data or information with Commercial Audiovisual Content, or otherwise apply to, associate with, or allow such data to persist in or remain associated with such content, so as to prevent its output through any analog or digital output authorized or permitted under license, law or regulation governing such Covered Product.

§76.1904 Encoding Rules for Defined Business Models

(a) Commercial Audiovisual Content delivered as Unencrypted Broadcast Television shall not be Encoded so as to prevent or limit copying thereof by Covered Products or, to constrain the resolution of the image when output from a Covered Product.

(b) Except for a specific determination made by the Commission pursuant to a petition with respect to a Defined Business Model other than Unencrypted Broadcast Television, or an Undefined Business Model subject to the procedures set forth in §76.1906:

(1) Commercial Audiovisual Content shall not be Encoded so as to prevent or limit copying thereof except as follows:

(i) to prevent or limit copying of Video-on-Demand or Pay-Per-View transmissions, subject to the requirements of paragraph (b)(2) of this section; and

(ii) to prevent or limit copying, other than first generation of copies, of Pay Television Transmissions, Non-Premium Subscription Television, and Free Conditional Access Delivery transmissions; and

(2) With respect to any Commercial Audiovisual Content delivered or transmitted in form of a Video-on-Demand or Pay-Per-View transmission, a Covered Entity shall not Encode such content so as to prevent a Covered Product, without further authorization, from pausing such content up to 90 minutes from initial transmission by the Covered Entity (e.g., frame-by-frame, minute-by-minute, megabyte by megabyte).

§76.1905 Petitions to Modify Encoding Rules for New Services Within Defined Business Models

(a) The Encoding Rules for Defined Business Models in §76.1904 reflect the conventional methods for packaging programs in the MVPD market as of December 31, 2002, and are presumed to be the appropriate rules for Defined Business Models. A Covered Entity may petition the Commission for approval to allow within a Defined Business Model, other than Unencrypted Broadcast Television, the Encoding of a new service in a manner different from the Encoding Rules set forth in §76.1904(b)(1)-(2). No such petition will be approved under the public interest test set forth below unless the new service differs from existing services provided by any Covered Entity under the applicable Defined Business Model prior to December 31, 2002.

(b) Petitions. A petition to Encode a new service within a Defined Business Model other than as permitted by the Encoding Rules set forth in §76.1904(b)(1)-(2) shall describe:

(1) The Defined Business Model, the new service, and the proposed Encoding terms, including the use of Copy Never and Copy One Generation Encoding, and the Encoding of content with respect to "pause" set forth in §76.1904(b)(2).

(2) Whether the claimed benefit to consumers of the new service, including, but not limited to, the availability of content in earlier release windows, more favorable terms, innovation or original programming, outweighs the limitation on the consumers' control over the new service;

(3) The ways in which the new service differs from existing services offered by any Covered Entity within the applicable Defined Business Model prior to December 31, 2002;

(4) All other pertinent facts and considerations relied on to support a determination that grant of the Petition would serve the public interest.

(5) Factual allegations shall be supported by affidavit or declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(c) Petition Process.

(1) Public Notice. The Commission shall give public notice of any such Petition.

(2) Comments. Interested persons may submit comments or oppositions to the petition within thirty (30) days after the date of public notice of the filing of such petition. Comments or oppositions shall be served on the petitioner and on all persons listed in petitioner's certificate of service, and shall contain a detailed full statement of any facts or considerations relied on. Factual allegations shall be supported by affidavit or declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(3) Replies. The petitioner may file a reply to the comments or oppositions within ten (10) days after their submission, which shall be served on all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit or declaration, of any additional facts or considerations relied on. There shall be no further pleadings filed after petitioner's reply, unless authorized by the Commission.

(4) Commission Determination as to Encoding Rules for a new service within a Defined Business Model.

(i) Proceedings initiated by petitions pursuant to this section shall be permit-but-disclose proceedings, unless otherwise specified by the Commission. The Covered Entity shall have the burden of proof to establish that the proposed change in Encoding Rules for a new service is in the public interest. In making its determination, the Commission shall take into account the following factors:

(A) Whether the benefit to consumers of the new service, including but not limited to earlier release windows, more favorable terms, innovation or original programming, outweighs the limitation on the consumers' control over the new service;

(B) Ways in which the new service differs from existing services offered by any Covered Entity within the applicable Defined Business Model prior to December 31, 2002; and

(ii) The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate.

(iii) A petition may, upon request of the petitioner, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the petition. A petitioner's request for the return of a petition will be regarded as a request for dismissal.

(d) Complaint Regarding a New Service Not Subject to Petition. In an instance in which an interested party has a substantial basis to believe and does believe in good faith that a new service within a Defined Business Model has been launched without a petition as required by this Rule, such party may file a complaint pursuant to section 76.7 of the Commission's rules.

§76.1906 Encoding Rules for Undefined Business Models

(a) Upon public notice and subject to requirements as set forth herein, a Covered Entity may launch a program service pursuant to an Undefined Business Model. Subject to Commission review upon Complaint, the Covered Entity may initially Encode programs pursuant to such Undefined Business Model without regard to limitations set forth in §76.1904(b).

(1) Notice. Concurrent with the launch of an Undefined Business Model by a Covered Entity, the Covered Entity shall issue a press release to the PR Newswire so as to provide public notice of the Undefined Business Model, and the proposed Encoding terms. The notice shall provide a concise summary of the Commercial Audiovisual Content to be provided pursuant to the Undefined Business Model, and of the terms on which such content is to be available to consumers. Immediately upon request from a party entitled to be a Complainant, the Covered Entity shall make available information that indicates the proposed Encoding terms, including the use of Copy Never or Copy One Generation Encoding, and the Encoding of content with respect to "pause" as defined in §76.1904(b)(2).

(2) Complaint Process. Any interested party ("Complainant") may file a complaint with the Commission objecting to application of Encoding as set forth in the notice.

(i) Pre-complaint resolution. Prior to initiating a complaint with the Commission under this subsection, the Complainant shall notify the Covered Entity that it may file a complaint under this subsection. The notice must be sufficiently detailed so that the Covered Entity can determine the specific nature of the potential complaint. The potential Complainant must allow a minimum of thirty (30) days from such notice before filing such complaint with the Commission. During this period the parties shall endeavor in good faith to resolve the issue(s) in dispute. If the parties fail to reach agreement within this 30 day period, Complainant may initiate a complaint in accordance with the procedures set forth herein.

(ii) Complaint. Within two years of publication of a notice under paragraph (a)(1) of this section, a Complainant may file a complaint with the Commission objecting to application of the Encoding terms to the service at issue. Such complaint shall state with particularity the basis for objection to the Encoding terms.

(A) The complaint shall contain the name and address of the complainant and the name and address of the Covered Entity.

(B) The complaint shall be accompanied by a certification of service on the named Covered Entity.

(C) The complaint shall set forth with specificity all information and arguments relied upon. Specific factual allegations shall be supported by a declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(D) The complaint shall set forth attempts made by the Complainant to resolve its complaint pursuant to paragraph (a)(2)(i) of this section.

(iii) Public Notice. The Commission shall give public notice of the filing of the complaint. Once the Commission has issued such public notice, any person otherwise entitled to be a Complainant shall instead have the status of a person submitting comments under paragraph (a)(2)(iv) of this section rather than a Complainant.

(iv) Comments and Reply.

(A) Any person may submit comments regarding the complaint within thirty (30) days after the date of public notice by the Commission. Comments shall be served on the Complainant and the Covered Entity and on any persons listed in relevant certificates of service, and shall contain a detailed full statement of any facts or considerations relied on. Specific factual allegations shall be supported by a declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(B) The Covered Entity may file a Response to the Complaint and comments within twenty (20) days after the date that comments are due. Such Response shall be served on all persons who have filed complaints or comments and shall also contain a detailed full showing, supported by affidavit or declaration, of any additional facts or considerations relied on. Replies shall be due ten (10) days from the date for filing a Response.

(v) Basis for Commission determination as to encoding terms for an Undefined Business Model. In a permit-but-disclose proceeding, unless otherwise specified by the Commission, to determine whether Encoding terms as noticed may be applied to an Undefined Business Model, the Covered Entity shall have the burden of proof to establish that application of the Encoding terms in the Undefined Business Model is in the public interest. In making any such determination, the Commission shall take into account the following factors:

(A) Whether the benefit to consumers of the new service, including but not limited to earlier release windows, more favorable terms, innovation or original programming, outweighs the limitation on the consumers' control over the new service;

(B) Ways in which the new service differs from services offered by any Covered Entity prior to December 31, 2002;

(vi) Determination Procedures. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate.

(b) Complaint Regarding a Service Not Subject to Notice. In an instance in which an interested

party has a substantial basis to believe and believes in good faith that a service pursuant to an Undefined Business Model has been launched without requisite notice, such party may file a complaint pursuant to section 76.7 of the Commission's rules.

§76.1907 Temporary Bona Fide Trials

The obligations and procedures as to Encoding Rules set forth in §§76.1904(b)-(c) and §§76.1905(a)-(b) do not apply in the case of a temporary bona fide trial of a service.

§76.1908 Certain Practices Not Prohibited

Nothing in this subpart shall be construed as prohibiting a Covered Entity from:

(a) encoding, storing or managing Commercial Audiovisual Content within its distribution system or within a Covered Product under the control of a Covered Entity's Commercially Adopted Access Control Method, provided that the outcome for the consumer from the application of the Encoding Rules set out in §§76.1904(a)-(b) is unchanged thereby when such Commercial Audiovisual Content is released to consumer control, or

(b) causing, with respect to a specific Covered Product, the output of content from such product in a format as necessary to match the display format of another device connected to such product, including but not limited to providing for content conversion between widely-used formats for the transport, processing and display of audiovisual signals or data, such as between analog and digital formats and between PAL and NTSC or RGB and Y,Pb,Pr.

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**Cable and Satellite Broadcasting Association of Asia
27 April, 2006**