

Submission of PCCW LIMITED
To the Bills Committee on the Copyright (Amendment) Bill 2006
Hong Kong S.A.R. Legislative Council

This submission is made by PCCW Limited. We thank the Committee for the opportunity to present our views.

1. Introduction

PCCW Limited is the premier telecommunications provider in Hong Kong and a leader in information and communications technologies in Asia. PCCW continues to enhance Hong Kong's role as a regional center of technological excellence through innovative services. Locally, PCCW group companies provide telephony, broadband and television and other media services. The phenomenal success of PCCW Media Limited's **now TV** service has attracted the attention and praise of industry players and government from around the globe.

The supply and use of copyright works is PCCW core business and the appropriate protection and enforcement of copyright a cornerstone of our television and media operations. We are also sensitive to the interests and requirements of our content providers and end-users of the copyright materials distributed through our networks. We are conscious that a balance needs to be made between the need to protect copyright materials from unlawful or unfair exploitation and the legitimate concerns of the community.

We welcome the updating of the Copyright Ordinance to take account of the rapid technological changes affecting distribution of content in the modern digital environment and for alignment with international obligations and standards.

This submission focuses on certain provisions of the draft Bill concerning circumvention of technological measures and business end-use of unauthorized television decoders, rights management and retransmission of free-to-air broadcasts over subscription television networks. We may wish to make further submissions in due course.

2. Civil remedies for circumvention activities

2.1 The draft Bill introduces civil liability for an act of circumvention provided the act was done with knowledge that the act will lead to copyright infringement. We are of the view that the knowledge requirement will make enforcement difficult or practically impossible in most cases. Some related provisions may also need refinement:

2.2 Knowledge Requirement:

(a) Under the proposed new sections 273A(1) and 273B(1) it must be shown that the defendant did the relevant act knowing or having reason to believe the act: (a) circumvents the measure without the authority of the copyright owner; and (b) will induce, enable, facilitate or conceal an infringement of copyright. When handling copyright material, the community is expected to know the law and therefore assume that the exclusive rights of a copyright owner will be infringed unless authorized. Once a user has knowledge that the use of the device is for circumvention of a protection system, there should be no need to also show that the user has knowledge or reason to believe that the circumvention will lead to copyright infringement.

(b) If a knowledge element is required, unscrupulous users of circumvention devices will seek to avoid liability by claiming a lack of relevant knowledge and could claim that the circumvention was to enable a lawful use, whereas their true intention was to enable an

unlawful use. Turning a 'blind eye' and claiming ignorance of the effect of the device, or the lack of authorization will become the standard 'loophole'. A more appropriate standard (and the standard adopted in directives of the European Union), would require that the defendant need only know or have reason to believe that he/she is circumventing a protection system.

- 2.3 Exemption for gaining access to parallel imported copies of copyright works: Section 273D(7) exempts from civil liability circumvention of measures applied to all copyright works containing regional coding or which prevents or restricts access for controlling market segmentation. The reception, decoding and viewing of satellite broadcasts of television programs in Hong Kong that are not authorized by the copyright owner for reception, decoding and viewing in Hong Kong is an infringement of copyright in the broadcast and underlying works. Section 273D(7) applies to all copyright works. It is not limited to physical articles. The net effect of this section would seem to permit activities that are currently subject to civil liability. Section 273D(7) should be amended to make it clear that the provision does not apply to broadcasts or cable programme services and underlying works or to devices for circumvention of such measures employed in the transmission of any copyright works.
- 2.4 Nexus between act of Circumvention and Liability: Sections 273A(2) and 273B(3) give the same rights and remedies to the persons listed as a copyright owner has in respect of an infringement of copyright. These sections appear to treat the act of circumvention as if it is an act of infringement or equivalent to an act of infringement, but this is not clear. It is not clear how the words of section 273A(2) and section 273B(3) establish liability for the act of circumvention or dealing in circumvention devices. Is the act of circumvention or dealing in a circumvention device an infringement of copyright (including for example, moral rights and rights in performances?) or is this a new type of civil wrong? In establishing liability and seeking a remedy must the plaintiff show a nexus between the act of circumvention and specific copyright works or related rights?
- 2.5 Standing of 'any other person': Sections 273A(2)(c) and 273A(3)(c) give 'any other person' who, issues, makes available or broadcasts the same rights as the copyright owner or exclusive licensee. It seems to us that these *other* persons would need to be authorized by or through the copyright owner to issue, make available or broadcast before they should have standing to sue. We submit that this should be made clear.

3. Criminal Liability for circumvention of technological measures

- 3.1 The Administration believes that in order not to affect legitimate activities such as parallel importation for private and domestic use and recording of broadcasts for later viewing the Bill will exclude from criminal liability measures that prevent access to parallel imported copies of copyright works or the recording of a broadcast or cable programme upon its reception. In addition the new provisions will not apply to television decoders that already attract criminal liability under the Broadcasting Ordinance. The Administration also proposes a defense for those who did not know that the measure enabled or facilitated the circumvention. We have a number of serious concerns about the proposed exemptions:
- 3.2 Exclusion of measures that prohibit the making of a recording of a broadcast or a cable program upon its reception:
- (a) Section 273F(12) exempts from criminal liability technological measures that prohibit the making of a recording of a broadcast or a cable program upon its reception.
 - (b) Section 79 of the Copyright Ordinance is headed "**Recording for the purposes of time shifting**" and provides: that "The making for *private and domestic* use of a recording of a broadcast or cable programme solely for the purpose of enabling it to be viewed or

listened to at **a more convenient time** does not infringe any copyright in the broadcast or cable programme or in any work included in it." (Emphasis added)

- (c) The exemption in section 79 is expressly limited to the making of a recording for private and domestic and use solely for the purpose of time shifting.
- (d) First, we cannot see any reason for a specific exemption for circumvention activities in support of section 79. Secondly, even if there were compelling reasons for an exemption, the proposed exemption is too wide and would provide an exemption whether or not for making of recordings for **private and domestic** use and whether or not solely for the for the purposes of **time shifting**.
- (e) The community will understandably be confused by the proposed exemption and will assume that as 273F(12) is not limited to private and domestic time shifting that circumvention for all purposes be permissible. For example the proposed exemption would potentially allow the circumvention of measures to prohibit the recording of on-demand programmes. There can be no legitimate 'time-shifting' purpose for the making of a recording of an on-demand programme.

3.3 Exclusion of unauthorized decoders referred to in section 6 or any decoder referred to in section 7 of the Broadcasting Ordinance:

- (a) An '**unauthorized decoder**' referred to in section 6 means a decoder by means of which encrypted television programmes or encrypted television programme services provided under a licence (i.e. a broadcasting license issued under the Broadcasting Ordinance) can be viewed in decoded form without payment of a subscription where a subscription is required to be paid (ie for a fee payable by or on behalf of any person for the right to view a television programme service in Hong Kong). A '**decoder**' referred to in section 7 means any decoder for use by a Television Receive Only System (ie a direct to home satellite receiver) to receive a broadcasting service which is not licensed on a subscription basis (ie for a fee payable by or on behalf of any person for the right to view a television programme service in Hong Kong). A decoder that comes within those terms would be excluded from the Copyright Ordinance.
- (b) It is not clear why possession or dealing in section 6 and section 7 decoders receive treatment under the Broadcasting Ordinance that is different to the treatment of any other decoders of copyright material. In particular, it is not clear why the Administration chooses to discriminate in favor of the unlawful use of decoders for receiving copyright works that are not broadcast by a licensed television programme service under the Broadcasting Ordinance.
- (c) We submit that all acts of decoder circumvention for commercial purposes of any television broadcast or cable programme service should attract criminal liability under the Copyright Ordinance. In this regard please also see our comments under part 4 below.

3.4 Knowledge Requirement:

We repeat our comments under paragraph 2.2 in relation to section 273C(4).

4. Business end-use criminal liability for unauthorized decoders

- 4.1 One of the stated aims of the Administration is to curb business end-user piracy. One of the most prevalent and visible forms of business end-user piracy in Hong Kong is the use of decoders for unauthorized decoding of broadcast signals intended for decoding and viewing outside of Hong Kong. Numerous commercial establishments including bars, restaurants and

clubs acquire decoders licensed for use in Thailand, the Philippines and South Africa to decode broadcast signals that are licensed for decoding and viewing only in Thailand, the Philippines or South Africa. The majority of unlawfully decoded programs are sports programs that attract high commercial license fees. Commercial operators acquire these decoders at residential rates for residential use in a place outside Hong Kong. The decoded programs are shown in commercial establishments to attract customers and thereby make or increase the profits of the commercial operator. This is business end-user piracy. We are not aware of any reason provided by the Administration to justify the exclusion of this activity from criminal liability.

- 4.2 These activities also make commercial sales of local broadcasting services practically impossible in many areas of Hong Kong and therefore seriously damage the business of local pay television businesses. Local and overseas business representatives seeing this conduct can only conclude that the Hong Kong Government is not serious about intellectual property protection, apparently when the copyright of overseas parties is concerned.
- 4.3 We again ask that the Administration takes this opportunity to rectify this omission and introduce criminal liability for unauthorized reception, decoding and viewing of all television broadcasts and not only the broadcasts and cable services of local broadcasting licensees. The Bill presents the appropriate opportunity for the Administration to put an end to this highly visible form of piracy.

5. Rights Management Information and allowing copyright owners and exclusive licensees to seek civil remedies

- 5.1 Exclusive licensees (copyright owners already have the right) will be given the right to seek civil remedies against anyone who interferes with rights management information. The Administration also proposes making it a condition that civil liability won't arise unless the defendant knows that this will lead to copyright infringement or an infringement in rights in performances.
- 5.2 Our comments under paragraph 2.2 above apply to the proposed section 274(2A). We query why the knowledge element includes the alternative of an infringement in rights in performances whereas the other knowledge requirement provisions do not include this alternative.

6. Re-transmission of free-to-air television broadcasts over subscription television networks

- 6.1 As a general policy it is desirable for the Hong Kong public to be able to receive good quality free-to-air television broadcasts including by re-transmission over subscription television networks, provided the broadcasts are re-transmitted immediately and without alteration. This should be regarded as complimentary to the government's Digital Terrestrial Television policy.
- 6.2 The benefits of re-broadcasting of television broadcasts over subscription television networks include:
- enhanced coverage/reception currently constrained by the high rise density and topology in HKSAR.
 - improved customer convenience, by allowing users to access both free-to-air and pay television signals via one set top box and remote-control handset.
 - allows for a single on-premises socket output point for both free-to-air and pay television.
 - allows for cost effective delivery without additional demand for the already congested IBCCDS.
 - improved audio/visual quality of reception, especially where retransmitted in digital format.

- 6.3 The current section 82(1)(b) is silent on whether retransmission of television broadcasts can take place at a subscription television network head-end or whether reception must occur at each building for protection to be available. As the subscription television networks in Hong Kong are primarily digital, retransmission of television broadcast signals is practically feasible only by reception and retransmission from their head-ends. It is submitted that all operators of subscription television services should be able to receive and retransmit from their network head-ends within the protection of Section 82 of the Copyright Ordinance and we ask that any necessary amendments to the Copyright Ordinance be made to clarify that interconnection on a per building basis is not be required for protection under Section 82.

Hong Kong must keep pace with and international standards of intellectual property protection and enforcement while balancing relevant local factors. Hong Kong has already established itself as playing a leading role in broadcasting and entertainment media industries in Asia. The broad thrust of many of the proposed amendments to the Copyright Ordinance are welcomed by PCCW. The comments we make in this submission are, we believe, appropriate and in line with the legitimate expectations of local industry, the community and Hong Kong's international obligations.