



Submission by Hong Kong Cable Television Limited
on the Copyright (Amendment) Bill 2006

1. Hong Kong Cable Television Limited (HKCTV) welcomes the opportunity to present our views on the captioned Bill. We shall concentrate on the “circumvention of effective technological measures”.
2. Since 2001, HKCTV has been requesting the Government to provide a full-fledged criminal protection against theft of pay television signals. In rejecting our request when the Broadcasting Ordinance was amended in 2004, the Government stated that pay television operators have the responsibility to safeguard the integrity of their properties by using the best available encryption technologies. While the pay television operators have made substantial investments in upgrading its technologies to prevent circumvention of their encryption systems, surprisingly, the Copyright (Amendment) Bill now proposes a full range of exceptions and enforcement hurdles which, in our views, have the effect of “legitimizing” circumvention of the pay television operators’ encryption technologies.
3. For instance, decoders used by pay television operators are excluded from the protection under s.273(c) of the Bill. Apparently, the Administration considers that the Broadcasting Ordinance has adequately protected this particular type of technological device, and the proposed exclusion will avoid duplication of enforcement efforts. We could not agree with this contention - the Broadcasting Ordinance has been too narrowly drafted and does not protect the encryption devices of foreign broadcasters, thereby leaving a glaring loophole for people to circumvent these devices to facilitate unlawful reception of the foreign broadcasters’ subscription programmes. Inclusion of television decoders in the protection under the copyright law will help to address this loophole. It also gives the public a correct message that decoder circumvention not only interferes with the legitimate business of a television operator (which business needs to be protected by the Broadcasting Ordinance), but also damages the integrity of the intellectual property rights (which should be protected by the Copyright Ordinance) of and in the decoder and the associated copyright works that the decoder is meant to protect. The worry about duplicative enforcement efforts can be



easily addressed by proper communications and arrangements within the Administration.

4. The Bill imposes a very burdensome “double knowledge” requirement in s.273A and s.273B. In order to find a defendant of breach, the plaintiff must prove that the defendant knows or has reason to believe not only that (a) he is doing an act of circumvention, but also (b) the act will induce, enable, facilitate or conceal an infringement of copyright. In our view, element (b) is very difficult, if not impossible, for a plaintiff to prove. On the contrary, the defendant could easily escape liability by claiming ignorance of the effect of his act of circumvention. Neither the European Union nor the United Kingdom require in their legislation the establishment of an element of guilt similar to (b). The Administration should therefore take down the requirement of (b).

5. S.273F(12) excludes the protection for “an effective technological measure which prohibits (a) the making of a recording of a broadcast or a cable programme upon its reception, or (b) the subsequent viewing or listening of a recording of a broadcast or cable programme made upon its reception”. As far as we understand from the Administration, this exception is intended for protecting the “right” of time-shifting which is allowed in s.79 of the Copyright Ordinance. The wordings of the exception, however, have gone beyond the scope of s.79 – which is limited to:-
 - private and domestic use; and
 - for the sole purpose of “viewing or listening at a more convenient time” (i.e. time-shifting)

The draft exception deprives a television service provider of its rights to:-

- (a) prohibit recording of its programmes at commercial premises, recording of video-on-demand programmes¹, and recording for “space-shifting”² purpose;

¹ No time-shifting is needed for VOD programmes as they are available at any time chosen by the viewer

² E.g. by uploading the programme copied onto the Internet



- (b) market and distribute its programmes in such novel ways as the digital technology allows.

If restriction of time-shifting by technological measure is a real concern, there could be an easier solution. Currently, all the licensed pay television service providers are required to obtain approval from the Office of the Telecommunications Authority and the Broadcasting Authority before they deploy a particular type of decoder. The regulators may include a condition of no blockage of legitimate time-shifting as one of the criteria for approval. Similar requirement for approval can be imposed upon future digital terrestrial broadcasters.

- 6. We do know notice any strong views from the community for providing the other exceptions in the Bill (except for cryptology which the universities have lobbied for), and we doubt the need thereof. Given s.273H empowers the Secretary for Commerce, Industry and Technology to exclude the application of the civil or criminal sanction in the prescribed circumstances, it is appropriate to take down or at least reduce the long list of exceptions from the Bill until it is proven by fact that a particular exception is warranted. This will ensure that the effectiveness of the circumvention provisions will not be unnecessarily impaired.

Hong Kong Cable Television Limited
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