

Lovells

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By hand

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Bills Committee on Copyright (Amendment) Bill
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Attn: Ms Polly Yeung, Clerk to the Bills Committee

Dear Sirs

COPYRIGHT AMENDMENT BILL 2006

We enclose for your consideration a memorandum (in English and Chinese) prepared by our firm for the video game industry regarding comments on liability for circumvention of effective technological measures under the Copyright Amendment Bill 2006.

If you have any queries or if we can be of further assistance, please contact our Ms Monique Woo at 2840-5075.

Yours faithfully

Enc

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Members of the International Trademark Association (INTA), the International Chamber of Commerce (ICC), the International Intellectual Property Association (IIPA), the International Trademark Association (INTA), the International Chamber of Commerce (ICC), the International Intellectual Property Association (IIPA), the International Trademark Association (INTA), the International Chamber of Commerce (ICC), the International Intellectual Property Association (IIPA)

7. This exception is of great concern because it means that no criminal action may be brought against circumvention devices designed for the PSone and PlayStation 2 consoles, Xbox consoles and the GameCube console. To understand the reason for this, some knowledge about the video game industry would be helpful.
8. Original consoles manufactured by SCEI cannot play pirated games. This is the same for other major game consoles in the market eg the Microsoft Xbox and the Nintendo GameCube. This is because these video game systems include TPMs which prevent the console from recognising and playing pirated video game discs.
9. However there are shops which sell modified consoles or offer the service of modifying a console which the consumer has already purchased. This involves installing a "mod chip" into the console. In the industry, this is commonly known as "改機". After "modification", a PlayStation console will recognise and play pirated games. In other words, pirated PlayStation games are of no use to consumers unless they have modified consoles which allow them to play pirate games.
10. PlayStation game software piracy is a serious problem in Hong Kong. Since 1998, SCEI has assisted HK Customs in more than 2,000 cases involving seizure of more than 3,620,000 pirate PlayStation games.
11. It is clear that criminal sanctions against shops selling modified game consoles will greatly help to reduce the current video game piracy problem. Without such modified game consoles, pirated game discs cannot be played and will be of no use to consumers.
12. However, TPMs in PlayStation consoles contain regional coding. This is the same for Xbox consoles and GameCube consoles. The exception under S273F(11) will have the effect of excluding criminal liability on those who deal in modified PSone and PlayStation 2 consoles, Xbox consoles and GameCube consoles. Just like under current copyright laws, only civil remedy is available to copyright owners.
13. Civil remedy has proven to be insufficient for the video game industry. In the past few years, SCEI has taken civil actions against retailers of modified consoles and mod chips in notorious areas such as Golden Shopping Arcade in Sham Shui Po and Ho King Commercial Centre in Mongkok which are well known black spots for sales of counterfeit discs. But these products continue to be readily available from these locations. When faced with legal actions, these shops simply change their names to avoid liability while continuing to sell the same products. We believe that the sales of modified consoles and mod chips can only be reduced through criminal actions carried out by HK Customs.
14. The government proposes to introduce the exception under S273F(11) to enable consumers to play genuine games which are imported from other regions. PSone and PS2 consoles sold by SCEI, Xbox consoles sold by Microsoft, and GameCube consoles sold by Nintendo in Hong Kong cannot play game software imported from the USA or Europe unless the consoles have been modified. As copyright laws were amended in 2003 to legalise sales of parallel imported computer programs in Hong Kong, SCEI/the video game industry understands why the government might view an exception that would purportedly allow consumers to modify their consoles for the purpose of playing genuine but parallel imported game software as necessary. However, it has been the industry's experience that the purported demand for devices that circumvent only region code restrictions is purely illusory – the real objective is to enable the play of pirated video games. Thus, it remains the industry's strong belief that there must be a clear prohibition against circumvention services and circumvention devices to guard against the creation of

loopholes that may hamstring effective enforcement against circumvention activities that facilitate infringing activity. Furthermore, providing the exception sought here would create tremendous enforcement difficulties for law enforcement authorities. For example, it would be extremely difficult to prove that the modification device only enables the play of parallel imported games, and that it in fact does not go beyond this purpose.

Issue no. 2

15. Under S273B (civil liability) & S273C (criminal liability), liability is imposed against persons who exhibit in public, possess or distribute a circumvention device for the purpose of or in the course of any trade or business.
16. The effect of this is that the video game industry can do nothing to stop hackers who distribute circumvention devices if they do so in a non-commercial context. In reality, many hackers enjoy "sharing" such circumvention devices (which may be in the form of a password for unauthorised access to online games, or software "cracks" or "patches") for free, especially through the internet. It is a clear loophole if the law does not provide copyright owners with a remedy to stop such activities.
17. It is suggested that both criminal and civil liability be imposed if such acts are conducted otherwise than in the course of trade or business to such an extent as to affect prejudicially the copyright owner. In this regard, we note that under existing copyright laws, prejudicial distribution of infringing copies of copyright works otherwise than in the course of trade or business attracts both criminal and civil liability.

Issue no. 3

18. Meaning of a "relevant device" (ie a circumvention device) is different under S273B (civil liability) and S273C (criminal liability). In particular, it is much easier to prove that a product is a circumvention device under S273B eg if it is shown the product is advertised or promoted as a circumvention device; or if the product has limited commercially significant purpose other than to circumvent TPMs.
19. However, under S273C, an offence is only made out if it can be proved (beyond a reasonable doubt) that the device in question is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of effective TPMs.
20. Without the assistance of the manufacturer of the circumvention device, it will be difficult to prove what the device is primarily designed, produced or adapted to do. Furthermore it is not clear what kinds of expert witnesses will be required to provide such evidence as manufacturers of these products will not likely assist in such cases.
21. On the other hand, prosecution of criminal cases will be much easier and made more efficient if the definition under S273B is adopted under S273C. Furthermore, in a case where shops promote their products for playing counterfeits, there is no reason why the prosecution should still be required to prove that the relevant product is primarily designed, produced or adapted to circumvent TPMs. This will likely involve engaging expert witnesses to provide evidence on complicated technological issues. It is also often the case that while the true uses of such devices are concealed, it is nonetheless quite clear to the public that these devices are intended to facilitate the play of pirated games.

Issue no. 4

22. Under S273A, S273B and S273C, liability is imposed only if the relevant person circumvents or deals in circumvention devices knowing that:

- (a) the act circumvents TPMs; or the device will be used to circumvent TPMs; AND
- (b) the act or the device will induce, enable, facilitate or conceal an infringement of copyright

23. The knowledge requirement under paragraph (b) above is difficult to prove. Furthermore, such requirement is not found in similar laws in other major jurisdictions. It is suggested that such knowledge requirement be removed. It is also problematic that the act of circumvention is linked to the underlying infringement. This linkage is not required by the WIPO Copyright Treaty language which requires that "adequate legal protection and effective legal remedies against circumvention of technological measures" be provided. This legal protection is independent of existing legal remedies that may be available against the underlying act of infringement.

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