



July 15, 2011

By email (mleung@legco.gov.hk)

Hon. Mr Chan Kam-lam
Bills Committee on Copyright (Amendment) Bill 2011
Legislative Council Building
8 Jackson Road
Central
Hong Kong

The Copyright (Amendment) Bill 2011 (the "Bill")

Thank you for your invitation to provide a written submission detailing our views on the Bill.

The Entertainment Software Association ("ESA") is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, personal computers, and the Internet. ESA members represent some of the world's leading entertainment software publishers whose releases account for a majority of the game software products sold in most countries around the world.

Overall, we consider the Bill to be promising in that if passed, it will enable Hong Kong to take a much-needed step forward in bringing its copyright law up-to-speed with advances in technology. We do however have concerns about a number of specific aspects of the Bill. We discuss these in more detail below and provide our suggestions on how the proposed provisions can be strengthened.

1. Right of communication to the public

- 1.1 Our understanding of the new right of communication to the public is that it is an additional exclusive right, and existing rights of copyright owners will not be subsumed. It would be useful to acknowledge this in the legislation itself as there will be instances where an act may not constitute an infringement of the communication right but would nonetheless constitute an infringement of the copyright owner's other rights. For example, where a person downloads an infringing copy of a work through a link sent to him by third party, this person may not infringe the relevant copyright owner's communication right by virtue of the proposed s. 28A(5) and (6) but may still be liable for infringement of the copyright owner's reproduction right under s.23.
- 1.2 Accordingly, we propose that sections 28(4) to (6) include prefatory language to the effect of "*Notwithstanding the existence of other rights ...*"

2. Limitations on liability of service providers relating to online materials

- 2.1 Our views on the proposed Division IIIA are subject to our review of the code of practice (referred to at s.88B(3)). We understand that the draft code of practice has yet to be made available to the public for comment.
- 2.2 Pending our review of the code of practice, we have concerns about the s.88B(2) conditions that must be fulfilled by a service provider in order to be eligible for "safe harbor". We note that these conditions do not impose any obligation on service providers to implement a policy for addressing repeat offenders. If service providers do not implement a policy whereby penalties (monetary or otherwise) are imposed on subscribers that receive a prescribed number of notices of alleged infringement, the sending of such notices and a service provider's removal of infringing material would have little practical effect in deterring online infringement. The subscriber could simply and quickly upload the infringing material on the service provider's platform again and again. The sending of notices and removal of infringing content would then be a waste of time and resources for copyright owners and service providers.

Should you have any questions or wish to contact us regarding this matter, please contact Ms Monique Woo of Hogan Lovells on (852) 2840 5075 or monique.woo@hoganlovells.com.

Yours faithfully,



Stevan D. Mitchell

Vice President, Intellectual Property Policy