



11th July, 2005

Clerk to Panel on Commerce and Industry
Legislative Council Secretariat
3/F., Citibank Tower
3 Garden Road, Central
Hong Kong

By Fax and Post

Fax: 2121 0420

Dear Sir/Madame,

Re : Preliminary Proposals on Various Copyright-related issues

We thank you the Panel on Commerce and Industry for giving us an opportunity to express our views on the proposed amendment to the Copyright Ordinance. As you may note, most of the issues addressed therein have previously been raised in the Copyright Amendment (2003) Ordinance which was suspended for further consultation after February 2004 on which we had also made a number of written submissions.

A. Background

1. On or about 9th December, 2004, Commerce, Industry and Technology Bureau of HKSAR Government (“CITB”) released a consultation paper on “Review of Certain Provisions of Copyright Ordinance” in order to seek public views on a number of copyright-related issues which carry wide social and economic implications with a view to improving Hong Kong’s copyright regime.
2. We have submitted our views and concerns on the issues as raised in that Consultation paper to CITB on 15th February and 14th March 2005 respectively.
3. It is the policy of the Hong Kong government to spearhead Hong Kong’s drive to become a world class knowledge-based economy and to make Hong Kong a regional hub of creativity. In order to achieve these objectives, Hong Kong must have an appropriate intellectual property protection regime in order to encourage investment in creative industry and related supportive infrastructure for creative industry.

4. Any policy which encourages the creation of new contents or works will make Hong Kong a center of content creators/producers and Hong Kong people will be able to create wealth based on the commercial exploitation of these creative contents or works.
5. Hong Kong used to be the main and key creative centre for Chinese-pop music. Hong Kong record companies were very successful at developing markets in other countries and their records were sold around the world. We believe this success was largely brought by the strong commitment of Hong Kong Government to the effective copyright protection regime in the analogue world of doing business and also to the compliance of the international agreements or conventions or treaties. However it is no longer so in the recent years.
6. Further development of our record industry has been hampered by the rampant on-line piracy of our copyright works in recent years and our inability to deal with the on-line piracy is mainly due to the inadequate copyright protection on the digital on-line environment. Our copyright law is simply lagging behind the technology, more so than other developed territories. **Any amendment or lack of amendment of law which departs from Hong Kong commitment to its creative industries will only weaken our effort in building a knowledge-based economy**
7. Hong Kong has invested substantially on the telecommunication system with the most of the advanced state of art and/or technology being made available and tested in this market. Copyright owners who invest, create and own a diversity of contents would have been very much willing to make their works available on-line. In fact, on-line transmission is one of the effective and efficient delivery systems of our musical visual/sound recordings.
8. **Such lack of updated legislation results in Hong Kong being one of the safe-havens for on-line piracy in the form of un-authorized peer to peer file sharing.** The e-commerce on copyrighted materials will not be able to take off and the opportunity will go to other countries. It is highly against the Hong Kong intellectual property and economic policies.
9. It is not surprising to see that most of the developed countries such as US, U.K. Australia and Japan, which are copyright/contents exporters, have updated their copyright law to give added protection to copyright holders to deal with the revolution in and to capitalize on digital technologies, particularly the growth of the Internet. They have done so by clarification of the reproduction right in the on-line environment and by the maintaining the integrity of the digital right

management system by implementing WIPO Copyright Treaty (1996) and WIPO Performances and Phonograms Treaty (1996).

10. It has always been our view that we must take an initiative to legislate digital copyright law first before we embark on any further discussion on major issues as raised in the aforesaid consultation paper. However, it is our understanding that for the purpose of this round of the consultation of the “ Review of Certain Provisions of Copyright Ordinance”, CITB only focuses on the two creatures of digital age, namely, adequate measures to deter people from circumventing **technological measures** that prohibit or forbid infringement (Section 273 of the Copyright Ordinance) and the sanction against any deliberate interference or removal of the **electronic right management system** (section 274). No doubt, these amendments are a major step taken by CITB for updating the copyright protection in the digital age.
11. In addition, CITB announced on 27 June 2005 that it has now formed the initial views on the issues as raised in the said consultation paper.

B. The Government Proposed Amendment to the Copyright Amendment.

12. End-user Criminal Liability.

- i. There will not be any extension of business end-user criminal liability to other categories of works other than the existing 4 categories of works, that is, computer programs, movies, television dramas, and musical recordings.
- ii. However, a new business end-user criminal liability (non-profit making educational establishments and educational establishments subvented by Government are exempted) is introduced to cover four types of printed publications, namely, books, newspapers, magazines and periodicals printed works on those who involve the act of copying with a view to distributing, or the act of distributing infringing copies of the said printed works. It is the actual distribution of significant amount of copies rather than the use of which at the work place which attracts criminal liability.
- iii, In addition, a new criminal offence against the director(s) or partner(s) (as the case may be) who has done an act amounting to business end-user criminal liability unless that the director(s) or partner(s) have not authorized the alleged infringing act.

Our view: We have no comment or opinion on the proposal.

13. Copyright Exemption

- i. Hong Kong will not go for a general open-ended non-exhaustive fair use regime along the US model and that all the existing permitted act provisions in the Copyright Ordinance will be retained and improved in some cases.
- ii The boarder provisions for fair dealing approach for use of copyright works that adopt the US fair use formula which will be kept within the limited two specific purposes, namely instruction and public administration.

Our comments : Any copyright exemption to cover on-line digital copy of musical visual/sound recordings in the absence of adequate copyright protection in digital environment is not to be taken lightly and in particular that the teachers or schools have been exempted from business enduser criminal liability.

Without the adequate copyright protection for digital environment, Hong Kong schools will then only become a safe haven for on-line piracy and that will only force the content industries to take schools or students to court for clarification or declaration if the particular dealing of a work is fair.

The end result is that the local contents industry and the education establishments are both losers. This will also be a great dis-incentive for investment in creative work in Hong Kong, in particular those directed at making educational contents a business. It appears that the amendment to the digital right management system will greatly bring the issues closer to home.

14. Circumvention of Technological Measures for Copyright Protection (section 273)

- i. We are pleased to learn that CITB takes the view that an effective protection against circumvention of technological measures is essential to facilitating and making Hong Kong an e-commerce centre for copyright works. The copyright owners would be more willing to venture to enter into the “ downloading business” so that the public may access to legitimate downloading sites for the copyright works. It is imperative that both criminal and civil remedies are available against those dealing with devices, products or components and the provision of

services on a commercial scale that circumvent technological measures are applied to a copy of a copyright work.

- ii. We understand that the measures cover the **access control** or **protection process** such as encryption, scrambling or other transformation of the works and/or for **restriction** in carrying out certain acts such as by copying control mechanism. **The provision must be able to close the analogue hole in the digital environment.**
- iii. We do not object to the introduction of an exemption for research into cryptography with the civil liability be provided for and in particular, for any act associated with the circumvention as long as that particular act of circumvention or the subsequent publication of the research information would not prejudicially affect the interest of the copyright owners.
- iv. At this juncture, it may be convenient to point out that the technological measures refer to those which are generic and may serve as a common platform for different copyright works such as encryption scrambling etc.

For example a game console may be fit for many different games as long as the game creators have obtained licence to use or to apply the technological measures as may be installed in the game console which restrict access and duplication to the games they have developed.

15. Rights Information Management (section 274)

- i. Rights Information Management is different in concept from technological measures as it has to associate with a particular work. It identifies a particular work such as the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work and any numbers or codes that represent such information (such as water marking). In short the information is specific and unique to each individual copyright work.
- ii. We welcome the proposal that both copyright owners and their exclusive licensees will have the same entitlement (in addition to those who provide the rights management system) to civil remedies against any persons who interfere with rights management information as they have in respect of an infringement of copyright. This is an important provision for copyright owners to control and detect any infringement of their works on-line.

16. Parallel Importation of Copyright Works

- i. We invite the committee to consider the issue in the context of the international law and international trade and also of the domestic economic policy.
- ii. Article 6 of the TRIPs agreement, as clarified by the WTO in the Doha declaration on the TRIPs Agreement and public health on 14 November 2001, simply leaves the question of the exhaustion of intellectual property rights to each member state which is free to adopt or establish its own regime for such exhaustion without challenge, subject to Most-Favoured Nation and national treatment provisions of articles 3 and 4.
- iii. This means that under WTO, each member may, according to its economic and trading policies, restrict or open parallel importation of, among other things, copies of copyright-protected works.
- iv. Hong Kong after years of consultation in the '90s, decided that the Copyright Ordinance, which was enacted on 27th June 1997, was to protect the copyright owner's importation right, and indirectly, its domestic distribution right, after a foreign sale.
- v. The key point as advanced by the content creators in support of this trading and economic policy is that if creators are forced to compete with a flood of cheaper imported copies of their works, the damage will be no different than if rampant reproduction were permitted, and allowing this result will destroy any incentive for further creation. Whether the imported objects are rudimentary product labels or intricate sculptures, they are entitled to protection.
- vi. In essence, the parallel importation restrictions allow copyright owners to separate the world market into different geographical areas in order to secure the greatest return on the investment relevant to each territory where the copyright works are promoted and exploited.

Obviously the terms of the licence will be very much different between the developed countries and those developing or underdeveloped ones. Investors in copyright industry such as records, films, books, computer game etc. would make their investment in a country where it will better protect their interest and investment.

- v. This issue was raised again in the early 2000's and CITB has finally agreed, as set out in the letter to the Bills Committee on Copyright (Amendment) Bill 2001 on 6 September 2002, that the Government position is that it will maintain the status quo in respect of the parallel import for copyright works other than computer program.
- vi. From the view point of economic policy, the critical issue is to set out a legal framework which would provide incentives to the various parties who create and distribute creative works as Hong Kong is now striving hard to build a knowledge based economy.
- vii. Any change of government trading policy by any amendment to the Copyright Law will have a devastating effect on the contents industry as it requires different windows of exploitation of their works and will change the landscape of the creative industries and the end-result is that Hong Kong will become an importer and a consumer market for Intellectual Property goods; Hong Kong will no longer be a centre of creativity or an exporter of intellectual property goods and services. Any vision of building a knowledge-based economy will become a dream or fantasy.
- viii. We are of further view that any exception for the existing criminal and civil liability for the importation and possession for use of parallel imports of copyright works by educational establishments and libraries for their education and library uses should be subject to the same defence mechanism in our current Copyright Ordinance, that includes the availability test.

17 Rental Rights for Films and Comic Books

- i. Article 14 (4) of the TRIPs agreement provides that member shall provide the producers of phonograms the right to authorise or to prohibit the commercial rental to the public of originals or copies of their copyright works.
- ii. WIPO Performances and Phonogram Treaty (which is part of the WIPO Internet Treaties) which serves to update the intellectual property rights of Rome Convention and Trips Agreement have made the following agreed statements in respect of the Musical Visual Recordings as follows.

The Agreed Statements of WPPT as **adopted by the Diplomatic Conference on December 20, 1996 Concerning Article 2(b)** :

It is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.

- iii. A special category of work known as **Musical Visual Recording** is defined in section 198 of the Copyright Ordinance as “*a **film** with an accompanying sound-track, the whole or a predominant part of which sound-track consists of the whole or any part of a **musical work or a musical work and a related literary work**”.*
- iv. The mode of commercial exploitation of the **Musical Visual Recordings** and the motion pictures is different as the consumers usually buy musical visual recordings for repeated listening and enjoyment whereas rarely people would see the same film more than twice at home.

Therefore, there are more people who would love to make copies of the Musical Visual Recordings for their life time enjoyment.

- iv. As more musical recordings are made in audio/visual formats in the digital era, any compulsory licensing scheme for the rental right for musical visual recording will render the rental right granted to musical sound recordings nullified and useless as the customers still will be able to make copies of both audio (from the soundtrack of the musical visual recordings) only and/or audio-visual recordings from a rented copy of a musical visual recording. This defeats the intention and the purpose of both the Copyright Ordinance and of the International Treaties.
- v. Therefore, we are of the view that albeit the musical visual recording falls within the definition of a film, it may be treated as a special category of work and that an unrestricted rental right be granted to the producer of the musical visual recordings.

This is not a only special case under our Copyright Ordinance. Another special category of work known as computer program, which is defined as literary work (section 4), has received different treatment in our copyright law (such as sections 35(3), 60, 61 and 118 A) due to the special characteristics and use of the computer program work.



These are our preliminary views on the proposed amendments to the Copyright Ordinance. We will make further comments and deal with other issues as and when the actual draft bill is available. If we may be of any further assistance, please do not hesitate to contact us.

Yours truly,
For and on behalf of
The International Federation of the Phonographic Industry
(Hong Kong Group) Limited

Ricky Fung
Chief Executive Officer

c.c. IFPI (Hong Kong Group) Committee
IFPI Asia Regional Office
IFPI