

Our Ref : 2006-7-17

17th July, 2006

The Hon SIN Chung-kai, JP
Chairman of Bills Committee on Copyright (Amendment) Bill 2006
Room 410, West Wing
Central Government Offices
Hong Kong

Dear The Hon SIN Chung-kai, JP,

**Re : The Joint Industry Response to CB(1)1982/05-06(01) ; CB(1)1982/05-06(02) on
TPM**

We, the undersigned industries, wish to make this joint submission to the Bills Committee, in particular the proposed amendment to section 273 as related to the circumvention of the technological measures and exemption which will be discussed during the session to be held on the 19th July, 2006. The industries are extremely concerned on the position taken by the Administration and therefore this joint submission is made. The undersigned industries wish the learned councilors to carefully reconsider the proposed amendment by taking into due consideration of our submission.

We share with the views as expressed by copyright organizations in their respective submissions to the Bills Committee earlier that the liability for the circumvention of the technological measures shall not be in any way linked to the knowledge of copyright infringement.

A review of the treaties, literatures, law reviews and legislations of the leading jurisdictions implementing the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (collectively known as the “WIPO Internet Treaties”) do not support the view of the Administration. We are adamant to insist that Hong Kong ought to follow the international norms and intention that the protection of the technological measures must be granted an independent protection separated from copyright protection.

Liability of the circumvention shall not be based on the knowledge of the copyright infringement on the part of the person who circumvents the technological measures used by the copyright owners to protect their copyright works in the digital environment.

Furthermore, we must insist that adequate legal protection and legal remedies must be available to the right owners and that no exception shall be allowed under any circumstances if it prejudices their legitimate interests.

A. Background

- (1) The rapid development of digital information technology in the '90s had created a new opportunity and also a challenge for the exploitation of the copyright. The information superhighway has no boundary and any material available on-line would be accessible globally. It is important that adequate and secure investment conditions as well as legal security are available across the world in accordance with the recommended international norms and obligation for the protection of intellectual property rights and practices for e-commerce.
- (2) Copyright owners who invest, create and own a diversity of contents would like to exploit their contents in the new digital on-line environment. However, they will only make their protected material available on-line if the rights granted to control such exploitation offer them adequate protection.
- (3) The digital information technology has had a tremendous impact on the system of copyright and related rights, it is essential that legal rules are set and applied appropriately to ensure that digital technology does not undermine the basic tenets, such as rights of reproduction, communication and distribution of copyright and related rights.
- (4) It is essential in our new digital copyright law that it must apply the existing "analogue" copyright to the digital environment. The law must provide the copyright industry with new protection of devices and technology, and other electronic information management system which is capable of identifying works, of providing metadata information, and of imposing the terms and conditions of use of the works in the digital environment.
- (5) The application of information technology to facilitate the exploitation of rights in digital network system is commonly referred to as "digital rights management" (DRM). DRM systems are aimed at enforcing certain licence terms and conditions in respect of the use of the copyrighted contents as no physical copy is involved for any on-line purchase of an on-line copy of a work. DRM aims at ensuring the terms of purchase are duly complied with. Technological Measures are part of the DRM system.
- (6) The need to provide the protection for such new technological measures and rights management information system used by the copyright owners to protect their works in the digital environment were recognized at the international level. Both the WIPO Internet Treaties have appropriately responded and addressed to these rights in the context of the copyright law in the digital environment.
- (7) The WIPO Internet Treaties recognize that both the technological measures and electronic rights management information are indispensable for an efficient exercise of the rights of the copyright owners in the digital environment.

- (8) Article 11 of the WIPO Copyright Treaties under the heading of Obligations concerning Technological Measures¹ provides that

“Contracting Parties shall provide **adequate legal protection and effective legal remedies** against the circumvention of effective technological measures that are used by authors **in connection with the exercise** of their **rights, under this Treaty or the Berne Convention** and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

B. The Interpretation Of The Phase “ ..In Connection With The Exercise Of The Rights ..” Under WIPO Internet Treaties.

- (9) With respect to the interpretation of the “ ...in connection with the exercise of ..” in the text of the WIPO Internet Treaties,

Marybeth Peters, the Register of Copyright, made the following statement before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary United States House of Representatives, 105th Congress, 1st Session on September 16, 1997

“Each of the WIPO treaties includes two provisions that require member countries to provide **technological adjuncts to copyright protection**. These technological *adjuncts* are intended to further the development of digital networks by making them a safe environment for copyrighted works to be disseminated and exploited. One provision protects against circumvention of the technology that copyright owners may use to protect their works against infringement.”

- (10) This means that the purpose and intention of the WIPO Internet Treaties is to provide **adequate legal protection and effective legal remedies of technological protection measures adjuncts to (addition to) the copyright protection². A violation of the anti-circumvention provisions is separated from an act of copyright infringement and any such violation of anti-circumvention must be proved on its own³.**
- (11) Therefore, the Effective technological measures are any technology, device or component which is designed, **in the normal course of its operation**, for the **purpose** of the intended **protection** of a copyright work. **Protection means the prevention**

¹Similar provision is also found in Article 18 of WIPO Performances and Phonograms Treaty.

²Section 1201 (c) (1) of the U.S. DMCA provides that anti-circumvention provisions have no impact on rights or remedies or defenses under copyright. Section 1201 (c) (2) further provides that the copyright liability, if any, of producers or distributors of circumvention products and services is unchanged. Fair use defence or other copyright defences do not apply.

³Please refer to paragraphs 21-26 of HKVDF' s submission to the Bills Committee of 27th April 2006.

or restriction of any acts that are not authorized by the copyright owner of that work and are restricted by the Copyright Law⁴.

- (12) The learned high court Judge Mr. Laddie J expressed his view in Sony v Ball (2004) EWHC 1738, Ch. D. that “the purpose of the anti-circumvention provisions is to prohibit the trade in device or act which circumvents the intended protection of a copyright work without regard to whether that assisted copyright infringement. **All that need to be proved is that it is intended to protect a copyright work or “to prevent or restrict copyright infringement” of a copyright work.**
- (13) This approach has been widely adopted in the international community as found in the DMCA⁵ of the USA, the Copyright Designs and Patents Act 1988 of United Kingdom, Copyright Act 1968 of Australia etc.

C. The Hong Kong Proposed Amendment.

- (14) We are mainly concerned on as to how Hong Kong, under the proposed amendment, would address and implement the two key issues related to the application of the said Article 11 :
- i. The provisions of the adequate legal protection and effective legal remedies and
 - ii. Technological Protection Measures are used by authors in connection with the exercise of their rights.. .

- (15) The meaning of “in connection with the exercise...”

Contrary to the intention and purpose of the WIPO Internet Treaties and international norm, the proposed amendment to section 272 linked circumvention liability with copyright infringement⁶.

D. Adequate Legal Protection And Effective Legal Remedies

- (16) It is plainly obvious that whenever a new technological measure is used by the copyright owner, a hacker will, only as a matter of time, be able to break or hack such new technological measure. The result of dissimulation of such hacking information to the public will cause great damages and losses to the copyright owners. Therefore a separate and independent legal protection from copyright infringement is absolutely necessary in order to prohibit the circumvention acts and the trading of circumventing

⁴ Article 6 (3) of the E.U. Directive 2001/29/EC on The Harmonisation Of Certain Aspects Of Copyright And Related Rights In The Information Society (“Information Society Directive”). See also section 296 ZF of the U.K. Copyright Designs and Patents Act 1988.

⁵ Similar position has been adopted in Recital 48 and Article 6 of E.U. Information Society Directive (2001/29/EC Directive) in 2001.

⁶ Please refer to the submission of IFPI London head office to CITB dated 1st June 2006. Also submissions from HKVDF and IFPI to CITB on 6th June and 5th June respectively

devices effectively which is essential to the key success and development of e-commerce.

- (17) We strongly oppose any such linkage of anti-circumvention activities with the knowledge of copyright infringement. It defeats the very purpose and the intention of the legal protection of the technological measures which serves as an extra 2nd layer of protection of copyrighted materials in the digital environment. The protection of the technological measures must be separated and independent from the copyright infringement action. Otherwise, we may simply sue the defendant for copyright infringement. We must harmonize our digital copyright law in the context of international norms and obligations.

E. The Exemptions

- (18) The international digital copyright law is aimed to harmonise the copyright law in the digital environment globally. Therefore any exemptions to the anti-circumvention of technological measures must be narrowly defined and shall not prejudice the legitimate interest of the right owners of the technological measures and conflict with the normal exploitation of that work by the copyright owner.
- (19) We submit that DMCA and EU Directive 2001/29/EC on “Information Society” as related to the legal protection and effective legal remedies against circumvention of the technological measures represent the international norms and obligations; the purposes and intention as set out therein cannot and should not be ignored lightly.
- (20) Therefore any person who publishes the circumvention of technological measures for the purpose of research into cryptography without complying the “good faith” requirement similar to DMCA of USA or section 269 ZA (2) of the United Kingdom Copyright Designs and Patents Act 1988 shall be liable as it will affect prejudicially the rights of the right owners. We suggest that we should follow the U.K approach and USA approach with regards to any exemption to be granted under section 273, which, in our view, must be a very narrow one.
- (21) Otherwise, an investor who invests multimillion dollars of research and development in the technological measures and the value of millions of copyright works which have been posted on-line will be down the drain just because a computer professor, for his own career advancement and own interest, has published the circumvention information somewhere in the world and the rights owners have no knowledge in respect thereof even months after such publication made by the professor. Such activity is not allowed in U.K.⁷, USA and other jurisdictions which comply with the WIPO Internet Treaties.
- (22) Adequate protection for broadcast content:

⁷ See paragraph 15-22 at page 876 of the Copinger and Skone James on Copyright, volume 1, 15th edition, 2005, Sweet and Maxwell.

- i. The current draft contains an exception for devices that record broadcast content. This creates an enormous gap in the legislation, removing all protection for copyright owners who transmit their content via broadcast means. The proposed exception is unique – no other WIPO member has implemented such a measure. It is drastic, because it denies effective protection to TPMs that govern all broadcast material and removes the ability of copyright owners to prevent widespread unauthorized digital diffusion of their works. And it is unnecessary, because other means are readily available to the government to safeguard consumers’ rights to “time-shift.” Such solutions have already been implemented in the EU and the US,
 - ii. For these reasons, this exception is inconsistent with the requirements of the Internet Treaties, and should be removed from the legislation.
 - iii. There is no reason why the right to time-shift needs a corollary right to circumvent protection. Hong Kong consumers would be better served by making them part of a broad international marketplace, and following international practice as established by every other jurisdiction which has considered anti-circumvention legislation.
- (23) Passage of this exemption would result in creation of a hub for circumvention and piracy in Hong Kong, delayed or cancelled introduction to the SAR of technological innovations in content delivery systems, and restriction of the content available to Hong Kong consumers. It is manifestly not in Hong Kong’s interest.

F. Computer Program And Circumvention of Technological Measures

- (24) Article 7 of the EU Directive (91/250/EEC) on the legal protection of computer programs specially refers to the exclusive rights and permitted acts under this Computer Software Directive which provides that, among others, the protection should be without prejudice to permitted acts such as backing-up, decompilation and the other permitted acts as stated in articles 5 and 6 of that Directive.
- (25) No such wordings are found in Article 6 of the EU Directive on the Information Society (2001/29/EC). Furthermore, the exceptions to the restricted acts in respect of the computer program are not applicable to those of other copyright works⁸.
- (26) The U.K. did raise the concern about the application of two separate schemes for the protection of the seemingly the same technological protection measures used by the copyright owner to protect the work⁹ (please see footnotes 12 below), however, the Commissioner and most EC states felt it is inappropriate to seek an unified approach at this stage.

⁸ Article 5 of the E.U. Computer Software Directive 91/250/EEC.

⁹ Paragraph 6.3 of the Consultation on U.K. Implementation of Directive 2001/29/EC on copyright and related rights in the information Society: The Analysis of Responses and Government Conclusions on the Patent Office’s consultation paper of 7th August 2002.

- (27) One must appreciate that computer programs have been widely used and applied in our other daily activities which may be installed in a machine (such as elevator, temperature control, lighting system, security system, car performance etc.) or a device that controls the operation of that machine or device (such as a tone cartridge in the case of a printer) but do not otherwise control the access or copying of the performance, display or reproduction of copyrighted works, and that the computer program itself may be a technological protection measure¹⁰.
- (28) Furthermore, one must appreciate that, unlike other copyright works, any **access to the computer program will necessarily involve copying**. On the other hand, an access control of a computer program, sometimes, does not actually constitute a technological protection measure per se as an access control is made only after infringement has occurred (for example a computer game console).
- (29) On the other hand, access control may block the legitimate use of the computer program under the exceptions or exemptions of the use specially allowed for computer program works (but not for other copyright works) such as achieving the interoperability of an independently created program with other program; connecting all components of a computer system, including those of different manufacturers so that they can work together; and studying or testing the functioning of the program in order to determine the ideas and principles which underline any element of the program¹¹.
- (30) In the premises, copy-protection remains the key and the most important technological protection measure in the case of computer program.
- (31) Therefore, in order to avoid any misunderstanding and for the proper interpretation of the intention of the provisions of the effective technological measures as apply to computer program and to other works, and for the sake of clarity, it is highly desirable to have two protection regimes, one for computer program works and the other for all other copyright works¹².

The undersigned industries would like to thank the Bills committee members in considering their joint submission.

c.c. Commerce, Industry and Technology Bureau

¹⁰ Paragraph A 3 of HKVDF submission on 5th June 2006 refers.

¹¹ Section 296A of U.K. Copyright Designs and Patents Act 1988.

¹² Please refer to the provisions of the protection against the circumvention **of technical devices applied to computer program under section 296** of the U.K. Copyright Designs And Patents Act 1988 and also to the protection of **technological measures** as **applied to copyright works other than the computer program work** under sections 296ZA-ZF.

The definition of the "technical device" is defined under section 296 (6) which is worded differently from the definition of "**technological measures**" as defined under section 296ZF.

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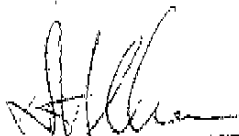
Re : The Joint Industry Response to CB(1)1982/05-06(01) : CB(1)1982/05-06(02)
on TPM

Signed, individually on behalf of individual organisations :

For and on behalf of
Cable & Satellite Broadcasting
Association of Asia
(亞洲有線與衛星電視廣播協會)


Mr John Medeiros
Vice President,
Government Relations & Regulatory Affairs


For and on behalf of
Hong Kong Cable Television Limited
(香港有線電視有限公司)


Mr Desmond Chan
General Counsel

For and on behalf of
International Federation of the
Phonographic Industry (Hong Kong Group)
Limited
(國際唱片業協會(香港會)有限公司)


Mr Ricky Fung
Chief Executive Officer

For and on behalf of
Television Broadcasts Limited
(電視廣播有限公司)


Ms Tina Lee
General Counsel
Legal Department

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on TPM**

The following industries supported the submission for the above subject :

For and on behalf of
Hong Kong and International Publishers'
Alliance (香港及國際出版聯盟)

For and on behalf of
Hong Kong Reprographic Rights
Licensing Society
(香港版權影印授權協會)



Mr Simon Li
Convenor (Hong Kong)

Ms Dillys Yu
General Manager

The following associations are also in support of this submission:

- Association of American Publishers (USA)
- Hong Kong Publishing Federation
- Anglo-Chinese Textbook Publishers Organisation
- Hong Kong Educational Publishers Association

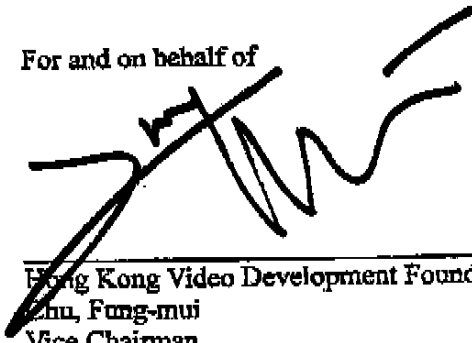
17th July, 2006

Our Ref : 2006-7-17

Re : The Joint Industry Response to CB(1)1982/05-06(01) ; CB(1)1982/05-06(02)
on TPM

Signed, individually on behalf of individual organisations :

For and on behalf of



Hong Kong Video Development Foundation Ltd
Fung, Fung-mui
Vice Chairman



17th July, 2006

Our Ref : 2006-7-17

Re : The Joint Industry Response to CB(1)1982/05-06(01) ; CB(1)1982/05-06(02)
on TPM

Signed, individually on behalf of individual organisations :

For and on behalf of MPDA



(Name) TONY SHTU
(Position) EXECUTIVE SECRETARY

17th July 2006

Our Ref: 2006-7-17

Re: The Joint Industry Response to CB(1)1982/05-06(01) : CB(1)1982/05-06(02)
on TEM

Signed, individually on behalf of individual organisations :

For and on behalf of
Intercontinental Video Limited



Robert Lee
General Manager

17th July, 2006

Our Ref : 2006-7-17

Re : The Joint Industry Response to CB(1)1982/05-06(01) ; CB(1)1982/05-06(02)
on TPM

Signed, individually on behalf of individual organisations :

For and on behalf of



(Name) Roberta Chim

(Position) Executive Director

Golden Harvest Entertainment (Holdings) Limited

嘉禾娛樂集團