

March 13, 2007

Clerk to the Bills Committee  
Bills Committee on the proposed Copyright (Amendment) Bill 2006  
Legislative Council  
Legislative Council Building  
8 Jackson Road, Central, Hong Kong  
[slchan@legco.gov.hk](mailto:slchan@legco.gov.hk) via email:

Dear Sir,

**Re: The Copyright (Amendment) Bill 2006 (the “Bill”) – Section 273**

We refer to the proposed revised amendment to Section 273 which was submitted to Legco on February 1, 2007 by CITB under the reference of CB (1)871/06-07(01).

Alan Greenspan in 1983<sup>1</sup>, before he became the chairman of the Federal Reserve, stated that “For economic incentives to work appropriately, property rights must protect the rights of capital assets.... At present ...severe economic damages (is being done) to the property rights of the owners of copyright ..... under present and emerging conditions, the industry simply has not out...Unless something meaningful is done to respond to the ...problem, the industry is at risk”.

His observation is still valid in the present Hong Kong situation. The revised anti-circumvention draft has one major hole in it which would, in our opinion, cause severe economic damages to the owners of copyright. Unless something meaningful is done to address that hole, the Hong Kong copyright industry is at high risk.

**Those who propose support and insist that** the protection of the technological measures must tie in with the copyright protection<sup>2</sup> and that the non-copyright infringement defence (fair dealing) is available to the defendant<sup>3</sup> **know very well** that:

- (a) **most of the acts of the circumvention would be to infringe copyright;**
- (b) there is **no impairment to the fair dealing use for digital copy of the works** as most of the works are still and will be available in analogue forms;
- (c) **the fair dealing use of the copyrighted works in the digital environment is still protected;** users can still enjoy fair dealing of the digital work in the traditional form **without circumvention act;** neither WIPO nor international copyright law provides that the user may use the most convenient or high quality exercise of that fair dealing;
- (d) **digital piracy poses a serious threat to justify the deprivation of the fair dealing right for circumvention of the technological Measures** under anti-circumvention laws in all the leading jurisdictions;

<sup>1</sup> From Greenspan's testimony before the Congress Subcommittee on Patents, Copyrights and Trademarks on October 25, 1983 on the Home Recording Act.

<sup>2</sup> Revised Section 273 (1) - Section 55 of the revised Bill.

<sup>3</sup> Revised Section 273 (A) - Section 56 of the revised Bill.

- (e) **the technological measures cannot tell the difference between the use for infringement purpose and for fair dealing purpose**, the revised draft requires the proof of copyright infringement for an act of circumvention and the provision of the fair dealing defence. *As copyright infringers can be punished under the existing copyright infringement provisions of the Hong Kong Copyright Ordinance, Hong Kong might then just as well decide not to protect technological measures at all;*
- (f) **fair dealing is not an issue as a defence in the anti-circumvention law** because the defendant will not be sued for copyright infringement but for the act of the anti-circumvention;
- (g) it is **difficult to prove copyright infringement in the networked environment** (downloading of BT files case is a good example), the prohibitive costs of detection, enforcement (preparation of the defence) will outweigh the perceived benefit of these provisions of purported legal protection of the technological measures, the end result is that a lot of resources will be allocated for the prohibitively high costs rather than for the creation of the intellectual property rights or **nobody will be interested in investing in cultural/copyright industry;**
- (h) **a clear misconception between fair dealing** for the copyright works **and the fair dealing for the act of circumvention** is the major fault of the revised amendment; this contradicts the views of the international norms, and of the leading jurisdictions as fair dealing may still be carried on in other traditional ways other than by way of circumvention of the technological measures;
- (i) **the proposal renders the protection of the technological measures politically (against Hong Kong policy on movie industry), commercially (nobody would absorb the prohibitively high transaction costs), socially (Hong Kong customers would not have access to more works on networked environment) and legally (against the international norms) unsound and of no practical use whatsoever** as any act of circumvention would be for infringing as well as non-infringing uses; and
- (j) **The anti-circumvention proposal in this Bill is the only unique kind as compared to those of similar political economic and social jurisdictions in the world.**

They also know very well that the anti-circumvention provisions as suggested in this Bill are unworkable and meaningless in the fight against circumvention of TPMs. Hong Kong will become the key centre and the leader of digital piracy and of hackers in the world. We would like to substantiate the major fault of the revised draft in relation to Section 273 (anti-circumvention provisions) as follows:

**A. Protection of Technological Measures Adjuncts to Rights**

1. The protection of the technological measures is the key building block for encouraging facilitating and establishing the transactions of intellectual property

goods in the on-line environment as no technological measures cannot be hacked. “Anti-circumvention laws are designed to encourage authors and copyright owners to explore new business models and methods of distribution, and to provide consumers with a range of choices for experiencing copyrighted works, at different price and convenience levels.”<sup>4</sup>

2. WIPO Copyright Treaties (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”) (WCT and WPPT are collectively known as “**WIPO Internet Treaties**”) endorse **the right of the owners to transmit their works to the public thereby treating digital transmissions as communications to the public**. The treaties have confirmed that copyright owners do have right to control digital transmissions that communicate their works to the public. **There is clearly a “perceived need for law to regulate infringement-enabling technologies and services”** and “WIPO Internet Treaties offered an international accord on regulation of infringement – enabling technologies and services.”<sup>5</sup>
3. **It was recognized during the preparation work of WIPO Internet Treaties** that it was not sufficient to provide for appropriate rights in respect of digital uses of works, particularly uses on the Internet. In such an environment, no rights may be applied efficiently without the support of technological measures of protection and rights management information necessary to license and monitor the use. The **third layer of protection of digital works**, i.e., the legal protection against the circumvention of technological protection measures,<sup>6</sup> was introduced at the international level through the WCT and the WPPT both adopted on December 20, 1996, and entered into force on May 6, 2002, and May 20, 2002, respectively.
4. “The WCT and WPPT also break new ground in recognizing the emerging role to be played by technological protection measures and by online management and licensing systems. They require member states to provide two types of technological **adjuncts to** the protection of copyright and related rights, in order to ensure that the Internet can become a safe place to disseminate and license protected material.”<sup>7</sup>
5. The digital works such as movies can now be duplicated without any loss of quality and be transmitted to a large number of recipients around the world at costs close to zero via the internet. **The internet has now been described as the “world’s biggest copy machine”<sup>8</sup>.**

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<sup>4</sup> June M. Besek, “Anti-circumvention Laws and Copyright: **A report from the Kernochan Center for Law, Media and the Arts**”, Columbia Journal of Law & Arts 2004, 385.

<sup>5</sup> Graeme B Dinwoodie, “International Intellectual Property Law and Policy” (2001) LexisNexis p732.

<sup>6</sup> Jacques de Werra, “The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Laws, 189 Revue Internationale du Droit d’Auteur (2001) (discussing three layers of copyright protection that have emerged: the first is the legal framework of basic copyright law, the second is the technical means by which works may be protected, and the third is the legal protection against the circumvention of such technical measures.)

<sup>7</sup> WIPO Primer on Intellectual Property And E-Commerce paras 120-125 (2000) under the heading of “**Technological Adjuncts to Rights**”. Also Graeme B Dinwoodie International Intellectual Property Law and Policy (2001) LexisNexis P727.

<sup>8</sup> WIPO Primer on Intellectual Property And E-Commerce paras 108-109 (2000). Also Graeme B Dinwoodie International Intellectual Property Law and Policy (2001) LexisNexis P722.

6. **The purpose for the anti-circumvention provisions** is that they assist in **combating digital piracy**. Digital piracy is a major problem worldwide. Copyright owners believe that the anti-circumvention provisions are absolutely necessary in the digital on-line environment because of the ease with which perfect reproductions can be made and **the difficulty of detecting copyright infringement**.
  7. The meaning of Technological Measure under the international norm is any technology device or component which is designed in the normal course of its operation, to protect a copyright work<sup>9</sup> and the legal protection of the technological measures is adjunct to (or a separate and distinct layer of protection) to copyright protection, therefore, “there is not necessary to prove that the protection of the work is the main or primary object of the measures: **all that is necessary is that the measures should have been designed to achieve this in the normal course of its operation**”.
  8. In a US case, Universal City Studios, Inc v Corley<sup>10</sup>, the Appeal court rules that: “[Subsection 1201(c) (1)] clearly and simply clarifies that the **DMCA targets the circumvention of digital walls guarding copyright material (and trafficking in circumvention tools), but does not concern itself with the use of those materials**. Subsection 1201(c)(1) ensures that the DMCA is not read to prohibit the “fair use” of information just because that information was obtained in a manner made illegal by the DMCA.”
  9. The legal protection of the technological measures is the separate layer of protection which is not tied, in any way, to any act of copyright infringement or fair dealing defence.
- B. Fair Dealing in the Anti-circumvention Law**
10. People who support the revised anti-circumvention draft of the Bill still believe that there is no difference between the analog world and the digital world. They believe that, as in the analog world, one acquires a copy of a digital work would have unlimited access to it and the ability to transfer it to another and the right to fair dealing use in the digital work.
  11. However, the fundamental goal of WIPO Digital Agenda is “to increase the options available to consumers, in terms of choice and convenience, and allow those who neither need nor desire unlimited access to obtain more limited use at a lower price.”<sup>11</sup>
  12. The report of the Kernochan Center For Law, Media And The Arts (2004)<sup>12</sup> summarizes the scenario very well that “**There has never been a right to gain access to copyrighted material in order to make fair use of it**. There is no right to break into a locked room to use a reference book kept there; no right to enter a movie theatre to see a movie in order to write a review; and no right to

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<sup>9</sup> S 296 ZF (1) of the United Kingdom Copyright Designs and Patents Act 1988.

<sup>10</sup> 2001 WL 1505495 (2d Cir. 2001).

<sup>11</sup> Footnote 4 supra page 479.

<sup>12</sup> Footnote 4 supra page 479.

hack into a database to get access to materials maintained there--whether or not protected by copyright.”

13. As **Professor Jane Ginsburg**, a well known WIPO scholar, has observed:

“The whole point of digital delivery, whether online, or in a limited-play freestanding package like our hypothetical DVD [that only allows three plays], is to permit price discrimination of a kind that consumers should find attractive. If the revised copyright law insists on **treating these deliveries like exhaustion copies** [over which the copyright owner has no further control], **there will be no point in offering works at differently-priced levels of enjoyment.**(Quote omitted)...

[T]he **DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies**, such as commenting on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie. (Quote omitted)”<sup>13</sup>

14. “**Professor Pierre Sirinelli**, another WIPO scholar, assessing national laws protecting technological measures, makes a similar point:

**To say that a locked e-book is protected is one thing. To say that the novel the e-book contains cannot be copied is another.** Another version, on paper, of the same work may exist. A handwritten copy can in any event be made. Similarly, to observe that a film locked in a DVD is normally impossible to copy digitally is correct. But to assert that it cannot be copied at all, even though one can use a video recorder to film its screen output is false. National laws attempt to give users zones of liberty. **This does not mean they seek to guarantee the most convenient or high quality exercise of that liberty.** In one case it is a matter of principle; in the other, one of comfort. (Quote omitted)”<sup>14</sup>

15. **Digital piracy poses a serious problem in the copyright industry** and one cannot distinguish between the fair dealing use or unlawful use of the technological measures, the threat of the serious loss caused to the copyright industry by digital piracy is sufficient to **justify the deprivation of the user to commit anti-circumvention act for fair dealing use of the digital work because most of the time those acts would infringe a copyright.**

16. However, it does not suggest that the anti-circumvention laws eliminate fair dealing such as quoting or commenting a digital work or comparing works for the purpose of study or criticism of a digital work. However, quoting from the Corley decision, “**the user does not have constitutional right to the most technologically convenient way to engage fair use.**” The user may still be able to use the traditional fair use way such as writing by hand or typing the quote from an e-source rather than cutting and pasting from the digital work<sup>15</sup>.

17. “Technological measures cannot be effective without legal sanctions against circumventing them or circulating circumvention tools. Accordingly, national and international bodies have supported laws that prohibit circumventing TPMs. Their

<sup>13</sup> Footnote 4 supra page 479.

<sup>14</sup> Footnote 4 supra page 480.

<sup>15</sup> See also United States v Elcom Ltd. a/k/a Elcomsoft Co., N.D. Cal., No. CR 01-20138 RMW.

goal is to facilitate electronic commerce in copyrighted works by reducing the risk to rightholders of transmitting their works over the internet.”<sup>16</sup>

18. Therefore **most leading jurisdictions would only allow act of circumvention of technological measures in a limited scope of the permitted acts which is much narrower than the scope of fair dealing** (as fair dealing may be performed in the traditional analogue way).

### **C. The Administrative Measures**

19. Hong Kong Administration in order to make sure the users are happy, it includes the Administrative Review Mechanism<sup>17</sup> to see if the users can have fair dealing use of the digital work by way of circumventing the technological measures. **This serves and maximizes the self-interests of a small number of people who are in research and/or academic positions** at the expense and social costs of but **with no net social benefit to Hong Kong.**
20. This **contradicts to the international norm** that the Administrative Review Mechanism is in place because only a narrow scope of permitted acts of circumvention of the technological measures (which is much narrower than the scope of fair dealing) as the second layer of protection is covered by the anti-circumvention law and the Governments of other leading jurisdictions would like to allow any person to voice his comments as regards the scope and operation of the permitted act.
21. The leading jurisdictions know **the difference between the fair dealing use** of a copyright work **and no fair dealing use** thereof by way of **anti-circumvention of the technological measures** but only the permitted acts of the circumvention of the digital work for specific purposes. Fair dealing use of digital works can be done without the act of the circumvention of the technological measures **in order to avoid technological arms race** between the hackers and the copyright owners which only allocate the resources in the non intellectual property creation areas which would in dynamic analysis cause the social harm and the losses in the social welfare.

### **E. The Proposal**

22. In the premises, **we venture to suggest that** Hong Kong Administration and **Legco should look hard on this matter** and that the proposed anti-circumvention provisions are flawed with misconception and/or misunderstanding as what it takes to provide an adequate legal protection and effective legal remedies for the protection of the TPMs in the digital environment.
23. We suggest that the anti-circumvention provisions must exclude any tying to copyright infringement or fair dealing defence elements to the protection of the TPMs. Please focus primarily on what does the value of the anti-circumvention law stand for. **Hong Kong must provide an economically efficient legislative measure against the circumvention of the TPMs.**

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<sup>16</sup> Footnote 4, page 477.

<sup>17</sup> See proposed Section 273 H.

24. There are and still will be plenty of works available in the analog format, there is no rush to open the fair dealing defence at this moment, it is better to do it right slowly than to rush the thing and ruin the copyright industry in Hong Kong. The Administrative Review Mechanism serves as a good cushion for any dispute or claim on the scope of the permitted acts among stakeholders. We believe that **the copyright industry's interests will eventually align with that of the social interests and benefits as a whole.**
25. Please forgive us for not writing in a more tactful manner as we honestly believe that it is justifiable to write in this manner due to the grave consequences and damages of the revised anti-circumvention draft (Section 273) of the Bill to the Hong Kong Industry which is beyond comprehension. Please take this matter seriously in the context of the social economical and cultural benefits and interests of Hong Kong, and in particular Hong Kong is now striving very hard to become one of the key movie production centers in the world.

For and on behalf of  
Hong Kong Video Development Foundation Ltd.



Chu Fung Mui, Clara

- c.c. Ms Priscilla To – Principal Assistant Secretary for Commerce, Industry and Technology  
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