



14th March, 2007

Clerk to the Bills Committee on
Copyright (Amendment) Bill 2006
Legislative Council
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Dear Sir/Madam,

Re: Proposed Amendment to Section 273 of the Copyright Ordinance

We refer to the revised amendments to section 273 of the Copyright Ordinance on the circumvention of the Technological Measures (“TPMs”) submitted as Committee Stage Amendments to the Bills Committee on the Copyright (Amendment) Bill 2006 by the Administration on or about 1 February 2007 under the reference of CB (1)871/06-07(01).

Circumvention of the TPMs is a global problem and therefore a global solution is needed. The question is that if we do not provide adequate legal protection and effective legal remedies against circumvention of the TPMs, this would leave the market to devise a new technology as defense against any previous technology which has been cracked by hacker (which is only a matter of short time) leading to the technological “arms race” between right holders and the hackers. Obviously, it would be better off for Hong Kong if the resources are allocated for the creation of the intellectual property rights which would **maximize the social welfare and benefit of Hong Kong.**

The solution as provided by WIPO Internet Treaties is to the **provision of adequate legal protection and effective legal remedies** against the circumvention of the technological measures in order to enable the e-commerce to take off and flourish as people would feel secure to transact their business in the cyberspace environment and more copyright works will then be make available on-line. This will reduce the costs of transaction and therefore the prices of online copyrighted materials will compare favourably with the traditional form of the dealing of the hard (analog) copy. The customers will have more options and choices. It allows those who prefer a limited use (rather than an unlimited use as in the analog form) of a copyright work at a lower price.

We strongly oppose the Government policy objective of the anti-circumvention provisions which serve “to **protect copyright works** in relation to which TPMs have been applied

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from copyright infringement.”¹ We venture to suggest that the aforesaid policy of the anti-circumvention provisions² which is solely aimed at the copyright protection rather than TPMs *per se* will only render any protection of the TPMs a nullity.

We would like to submit our response to the amendment of the proposed section 273 as follows:

A “In Connection With The Exercise Of Their Rights Under This Treaty Or The Berne Convention”

1. The Administration considers that “*Article 11 of WCT and Article 18 of WPPT* require contracting parties to provide adequate legal protection and effective legal remedies against circumvention of effective TPMs used by authors/performers *in connection with the exercise of their rights* under the international treaties and *which are not authorized by them* or permitted by law. .. The TPMs that are required to be protected are those used by authors/performers in connection with the exercise of their right under the Treaties and the Berne Convention.”³
2. The Administration further suggests that “(Its) policy objective is to protect copyright works and not the TPMs per se. (It) believe(s) that the *existing link between TPMs and exclusive rights* provides a right balance between the interest of copyright owners and users.”⁴
3. The above *literal interpretation* on the part of the Administration *forms the legal framework and substratum in support of* its proposed amendment to the anti-circumvention provisions in their present form. The protection of the TPMs must bundle with the contents of copyright works and therefore any act of circumvention of the TPMs which does not amount to copyright infringement would be allowed. It considers that the fair dealing use of copyright works (non-copyright infringement defence) should be provided for digital works⁵. It simply rejects that there should be separate layers of protection for the digital works, namely the copyright protection and the protection of the technological measures. “The anti-circumvention provisions are to protect copyright works and not the TPMs per se.”⁶

¹ Submissions to the Bills Committee on the Copyright (Amendment) Bill 2006 on the Circumvention of Technological measures for Copyright Protection dated 21.9.06 under reference CB(1)1982/05-06(01), Under the Column of Administration’s response, para 1.1, page 1.

² Ibid, under the column of Administration’s response, para. 1.5, page 7.

³ Ibid para 2.2 at page 9.

⁴ Ibid.

⁵ Section 56 of the revised Bill amending section 273 (A).

⁶ Footnote 2 supra.



4. With the greatest respect to the Administration, we suggest that the above interpretation of Article 11 of the WCT and Article 18 of WPPT literally by the Administration is against the international norms and obligations. The net result is that the anti-circumvention provisions will fail to provide neither any adequate legal protection nor any effective legal remedies against any circumvention of TPMs. On the contrary, such provisions will only promote and facilitate the circumvention acts.
5. We venture to suggest that the purported legal framework and substratum as suggested by the Administration (see paragraph A 3 above) would collapse. Even if the Administration's own interpretation is correct (which we do not agree), its own interpretation will render the purported legal protection of TPMs amounts to nothing or practically non-existent.
6. Perhaps, if we may, we would like to quote the views of the Professor Sam Ricketson⁷ and Jane Ginsburg, both are internationally renowned and well respected WIPO scholars, on their interpretation of the phrase of "in connection with the exercise of their rights under this Treaty or the Berne Convention"⁸ as follows:

"This phrase concerns the type of technology protection measures covered. A measure that prevents or hinders any of the acts covered within Berne or WCT economic or moral rights with respect to protected works would come within article 11's scope.

Thus, measures protecting against copyright (Berne Convention article 9), adapting (Berne Convention article 12), distributing of physical copies, including by means of rental (WCT, article 6), publicly communicating (Berne Convention, article 11, 11 bis, 11 ter, 14, 14 bis; WCT article 8), violation of the integrity and attribution rights (Berne Convention, article 6 bis) would all be covered."

7. Their view is diametrically opposite towards the view of the CITB. In short, any TPMs which are not used for the exercise of the rights as prescribed by the Berne and WIPO Internet Treaties would not be covered. Anti-circumvention laws are not about preventing copyright infringement but rather on the activities enable others to infringe copyright.

⁷ Professor Sam Ricketson was one of the speakers at 2004 WIPO Regional Symposium on Copyright in Education Institutions and Libraries in the Digital Era as organized by WIPO held in Hong Kong on 15-16 March 2004.

⁸ Sam Ricketson and Jane Ginsburg, "International Copyright And Neighboring Rights: The Berne Convention and Beyond", Vol. 2 2nd edn Oxford University press 2006, para 15.13 at page 973.



This lends support to both our view and the view of the London's Head office of IFPI on the contextual interpretation of that phrase.

B. The Separate Layers of Protection for Copyright and TPMs

8. As we have submitted before, the legislations and the case laws in leading jurisdictions on the TPMs such as UK and US have pointed to the international norm that TPMs must act as another layer of protection which is distinct, independent and separate from copyright protection of copyright works in order to be effective.
9. *The International Norm of the anti-circumvention provisions are not for the protection of the copyright works but the protection of TPMs.*⁹ The Administration's aforesaid policy objective is contrary to this norm.
10. The main issue of contention is that on-line piracy is predominant and rampant in Hong Kong. In a digital age, a near exact perfect copy of a copyright work can be copied at practically zero costs and thousands of copies of that copyright work can be transmitted instantaneously over the world in a matter of minutes. Therefore, **it is not difficult to recognize that most of the use of the circumvention devices or tools and/or any act of the circumvention of TPMs would be for the copyright infringement purposes rather than for the fair dealing purposes.**
11. In a practical term, **all TPMs cannot discriminate between infringing and non-infringing use of the copyright works** and we know that no TPMs cannot be cracked or hacked. Therefore **the monitoring costs and the costs of enforcing the legal protection of the TPMs against any act of circumvention of the TPMs on the basis of the copyright infringement would be prohibitively high** rendering the legal remedies highly inefficient and ineffective.
12. In fact the transaction costs (the monitoring costs and the enforcement costs) involved are equivalent to the finding of good quality evidence in support of copyright infringement against the defendant in the networked environment. It is extremely difficult and costly to collect evidence of copyright infringement in the digital environment. *If we have to prove copyright infringement in the anti-circumvention cases, the copyright infringers can be punished under the existing copyright infringement provisions already.* Therefore there is *no need for any legal remedies for any circumvention act of TPMs.*
13. **Furthermore, there is no suggestion that the fair dealing use of a work** (which amounts to a tiny percentage of use of digital work compared to unlawful use)

⁹ Footnote 1 supra, please note that all the organizations as listed therein are unanimous on this point.



would be hampered if we simply provide protection of TPMs *per se* (please refer to our views in paragraph C below).

14. If a user can use the circumventing device or perform any act of circumvention for infringing as well as non-infringing uses. At that point, as one US commentator explains, "[p]erhaps one might then just as well decide not to protect TPMs at all."¹⁰
15. As we have pointed out before, US Congress and EU have chosen to protect TPMs as a separate layer of protection independently and distinctly from the copyright infringement, after weighing the tradeoffs and concluding that the potential inconvenience to fair uses was outweighed by the enhanced consumer access that TPM would enable.

C. The Fair Dealing and the TPMs

16. The issue is that from the technological perspective, the user may find it inconvenient to exercise the fair dealing privilege by old-fashioned ways, such as copying the text or a paragraph from an article of a technology journal by hand or by re-typing rather than by cutting and pasting from the digital copy of that technology journal. It is imperative to take note that *the user is not entitled to the most convenient way to exercise the fair dealing use of a work under WIPO treaties or any international copyright treaties and conventions.*
17. As regards the fair dealing in the digital works, Professor Sam Ricketson and Professor Jane Ginsburg are of the view that

*"Clearly if a work has already been made available in hard copy analog form, it will be possible for such rights to be exercised, even it cannot be done in relation to a digital version protected by an effective technological measure (it can be said that a copyright owner is not required to unlock the back storeroom if there are already copies out on the shelves in the shop). On the other hand if a work is only available in a digital protected format, with no provision for the making of the quotations other than on terms specified by the right holder would the effect of this to be deny the exception under article 10 (1) altogether? If this were so, it would obviously have far-reaching consequences into the future as more and more works become available in digital protected formats only. **Further reflection, however, suggest that such terms of access would usually only cause third-party users inconvenience, rather than deny the benefit of the exception under 10 (1) altogether, in that, even if it is not possible to make ready digital cuts from the***

¹⁰ Tom W. Bell, Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine, 76 N.C. L. Rev. 557, 587 (1998).



work it is still usually possible to make transcriptions manually from digital versions to film or make photographic images. While allowances for digital quotation might well be desirable (and desired by users), there would be no breach of article 10 (1) so long as the making of quotations through these more traditional means remained possible..... making thing more difficult or cumbersome for users does not ultimately impair the utility of the quotation right."¹¹

D. Limitations And Exceptions Under WIPO Internet Treaties

18. Article 10 (1) of WCT (also article 16 of WPPT) provides that "Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty."
19. The *Agreed Statement Concerning Article 10 of WCT* (also see concerning article 16 of WPPT) provides that "Article 10 permits contracting parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws, and devise **new exceptions and limitations that are appropriate in the digital networked environment.**"
20. **Article 10 is not mandatory** whereas **Article 11** (also article 18 of WPPT) states that contracting parties **shall** (mandatory) provide adequate legal protection and effective legal remedies against the circumvention of Technological measures.
21. The additional requirement of Article 11 of the WCT (also article 18 of WPPT) that protection against the circumvention which are "***not authorized by the authors concerned***"¹² further lends support to the suggestion that **copyright owners' rights prevail over copyright users' rights under WIPO Internet Treaties** in view of the special characteristic of the networked environment.
22. **Professor Sam Ricketson and Professor Jane Ginsburg** also express the same view that "*authors and right holders fear that limitations and exceptions in relation to their anti-circumvention measures may undermine the value of those measures.*"¹³ The phrase "... as permitted by law" in Article 11 of WCT (also

¹¹ Footnote 8 supra para 13.132 at Pp 877-878

¹² The proposed amended section 273 F (12A) provides that the exceptions do not apply to the TPMs as applied to broadcast and cable programme works in the interactive format. However, section 296 ZE (9) of the United Kingdom Copyright Designs and Patents Act 1988 covers all kinds of copyright works which stipulates that "this section does not apply to copyright works made available to the public on agreed contractual term in such a way that members of the public may access them from a place and at a time individually chosen by them." See also Article 6 (4) and Article 9 and recital 53 of the EC Information Directive 2001/29/EC.

¹³ Footnote 8 supra Vol. 1 para 13.130 at Page 874.



*similar phrase is used in WPPT) “does not mandate that any particular exceptions or limitations to anti-circumvention protection must be provided for under that law.”¹⁴ In short, for the purpose of the law related to the circumvention of protection, **fair dealing exception of the copyright work can be excluded.***

23. Therefore **any tie-in between TPMs protection and copyright infringement would amount to the provisions of fair dealing exceptions to digital works** which only encourage the users/hackers to circumvent the TPMs under the disguise or cloak of the fair dealing use of a copyright work because TPMs are not protected *per se* as suggested by the Administration.
24. The effect of the current CSA remain me to favors the hackers and copyright infringers. As is **the Bill is sought to ensure that Hong Kong shall become one of the key hacker centers in the world and digital piracy will be a norm here.**
25. In short, **it fails to provide effective legal protection and adequate remedies against circumvention of the technological protection** because it believes that there is only one layer of copyright protection as in the analog world and therefore anti-circumvention protection must tie in with the copyright infringement and fair dealing defence.

E Administrative Measures and the Fair Dealing

26. Due to the uncertainty with regards to the future technological developments on which the new business model may emerge in the use of or exploitation of the TPMs for the protection of the copyrighted works, the leading jurisdictions have pursued a “wait and see” attitude and policy for the protection of the circumvention of TPMs law and would only intervene if there is a practical need for legislation has become evident. They provide the “permitted acts” exception which is much narrower in scope of the fair dealing use of the analog hard copy of a work.
27. In addition, they also provide for the mechanism for improving the scope of limitations and exceptions to address any complaint arises from the operation of the anti-circumvention law. For example, UK has adopted a special administrative procedure¹⁵; US requires the Librarian of the Congress to review the exceptions every 3 years.¹⁶

¹⁴ Footnote 8 supra para 13.131 at page 875.

¹⁵ Section 296ZE (6) of the Copyright Designs and Patents Act 1988.

¹⁶ Section 1201 (1) of the DMCA.



28. Hong Kong Administration has also proposed to adopt a Special Administrative Procedure¹⁷ in order to address the issue. However, **its proposal appears to be contradicted in terms**. If it proposes that a fair dealing defence be included in the exceptions, there is no need for the establishment of such Special Administrative Procedure as it would be up to the court who would decide if the use of the digital work falls within the definition of fair dealing.
29. The proposed revised draft indicates that the Administration may have an option to consider widening the scope of fair dealing use of the digital work beyond what have been provided for the analog copy of a work by the incorporation of such Special Administrative Procedure in anti-circumvention provisions. No doubt, the transaction costs in monitoring enforcing and defending the anti-circumvention case would be prohibitively high which would render the allocation of resources highly inefficient. It will be *worse off* for Hong Kong if the resources are allocated to the high costs of litigation but will be *better off* if the same resources are allocated for the creation of the intellectual property rights which will generate wealth for the society.
30. The wisdom and experience of other leading jurisdictions deserve special attention and consideration if Hong Kong would like to encourage more transactions and dealings of copyright works in digital environment such as on-line movie rental and legitimate music download. The present proposal would only discourage the content creators/investors/providers to exploit digital business model as the transaction costs involved rendering it impracticable if not impossible to make any meaningful investment.
31. In short, **it is highly unlikely that the protection of the TPMs *per se* against any act of circumvention would narrow the scope of the fair dealing** as a lot of works are now and will be available in the analog form and also there are old fashioned ways of exercising the fair dealing use of the digital copy of a work even if the analog copy of that work is not available. We would only consider making necessary improvement on the anti-circumvention law after we have more experience with the actual operation of the anti-circumvention law. The proposed Special Administrative Procedure would serve to shape the future direction of our digital agenda when all the stakeholders will be involved in every process.

E. The Conclusion

32. **The present proposal of the anti-circumvention law is ineffective and economically inefficient which only encourages users to hack the digital work without any fear of being caught as the transaction costs are prohibitively high in enforcing the anti-circumvention law rendering any legal remedies**

¹⁷ The proposed section 273 H.



practically non-existent. The net result is that nobody would invest in the copyright industry as the on-line piracy will be rampant much more so than what we have now.

33. The act of circumvention against the TPMs must not be bundled with the copyright infringement and anti-circumvention provisions must protect TPMs *per se*.
34. The bottom line is that there is no fair dealing as such for TPMs protected copyrighted works. The permitted acts which allow the user to circumvent the TPMs must be of a very narrow and limited scope and for specific purposes.
35. In the circumstances, we suggest that the whole section 273 be revised and amended with one clear policy objective for the protection of TPMs *per se* : namely, (i) to achieve the purpose of : the adequate legal protection and (ii) to ensure the effect by providing : the effective legal remedies against the circumvention of the TPMs. As we are now in the process of shifting from the “industrial economy” to “information economy”, we must have the effective anti-circumvention law in order to ensure that the networked environment is a safe place to trade and to do business. This will offer more choices for the consumers at reduced prices. This has been done in other advanced nations, and we believe Hong Kong can get the job done well in these aspects.

The IFPI Hong Kong Group is grateful for this opportunity to make the above submission and we welcome any enquiry if the need arise.

Thank you for your kind attention.

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

A handwritten signature in black ink, appearing to read 'Ricky Fung', written over a circular stamp or seal.

Ricky Fung
Chief Executive Officer

c.c. IFPI (Hong Kong Group) Committee
IFPI

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