



INTERNATIONAL
FEDERATION OF
THE PHONOGRAPHIC
INDUSTRY
[HONG KONG GROUP]
LIMITED

國際唱片業協會(香港會)有限公司

9th August, 2005

The Hon Sophie LEUNG LAU Yau-fun, SBS, JP
Panel Chairman
Panel on Commerce and Industry
Legislative Council
Hong Kong

By Fax & Email

Dear The Hon Sophie LEUNG, Panel Chairman,

The International Federation of the Phonographic Industry (Hong Kong Group) Limited would like to thank the Legislative Panel on Commerce and Industry for the opportunity to submit its position on the protection of Technological Measures and Rights Management Information.

A. Background

1. The Analogue World

Copyright law started off in the early 18th century to protect books. It progressively expanded through the 19th century to cover more of the creative arts: fine art, music, drama and the field of photography. The 20th century saw the law expand to cover new technologies and new and innovative “**analogue**” modes of exploitation of these works such as film, radio, television, cassette tape and videocassette tape.

Hong Kong is a party to the following international agreements in the area of copyright and related rights:

- (1) the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) (“the Berne Convention”).
- (2) the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms, Geneva 1971 (“Phonograms Convention”).
- (3) The Agreement on Trade-Related Aspects of Intellectual Property Rights 1995 (“TRIPs Agreement”).



These Conventions and Agreement are formulated mainly for the analogue modes of exploitation of the copyright works.

2. The Digital World

Since the 1990s, information technologies have accounted for a large share of investment and made a significant contribution to economic growth. The Internet has now becoming an increasing prevalent medium for use in businesses, personal communication and governments. The explosion of the information technology has profoundly shaken the economic world and more business deals are now done on-line. The swift emergence of a global "information society" is changing the way we live, learn, work and relate. This also poses new problems as how to protect intellectual property in the digital environment.

3. The Analogue World and the Digital World

One cannot equate the analogue modes of exploitation of copyrighted material to the digital modes.

The process of 'digitization' allows the transmission of copyrighted material across the Internet easily, virtually instantaneously and accurately which may then be further disseminated, copied and stored in perfect digital form at multiple anonymous locations around the world within a matter of minutes without any loss of the quality.

This is in great contrast to the mechanical copying of a copyright work in an analogue world which could only be done by an individual in *limited quantities and* it requires considerable *time and costs*, and the copies are *physically located* in the *same place* as the person making the copy but the quality of the copy is deteriorating every time a copy is made from the previous copy of a work.

The view of the rightholders is simply that any copyrighted materials sent over the Internet or stored on web servers are treated conceptually in the same manner as copyrighted material in other analogue media. The fact that they are made available on the Internet does not constitute a waiver of copyright nor does it carry any implied licence for anyone to download or reproduce the material without the permission of the rightholders.

It is essential that legal rules are set and applied appropriately to ensure that digital technology does not undermine the basic tenets of copyright and related rights. The rightholder shall have the exclusive right of communication of its copyright work to the public; right of reproduction and the right of the distribution of its copyright work in both the digital and analogue worlds.



4. The First Sale Doctrine and the Digital Rights Management System

Any sale of a book by the rightholder to a consumer implies a transfer of ownership in the physical object **and not in the rights of the contents themselves**. But the rights of the rightholder in respect of the physical object are said to be exhausted and it no longer has any control over the further distribution of that particular book. Any subsequent dealings of that book by that consumer (such as a sale of the book to a third party and so on) with respect to the copyrighted materials incorporated in the physical object will be governed by the copyright law. This is known as the first sale doctrine¹.

This is plainly obvious that the first sale doctrine which only applies to physical copies shall not apply to the electronic copy as first sale doctrine² does not include the right of reproduction. In short, a transmission over the internet produces a reproduction or copy on the recipient's computer, the copy that is on-line, remains on-line.

As the first sale doctrine does not apply to digital/electronic files of a copyright work and especially those available on-line, the rightholder must exercise control over any further dealing of the digital/ electronic files. There must be certain terms and conditions to govern the use of the electronic files. Under no circumstances shall any further reproduction of the copyright work be allowed nor any further swapping of files by way of peer-to-peer (p2p) or direct transmission to other party nor any subsequent transfer be allowed other than those used by the first Customer of that electronic copy for limited purpose of his enjoyment of the work.

The use of the electronic files and the subsequent dealing thereof must be governed by the terms and conditions of the licence as imposed by the rightholder when the sale is made.

The tool for regulating and enforcing the terms of the use of the legitimate copy of a work in digital/electronic file format is commonly known as digital rights management system (DRM system).³ The terms may cover access control, copy control, length of use, number of times of use etc. In short, DRM aims at ensuring the terms of purchase are complied.

5. The Need for the Legal Protection of Digital Rights Management

¹ Hong Kong Copyright Ordinance applies first sale doctrine to the physical object but not those available on-line- see sections 24 (2) and section (4) subject to section 64.

² See section 64 of the Copyright Ordinance and footnote 1 above

³ Please refer to paragraph B of this submission for the description of DRM systems.



The process of digitization not only brings about new risks in a new form of piracy for rightholders of copyright and related rights, it also makes it potentially easier to control acts of exploitation by means of access control, identification and anti-copying devices.

However, every technological device or measure that can be devised for the purpose of protecting the electronic files against widespread infringement as part of the terms of the licence governing the use of these electronic files can in turn be defeated by other persons' ingenuity.

Meaningful protection for copyright works must therefore proceed on two fronts: the property rights themselves, supplemented by legal assurances that those rights can be technologically safeguarded.

6. WIPO Internet Treaties

Hong Kong is yet to join the two major international agreements on the protection of related rights: the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961 ("Rome Convention") and the WIPO Performances and Phonograms Treaty ("WPPT"). The WPPT, together with the WIPO Copyright Treaty ("WCT") were adopted by WIPO member states around the world in 1996. These Treaties have been ratified and implemented by a large number of countries and have updated the international standard for the protection of copyright.⁴

The WIPO treaties reflect international consensus on the protection that copyright and related rights owners need in the digital age. They serve to update certain provisions not covered by Berne Convention Rome Convention and TRIPs by giving added protection to rightholders to deal with the revolution in digital technologies. These treaties generalise the right of communication to the public, including broadcasting and communication through the Internet⁵; and also make provisions that specifically address the impact of digital technologies, such as clarification of the right of reproduction in the digital environment, by providing that the storage of a work in digital

⁴At this moment 50 countries have ratified and implemented the WPPT.⁶ The 25 member states of the European Union adhere to equivalent rules following the 2001 EU Copyright Directive (Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society).

⁵ Hong Kong has followed the article 8 of WIPO Copyright Treaty and the article 14 of WIPO Performances and Phonograms Treaty by enacting the internet right as one of the restrictive copyright acts. See section 22 (1) (d) of the Copyright Ordinance.



form in an electronic medium constitutes reproduction within the meaning of these articles.⁶

The WIPO conference fully recognized that rightholders who invest, create and own a diversity of contents must be able to control the exploitation of their works in the new digital on-line environment. The underlying understanding was that rights holders would be encouraged to make their protected material available on-line only if there is an effective legal protection against unauthorized exploitation of their works. In this respect, both the WCT and the WPPT require Member States to provide two types of technological adjuncts to the protection of copyright and related rights, aiming to ensure that the Internet may become a safe place to disseminate and license protected material:

- (a) Protection against the circumvention of Technological Measures, addressed in art. 11 of the WCT and art. 18 of the WPPT.
- (b) Protection for Rights Management Information, addressed by art. 12 of the WCT and art. 19 of the WPPT⁷.

B. The Digital Rights Management System

There is no general definition for Digital Rights Management Systems which typically provide for technological protection system for access controls, use controls, protection control, copy control and tracking functions. WIPO⁸ described that **Digital Rights Management** Systems comprise a set of components and tools, which together can be integrated into a coherent system. There are two main components of DRM, namely "**the management of digital rights**" (for identification, metadata⁹ and rights granted) and the "**digital**

⁶ Section 23 (2) of the Hong Kong Copyright Ordinance provides that "Copying of a work means reproducing the work in any material form. This includes storing the work in any medium by electronic means." Section 23 (6) further provides that " Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work". The combination of the two provisions makes it clear that any transient copying of a copyright work in a computer memory is one of the exclusive economic right of the copyright owner.

⁷ Hong Kong has followed the recommendation of WIPO Internet Treaties and has made provision for civil remedy against offender of the rights management information as applied to a copy of a copyright work, which is not found in the original UK 1988 Act (Section 274 of the Copyright Ordinance refers).

⁸ The paper prepared and presented by Mr. Jeffrey P. (Washington, D.C., U.S.A.), Mr. Keith Hill (London U.K.) and Mr. Chris Barlas (London , U.K.). on the WIPO Standing Committee on Copyright and Related Rights, Tenth Session, Geneva November 3 to 5, 2003.

⁹ The Dublin Core Metadata Initiative identifies the key core elements of Metadata : Title, Subject, Description, Creator (or primary contributor), Contributor, Publisher, Date, Type, Format, Identifier, Source (previous resource), Language, Relation (to another resource), Coverage (geographical or temporal) and Rights. <http://dublincore.org/>



management of rights" (such as encryption privacy technologies payment system etc).

In other words, DRM system includes both the technological measures and rights management information.

Typically, the terms and conditions of the licence as attached to the digital/electronic files govern the accessibility of the work by the user and for how long, whether copying is permitted, how many times the user may be entitled to view the contents, any right to adapt the work or whether the user can access the contents on one or more multiple devices etc.

In a practical term, DRM system aims to automate the process of licensing works in digital/electronic form as embodied or attached to digital/electronic copy of a work and of ensuring that licence terms are complied with.

There are **a wide range of DRM systems** available in the market place today which may be hard-ware based such as Direct TV, smartcards; and conditional access systems such as digital cable television. Software DRM systems provide for, among others, the secure delivery of contents over the Internet and digital watermarking.

C. The Elements of Digital Rights Management System

The following elements are always associated with DRM system:

- (a) Technological Protection Measures, i.e., systems designed to ensure that certain usage rules are complied with, in particular those concerning **access control** or protection process such as encryption and for the restriction of certain act such as **copying control** mechanism.
and
- (b) Rights Management Information which deals with
 - (i) identifiers, i.e., numbers or codes permitting the unique identification of a piece of content (comparable to, for example, the ISBN number for books); and
 - (ii) information about the identity of the rightholders, the identity of the user, the price for using the work, the terms and conditions



of the use of the work and any numbers or codes that represent such information such as watermarking.

The information as may be embodied in or attached to the electronic files is specific and unique to each and every copy of a work.

D. Protection for Technological Measures

Our submission to the CITB in response to the December 2004 consultation document emphasized the importance of strengthening the protection of technological measures under the Hong Kong legislation.

Technological Protection Measures (TPMs) are an essential tool for controlling the exploitation of protected works in the digital age. Their importance is reflected in the emergence of new ways of exploitation of copyright works and the growing popularity of legitimate digital on-line digital publication¹⁰ of musical content. Benefiting both rightholders and users of works alike, TPMs allow rightholders to control the on-line digital publication of their works over new media, hence providing users with wider methods of consumption and encourages rightholders to make available wider choices of content to match different tastes.

The experience with TPMs shows that without appropriate legal protection, the benefits arising from the use of TPMs are lost. TPMs that control access to the work and prevent the unauthorised copying of the work must be protected against circumvention. It is also equally important to protect both copy-control measures and access control measures in a meaningful way to encourage rightholders to distribute more works in digital form in confidence. It is vital to place liability on both the act of dealing with devices designed to circumvent protection measures, as well as on the actual act of circumvention, so that effective legal action can be taken against every person in the chain of piracy.

¹⁰ The making electronic copy of a work available to the public is different from the distribution of copies of work in physical objects format under WIPO Internet Treaties.

The Agreed Statements concerning articles 6 and 7 of the WIPO Copyright Treaty as adopted by the Diplomatic Conference on December 20, 1996 clarify that "As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects."

The Agreed Statements concerning Articles 2(e), 8, 9, 12, and 13 of WIPO Performances and Phonograms Treaty as adopted by the Diplomatic Conference on December 20, 1996 provide the same clarification in respect of the distribution and rental right as in WIPO Copyright Treaty.



Chapter 12 of the US Copyright Act addresses these issues and provides a comprehensive protection for technological measures, restricting acts of circumvention and dealing with circumvention devices. Effective protection for TPMs has also been introduced in European legislation. The UK 1988 Copyright Designs and Patents Act was amended in 2003 with the introduction of new provisions that render illegal both the act of circumvention and the dealing with circumvention devices. This amendment brought the UK legislation in line with the level of protection for TPMs mandated by the EC Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (Directive 2001/29). The implementation of this Directive, and the introduction of effective provisions on TPMs protection has already taken place in most other European Countries and the standard set by the wording of the Directive has proven to be useful and appropriate.

Providers of online music services are dependent on TPMs and Rights Management Information (“RMI”) that enable to control the use of works in digital formats. RMI includes information that identifies the content and sets usage rules for the work. TPMs control the exploitation and therefore allow rightholders to exercise the exclusive rights of reproduction, distribution and communication. Together, RMI and TPMs enhance legitimate online digital publication and support the increasing market for digital content¹¹. More information on the rapidly developing market for online content is available from <http://www.pro-music.org/> and from http://www.bpi.co.uk/index.asp?Page=piracy/content_file_76.shtml.

Right holders also increasingly use TPMs to exercise control over content distributed in traditional methods, such as on material carriers. Copy-control measures applied to CDs and DVDs, for example, restrict unauthorised copying and discourage illegal counterfeiting and piracy. These measures also enhance digital publication over new media which benefits consumers with quick access to a broader range of content.

The existing provisions on TPMs in the Hong Kong Copyright Ordinance determine a **civil** liability for the acts of **manufacturing/dealing with devices** designed to circumvent **copy-protection** measures (sec. 273(2)(a)). The Ordinance also currently provides **civil** remedies for the publishing of information intended to assist others in circumventing copy-protection measures (sec. 273(2)(b)).

¹¹On 8th August 2005, Apple® announced that music fans in Japan have purchased and downloaded more than one million songs from the iTunes® Music Store since its launch just four days ago.
<http://www.apple.com/pr/library/2005/aug/08itms.html>



Required changes that would bring the Hong Kong legislation in line with the effective level of protection for TPMs mandated by the WPPT and common to other domestic copyright legislation include the following:

- i) Application to **access control** measures. As access control measures are increasingly implemented and serve new business models in the digital environment, it is crucial that the integrity of access control measures be protected and that the restricted act of circumvention and the dealing with circumvention devices would cover access control measures as well.
- ii) Implement **criminal liability for the acts of dealing with devices/publishing information** on circumvention (of copy control and access control measures). The possibility of criminal sanctions would constitute a much greater deterrent than civil remedies and are therefore of significant importance.
- iii) Introduce **civil and criminal liability for the act of circumvention** (of copy control and access control measures). In order to provide effective protection, it is vital to prohibit not only the manufacture and dealing with circumvention devices **but also the act of circumvention itself**, so that combating piracy can involve legal action against all persons in the piracy chain.
- iv) **Omit the "knowledge of intent to infringe copyright" requirement.** Currently, sec. 273(2) restricts the act of "dealing with circumvention devices" only to the extent that the person involved in such dealing "knows or has reason to believe" that the device will be used to make infringing copies.

E. Rights Management Information

The term Rights Management Information refers to information that identifies the content protected by copyright or related rights; identifies the author or the owner of rights in the work; or includes information on the terms and conditions of use of the work. With the rapid growth of use of works in digital formats, Rights Management Information serves as the basis for licensing and for certifying the integrity and authenticity of works in digital formats.

The application of digital technology to facilitate the management of the exploitation of rights by the rightholders in the digital environment is vital. The terms and conditions of the licence attached to the digital file govern the accessibility of the work and determine permitted use (for example: length of



time allowed to use, whether copying is permitted, the number of times the user is entitled to view the content, the possibility to adapt the work, the possibility to access the contents on one or more multiple devices).

Technological protection measures are usually associated with DRM systems. They are designed to ensure that certain usage rules are complied with, in particular those concerning access control. Copying control mechanisms protect against unauthorised restricted acts such as the reproduction of the work.

The use of Rights Management Information allows for the efficient combating of piracy as the origin of works, information on the usage rules and details on the owner of rights would be much more easily identified. Therefore, adequate protection of both the technological measures and rights management information will enhance the ability of rightholders to exploit their works on the Internet, encourage them to make more content available in digital form, and allow consumers to rely on the accuracy of the information they receive.

It is therefore imperative to provide adequate and effective protection for RMI against any act of interference. Section 274 of the Copyright Ordinance provides for the civil remedies against a person who removes or alters or otherwise tampers with right management information; or which issues, makes available or otherwise deals with copies of works knowing that the electronic rights management information has been removed from that work without authority. This provision is in line with Article 12 of the WCT and Article 19 of the WPPT.

However, the current language of section 274 grants the rights in respect of an action based on interference with RMI only to the "person who provides the RMI". It is submitted that in order to give full effect to this provision and the prohibition against interference with RMI, the rights and remedies should be available to the copyright owner and the exclusive licensee as well.

F. The Digital Rights Management System and E-Commerce

The information superhighway has no boundary and any material available on-line would be and can be accessible globally. It is important that adequate and secure investment conditions as well as legal security are available globally according to the recommended international guidelines protection and practices for e-commerce.



The enactment of statutory protection for the integrity of DRM system **adjuncts to copyright protection** as set out by the guidelines of WIPO Internet Treaties is a necessity. The **DRM system is one of the most important creatures of the digital age.**

Therefore a clear provision for the protection of the on-line copy of a work is the key step in building a digital publication industry in Hong Kong.

Hong Kong has invested substantially on the application aspects of digital information technology (albeit all the hardware such as cellular phones and supporting software etc. are imported into Hong Kong) and the Internet has now been our prevalent means of communication.

The digital information technology has now been served as an effective transportation system for the digital publication of copyright works in the form of electronic/digital files. The economic policy of Hong Kong for building a knowledge-based economy and for becoming one of the regional creative centres is very much dependent on fostering the capacity to generate and disseminate the creative endeavours of Hong Kong people.

The copyright content industry and the information technology have been and will continue to be a vital part of Hong Kong economy.

The electronic commerce on copyrighted materials will not be able to take off here in the absence of adequate copyright protection in the digital environment such as legal prohibition against circumvention of the effective technological measures and against the interference of the rights management information. The opportunity will go to other countries which have the proper copyright protection for digitalized works.

In short, the ability of copyright owners to exploit their works on the Internet, and allow consumers to feel secure transacting online will very much depends on the effective and efficient protection of both the effective technological measures and rights management information designed to deter any person who engages in circumvention business and to deter any hackers who alter or remove or tamper with the right management information of a work.

G. The Legal Protection of DRM System in Hong Kong

We submit that acts of circumvention of access controls or deliberate interference of the rights management information system are by their nature inherently non-commercial and personal. **Anyone who seeks to perform any**



act of access circumvention or of interference of must be highly technically literate. This means that **there are only a limited number of people capable of circumventing the effective technological measures and of interference of rights management information system** but the consequence of their act will be very grave as it effectively destroys the confidence of both the rightholders and the users to carry out any on-line transaction and defeats the very purpose of having the protection of the DRM system as advanced by WIPO Internet Treaties and renders the legal protection a nullity.

This means that any **exemptions** to the circumvention of technological measures and of the interference of the rights management information **be limited to academic research for non-commercial purpose** and only to the extent as not to cause any prejudice to the normal exploitation of the work in the digital environment by the rightholders in order to ensure that the impact on the rightholders of any exemption will be limited.

IFPI has acquired extensive experience in helping governments implementing new laws in the area of copyright protection. IFPI Hong Kong Group is willing to assist further in the consultation process in Hong Kong by providing additional information on the implementation of effective protection for technological measures and adjusting the provisions on the interference with the integrity of DRM systems to provide full effect to the restricted acts.

If we may be of any further assistance or if you have any further query on this submission, please do not hesitate to contact us.

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 mark.

Ricky Fung
Chief Executive Officer

c. c. Mr Gadi Oron / IFPI Secretariat
Mr J C Giouw / Ms Leong May Seey / IFPI Asian Regional Office
IFPI HKG Committee