



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

國際唱片業協會(香港會)有限公司

18th 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 : Copyright (Amendment) Bill 2006 on TPM and Exemptions

We understand that a bills committee meeting will be held tomorrow, the 19th July, 2006 at the Legco Building for the purpose of considering the proposed amendment to the technological protection measures ("TPM") and electronic rights management information system.

As we have pointed out in our previous submissions from both the International Federation of Phonographic Industry London Head office and the International Federation of Phonographic Industry (Hong Kong Group) that the provisions of adequate legal protection and legal remedies to the technological protection measures and electronic rights management information system are the pillars of the digital copyright law and are the key and the prime factor for the development of e-commerce. The amendment must achieve the very purpose and intention of the provisions of adequate legal protection and legal remedies in accordance with and in harmonisation with the international norms and obligations. Otherwise, Hong Kong will become an international haven for hackers of TPMs.

Both London and our Hong Kong office have read through the responses made by the CITB on the TPMs carefully. We share with the concern as raised by our London Head office in respect thereof. For the sake of completeness, we hereby summarise our positions in bullet points on TPM issues based on our IFPI previous submissions in response thereto for your kind attention as follows:

1. Knowledge requirement

Our position: liability for circumvention should not be linked to copyright infringement.

CITB response: the goal is to protect copyright, not TPMs per se; this requirement ensures beneficiaries of permitted acts are not held responsible for TPM liability.

- This requirement should be omitted from the text; if maintained, it would result in an overall weakening of TPM protection.
- The WIPO treaties establish a separate layer of protection to TPMs.
- No requirement of a link between circumvention and copyright infringement is mentioned in the WPPT and it is not the intention of the WIPO treaties to impose



such a link between TPM protection and copyright infringement, as reflected from the domestic laws of other jurisdictions which comply with WIPO requirements. Many other jurisdictions implemented TPM protection without imposing such a knowledge requirement.

- **WPPT TPM provision should be implemented correctly by eliminating the requirement of knowledge on copyright infringement** in order to achieve its primary objective of providing adequate legal protection and effective legal remedies against circumvention of TPM.
- Imposing such a link would not stop at ensuring that beneficiaries of exemptions are not subject to TPM liability but would result in an overall ineffective TPM protection, because of (1) the practical difficulty in controlling the distribution of circumvented works and (2) the practical difficulty in proving, in the case of devices, that the dealer had knowledge of the intent of his customer.
- In situations where infringement of copyright can be proved, the right holder will include claim for copyright infringement anyway but the provision of protection of TPM is especially tailored for cases where it is difficult to prove infringement and in order to provide effective legal protection, it is unnecessary to prove knowledge of the copyright infringement as it is an independent protection of TPMs which is important.

2. Other countries' legislation on TPMs

Our position: other common law countries do not impose a similar "knowledge requirement"; HK should follow this approach.

CITB response: want to ensure users' interests in undertaking permitted acts; introducing this requirement is a better than the UK approach (complaints to Secretary of State)

- It must be imperative to take note that the interests of beneficiaries cannot justify imposing a link to copyright infringement – the ramifications of such a link would **jeopardise the effectiveness of TPM protection** altogether and it **defeats the purpose of WIPO Internet Treaties**, namely to provide adequate legal protection and effective legal remedies against the circumvention of the TPM.
- The interests of users are already accounted for: section 273H allows CITB to examine the need to introduce specific exemptions from TPM liability.
- HK copyright law has traditionally followed UK and common law copyright approach. In the UK, US and Singapore, there is no such link between TPMs and copyright infringement and instead mechanisms for introducing exemptions where the need for them has been demonstrated. In our previous submissions we did mention a long list of other countries that do not require such a link in their TPM provisions.

3. "Adequate Legal Protection and Effective Legal Remedies"



Our position: imposing a “knowledge on copyright infringement” requirement does not provide “adequate legal protection” against circumvention as required under WPPT.

CITB response: do not want to protect TPMs per-se; need to cater for users’ concerns.

- The very purpose of the protection of TPM is to provide the protection of TPMs which 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 or restriction of any acts that are not authorized by the copyright owner of that work and are restricted by the Copyright Law. Any technological measure which is not designed for this purpose will be outside the scope of the definition of the TPM.**
- 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.**
- **Therefore, it is not protection of TPMs per-se in a strict sense.**
- This is important to appreciate that it is the TPM which is used for the intended protection of a copyright work needed to be protected against the abuse of the use of the exemption and the consequence of such abuse would be catastrophic to the right owners. **The main concern of the right owners is whether they would feel secure to carry out any transaction in the digital environment.**
- We have already taken care of the users’ considerations which can be accounted for when a demonstrable need arises through sec. 273H by introducing exemptions for specific classes of works.
- If a strong link to copyright infringement is maintained, enforcement against persons undertaking circumvention activities or dealing with devices would be extremely difficult and ineffective and **practically unenforceable**. It renders the protection of TPMs meaningless.

4. Criminal Liability for the Act of Circumvention

Our position: HK should introduce criminal liability not only for dealing with circumvention devices, but also for the act of circumvention.

CITB response: criminal liability for dealing is enough.

- We strongly recommend introducing criminal liability for the act of circumvention to ensure a more effective TPM regime. This would allow enforcement agencies – and not just right holders – to take action against the different persons involved in piracy and circumvention, which is especially important against those involved in large scale piracy.



5. “Commercial purposes” required for the liability associated with circumvention devices

Our position: need to omit the words “in the course of a trade or business” (sec. 273B(1)(b)).

CITB response: business can be non-profit making activity. Deleting these words would mean that even exhibiting a single unit/device could incur liability.

- We strongly oppose this wording. It would make the provision unclear and may place on right holders the burden of proof that distribution was linked to a business.
- If not deleted, these words would open the door for circumvention devices to enter the market.
- Practical solution would be to replace these words with the detailed list of acts in art. 6(2) of EU Information Society Directive (2001/29/EC).

6. Definition of “circumvention device”

Our position: same definition should be used for civil and criminal liability; narrower definition for purposes of criminal liability should be avoided.

CITB response: more stringent approach needed for criminal liability.

- CITB’s position here is unclear – and would create difficult questions of interpretation on which devices fall within the scope of the civil liability but are excluded from the scope of the criminal liability.
- The approach taken also means that CITB is willing to allow all devices that are not “primarily designed” for circumvention purposes to be out of the scope of the criminal provision.
- Stringent approach is already taken in the drafting of the provisions – section 273(3) is more detailed and specific on the prohibited acts than section 273B(1)

7. Exceptions to circumvention liability

Our position: exceptions should be kept to the minimum and should not apply to dealing with circumvention devices. Instead, there should be more reliance on the possibility to introduce exceptions when the demonstrable need arises in the future.

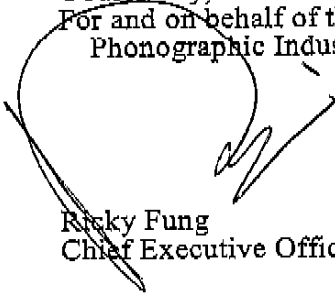
CITB response: exceptions support development of technology and legitimate use by users.



- We must maintain that we should follow the approaches taken in the UK and US – more reliance on voluntary measures (EC Directive) and oversight mechanism (US law) already introduced by sec. 273H.
- **Exception to support development of technology and legitimate use by users shall only be allowed to the extent and limit that it will not affect prejudicially the rights and legitimate interests of the right owners.**

Thank you for your kind attention

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



Risky Fung
Chief Executive Officer

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