

CB(1)1765/05-06(02)



representing the  
recording industry  
worldwide

## IFPI Further Submission to CITB on the Implementation of Protection for Technological Measures

June 2006

IFPI thanks the CITB for the opportunity to provide additional comments on the Copyright (Amendment) Bill 2006. Our comments below focus on issues related to the protection of technological measures (TPMs), following discussions held during the 17 May meeting with our industry's representatives.

### 1. LIABILITY FOR CIRCUMVENTION SHOULD NOT BE CONDITIONED ON KNOWLEDGE OF COPYRIGHT INFRINGEMENT

We understand that CITB takes the view that liability for TPM circumvention, as established by the WIPO treaties, should be conditioned on knowledge of copyright infringement. We do not believe this interpretation is supported by the text of the treaties. A review of the treaties, literature on these treaties and domestic laws implementation of the TPM provisions in WCT and WPPT demonstrate the prevailing approach that TPMs should be granted independent legal protection that is separated from copyright protection. The WIPO treaties create two cumulative layers of protection to digital works: the first is the protection of content under copyright and the second is the legal protection of TPMs that protect the copyright content. Liability for circumvention of TPMs is not premised on knowledge of copyright infringement. Creating an unnecessary link between copyright for the content and legal protection against circumvention, by requiring knowledge on infringement for circumvention liability, would significantly weaken the "effective legal protection" of TPMs required under article 18 WPPT.

The phrase "in connection with the exercise of their rights under this treaty" in article 18 WPPT is not intended to link circumvention liability to copyright infringement. Indeed, this phrase indicates the types of TPMs covered under the treaty.<sup>1</sup> It clarifies the extend to which signatories are required to protect TPMs and provides that, as a minimum, measures designed to prevent or hinder acts covered by WPPT rights are to be protected under domestic laws. Signatories are free, however, to extend protection to TPMs that control other acts not specifically covered under WPPT but recognised under domestic laws.<sup>2</sup> It results that this phrase should not be interpreted to limit the application of protection only to situations where circumvention was undertaken with intent to infringe copyright. Legal remedies against circumvention should not be dependent upon copyright infringement.

Interpreting the WPPT language in a way that protects TPMs only against acts of circumvention that facilitate copyright infringement would effectively legalise circumvention in a broad range of cases, creating legal uncertainty and undermining the effectiveness of the prohibition altogether. For example, it would likely exempt acts of circumvention undertaken by persons who legitimately obtained copies of the work. The obvious difficulty in controlling further distribution of such circumvented copies would render ineffective the prohibition against circumvention.

<sup>1</sup> Jane C. Ginsburg, Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience (a paper prepared for the Norwegian Center for Computers and Law, Columbia Law School, May 2005), p. 5. Available from: <http://lsr.nelco.org/cgi/viewcontent.cgi?article=1017&context=columbia/pli>

<sup>2</sup> Jorg Rinbothe, Silke von Lewinsky, The WIPO Treaties 1996 (Butterworths, 2002) p. 417.

Similarly, requiring proof of knowledge on intent to infringe copyright for the liability associated with distributing circumvention devices would make enforcement against such dealers almost impossible. Distribution of circumvention devices would remain legitimate for many non-infringing purposes, and distributors will easily escape liability simply by arguing that they thought the devices would be used for non-infringing purposes. Further, since it is almost impossible to enforce the prohibition against the act of circumvention anyway (because most circumvention acts are conducted by private persons in their private capacity) a weak prohibition against dealing with circumvention devices would result in a non-effective TPM protection regime.

Linking circumvention liability with copyright infringement also has significant market impacts and economic disadvantages. Right holders and the industries concerned with development of TPMs cannot make use of market opportunities for the benefit of consumers if legal protection for TPMs is weakened by imposing this link. Requiring proof of copyright infringement, or intent to infringe copyright, would allow free distribution of circumvention devices for "non-infringing purposes", consequently enabling circumvention for infringing purposes. This would make the implementation of TPMs pointless and would undermine the efforts of creative industries to make their content available under different licensing schemes adjusted to consumer demands.

Maintaining a link between liability for TPM circumvention and infringement of copyright cannot be justified by the need to allow users to make exempted uses of the work. In response to arguments raised by consumer groups, libraries and other users supporting such a link we suggest careful consideration of specific types of works that need to be exempted. We note that CITB already took such considerations into account by introducing section 273H. This section, which allows to exclude classes of works from the TPM prohibitions when the use of such works does not constitute infringement and has been "adversely affected" by the TPM protection sufficiently accommodates the concerns of such user groups.

It must be kept in mind that legal protection for TPMs is afforded for the very reason that TPMs themselves can be defeated. It is particularly in the cases where TPMs are defeated and copyright infringement is difficult or impossible to prove that protection against circumvention is much needed. Where infringement can be proved anyway, right holders can base their claims against the infringer on copyright provisions and need not rely on the violation of TPM provisions. It is in the border cases where infringement is difficult to prove that the importance of TPM protection comes into play. For this reason, and to deter acts of circumvention, TPM provisions should be carefully crafted to ensure their effectiveness. Requiring copyright infringement for the liability associated with circumvention would create a broad carve out, taking away the benefits of TPM protection.

## **2. INTERNATIONAL APPROACHES DEMONSTRATE THAT THE CORRECT IMPLEMENTATION REFRAINS FROM REQUIRING KNOWLEDGE ON COPYRIGHT INFRINGEMENT FOR CIRCUMVENTION LIABILITY**

The EU Copyright Directive does not impose a requirement on knowledge of copyright infringement for the liability associated with circumvention or dealing with circumvention devices. Article 6 of this Directive obliges member states to provide adequate legal protection against circumvention "which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective". The only knowledge therefore refers to knowledge on the act of circumvention. Circumvention is prohibited regardless of whether it facilitates or enables copyright infringement.

In the UK, the 2003 Regulations implementing the Copyright Directive apply a knowledge element that is limited to knowledge of the act of circumvention itself (sec. 296ZA(b)). The laws of many other EU countries take the same approach. Denmark,<sup>3</sup> Germany,<sup>4</sup> Greece,<sup>5</sup> Hungary,<sup>6</sup> the

<sup>3</sup> Articles 75b and 75c of the Denmark Consolidated Act on Copyright 2003, available at <http://www.kum.dk/sw%204550.asp>

Netherlands,<sup>7</sup> Portugal<sup>8</sup> and other EU countries also refrain from requiring proof of copyright infringement for the prohibition against circumvention.

Many other countries outside the EU implemented the WPPT TPM provisions in a similar way, without making any link between liability for circumvention and copyright infringement. Good examples are the laws of the US,<sup>9</sup> Japan<sup>10</sup> and Singapore.<sup>11</sup>

### 3. THE UK PROVISION AND THE LINK BETWEEN TPM CIRCUMVENTION AND COMPUTER PROGRAMS

Under section 296 of the UK Copyright, Designs and Patents Act, a person is liable for dealing with circumvention devices when he has knowledge, or reason to believe, that the device will be used to make infringing copies. This provision is only relevant to circumvention of measures applied to **computer programs**. Unlike the case of computer programs, the prohibition against circumvention in respect of other rights in sections 296ZA and 296ZB does not impose such knowledge requirement. We can assume that this difference results from the language of article 7 of the Computer Software Directive. Article 7, which is the basis for the UK provision on TPMs in computer software, specifically refers to the exclusive rights and permitted acts under the Computer Software Directive. The article expressly provides that TPM protection should be "without prejudice to" permitted acts such as decompilation, backing-up and the other permitted acts in articles 5 and 6 of that Directive. A similar wording does not exist in article 6 of the Copyright Directive, which is the basis for the UK provisions on TPMs applied to other types of works. The knowledge of copyright infringement requirement in section 296 is not free from criticism and the difficulties in applying this requirement are illustrated in the UK court decision in *Sony v Ball* ([2004] EWHC 1738 (Ch)).<sup>12</sup>

### 4. SUGGESTED AMENDMENTS TO THE BILL

Taking into account the above considerations, we suggest the following amendments to the legislative text:

#### 273 Interpretation of sections 273 to 283H

(...)

(3) In subsection (2) –

(a) technological measure means any technology, device, component or means applied by the right holder to the work, which achieves the intended (...)

---

<sup>7</sup> Article 95a of the Law on author's rights.

<sup>8</sup> Section 66A of the Law on Intellectual Property and Neighbouring Rights

<sup>9</sup> Article 95 of the 1999 Copyright Act.

<sup>10</sup> Articles 1.1 and 19 of the Neighbouring Rights Law.

<sup>11</sup> Articles 217-219 of Law no. 45/85.

<sup>12</sup> Section 1201(a) Copyright Act 1976.

<sup>13</sup> Article 120bis of the 1970 Copyright Law

<sup>14</sup> Sections 261B – 261 of the 1987 Copyright Act.

<sup>15</sup> Decision available at: <http://www.bailii.org/ew/cases/EWHC/Ch/2004/1738.html>

**273A. Rights and remedies in respect of circumvention of effective technological measures**

- (1) subject to sections 273D and 273H, this section applies where an effective technological measure has been applied in relation to a copyright work, and a person does any act which circumvents the measure, knowing, or having reason to believe –
- a. that he is doing an act which circumvents the measure; and
  - b. ~~that the act will induce, enable, facilitate or conceal an infringement of the copyright in the work.~~
- (...)

**273B. Rights and remedies in respect of devices and services designed to circumvent effective technological measures**

- (1) Subject to sections 273E and 273H, this section applies where an effective technological measure has been applied in relation to a copyright work, and a person –
- a. Makes, imports, exports (...)
  - b. Exhibits (...)
  - c. Provides any relevant service,
- ~~knowing or having reason to believe that the relevant device or the relevant service, as the case may be, will be used to circumvent the measure to induce, enable, facilitate or conceal an infringement of the copyright in the work.~~

■ ■ ■

For further information, please contact:

May Seey Leong, IFPI Asian Regional Office, Room 3705, Hopewell Centre, 183 Queen's Road East, Wanchai, Hong Kong, Tel: +852 2 866 6862; Fax: +852 2865 6326;  
email: [leongmayseey@ifpi-asia.com.hk](mailto:leongmayseey@ifpi-asia.com.hk)

Gadi Oron, IFPI Secretariat, 54 Regent Street, London W1B 9RE, United Kingdom,  
Tel: +44 (0)20 7878 7900; Fax: +44 (0)20 7878 6832; e-mail: [gadi.oron@ifpi.org](mailto:gadi.oron@ifpi.org),  
Website: [www.ifpi.org](http://www.ifpi.org)