

CITY UNIVERSITY OF HONG KONG
香港城市大學

**The Political Economy of Digital
Copyright in Hong Kong**
香港數碼版權法的政治經濟關係分析

Submitted to
School of Law
法律學院
in Partial Fulfillment of the Requirements
for the Degree of
Doctor of Juridical Science
法學博士學位

by

Wan Charn Wing
溫燦榮

August 2009
二零零九年八月

ABSTRACT

By using the Approaches of the New Institutional Economics especially the works of Douglas North and Ronald Coase, this thesis examines the effect of the new and emerging digital technologies on the development of Hong Kong copyright law given the magnitude of online piracy in the context of Hong Kong's policy-making process and globalisation, and the way such development may affect Hong Kong's content industries.

The creative industries play a crucial role in the development of the digital information society and contribute to the development of the knowledge-based economy. The success of the creative industries is largely dependent on adequate copyright protection and effective legal remedies against copyright infringement in the digital environment. But the Internet has no boundaries, and any material posted online is accessible globally, while any online protection in a particular country would be incomplete in the absence of adequate protection at the international level. The dominant power of leading jurisdictions, which have strong content industries, shapes and guides global digital copyright law through international institutions such as copyright conventions and treaties, and trade agreements, and coerces other jurisdictions to comply with such international institutions with a credible threat of trade sanctions.

Many legal scholars have contributed to the debate on the justification of the copyright system based on normative arguments concerning what level of copyright protection is necessary to serve the interests of the local economy in the context of its cultural policy. In this thesis, I look at the issues from the perspectives of political economy, as copyright is an important economic institution created by statute, which originates from political institutions, to internalise externalities (public goods). This thesis illustrates that the normative approach has to yield to political power comprising international and local content industries (the ‘content industries’).

As a result of the delay in changing the law in response to recent technological changes, rampant online infringement has caused harm to the content industries in Hong Kong. I suggest that the delay is largely due to the way the policy making process is designed under Hong Kong’s limited democratic political institutions-the Legislative Council (‘LegCo’) and the neoliberal Executive-led system of governance. Under the constitutional design, the Chief Executive has almost exclusive control over the legislative agenda setting power but he has no control over the voting of the LegCo and needs the support of various political and economic groups in order to govern. Any policy change which affects the incentive structure of these groups would lead to bargaining and negotiation processes among the competing interest groups. In the past decade, the government has usually started with pro-consumer bills after having concluded the public

consultation on the copyright policy. The content industries have argued strongly that the proposed policy failed to conform to the international institutions. This thesis also examines how the government started with the pro-consumer copyright bill but eventually led to the enactment of pro-copyright owner law; and how the content industries utilised the political process to bring about changes to the copyright policies on parallel imports (analogue mode of exploitation), protection of technological measures (digital mode of exploitation) and education exceptions. I suggest that as the international institutions would constrain the set of policy choices, and the public view, whatever it may be, has to yield to them, the deliberative processes in the LegCo may be more efficient if it carries out a two-stage inquiry on any proposed policy: to determine if it (1) complies with international norms and (2) increases the social benefit.

The *Chan Nai Ming* case illustrates that the scope of criminal sanction against online infringers covers the initial seeder, but it is not certain if it covers P2P cases; copyright owners have to resort to civil remedies to enforce copyright, but the problem is that the transaction costs of copyright enforcement are prohibitively high, with most of the costs attributing to the Norwich Pharmacal orders against the Internet Service Providers ('ISPs'). Unless the government addresses the ISPs' liability and the transaction costs when it enacts the digital copyright law in 2009, it will hinder Hong Kong's development as an electronic commerce centre for copyright content.

The study also suggests that a strong enforcement mechanism is necessary to promote pro-copyright norm, to increase copyright compliance and to facilitate the social control of anti-copyright behaviours. I suggest that the reduction of transaction costs facilitates copyright enforcement especially in the networked environment, which increases the credibility of the copyright system, which in turn reinforces the incentive to be creative. I also suggest ways to reduce the transaction costs based on economic principles and on the experience of other jurisdictions. And if this approach is included in our policy considerations, it will change the way we analyse the workings of our copyright system and the way we think about copyright policy.

TABLE OF CONTENTS

	Page No
ABSTRACT	i
ACKNOWLEDGEMENTS	v
CONTENTS	vii
ACRONYMS AND ABBREVIATIONS	xv
CHAPTER ONE: INTRODUCTION	
1 Research Background	1
1.2 The Normative Approach	17
1.2.1 The Theories of Intellectual Property	17
1.2.2 Instrumentalism	24
1.2.3 The Philosophical Debates	32
1.2.3.1 The Posner Utilitarianism and Instrumentalism	32
1.2.3.2 Writings Considered Relevant by the Government in the context of Hong Kong's Copyright Reform	36
1.3 The Approach from the Perspectives of Political Economy	39
1.3.1 Institutional Economics and Transaction Costs	44
1.3.2 Institutional Environment (Macro Analysis) and Institutional Arrangement (Micro Analysis)	47
1.3.3 The Politics of Copyright	50
1.4 Research Aims and Objectives	51
1.5 Arrangement of the Chapters	53

CHAPTER TWO: POLITICAL ECONOMY OF HONG KONG

2.1	Political Economy Theories	68
2.2	Background of the Political Economy of Hong Kong	69
2.3	Institutional Determinants of Political Reform in Hong Kong	70
2.3.1	Institutional Environment from Hong Kong's Perspectives	73
2.3.2	Institutional Environment from China's Perspectives	91
2.3.3	The Policy Debates	94
2.3.4	The Macro Analysis – the Institutional Environment	98
2.3.5	The Micro Analysis – the Institutional Arrangement	104
2.4	Conclusion	115

CHAPTER THREE: THE POLITICAL ECONOMY OF INSTITUTIONS OF HONG KONG COPYRIGHT POLICY MAKING PROCESS

3.1	The Institutional Constraints of Policymaking Process: A comparative study	120
3.1.1	Introduction	120
3.1.2	Comparative Institutional Structures of Agenda Control Power in Parliamentary and Presidential systems	122
3.1.3	Westminster Parliamentary US Presidential and Hong Kong Executive-led Political Systems.	124
3.1.3.1	Power to Control the Legislative Agenda in the U.K. Parliamentary System	126
3.1.3.2	Power to Control the Legislative Agenda in the US Presidential System	128
3.1.3.3	Power to control the Legislative Agenda in the Hong Kong Executive-led System	130
3.1.3.4	Discussion	134
3.1.4	The Belief System as an Institution	135
3.1.4.1	Theoretical Considerations	135

3.1.4.2	From the Keynesian Welfare Economy to the Neoliberal Laissez-Faire Economy	140
3.1.4.3	The Influence of Schumpeter's Writings on Neoliberalism	142
3.1.4.4	Instrumentalism	145
3.2	Policy of Public Consultation and Consensus	146
3.3	Institutions of Policy Networks: A comparative approach	150
3.3.1	Policy Networks in the US Congressional System	152
3.3.2	Policy Networks in the U.K. Parliamentary System	157
3.3.3	Policy Networks in the Hong Kong Executive-led System	160
3.4	Interest Groups	161
3.4.1	Interest Groups in Hong Kong Politics	162
3.5	Neoliberal Copyright Policy in Hong Kong: from a political and economic perspective	166
3.5.1	The Policy Debates	168

CHAPTER FOUR: THE POLITICAL ECONOMY OF COPYRIGHT REFORM IN HONG KONG

4.1	The Background of the Copyright Law of Hong Kong	171
4.2	The Copyright Ordinance of 1997	177
4.2.1	The Consultation	178
4.2.2	The Compromise	181
4.2.3	Education Exceptions	182
4.2.4	Technological Protection Measures	183
4.2.5	The Reverse Onus of Proof	184
4.3.	The US Special 301 against Hong Kong	185
4.3.1	The Policy Network in respect of the US Special 301 Watch List	185
4.3.2	The Prevention of Copyright Piracy Bill 1997	186
4.3.3	The Consultation	187
4.3.4	The Removal of Hong Kong from the Special 301 Watch List	188
4.4	The Intellectual Property (Miscellaneous Amendments) Ordinance 2000	189

4.4.1	The Policy Debates on Parallel Imports and so on	189
4.4.2	Public Consultation on ‘Combating Intellectual Property Rights Infringement in the Hong Kong Special Administrative Region: Possible Additional Legal Tools’	190
4.4.3	The Intellectual Property (Miscellaneous Amendments) Bill 2000	193
4.5	The Copyright (Suspension of Amendments) Ordinance 2001	195
4.5.1	The Public Outcry	195
4.5.2	The Quick Legislative Fix	196
4.5.3	The Copyright (Suspension of Amendments) Bill 2001	197
4.6	The Copyright (Amendment) Ordinance 2003	199
4.6.1	The Liberalisation of Parallel Importation of Computer Software	199
4.6.2	The Consultation	199
4.6.3	The Copyright (Amendment) Bill 2001	200
4.6.3.1	Presentation of Views before the Bills Committee by Deputations	202
4.6.3.2	The Likely Purpose of Acquisition of an Article Test	205
4.6.4	The Copyright (Amendment) Ordinance 2001	206
4.7	The Copyright (Amendment) Ordinance 2004	206
4.7.1	The copyright (Amendment) Bill 2003	207
4.7.2	Presentation of Views by Deputations	208
4.7.3	The Committee Stage Amendments	210
4.7.4	The Unresolved Policy Issues	211
4.8	The Observations and Comments on the Shifting of Policy	212
4.9	The Public Consultation of 2004	215
4.10	The LegCo’s concerns over <i>Chan Nai Ming</i> case	216
4.11	Analogue and Digital Copyright Protection under the Copyright Ordinance	217
4.12	The Audit of Digital Copyright in Hong Kong	218
4.12.1	First Sale Doctrine and Digital Rights Management System	218
4.12.2	Making Available Right-Communication Right	220
4.12.3	Work in Electronic Form in a Physical Carrier	221

4.13	The Hong Kong Court of Final Appeal Case:	
	<i>Chan Nai Ming</i>	225
4.13.1	Discussion	231

CHAPTER FIVE: THE NEO-LIBERAL DIGITAL COPYRIGHT REFORM POLICY REGIME OF HONG KONG – FROM A POLITICAL AND ECONOMIC PERSPECTIVE

5.1	Introduction	235
5.2	The Copyright (Amendment) Bills 2006 and the Onslaught of Lobbying	240
5.2.1	Margaret Ng’s Committee Stage Amendments	247
5.3	Policy on Parallel Import	251
5.3.1	Last Minute Change of policy on Parallel Importation of Copyrighted Products	251
5.3.2	The Policy debate	252
5.3.3	The Views of Deputations before the Bills Committee	254
5.3.4	The Compromise	255
5.4	Protection of Technological Measures	257
5.4.1	The International Legal Framework	258
5.4.2	The Policy Debate on the Proposed Anti-circumvention Provisions-protection of copyright or TPM <i>per se</i> .	261
5.4.2.1	The Fair Dealing and the Limitations and Exceptions under the WIPO Internet Treaties	266
5.4.2.2	Special Administrative Procedure	268
5.4.3	The Powerful Lobbying at Committee Stage Amendments’ Stage	268
5.4.4	The prevailing view-protection of TPM <i>per Se</i>	272
5.5	Education Exceptions	275
5.5.1	The Legal Framework for Fair Dealing in Hong Kong	275
5.5.1.1	The International Legal Framework	279
5.5.1.2	Section 41: Fair Dealing for Purposes of	

	Giving or Receiving Instruction	281
	5.5.1.3 The Use of the TPM in Educational Establishments	283
5.5.2	Section 45(2): Reprographic Copying Made by Educational Establishments	286
	5.5.2.1 International Legal Framework	287
	5.5.2.2 The Withdrawal of Amendment	288
5.5.3	The Recording by Educational Establishments of Broadcasts and Cable Programmes (Section 44)	289
	5.5.3.1 The International Legal Framework	289
	5.5.3.2 The Withdrawal of Amendment	293
5.5.4	Section 43: The Performing, Playing or Showing of Work, in the Course of Activities of Educational Establishments	293
	5.5.4.1 The International Legal Framework	293
	5.5.4.2 The Consultation	296
	5.5.4.3 The Withdrawal of Amendment	297
5.6	Discussion	299
	5.6.1 The US Special 301 Watch List against New Zealand	299
	5.6.2 Hong Kong Public Consultation and Consensus Policy	300
	5.6.3 The Misinterpretation of International Treaties	304
	5.6.4 The Outcomes	305
	5.6.5 The Way Forward	307

CHAPTER SIX: NORMS AND ENFORCEMENT OF COPYRIGHT IN THE NETWORKED ENVIRONMENT IN HONG KONG

6.1	Introduction	312
6.2	Background	315
6.3	The Applicable Copyright Law in the Networked Environment	316
6.4	The Civil Action against Uploaders	318
6.5	The Surveys	321
	6.5.1 The 2005 Surveys of IFPI (HKG) and	

	of Intellectual Property Department	321
6.5.2	The Second Survey of IFPI (HKG) - Student population	324
6.6	The Survey of the Uploaders	325
6.7	The Obligations to Obey the Law: Theoretical Considerations	328
6.8	Social Norms and Online Infringement	331
6.8.1	Copyright Norms	334
6.8.2	Creation and Enforcement of Copyright Norms	335
6.8.3	Pro-Copyright Norm	336
6.8.4	Anti-Copyright Norm	337
6.9	Instrumental Economic Approach	338
6.10	Costs of Maintaining Pro-Copyright Norm	341
6.11	Optimal Criminal Sanctions against Uploaders	344
6.12	The Legitimacy of Enforcing Copyright Law	346
6.13	The Observations and Comments	348
6.14	The Game Theoretic Approach	352
6.14.1	Entry Games	352
6.14.2	Signalling Game and Pro-Copyright Norm	353
6.14.3	Evolutionary Games and Copyright Norms	354
6.14.4	Learning Games and Copyright Norms	355
6.15	Discussion	356

CHAPTER SEVEN: REFORM OF COPYRIGHT PROTECTION IN THE NETWORKED ENVIRONMENT: A HONG KONG PERSPECTIVE

7.1	Introduction	359
7.2	The Government's Public Consultation	361
7.2.1	The Government's Public Consultation	361
7.2.2	The Preliminary Proposals	363

7.3	Background of the Copyright Issues Raised in the Public Consultation: A Comparative Approach	366
7.4	Meaning of Authorisation	369
7.5	The Liability of Online Service Providers	374
7.5.1	The Safe Harbour Provisions	374
7.5.2	The Liabilities of the Providers of Search Engines	376
7.5.3	P2P Online File Sharing and the Inducement Rule	382
7.6	The Debates on the Preliminary Proposals	385
7.6.1	The OSPs' Liability	385
7.6.2	The Code of Practice	386
7.6.2.1	The Principle of Least Cost Avoider	388
7.6.2.2	The Coase Theorem and Online Infringement	389
7.6.3	Piracy v Privacy	391
7.6.4	Notice and Takedown Procedure	394
7.6.5	Freedom of Expression and Copyright	396
7.6.6	The WIPO Internet Treaties	399
7.6.7	Criminal Liability of Downloaders	401
7.6.8	Difference between Analogue and Digital Worlds	403
7.6.9	Statutory Damages	404
7.6.10	Media-Shifting Exception	408
7.7	Discussion	409

CHAPTER EIGHT: CONCLUSION

8.1	A Synopsis of the Findings	415
8.1.1	Theoretical Considerations	415
8.1.2	Institutional Constraints and Copyright Reform	417
8.1.3	Policy Implications	425
8.2	The Future of Digital Copyright	431

BIBLIOGRAPHY	435
---------------------	-----

Appendix A: Hong Kong 2005 Political Reform Game	453
---	-----

Appendix B: Hong Kong Political Reform Game	458
--	-----

ACRONYMS AND ABBREVIATIONS

AAP	Association of American Publishers
Berne	Berne Convention for the Protection of Literary and Artistic Works (1971)
BSA	Business Software Alliance
Chief Executive	The Chief Executive of Hong Kong
China	The People's Republic of China
CSA	Committee Stage Amendments
CITB	The Commerce Industry and Technology Branch of the Hong Kong Government (has now been named as the Commerce Industry and Tourism Branch since 1 July 2007)
DMCA	United States Digital Millennium Copyright Act of 1998
DRM	Digital Rights Management System
EC	European Council
EU	The European Union
ExeCo	Executive Council of Hong Kong Government
HKVDF	Hong Kong Video Development Foundation Limited
Hong Kong	Hong Kong Special Administrative Region of the People's Republic of China
IFPI	International Federation of Phonographic Industry
IFPI (HKG)	International Federation of Phonographic Industry (Hong Kong Groups) Limited
IFRRO	International Federation of Reproduction Rights Organizations
IIPA	International Intellectual Property Alliance

IPA	International Publishers' Alliance
IPD	Intellectual Property Department of Hong Kong government
IPRs	Intellectual Property Rights
ISPs	Internet Services Providers
Joint Declaration	Sino-British Joint Declaration of 1984
LegCo	Legislative Council of Hong Kong
LegCo Panel	LegCo Panel on Commerce and Industry (before 2000, on Industry and Trade)
Miscellaneous Ordinance 2000	Hong Kong Intellectual Property (Miscellaneous Amendments) Ordinance 2000
MPA	Motion Picture Association
MPDA	Movie Producers and Distributors Association of Hong Kong Limited
MPIA	Hong Kong, Kowloon & New Territories Motion Picture Industry Association
NPC	National People's Congress of the People's Republic of China
NPCSC	The Standing Committee of the National People's Congress
The Ordinance	Hong Kong Copyright Ordinance of 1997 (Cap 528)
OSPs	Online Service Providers
Paris Convention	Paris Convention for the Protection of Industrial Property (1967)
P2P	Peer to peer technology
Phonograms Convention	Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms of Geneva 1971
PRC	The People's Republic of China
Preliminary	The Government's Preliminary Proposal on Copyright

Proposals	Protection in the Digital Environment dated 15 April 2008
Privacy Ordinance	Personal Data (Privacy) Protection Ordinance (Cap 486)
Public Consultation	Public consultation paper on the ‘Copyright Protection in the Digital Environment’ issued by CITB of the Hong Kong Government on 19 December 2006.
R & D	Research and Development
TPM	Technological protection measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights (1993)
UK	The United Kingdom
U. K. 1988 Act	United Kingdom Copyright Designs and Patents Act of 1988
U.S.	The United States of America
USTR	Office of the United States Trade Representatives
WIPO	World Intellectual Property Organization
WCT	WIPO Copyright Treaty (1996)
WIPO Internet Treaties	WCT and WPPT are collectively known as the WIPO Internet Treaties
WTO	World Trade Organization
WPPT	WIPO Performances and Phonograms Treaty (1996)