

**RESPONSE TO CONSULTATION PAPER ON THE PROVISION OF ADDITIONAL EXEMPTIONS ON  
CIRCUMVENTION OF TECHNOLOGICAL MEASURES (THE "PAPER")**

1. The objective of the Paper is to seek views on the possible formulation of additional exemptions on circumvention of technological measures, pursuant to the limited powers (see below) of the Secretary for Commerce and Economic Development ("SCED") provided by the new section 273H of the Copyright Ordinance. The government agreed to carry out a consultation before introducing the new civil liability provisions for acts of circumvention.
2. To an extent we find the consultation artificial in that it refers to exemptions provided for in other countries, which were inevitably introduced under different economic circumstances and not pursuant to the limited powers of the SCED. Exemptions under these powers should only be introduced if users necessarily require it and not on the basis that they would be nice to have.
3. For the consultation to have any merit, it is important that relevant copyright owners are provided with the opportunity to respond to any suggested exemptions from users rather than being asked to respond blindly to a list of possible exemptions without knowing what users may propose.
4. In particular, we note that exemptions may only be introduced in exercise of SCED's powers if the exempted use or dealing would not constitute or lead to any copyright infringement and is likely to be adversely impaired or affected by the prohibitions on circumvention. This means that the scope of any exemptions introduced in exercise of SCED's powers is very limited and depends upon the actual business and market situation prevailing in Hong Kong at the time.
5. In contrast, it appears that the various examples of overseas exemptions considered were either not introduced pursuant to such similarly limited powers or were introduced under different business and market conditions or have in fact not been introduced at all.
6. For example, exemptions were only introduced in the US after the presentation of evidence from users of the specific problems they faced in gaining access to copyright works in the US. Similar exemptions should not be introduced in Hong Kong if there is no evidence to show that Hong Kong users face similar problems.
7. Further, the exemptions in under the Singapore Copyright (Excluded Works) Order 2005 are only in force until 31 December 2008. None of the other exemptions proposed in the Draft Copyright (Excluded Works) Order 2007 were in fact accepted.
8. In any event, there are significant differences in the structure, drafting and substance of copyright laws in the US, Australia and Singapore compared to the Hong Kong Copyright Ordinance. To name but one example, the concept of fair use under US laws and the concept of fair dealing under Hong Kong laws are very different. It would be inappropriate to extract an exemption found under US laws for incorporation into our Copyright Ordinance as this would generate inconsistencies within our copyright laws.

9. "Technological measures" include both copy control and access control measures. The Paper (see paragraph 11(b) and (c)) considers only exemptions to measures designed to prevent copyright infringement. However, paragraph 14 of the Paper correctly points out that the various overseas examples of exemptions apply only to the circumvention of access controls measures but could be applied to copy control measures.

We find this analogy confusing. In particular, Note 11 states that the US, Singapore and Australia only prohibit circumvention of access control measures but not copy control measures. In fact, these countries prohibit circumvention of technological measures to prevent unauthorised access and to restrict unauthorised copying of works. It is the exemption that is limited to access control. The Paper seems to recognise this by prefacing some of the examples of access control exemptions with the rubric "provided that the act does not infringe copyright in the work or other subject matter". We submit that this rubric should apply to all and any proposed exemptions (namely Exemptions (1) to (7))

10. An example is Exemption (2) which concerns computer programs and video games distributed in formats that have become obsolete because the hardware required to play these games is no longer available and circumvention is necessary for library or archive use. Although the exemption is described as an exemption to access control, it is in fact an exemption to copy protection. If the software cannot be accessed because no relevant hardware is available to play it, breaking the access control does not assist. Instead what is required is to convert the software into a format which is playable by commercially available hardware. This "conversion" process involves making a copy of the software. The exemption would not be necessary if the library or archive can obtain a copy of the computer program or video game directly from the copyright owner.
11. Paragraph 4 of the Paper notes that 7 categories of exemptions have already been included in the Amendment Ordinance and Paragraph 12 of the Paper states that any further exemption to be provided should be narrow in scope and focused on the problems identified. The Paper does not identify any specific problem which has arisen in Hong Kong that may warrant further exemption to be created. The SCED should not take it upon itself to introduce further exemptions without any specific problem having been identified by users in Hong Kong.
12. It is our view that only if the SCED becomes aware of any potential problem raised by users, the SCED should provide an opportunity for the relevant copyright owners to present their views. Further exemptions should only be introduced as a last resort if the problem identified cannot be resolved by other means. The creation of further exemptions will weaken the strength of the Amendment Ordinance in the protection of copyright works.
13. If the government decides that further exemptions should be introduced, it should do so only upon evidence that the exemptions are necessary and any such exemptions should be very narrow to cater for the specific needs of users. Furthermore, the exemptions should be subject to review (as in the US and Singapore) after a period time (at most 3 years) from their introduction.
14. In conclusion, without specific representations from users and evidence of any unwillingness on the part of the relevant industries to allow to their works or other protected subject matter - eg access to read-aloud functions for the blind as proposed under Exemption (3) - the Law Society does not see the need to introduce any of the exemptions raised in the Paper at this stage.

**The Law Society of Hong Kong  
Intellectual Property Committee  
31 January 2008**

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