

Consultation paper on the provision of additional exemptions on circumvention of technological measures

Objective

This paper seeks your views on the formulation of additional exemptions on circumvention of technological measures.

Background

2. The Copyright (Amendment) Ordinance 2007 (“Amendment Ordinance”) was enacted on 6 July 2007. One of the changes brought about by the Amendment Ordinance is the enhanced protection for technological measures that are used to protect copyright works¹.

3. Under the amended Copyright Ordinance, a person who does an act which circumvents a technological measure applied to a copyright work or performance may incur civil liability. Technological measures include access control measures and copy control measures. Examples of such measures include the use of passwords to restrict access to copyright works or the use of special chips that prevent unauthorized digital copying of works. Furthermore, there are civil and criminal liabilities for a person who makes or deals in devices, or provides services, for the circumvention of technological measures².

4. To ensure that the above prohibitions would not hinder the development of technology and the conduct of other legitimate activities, we have provided specific exceptions in the Amendment Ordinance. These exceptions, subject to certain conditions as provided for under the Amendment Ordinance, would allow a person to circumvent technological measures, or provide circumvention devices or services, for the following purposes³:

- to achieve interoperability of an independently created computer program with another computer program;
- to conduct research into cryptography;

¹ The relevant amendments will come into force on a day to be specified by notice in the Gazette.

² The new sections 273A, 273B and 273C of the Copyright Ordinance are relevant.

³ The new sections 273D, 273E and 273F of the Copyright Ordinance are relevant. It should be noted that the exemptions are formulated after careful consideration of the need to balance the interest of the copyright owners and the legitimate needs of users. Each of them is subject to a set of detailed conditions in order to minimize the risk of abuse.

- to identify and disable the function of a technological measure to collect or disseminate information which tracks and records the manner of a person's use of a computer network in order to protect privacy (spyware);
- security testing for a computer or computer system/network;
- to gain access to parallel imported copies of copyright works;
- to prevent access by minors to harmful materials on the Internet (filtering software); and
- law enforcement.

Furthermore, librarians and archivists are allowed to circumvent technological measures for the sole purpose of making copies of works for supply to other libraries, or for the preservation or replacement of works in its permanent collection (or those of other libraries or archives).

5. The Secretary for Commerce and Economic Development ("SCED") is empowered under the Amendment Ordinance to provide further exemptions as and when necessary. More specifically, SCED is empowered to exclude any work or performance, class of works, performances, devices or services from the above prohibitions⁴. Before exercising his power, SCED must be satisfied that:

- (a) any intended use of or dealing with the works, performances, devices, or services would not constitute or lead to an infringement of copyright or the rights in performances; and
- (b) such intended use or dealing is likely to be adversely impaired or affected as a result of the prohibitions on circumvention.

6. We have agreed that the civil liability provisions for acts of circumvention would not come into effect until copyright owners and users have been consulted on the first list of exemptions⁵.

⁴ The new section 273H of the Copyright Ordinance is relevant.

⁵ The commencement date of the provisions imposing civil and criminal liability for dealing in circumvention devices and provision of circumvention services would not be affected by the present consultation and will come into effect on a day to be specified in the Gazette.

Scope of the proposed exemptions

7. We propose that the first list of exemptions be confined to the act of circumvention itself. The first list of exemptions will *not* extend to persons who are engaged in dealing in circumvention devices or providing circumvention services. This is because:

- (a) stringent prohibitions on the supply of circumvention devices and provision of circumvention services are necessary to deter widespread infringing activities using such devices or services;
- (b) most circumvention devices could be used for both legitimate and infringing purposes. Providing general exemptions to providers of such devices or services (e.g. for installation of circumvention devices) could easily lead to abuse; and
- (c) the exemptions currently provided in the Amendment Ordinance to providers of circumvention devices and services strike a balance between the interest of the copyright owner and the legitimate needs of users.

Experience of other jurisdictions

8. We have referred to the laws of other countries on protection of technological measures. The copyright laws of the U.S., Singapore and Australia are most relevant for our purpose as they are common law countries which provide a similar scope of protection for technological measures. Moreover, they provide a mechanism, similar to that provided in our copyright law, for review and enactment of additional exemptions to supplement the exemptions provided in the main legislation⁶.

9. The exemptions provided by the above countries in their main legislation are largely similar to those presently contained in the Amendment

⁶ Anti-circumvention provisions were first introduced in the copyright legislation of the U.S. The provisions in Singapore and Australia are largely similar to those in the U.S. as a result of the Free Trade Agreements between the U.S. and the other two countries.

Ordinance⁷. Apart from these exemptions, additional exemptions were introduced in the above countries through subsidiary legislation.

10. Specifically, the exemptions in the U.S. and Singapore are fairly similar and focused on very specific circumstances. Australia adopts a different approach in that most of the exemptions are granted to enable users to do specific permitted acts⁸ allowed under its copyright law. In effect, users are allowed to circumvent access control measures to gain access to copyright works and to use such works in a manner specifically permitted by law. A brief description of the exemptions in these countries together with our analysis is set out in the Annex to this paper for your reference.

Relevant issues for consideration

11. We propose that the following principles should be applied in considering any proposed exemption:

- (a) the technological measure concerned could either be an access control measure or a copy control measure;
- (b) the measure is applied to a copyright work or performance (or class of works or performances) to prevent others from doing any act that would infringe the copyright in the work or the right in the performance. These are generally works or performances available in electronic form;
- (c) the prohibition against circumvention of technological measures brought about by the Amendment Ordinance has resulted in the user being practically unable to use or deal with the work (or the performance) ;

⁷ See paragraph 4 above for exemptions provided in the Amendment Ordinance. There is one additional exemption in the main legislation of the U.S., Singapore and Australia which allows non-profit libraries, archives and educational institutions to circumvent access control measures to gain access to commercially exploited copyright works solely for the purpose of making a good faith determination of whether to acquire copies of those works. Critics have, however, commented that this exemption serves limited practical use as it is highly unlikely that a content provider will withhold from making available his work to a potential customer, particularly institutional customers such as libraries and schools.

⁸ Permitted acts are acts which are infringing in nature but are exempted from infringement. They are designed to balance the interests of copyright owners and the public interest.

- (d) the intended use or dealing would not constitute or lead to an infringement of copyright in the work (or the right in the performance)⁹; and
- (e) the intended use of or dealing with the copyright work (or performance) is not covered by the exemptions currently provided elsewhere in the Amendment Ordinance¹⁰.

12. Furthermore, to minimize the risk of abuse, any exemption to be provided should be narrow in scope and focused on the problems identified. By way of illustration, a general exemption which allows a person to circumvent a technological measure so that he may do any or all of the permitted acts allowed under our copyright law would be too broad and therefore inappropriate.

13. The exemptions provided in other countries could also be of reference to us. We could consider whether similar exemptions are necessary in Hong Kong, having regard to the local circumstances (e.g. whether we face a similar problem, whether the exceptions currently provided in the Amendment Ordinance could adequately address the concern).

14. Readers should note that the overseas exemptions set out in the the Annex apply to the circumvention of access control measures only¹¹. Nevertheless, we could also consider whether similar or other exemptions are required for circumvention of copy control measures which restrict the copying of a work.

⁹ An act would not infringe copyright where:

- (a) it is not an act restricted by the copyright in the work (sections 22-29 of the Copyright Ordinance);
- (b) the act, though restricted by copyright, is done with the authorization of the copyright owner of the work; or
- (c) the act is a permitted act under sections 38-88 of the Copyright Ordinance.

An act would not constitute an infringement of the rights in a performance where:

- (a) it is not an act which requires the consent of the performer or a person having fixation rights in the performance (sections 202-211 of the Copyright Ordinance);
- (b) if the act requires the consent of the performer or person having fixation rights, such consent has been obtained; or
- (c) the act is a permitted act under sections 241-261 of the Copyright Ordinance.

¹⁰ Please refer to paragraph 4 of this paper.

¹¹ The legislation in the U.S., Singapore and Australia only prohibits circumvention of access control measures but not copy protection measures. Thus, the exemptions provided by these countries only relate to circumvention of access control measures.

How to respond

15. We welcome views from all interested parties, including copyright owners, educational institutions, industries and members of the public. Please include detailed reasons for including or not including certain exemptions (especially those provided for in other jurisdictions). If you wish to propose any new exemption, you are requested to provide the following information for consideration:

- (a) a description of the copyright work or performance or the class of copyright works or performances and the format in which they are made available to users;
- (b) the manner in which the work or performance has been used or is intended to be used;
- (c) the type or nature of the technological measure that has been applied to the work or performance and how such measure has affected or would affect the intended non-infringing use of the work or performance;
- (d) whether the work or performance is available in the market in other formats with no technological measure applied; and
- (e) other rationale for the exemptions.

16. Please send your views on or before [4 January 2008] for the attention of Division 3 of the Commerce, Industry and Tourism Branch by email, by post or by fax at the following address and fax number:

Email : co_consultation@cedb.gov.hk
Post : Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
Level 29, One Pacific Place,
88 Queensway, Hong Kong
Fax : 2869 4420

17. An electronic copy of this document is available at the following websites:

- Commerce, Industry and Tourism Branch <http://www.cedb.gov.hk/citb>
Commerce and Economic Development
Bureau
- Intellectual Property Department <http://www.ipd.gov.hk>

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Overseas Exemptions on Circumvention of Access Control Measures

Exemption (1)

Computer programs protected by dongles¹ that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace².

Applicable countries

- Introduced in the U.S. since 2000³.
- A similar exemption was introduced in Singapore since 2005⁴. The Singaporean Government has proposed that the exemption should continue to apply with slight broadening in scope after its expiry in 2008⁵.

Background information⁶

Evidence was presented in the U.S. by the proponents of this exemption to the effect that damaged or malfunctioning dongles prevented authorized users from gaining access to certain protected software. Since the software vendors may, in some instances, be unresponsive or have gone out of business, the evidence showed a genuine problem faced by authorized users of computer programs (often expensive ones) who lost their ability to gain access to those programs due to malfunctioning or damaged hardware that could not be replaced or repaired. It was therefore considered necessary to provide this exemption to enable authorized users to circumvent the dongles and thus continue using their computer programs.

¹ Hardware locks attached to a computer that interact with software to prevent unauthorized access to that software.

² Extracted from the U.S. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Federal Register /Vol. 71, No. 227/Monday, November 27, 2006/ Rules and Regulations (www.copyright.gov/fedreg/2006/71fr68472.html).

³ Exemptions on circumvention of technological measures were granted in the U.S. in 2000, 2003 and 2006. The current version of the exemption was slightly different from those granted in 2000 and 2003. For details of the exemptions granted in 2000 and 2003, see www.copyright.gov/fedreg/2000/65fr64555.html and www.copyright.gov/fedreg/2003/68fr2011.html respectively.

⁴ The exemption is contained in the Copyright (Excluded Works) Order 2005. The Order is valid until 31 December 2008. For details of the Order, see www.ipos.gov.sg/NR/rdonlyres/866F0254-BAF2-4335-81DD-EB5EBA896F1E/0/CopyrightExcludedWorksOrder.pdf.

⁵ The proposal is set out in the Draft Copyright (Excluded Works) Order 2007. For details of the draft Order, see www.ipos.gov.sg/NR/rdonlyres/6AD6F791-A854-4DFB-98F9-243AC45DB83A/751/Annexa.pdf.

⁶ Public documents available to us on the background of the exemptions provided in Singapore are limited. However, since most of the exemptions provided or proposed in Singapore are similar to those provided in the U.S., reference could be made to the information on the U.S. exemptions.

Exemption (2)

Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace⁷.

Applicable countries

- Introduced in the U.S. since 2003⁸.
- A similar exemption was introduced in Singapore since 2005⁹. The Government has proposed that the exemption should continue to apply after its expiry in 2008¹⁰.

Background information¹¹

The main proponent for this exemption in the U.S. was the Internet Archive¹². It provided evidence to establish that: (i) its archival and preservation activities were non-infringing; and (ii) computer programs and video games distributed in formats that had become obsolete and that required the original media or hardware as a condition of access (e.g. the original floppy diskette must be inserted into a computer's disc drive in order for the program to operate) constituted works protected by access controls. Moreover, without the ability to circumvent those "original-only" access controls, it could not engage in its preservation and archival activities with respect to those works. The exemption was granted on the above basis.

⁷ Extracted from the U.S. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Federal Register /Vol. 71, No. 227/Monday, November 27, 2006/ Rules and Regulations (www.copyright.gov/fedreg/2006/71fr68472.html).

⁸ The exemption granted in 2003 was slightly different from that granted in 2006. For details of the exemption granted in 2003, see footnote 3 above.

⁹ Copyright (Excluded Works) Order 2005 of Singapore. For details, see footnote 4 above.

¹⁰ The proposal is contained in the Draft Copyright (Excluded Works) Order 2007. For details, see footnote 5 above.

¹¹ See footnote 6 above.

¹² The Internet Archive is a non-profit library that maintains a collection of websites, software and other works in digital formats in a digital archive, migrates such works to modern storage systems (e.g., by transferring a computer program from a floppy diskette to a hard drive) that are more stable and that will ensure continuing access to the works.

Exemption (3)

Literary works distributed in e-book format when all existing e-book editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format¹³.

Applicable countries

- Introduced in the U.S. since 2003.
- A similar exemption was introduced in Singapore since 2005¹⁴. The Singaporean Government has proposed that the exemption should continue to apply after its expiry in 2008 with slight broadening in scope¹⁵.

Background information¹⁶

“Screen readers” and “read-aloud” functions enable persons who are visually impaired to “read” the text of an e-book by rendering the written text of the book into audible, synthetic speech. Screen readers also allow the text and layout of a text screen to be conveyed spatially so that a visually impaired user can perceive the organization of a page on the screen or even the organization of a work as a whole and navigate through that e-book.

The U.S. Government was satisfied, based on the evidence provided, that: (i) some literary works were distributed in e-book form with the read-aloud and screen reader functions disabled through the use of digital rights management tools; and (ii) in order to alter the usage settings of such e-books so as to enable the read-aloud and screen reader functionality, a user would have to circumvent the access controls. The above exemption was considered necessary as it would enable visually disabled persons to use e-books.

¹³ Extracted from the U.S. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Federal Register /Vol. 71, No. 227/Monday, November 27, 2006/ Rules and Regulations (www.copyright.gov/fedreg/2006/71fr68472.html).

¹⁴ The exemption is contained in the Copyright (Excluded Works) Order 2005. For details of the Order, see footnote 4 above.

¹⁵ The proposal is set out in the Draft Copyright (Excluded Works) Order 2007. For details of the draft Order, see footnote 5 above.

¹⁶ See footnote 6 above.

Exemption (4)

Any compilation which consists of a list of blocked Internet locations.

“Internet locations” include any domain, uniform resource locator (URL) or numeric Internet protocol (IP) address or any combination thereof.

“List of blocked Internet locations” means a list of Internet locations to which access is blocked by means of a commercially available filtering computer program which operates to prevent access to any domain or website or any part thereof, but does not include any list of blocked Internet locations which is merely protected by (i) a computer program which operates exclusively to prevent damage to a computer or computer network; or (ii) a computer program which operates exclusively to prevent receipt of electronic mail¹⁷.

Applicable countries

- Introduced in Singapore since 2005. The Singaporean Government has proposed that the exemption should continue to apply after its expiry in 2008¹⁸.
- A similar exemption was provided in the U.S. in 2000 - 2006¹⁹. It was discontinued in 2006.

Background information²⁰

The U.S. Government granted the exemption previously to enable users to gain access to the list of blocked websites or Internet addresses that were used in various filtering software programs (censorware). These programs were intended to prevent minors and other Internet users from viewing objectionable materials online. There were criticisms that the emphasis of these programs was

¹⁷ Extracted from Copyright (Excluded Works) Order 2005 of Singapore. For details of the Order, see footnote 4 above.

¹⁸ The proposal is set out in the Draft Copyright (Excluded Works) Order 2007. For details of the draft Order, see footnote 5 above.

¹⁹ The exemption granted by the U.S. in 2000 was in the following terms:
“Compilations consisting of lists of websites blocked by filtering software applications”.

The exemption granted by the U.S. in 2003 was as follows:

“Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email”.

“Internet locations” are defined to include domains, uniform resource locators (URLs), numeric IP addresses or any combination thereof.

²⁰ See footnote 6 above.

on robust blocking with the result that this type of filtering software had the tendency to over-block, thereby preventing access to legitimate information resources. It was considered that the access control applied to the lists of blocked websites had adversely affected one's ability to comment on and criticize the lists and an exemption was granted on this basis. The exemption was, however, discontinued in the U.S. in 2006 because the Government considered that inadequate evidence was provided in support of its renewal.

Exemption (5)

Audiovisual works included in the educational library of a college or university's film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by film or media studies professors²¹.

Applicable countries

- Introduced in the U.S. since 2006.
- A similar exemption was proposed in Singapore under the Draft Copyright (Excluded Works) Order 2007²².

Background information

This exemption was granted in the U.S. on the basis that film or media studies professors needed to create compilations of portions of motion pictures which were distributed on DVDs protected by Content Scrambling System (CSS) for classroom performance. Such compilations were necessary for effective teaching purposes. It was noted that encrypted DVD versions of motion pictures were often of higher quality than copies in other available formats and contained attributes that were extremely important for teaching purposes, for example, original colour balance in DVD version of older motion pictures. Furthermore, proponents of the exemption have demonstrated that the reproduction and public performance of short portions of motion pictures or other audiovisual works in the course of face-to-face teaching activities of a film or media studies course would generally constitute a non-infringing use.

²¹ Extracted from the U.S. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Federal Register /Vol. 71, No. 227/Monday, November 27, 2006/ Rules and Regulations (www.copyright.gov/fedreg/2006/71fr68472.html).

²² For details of the Draft Copyright (Excluded Works) Order 2007, see footnote 5 above.

Exemption (6)

*Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network*²³.

Applicable country

Introduced in the U.S. since 2006.

Background information

Evidence was provided in the U.S. by proponents of this exemption that providers of mobile telecommunications (mobile phone) networks were using various types of software locks in order to control customers' access to the "bootloader" programs²⁴ on mobile phones and the operating system programs embedded inside mobile handsets. These software locks prevented customers from using their mobile handsets on a competitor's network by controlling access to the software that operated the mobile phones (e.g. the mobile firmware). As a result, consumers could not use the network of another carrier even after fulfilling their contractual obligations with the carrier that sold the phone to them. In order to switch carriers, the consumer would have to purchase a new phone from a competing mobile telecommunications carrier.

The U.S. Government noted that the software locks were access controls that adversely affected consumers from making non-infringing use of the software on their mobile phones. Moreover, it appeared to the U.S. Government that the access controls were not deployed to protect the interests of the copyright owners but were merely used by wireless carriers to limit the ability of subscribers to switch to other carriers. An exemption was therefore granted to tackle the problem identified.

²³ Extracted from the U.S. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Federal Register /Vol. 71, No. 227/Monday, November 27, 2006/ Rules and Regulations (www.copyright.gov/fedreg/2006/71fr68472.html).

²⁴ A bootloader is "a small program stored in ROM and responsible for initializing the hardware to a known initial state and making it possible to download application software to the system to be run." Jack Ganssle and Michael Barr, *Embedded Systems Dictionary* 33 (2003).

The Singaporean Government has also specifically considered whether a similar exemption should be provided in their legislation²⁵. However, they took the view that the exemption was not necessary as telecommunications companies operating in Singapore do not currently apply such measures on the mobile phones sold there²⁶.

²⁵ A similar exemption is not currently provided in the Copyright (Excluded Works) Order 2005. However, the Singapore Government considered the need for a similar exemption in the course of preparation of the Draft Copyright (Excluded Works) Order 2007.

²⁶ Similar to the position in Singapore, we are not aware of unfair trade practices adopted by telecommunication service providers in Hong Kong that prevent customers from switching to another service provider after their contracts with the existing service provider expire. On this basis, it appears that this exemption is of less relevance to us.

Exemption (7)

Sound recordings, and audiovisual works associated with those sound recordings, distributed in compact disc format and protected by technological protection measures that control access to lawfully purchased works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities²⁷.

Applicable countries

- Introduced in the U.S. since 2006.
- A similar exemption was proposed in Singapore under the Draft Copyright (Excluded Works) Order 2007²⁸.
- A similar but much broader exemption was granted in Australia since January 2007²⁹.

²⁷ Extracted from the U.S. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Federal Register /Vol. 71, No. 227/Monday, November 27, 2006/ Rules and Regulations (www.copyright.gov/fedreg/2006/71fr68472.html).

²⁸ For details of the Draft Copyright (Excluded Works) Order 2007, see footnote 5 above.

²⁹ The exemption was granted by the Copyright Act (section 116AN(9)) and the Copyright Regulations 1969 (regulation 20Z and schedule 10A, added by the Copyright Amendment Regulations 2006) of Australia (For details of the Copyright Act and the Copyright Regulations 1969, see www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/index.html and www.austlii.edu.au/au/legis/cth/consol_reg/cr1969242/). It allows a person to circumvent an access control measure for the doing of the following prescribed act provided that the act does not infringe the copyright in the work or other subject-matter:

“The gaining of access to copyright material that is protected by a technological protection measure that interferes with or damages a product in which it is installed (the host product) or another product used in conjunction with the host product:

- (i) to prevent damage, or further damage, to the host product or another product by the technological protection measure; or
- (ii) to repair the host product or another product (if circumvention of the technological protection measure is necessary to enable the repair to be carried out).”

The Australian exemption is broader in scope than the U.S. exemption e.g. it is not limited to sound recordings and associated audiovisual works, the host product is not restricted to a personal computer, and the damage caused by the technological measure is not confined to security flaws or vulnerabilities.

Background information

This exemption was granted in the U.S. as a consequence of complaints arising out of the distribution, by Sony BMG Music Entertainment, of compact discs (CDs) which employed certain digital rights management software that created security vulnerabilities on computers on which the software was installed. Specifically, SunnComm's MediaMax content protection software and First4Internet's XCP copy protection software program were identified.

The evidence provided demonstrated that MediaMax and XCP controlled access to the sound recordings (as well as some related audiovisual works, such as music videos) on a number of CDs distributed in 2005 and, as a consequence, ended up being installed on about half a million computer networks worldwide. The evidence also established that these access controls created security vulnerabilities on the personal computers on which they were installed.³⁰

Copyright owners in the U.S. opposed the above exemption on the ground that there were another statutory exemption which allowed circumvention of access controls for the purpose of good faith testing, investigating or correcting, a security flaw or vulnerability³¹. However, since it was not clear whether the statutory exemption of security testing extended to the circumvention in cases such as those involving MediaMax and XCP and in light of the seriousness of the problem, the U.S. Government decided to provide a specific exemption for this purpose³².

³⁰ For example, XCP includes a "rootkit" which cloaks the existence of other aspects of the XCP digital rights management software (a music player application and a device driver). The rootkit creates security vulnerabilities by providing a cloak that conceals malicious software. Unlike XCP, MediaMax does not include a rootkit. However, the installation of MediaMax "left openings by which a malicious person could seize control of the computer". For details, see Recommendation of the Register of Copyrights, November 17, 2006 at page 56 at http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

³¹ Section 1201(j) of U.S. Copyright Act (<http://www.copyright.gov/title17/92chap12.html>).

³² The U.S. Government agreed that XCP and MediaMax software were access control measures. In relation to the exemption on security testing, section 1201(j)(1) of the U.S. Copyright Act defines "security testing" as "accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating, or correcting, a security flaw or vulnerability". Proponents of the exemption submitted that it was uncertain whether the act allowed included circumventing an access control that protected a sound recording or audiovisual work that was stored in a computer or on a removable media that could be accessed through a computer (as opposed to circumventing an access control measure that protected the computer system itself). Since the language of the exemption on "security testing" has not been tested by the U.S. courts, the U.S. Government granted the exemption to avoid any uncertainty.

Section 273D(2) of our Copyright Ordinance provides an exemption for circumvention of technological measures for the sole purpose of security testing, investigating or correcting a security flaw or vulnerability of a computer, computer system or computer network. The provision should be wide enough to cover problems similar to those caused by installation of the XCP and MediaMax software.

Exemption (8)

A person who circumvents an access control measure for the purpose of doing the following act would be exempted from liability provided that the act does not infringe copyright in the work or other subject-matter:

The reproduction or communication by a library of a kind mentioned in section 49 of the Copyright Act, or archives, of part or the whole of an article or published work to a person for research or study in the circumstances mentioned in that section³³.

Applicable country

Introduced in Australia since January 2007.

Background information

Section 49 of the Copyright Act of Australia³⁴ is a permitted act which allows libraries and archives to reproduce and communicate³⁵ reasonable portions of works to users who need to use them for research or private study under specified conditions. Exemption (8) effectively allows libraries and archives to circumvent access control measures for the purpose of doing the permitted act³⁶.

³³ Extracted from the Copyright Regulations 1969 of Australia. For details of the Regulations, see footnote 29 above.

³⁴ For details of the Copyright Act of Australia, see footnote 29 above.

³⁵ To “communicate” means to make available online or electronically transmit (section 10 of the Australian Copyright Act).

³⁶ For comparison, our copyright law also allows librarians to copy reasonable portions of works for the purpose of supplying to persons who need to use them for research or private study under specified conditions (sections 47-49 of the Copyright Ordinance).

Exemption (9)

A person who circumvents an access control measure for the purpose of doing the following act would be exempted from liability provided that the act does not infringe copyright in the work or other subject-matter:

The making of a copy of a sound recording in association with other matter solely for broadcasting it in the circumstances mentioned in section 107 of the Act³⁷.

Applicable country

Introduced in Australia since January 2007.

Background information

Section 107 of the Copyright Act of Australia³⁸ permits the making of a copy of the sound recording for purpose of broadcasting under specified conditions where the broadcasting of the recording does not constitute an infringement of the copyright in the recording³⁹. Exemption (9) effectively allows broadcasters to circumvent access control measures for the purpose of doing the permitted act above.

³⁷ Extracted from the Copyright Regulations 1969 of Australia. For details of the Regulations, see footnote 29 above.

³⁸ For details of the Copyright Act, see footnote 29 above.

³⁹ For the purpose of comparison, our copyright law allows a person, who is licensed to broadcast a work or include a work in a cable programme service, to make an incidental copy of a sound recording or film of the work, for the purpose of broadcast or inclusion in a cable programme service subject to specified conditions (section 77 of the Copyright Ordinance).

Exemption (10)

A person who circumvents an access control measure for the purpose of doing the following act would be exempted from liability provided that the act does not infringe copyright in the work or other subject-matter:

The gaining of access to copyright material to which a technological protection measure has been applied if:

- (i) the technological protection measure is not operating normally; and*
- (ii) a replacement technological protection measure is not reasonably available⁴⁰.*

Applicable country

Introduced in Australia since January 2007.

Background information

The above exemption allows circumvention of an access control measure that is “not operating normally”. This is intended to cover access control measures that are obsolete, lost, damaged, defective, malfunctioning or unusable. A replacement measure is reasonably available if it is available within a reasonable time at an ordinary commercial price.

⁴⁰ Extracted from the Copyright Regulations 1969 of Australia. For details of the Regulations, see footnote 29 above.

Exemption (11)

A person who circumvents an access control measure for the purpose of doing the following act would be exempted from liability provided that the act does not infringe the copyright in the work or other subject-matter:

The reproduction or adaptation by a person of a computer program of a kind mentioned in section 47D of the Copyright Act to achieve interoperability of an independently created article with the program or any other program in the circumstances mentioned in that section⁴¹.

Applicable country

Introduced in Australia since January 2007.

Similar exemption in Hong Kong

To ensure that the anti-circumvention provisions in our copyright legislation would not hinder legitimate software development activities, we have provided an exception to cases where circumvention is conducted for the purpose of achieving interoperability of different computer programs provided that certain specified conditions are satisfied⁴².

⁴¹ Extracted from the Copyright Regulations 1969 of Australia. For details of the Regulations, see footnote 29 above.

⁴² See section 273D(1) of the Copyright Ordinance. We believe that the existing exemption should be adequate for the purpose and further exemptions on interoperability are not required.

Exemption (12)

A person who circumvents an access control measure for the purpose of doing the following act would be exempted from liability provided that the act does not infringe the copyright in the work or other subject-matter:

The reproduction or communication by, or on the premises of, an educational institution of copyright material of a kind, and in circumstances, mentioned in Division 2A of Part VB of the Copyright Act⁴³.

Applicable country

Introduced in Australia since January 2007.

Background information

There are permitted acts in Australia which allow an educational institution to reproduce and communicate⁴⁴ insubstantial parts of a work⁴⁵ that is in electronic form for the purpose of a course of study provided by the educational institution if other specified conditions are satisfied. However, where the part copied exceeds such limit, equitable remuneration⁴⁶ is required to be paid to the collecting society representing the copyright owner.

On the other hand, teachers and students in Hong Kong are allowed to copy and make available reasonable portions of works through the school's Intranet for teaching or learning in a course of study provided by the educational establishment as long as the acts constitute fair dealing⁴⁷. Furthermore, they are allowed to make reprographic copies of a work, to a reasonable extent, for teaching or learning purpose⁴⁸.

⁴³ Extracted from the Copyright Regulations 1969 of Australia. For details of the Regulations, see footnote 29 above.

⁴⁴ To "communicate" means to make available online or electronically transmit (section 10 of the Australian Copyright Act).

⁴⁵ Generally speaking, an insubstantial part should not exceed 2 pages or 1% of the work (whichever is higher).

⁴⁶ Educational institutions in Australia are required to pay compensation to the collecting society representing the copyright owners at a rate to be agreed, or failing such agreement, to be determined by the Copyright Tribunal of Australia.

⁴⁷ Section 41A of the Copyright Ordinance.

⁴⁸ Section 45 of the Copyright Ordinance. The permitted acts in Hong Kong differ in many respects from those in Australia. The Australian permitted act is subject to very specific limits/quantifiers which are insubstantial in nature. Where the copying exceeds the defined limits, users are required to pay compensation to the copyright owner under the "equitable remuneration" system. On the other hand, the permitted acts of "fair dealing" and "reprographic copying" in Hong Kong are more flexible and cover a wide range of works and activities. They are not subject to specific quantifiers. Copyright users are required to apply the criteria set out in the exceptions to the particular facts of each case. If the users comply with the relevant conditions, no compensation is required to be paid to the copyright owner for the use of the work.

Exemption (13)

A person who circumvents an access control measure for the purpose of doing the following act would be exempted from liability provided that the act does not infringe the copyright in the work or other subject-matter:

The reproduction or communication by an institution assisting persons with a print disability for provision of assistance to those persons of copyright material of a kind, and in the circumstances, mentioned in Division 3 of Part VB of the Copyright Act⁴⁹.

Applicable country

Introduced in Australia since January 2007.

Background information

There are permitted acts in Australia which allow institutions assisting persons with a print disability to reproduce and communicate⁵⁰ part of a work provided that equitable remuneration⁵¹ is paid to the collecting society representing the copyright owner.

In Hong Kong, organizations that provide assistance to persons with a print disability are allowed to make or supply to persons with a print disability copies of works adapted for their special needs⁵².

⁴⁹ Extracted from the Copyright Regulations 1969 of Australia. For details of the Regulations, see footnote 29 above.

⁵⁰ See footnote 44 for the meaning of “communicate”.

⁵¹ Institutions assisting persons with a print disability in Australia are required to pay compensation to the collecting society representing the copyright owners at a rate to be agreed, or failing such agreement, to be determined by the Copyright Tribunal of Australia.

⁵² Sections 40A-40F of the Copyright Ordinance. The major difference between the permitted acts in Hong Kong and those in Australia is that institutions in Australia are required to pay equitable remuneration to the copyright owners for use of their works. Organizations in Hong Kong, on the other hand, are not required to pay compensation to the copyright owner as long as the specified conditions are satisfied.

Exemption (14)

A person who circumvents an access control measure for the purpose of doing the following act would be exempted from liability provided that the act does not infringe the copyright in the work or other subject-matter:

The reproduction or communication by a library or archive of part or the whole of an article or published work to another library or archives in the circumstances mentioned in section 50 of the Copyright Act⁵³.

Applicable country

Introduced in Australia since January 2007.

Similar exemption in Hong Kong

Librarians in Hong Kong are allowed under our copyright law to make copies of works for supply to other libraries under specified conditions⁵⁴. To ensure that the anti-circumvention provisions introduced by the Copyright (Amendment) Ordinance 2007 would not hinder legitimate library activities, we have already provided an exemption so that librarians would not be prohibited from circumventing technological measures if the sole purpose of the circumvention is to make copies of works for supply to other libraries pursuant to the existing permitted act provided in our law⁵⁵.

⁵³ Extracted from the Copyright Regulations 1969 of Australia. For details of the Regulations, see footnote 29 above.

⁵⁴ Section 50 of the Copyright Ordinance.

⁵⁵ See section 273D(8) of the Copyright Ordinance. The exemption should be adequate for the purpose.

Exemption (15)

A person who circumvents an access control measure for the purpose of doing the following act would be exempted from liability provided that the act does not infringe the copyright in the work or other subject-matter:

The reproduction or communication by a library or archive of:

- (i) *a work for a purpose, and in the circumstances, mentioned in section 51A of the Copyright Act;*
- (ii) *an unpublished sound recording or cinematograph film for research or study, or with a view to publication, in the circumstances mentioned in section 110A of the Copyright Act; and*
- (iii) *a sound recording or cinematograph film for the preservation or replacement of the sound recording or cinematograph film, or for research, in the circumstances mentioned in section 110B of the Copyright Act*⁵⁶.

Applicable country

Introduced in Australia since January 2007.

Background information

Preservation of works

In brief, sections 51A and 110B of the Copyright Act of Australia allow reproduction and communication⁵⁷ of works, sound recordings and cinematographic films by libraries or archives for preservation and replacement purposes, and other administrative purposes directly related to the care and control of such works.

The position in Hong Kong regarding the preservation of works is that librarians and archivists are allowed under our copyright law to make copies of works for preservation and replacement purposes subject to certain specified conditions⁵⁸. To ensure that the anti-circumvention provisions introduced by the Copyright (Amendment) Ordinance 2007 would not hinder legitimate library activities, we have already provided an exemption so that librarians and archivists would not

⁵⁶ Extracted from the Copyright Regulations 1969 of Australia. For details of the Regulations, see footnote 29 above.

⁵⁷ See footnote 44 above on the meaning of “communicate”.

⁵⁸ Sections 51 and 53 of the Copyright Ordinance.

be prohibited from circumventing technological measures if the sole purpose of the circumvention is to make copies of works for preservation or replacement purposes⁵⁹.

Reproduction and communication of unpublished works

Section 110A of the Copyright Act of Australia allows reproduction and communication of unpublished sound recordings or cinematograph films to users for the purpose of research or study or with a view to publication at a time when more than 50 years have expired since the recordings and films were made (though copyright in these works still subsists) provided that the specified conditions are satisfied.

The position in Hong Kong is that librarians and archivists are currently permitted under our copyright law to make copies of unpublished works for supply to users who need to use the works for research or private study under specified conditions⁶⁰.

⁵⁹ Section 273D(8) of the Copyright Ordinance. The exemption should be adequate for the purpose.

⁶⁰ Section 52 of the Copyright Ordinance.

The permitted act in our copyright law is much broader in scope than the Australian provision. Our permitted act applies to all unpublished literary, dramatic and musical works and sound recordings and films irrespective of the time of making of these works. The Australian permitted act, however, applies only to unpublished sound recordings and cinematographic films made for more than 50 years although copyright still subsists in them.

Exemption (16)

A person who circumvents an access control measure for the purpose of doing the following act would be exempted from liability provided that the act does not infringe the copyright in the work or other subject-matter:

The broadcasting of a sound recording in the circumstances mentioned in section 109 of the Copyright Act⁶¹.

Applicable country

Introduced in Australia since 2007.

Background information

In brief, section 109 of the Copyright Act of Australia permits a person to make a broadcast of a published sound recording provided that an amount specified in accordance with an order of the Copyright Tribunal has been paid to the owner of the copyright in the recording. Where there is no order of the Tribunal in force, the broadcaster could broadcast the sound recording after it has given a written undertaking to pay to copyright owner of sound recording such amount as may be determined by the Copyright Tribunal⁶².

⁶¹ Extracted from the Copyright Regulations 1969 of Australia. For details of the Regulations, see footnote 29 above.

⁶² We do not currently have a similar permitted act in the Copyright Ordinance.

Exemption (17)

Any computer program that requires a key code for activation –

- (i) the key code is lost and cannot be found after a reasonable search;*
- (ii) the replacement key code is no longer commercially available; and*
- (iii) the user is not in breach of the licence terms relating to the key code found in the licence agreement made between the user and the original computer program producer⁶³.*

Applicable country

Proposed for consultation in Singapore by way of the Draft Copyright (Excluded Works) Order 2007⁶⁴.

Background information

The proposed exemption addresses the problem where the key code of a computer program is lost and could not be replaced with the result that a legitimately purchased computer program cannot be installed by the user.

[end]

⁶³ Extracted from Draft Copyright (Excluded Works) Order 2007 of Singapore. See footnote 5 above for details of the draft Order.

⁶⁴ For details of the draft Order, see footnote 5 above.