

Proposing Additional Exemptions on Circumvention of Technological Measures

Guidance Note for Proponents

This note outlines the procedures and information required for proposing additional exemptions in relation to the act of circumvention of technological measures under the Copyright Ordinance (Cap. 528) (“CO”).

Background

2. Under the CO, a person who knowingly does an act which circumvents a technological measure applied to a copyright work or performance may incur civil liability¹. 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.

3. To ensure that the above prohibition would not affect legitimate use of copyright works, specific exceptions are provided for under the CO. These exceptions, subject to certain conditions, would allow a person to circumvent technological measures for the following purposes²:

- achieving interoperability of an independently created computer program;
- research into cryptography;
- identifying and disabling 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;
- security testing for a computer or computer system/network;
- gaining access to parallel imported copies of copyright works;
- preventing access by minors to harmful materials on the Internet;
- law enforcement; and
- copying by librarians or archivists for supply to other libraries, or for preservation or replacement purposes

¹ See section 273A of the CO effective on 11 July 2008.

² See section 273D of the CO effective on 11 July 2008.

4. Apart from the above statutory exceptions, the Secretary for Commerce and Economic Development (“SCED”) is empowered under the CO to provide *additional exemptions* by excluding any work or performance, class of works or performances from the above prohibition. Before exercising his power, SCED must be satisfied that:

- (a) any intended use of or dealing with the works or performances does not constitute or lead to an infringement of copyright or the rights in performances; and
- (b) such intended use or dealing has been, or is likely to be, adversely impaired or affected as a result of the prohibition.³

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5. We appreciate that legitimate needs for additional exemption may arise due to changes in circumstances. Members of the public are welcome to put forward new exemption proposals for the Government’s consideration as and when necessary. The following paragraphs outline the procedures and the information required for proposing an additional exemption.

(A) Scope of proposed exemptions

6. Generally speaking, any proposed additional exemption should be confined to the act of circumvention only⁴.

(B) Points to be noted

7. A proponent should take note of the following points when making any proposals for additional exemptions on the circumvention of technological measures:

³ See section 273H of the CO.

⁴ We do not consider additional exemptions should be granted to persons who are engaged in dealing in circumvention devices or providing circumvention services (those activities may attract civil and/or criminal liabilities under sections 273B and 273C of the CO) 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 sections 273E and 273F of the CO to providers of circumvention devices and services strike a balance between the interest of the copyright owners and the legitimate needs of users.

- (a) the technological measure concerned could be an access control measure, a copy control measure or both;
- (b) the technological measure is applied to a copyright work or performance to prevent others from doing any act that would infringe copyright in the work or the right in the performance. These are generally works or performances available in electronic form;
- (c) the prohibition against the circumvention of technological measure has resulted or is likely to result in the user being unable to use or deal with the copyright work or performance;
- (d) the intended use or dealing would not constitute or lead to an infringement of copyright in the work⁵ or the right in the performance⁶; and
- (e) the intended use of or dealing with the copyright work or performance is not covered by the exemptions currently provided in the CO (please refer to paragraph 3 above).

(C) Information required

8. A proponent should provide the following information for **each** of his/her proposed additional exemption:

- (a) a description of the copyright work or performance (or the class of copyright works or performances) to be exempted and the format in which they are made available to users;

⁵ 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 CO); (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 33-88 of the CO.

⁶ 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 CO); (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 CO.

- (b) the manner in which the copyright 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 copyright work or performance, and full explanations (with concrete examples and evidence) of how such measure has adversely affected or would adversely affect the intended non-infringing use of the copyright work or performance;
- (d) whether the copyright work or performance is available in the market in other formats with no technological measure applied; and
- (e) any other factors/evidence the proponent considers relevant to support his/her proposal

A standard proforma for submitting proposal is at **Annex A**.

(D) Procedure for making proposal

9. Proponents may send their written proposal(s) including all information required under part (C) above for the attention of Division 3 of the Commerce, Industry and Tourism Branch of Commerce and Economic Development Bureau (“CEDB”) by email, by post or by fax at the following address and fax number:

Email : citbenq@cedb.gov.hk
Post : Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
~~Level 29, One Pacific Place,~~ 23/F, West Wing, Central Government Offices,
~~88 Queensway, Hong Kong~~ 2 Tim Mei Avenue, Tamar, Hong Kong
Fax : ~~2869 4420~~ 2840 1621

10. The proposal should be specific with clear justifications for the exemption(s) to be added. Once CEDB receives such proposal, CEDB would consult relevant right holders with a view to assessing the proposal and exploring the best way to address the proponent’s concern (as there may be other alternative solutions, such as the grant of authorisation by copyright owners.) The proponent may also be invited to further explain his/ her

proposal. If the Government is convinced that the grant of an additional exemption is the most appropriate way in resolving the matter, we would introduce the proposed “Exclusion List” into the Legislative Council after consulting other relevant groups, as appropriate. A flowchart setting out the procedures for granting additional exemptions is at **Annex B**. The Government will also review the need for continuing or updating the granted exemption(s) in about three years’ time in consultation with the relevant stakeholders.

11. For enquiries on these guidelines, please contact Division 3 of the Commerce, Industry and Tourism Branch of CEDB (email: citbenq@cedb.gov.hk).

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