

**Submissions to the Bills Committee on the
Copyright (Amendment) Bill 2006**

Circumvention of Technological Measures for Copyright Protection			
<ul style="list-style-type: none"> - to extend existing civil rights of copyright owners against circumvention of technological measures used to protect copyright works from copying infringement to cover access control measures and the act of circumvention - to introduce a new criminal offence against commercial dealing of devices, products or components and the provision of services on a commercial scale which circumvent technological measures applied to a copy of a copyright work 			
	Organizations / Individuals	Views / Concerns	Administration's Response
1.1	<p><u>Music Industry</u></p> <ul style="list-style-type: none"> ● International Federation of the Phonographic Industry (IFPI) ● International Federation of the Phonographic Industry (Hong Kong Group) Limited (IFPI (HK Group)) <p><u>Broadcasting Industry</u></p> <ul style="list-style-type: none"> ● Cable and Satellite Broadcasting Association of Asia (CASBAA) ● PCCW Limited (PCCW) ● Television Broadcasting Limited (TVB) ● Hong Kong Cable Television Limited (Cable TV) <p><u>Film Industry</u></p> <ul style="list-style-type: none"> ● Hong Kong Video Development Foundation Ltd (HKVDF) ● Motion Picture Association (MPA) 	<p>Knowledge of copyright infringement under <u>the proposed sections 273A and 273B</u></p> <p>IFPI, IFPI (Hong Kong Group), CASBAA, TVB, PCCW, Cable TV, HKVDF, MPA, BSA, HKITF, IIPA, the Law Society and AmCham consider that the requirement of “knowledge of infringement of copyright” in sections 273A and 273B (“knowledge requirement”) is a barrier to effective protection of technological measures (TPMs) and propose that it should be deleted.</p> <p>Law Society comments that the wrongful act is the circumvention of TPM rather than infringement of copyright.</p> <p>An organization from the software game industry submits that if a defendant conscientiously does an act of circumvention, he must know that the act would lead to an infringing act. If the circumvention is for a legitimate purpose, the act of circumvention will not attract liability in the first place.</p>	<p>The policy objective of sections 273-273H is to protect copyright works in relation to which TPMs have been applied from copyright infringement. The “knowledge requirement” aims to ensure that users’ legitimate interests to use copyright works under the permitted acts would not be jeopardized. This is in line with our aim to protect copyright rather than TPMs per se. An example is that a user who is entitled to rely on the permitted acts in Division III of Part II of the Copyright Ordinance should not be liable for circumventing TPMs in order to exercise a permitted act (such as circumventing a copy protection measure in order to copy a reasonable extract of the work for research or private study) since there is no copyright infringement involved. Without the “knowledge requirement”, beneficiaries of permitted acts would be subject to civil liability since he has circumvented the TPM applied by the copyright owner to protect his work.</p>

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<p><u>IT and Software industry</u></p> <ul style="list-style-type: none"> • Business Software Alliance • Hong Kong Information Technology Federation (HKITF) <p><u>Software Game Industry</u></p> <ul style="list-style-type: none"> • An organization from the industry <p><u>Trade Alliance</u></p> <ul style="list-style-type: none"> • International Intellectual Property Alliance (IIPA) <p><u>Professional Bodies</u></p> <ul style="list-style-type: none"> • The Law Society of Hong Kong (Law Society) <p><u>Trade Association</u></p> <ul style="list-style-type: none"> • The American Chamber of Commerce (AmCham) 	<p>IFPI further takes the view that the link between TPMs and copyright infringement is sufficiently contained in section 273. The concern of user groups should sufficiently be accommodated by section 273H which allows exclusion of 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. The copyright infringement knowledge requirement would create loopholes in enforcement against distributors dealing with circumvention devices since they would easily escape liability by claiming that they thought the devices would be used for non-infringing purposes.</p> <p>AmCham considers that there are few (if any) legitimate uses of the copyright works that would require circumvention of TPMs or few legitimate uses of circumvention devices that are not already provided in the exemptions in section 273D and 273E and hence the knowledge requirement is not necessary.</p>	<p>It should also be noted that the knowledge requirement is also contained in the existing section 273(2) of the Copyright Ordinance.</p> <p>The definitions in section 273 do not exempt people undertaking permitted acts from liability. TPM is defined in section 273(3) to mean devices that are designed to protect copyright works (i.e. prevent the doing of restricted acts without the licence of the copyright owner). Furthermore, a “technological measure” is effective if the use of the copyright work (i.e. the doing of any of the restricted acts) is controlled by the copyright owner. Since a TPM could prevent infringing acts and permitted acts alike (both of which are by their nature restricted acts though permitted acts are allowed by law), the “knowledge requirement” in sections 273A and 273B is included to ensure that users’ legitimate interests to use copyright works under the permitted acts would not be jeopardized.</p> <p>We understand copyright owners are concerned that it would be difficult for</p>

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			them to prove the mental state of the defendant which would render the protection ineffective. We will consider if amendments should be made to the proposed provisions to address their concern.
1.2	<ul style="list-style-type: none"> ● Cable and Satellite Broadcasting Association of Asia (CASBAA) ● Television Broadcasting Limited (TVB) 	Opine that under the proposed sections 273A and 273B, the copyright owner needs to prove that the circumventor had an understanding of copyright law.	We do not agree. What the copyright owner needs to prove is that the circumventor knows or has reason to believe that his act will facilitate an infringement of copyright. The test includes both a subjective as well as an objective element. It does not mean that the circumventor should have real knowledge of the copyright law.
1.3	<ul style="list-style-type: none"> ● International Federation of the Phonographic Industry (IFPI) ● International Federation of the Phonographic Industry (Hong Kong Group) Limited (IFPI (HK Group)) ● Cable and Satellite Broadcasting Association of Asia (CASBAA) ● Television Broadcasting Limited (TVB) 	<p>All point out that the requirement of "knowledge of infringement of copyright" does not feature in the legislation of other jurisdictions.</p> <p>IFPI (Hong Kong Group) cites the implementation of the Digital Millennium Copyright Act in the US and opine that unauthorized circumvention of TPMs should differentiate from copyright infringement and</p>	As indicated above, the reason for including a requirement of "knowledge of infringement of copyright" is to ensure that users' legitimate interests to use copyright works under the permitted acts would not be jeopardized. We are aware that other jurisdictions adopt different means to address users' concerns in this respect. For example, the UK uses a scheme whereby complaints can be made to the

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	<ul style="list-style-type: none"> ● Hong Kong Cable Television Limited (Cable TV) ● Hong Kong Video Development Foundation Ltd (HKVDF) ● An organization from the industry ● The Law Society of Hong Kong (Law Society) 	<p>that it must not be necessary to prove copyright infringement in order to establish a violation of the anti-circumvention provision.</p>	<p>Secretary of State who would then investigate the matter and make directions as appropriate to ensure that the benefit of exceptions can be safeguarded. We think that a requirement of knowledge of copyright infringement is better than the UK approach which is basically a remedial approach based on complaints. We understand copyright owners are concerned that it would be difficult for them to prove the mental state of the defendant. We will consider if amendments should be made to the proposed provisions to address their concern.</p>
1.4	<ul style="list-style-type: none"> ● International Federation of the Phonographic Industry (IFPI) ● Hong Kong Video Development Foundation Ltd (HKVDF) ● Joint Industry Response from <ul style="list-style-type: none"> – CASBAA – HK Cable TV Ltd – IFPI (HKG) – TVB – Hong Kong and International Publishers' Alliance 	<p>Opines that a similar “knowledge requirement” existed under the old UK law but was repealed in 2003 with the implementation of the EU Copyright Directive. The UK decision of Sony v. Ball described the difficulties and ineffectiveness of the old requirement.</p> <p>HKVDF further suggests that the UK approach of providing separate protection regimes for TPMs applied in relation to computer programs and other kinds of</p>	<p>When the UK Copyright, Designs and Patents Act (CDPA) was enacted in 1998, section 296 provides civil remedies for making and dealing in circumvention devices used for <i>copy</i>-protection. A person who deals in circumvention devices will be liable if he has knowledge that the device will be used to make infringing copies.</p> <p>Substantial amendments were made to the anti-circumvention provisions by the UK</p>

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	<ul style="list-style-type: none"> - Hong Kong Reprographic Rights Licensing Society - HKVDF - Movie Producers and Distributors Association of HK Ltd - Intercontinental Video Ltd - Golden Harvest Entertainment (Holdings) Ltd 	<p>copyright works should be followed. For computer programs, the TPMs should be limited to copy-protection measures and not access control as computer programs may be embedded in hardware or software which control the functionality of many daily operation systems. As regards the TPMs applied in relation to copyright works other than computer programs, violation of anti-circumvention provisions should not be connected with copyright infringement.</p> <p>The Joint Industry Response shares similar views in respect of separation of protection regimes for computer program and other categories of works.</p>	<p>Copyright and Related Rights Regulations 2003 which came into effect in October 2003. The Regulations were made to comply with the EU Information Society Directive (Directive 2001/29/EC). A new section 296 was substituted (dealing only with computer programs) and sections 296ZA – 296ZF (dealing with works other than computer programs) were added. The “knowledge requirement” was retained in relation to computer programs whilst it was absent from the provisions relating to other copyright works. It appears that the difference results <i>mainly</i> from the implementation of two different EU Directives. During the negotiations on the Information Society Directive, the UK Government did express concern about the difficulties which might arise from the existence of separate regimes for computer programs and other works. We share similar concerns if HK were to introduce two separate regimes for computer programs and other kinds of copyright works.</p>

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			<p>We are not aware that the UK court <i>ruling on [Sony v. Ball]</i> criticized the “knowledge requirement” in the pre-2003 version of the UK law. The activities of the defendant in the case covered the periods both before and after amendments were made to the anti-circumvention provisions by the UK Copyright and Related Rights Regulations 2003. The “knowledge requirement” was only relevant to acts done before October 2003. The counsel for the defendant argued that “infringement” under CDPA referred to infringement that took place in the UK only. Since some of the circumvention devices were exported abroad, the RAM copying occurred outside the UK and would not result in the creation of infringing copies. It followed that the defendant did not have the requisite knowledge of infringement. Laddie J. decided that, insofar as the defendant knew that the circumvention devices were to be sold to UK customers, he would be in breach of the provision. On the other hand, if the defendant did not know whether an individual device would be sold and installed in the UK or abroad, he did</p>

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			not have the necessary knowledge element and would not be liable. We would like to point out that in the said case, Laddie J. did not criticize the "knowledge requirement" in the pre-2003 version of the law although he did point out the differences between the provisions under the old law and the new law.
1.5	<ul style="list-style-type: none"> ● International Federation of the Phonographic Industry (IFPI) ● International Federation of the Phonographic Industry (Hong Kong Group) Limited (IFPI (HK Group)) ● Cable and Satellite Broadcasting Association of Asia (CASBAA) ● Television Broadcasting Limited (TVB) ● Hong Kong Video Development Foundation Ltd (HKVDF) ● An organization from the game industry [dated 17 July 06] ● Joint Industry Response 	<p>All consider that "knowledge of copyright infringement" ("knowledge requirement") does not provide "adequate legal protection and effective legal remedies against circumvention" as required by the World Intellectual Property Organization Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively known as WIPO Internet Treaties).</p> <p>IFPI opines that the phrase "in connection with the exercise of their rights under this treaty" in article 18 of WPPT is not intended to link circumvention liability to copyright infringement. Rather, it clarifies the extent to which signatories are required to protect TPMs and provides that, as minimum, measures designed to prevent or hinder acts covered by</p>	Our policy objective is to protect copyright works against infringements and not TPMs per se. We consider that the proposed anti-circumvention provisions have struck a reasonable balance between the need to combat circumvention activities for copyright protection and the community's grave concern that any anti-circumvention measures should not have the inadvertent effect of affecting consumers' legitimate use of copyright works. As stated above, we understand that copyright owners consider it difficult for them to prove the mental state of the defendant. We will consider if amendments should be made to the proposed provisions to address their concern.

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		<p>WPPT rights are to be protected under domestic laws. HKVDF expresses similar views. The Joint Industry Response also shares the views and opines that liability for circumvention should not be based on the knowledge of copyright infringement on the part of the person who circumvents the TPMs.</p> <p>An organization from the game industry pointed out that copyright infringement linkage is not required in WCT.</p>	
2.1	<ul style="list-style-type: none"> ● Motion Picture Association (MPA) ● Cable and Satellite Broadcasting Association of Asia (CASBAA) 	<p><u>Meaning of “circumvention”</u></p> <p>Comment that the definition of “circumvention” is circular and should be clarified by the following –</p> <p style="padding-left: 40px;">“to avoid, bypass, remove, deactivate, impair or otherwise to circumvent the measure.....”</p>	<p>The purpose of defining “circumvent” in the proposed section 273(1) is to make it beyond doubt that the act is done without authorization from the copyright owner. Apart from this clarification, we consider that the ordinary meaning of “circumvent” is adequate and there is no need to expand the present definition.</p>
2.2	<ul style="list-style-type: none"> ● IFPI (Hong Kong Group) ● Hong Kong Video Development Foundation Ltd (HKVDF) 	<p><u>Meaning of “effective technological measures”</u></p> <p>HKVDF and IFPI (Hong Kong Group)</p>	<p>Article 11 of WCT and Article 18 of WPPT require contracting parties to provide adequate legal protection and effective legal remedies against circumvention of</p>

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	<ul style="list-style-type: none"> • Motion Picture Association (MPA) 	<p>consider that it is unnecessary to prove that protection of the works is the main or primary object of the TPM.</p> <p>MPA considers that protection of access controls should be given whether or not they are intended to control the exercise of an exclusive right.</p>	<p>effective TPMs used by authors/performers <i>in connection with the exercise of their rights</i> under the international treaties and which are not authorized by them or permitted by law.</p> <p>The TPMs that are required to be protected are those used by authors/performers in connection with the exercise of their rights under the Treaties and the Berne Convention. These rights are expressed in our Ordinance as restricted acts/exclusive rights. Therefore, effective TPMs should be linked up with these exclusive rights. Access to works per se is not a restricted act. The definition in the proposed section 273 is similar to that in the UK. Australia requires that the TPM is designed to prevent or inhibit infringement of copyright in a work.</p> <p>Our policy objective is to protect copyright works and not the TPMs per se. We believe that the existing link between TPMs and exclusive rights provides a right balance between the interests of copyright owners and users.</p>

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3.1	<ul style="list-style-type: none"> ● PCCW Limited (PCCW) ● Cable and Satellite Broadcasting Association of Asia (CASBAA) ● Television Broadcasting Limited (TVB) ● Motion Picture Association (MPA) 	<p><u>Persons entitled to seek civil remedies</u></p> <p>PCCW, CASBAA, TVB, MPA suggest that a qualification should be added to sections 273A(2)(c) and 273B(3)(c) such that persons who issue, make available or broadcast the work should only be entitled to take proceedings if they are authorized to so issue, make available or broadcast the work.</p> <p>PCCW questions whether sections 273A(2) and 273B(3) treat the act of circumvention as if it is an act of infringement or equivalent to infringement. Is the plaintiff required to show a nexus between the act of circumvention and the specific copyright works or related rights in order to establish liability?</p>	<p>This is indeed our policy intent. We will consider amendments to clarify the provision.</p> <p>The effect of sections 273A(2) and 273B(3) is to confer the same rights and remedies on persons listed in these sections with rights and remedies available to the copyright owner in respect of infringement of copyright (e.g. injunction, account of profit, damages etc.).</p> <p>As one of the conditions for incurring liability under sections 273A and 273B is that the circumventor/ trader knows or has reasons to believe that the prohibited act (i.e. act of circumvention or dealing) would induce, enable, facilitate or conceal copyright infringement, the plaintiff would be required to prove this on balance of probabilities.</p>

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4.1	<ul style="list-style-type: none"> ● International Federation of the Phonographic Industry (IFPI) ● International Federation of the Phonographic Industry (Hong Kong Group) Limited (IFPI (HK Group)) ● Hong Kong Video Development Foundation Ltd (HKVDF) ● Motion Picture Association (MPA) ● International Intellectual Property Alliance (IIPA) 	<p><u>Criminalizing the act of circumvention</u></p> <p>All consider that criminal sanctions should be introduced for the act of circumvention. This is particularly the case where the act is done with a commercial motivation and for a clearly improper purpose.</p>	<p>Article 11 of WCT and Article 18 of WPPT only require the contracting parties to provide adequate legal protection and effective legal remedies against circumvention of effective TPMs used to protect rights of copyright owners and performers.</p> <p>We propose that commercial dealing of circumvention devices and the provision of commercial circumvention services should be a criminal offence whereas the act of circumvention should be subject to civil liability. We believe that the proposed framework strikes a reasonable balance between the need to combat circumvention activities and the community's grave concern that the anti-circumvention provisions should not have an adverse effect against consumers' legitimate use of copyright works, advancement in technology and research activities. This approach is in line with the practice in the UK.</p>

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5.1	<ul style="list-style-type: none"> ● International Federation of the Phonographic Industry (IFPI) ● International Federation of the Phonographic Industry (Hong Kong Group) Limited (IFPI (HK Group)) [dated 30 April 2006, 5 June 2006 and 18 July 2006] ● Motion Picture Association (MPA) ● Business Software Alliance (BSA) ● An organization in the software game industry ● International Intellectual Property Alliance (IIPA) 	<p>Exhibiting in public and distribution of circumvention devices in a non-business <u>context</u></p> <p>Consider that the requirement that the act of “exhibits in public” and “distributes” should be done for the purpose of or in the course of trade or business in section 273B(1)(b) is unnecessary and will significantly limit the effectiveness of this section. Many individuals distribute or traffic circumvention devices for non-business or trade purposes but merely for the intention of causing disruptions to copyright owners.</p> <p>IFPI (HK Group) in its submission dated 18 July 2006 suggests replacing the words “in the course of a trade or business” with the detailed list of acts in Article 6(2) of EU Information Society Directive (2001/29/EC).</p> <p>The organization in the software game industry submitted on 17 July 2006 that apart from criminal sanctions as set out in item 5.2 below, civil remedies should also be provided to deter hackers who distribute circumvention devices in a non-commercial context.</p>	<p>The proposed formulation in section 273B(1)(b) stating that a person would incur liability if he “exhibits in public” or “distributes” circumvention device in a business context is in line with section 31(1)(c) of the Copyright Ordinance in relation to exhibition in public and distribution of infringing copies of copyright works. It should be noted that “business” could include non-commercial or non profit-making activities. We do not consider it appropriate to delete the reference “for the purpose of or in the course of any trade or business” as this would mean that distribution or exhibition in public of any number of circumvention devices (even a single unit of the device) in a casual or private context may incur liability.</p> <p>Article 6(2) of EU Information Society Directive (2001/29/EC) provides that Member States shall provide adequate legal protection against “the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes”</p>

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			<p>of circumvention devices or the provision of circumvention services". The effect of this Article could be wide enough to catch distribution of any number of circumvention devices in a casual or private context. As pointed out above, we do not consider it appropriate to do so.</p> <p>Nonetheless, we will give further consideration as to whether civil remedies should be provided against prejudicial distribution of circumvention devices in a non-business context.</p>
5.2	<ul style="list-style-type: none"> ● Motion Picture Association (MPA) ● Business Software Alliance (BSA) ● The Law Society of Hong Kong (Law Society) ● An organization in the software game industry [27 April 2006, 17 July 2006] ● International Intellectual Property Alliance (IIPA) ● American Chamber of 	<p>MPA, BSA and Law Society take the view that the requirement in section 273C(1)(e) and (f) (offences relating to "exhibits in public" and "distributes") that the trade or business should "consist of dealing in circumvention devices" would exculpate a large-scale commercial distributor of circumvention devices as long as he distributes other items. They propose that the above qualification should be deleted.</p>	<p>The acts prohibited under section 273C are largely in line with the prohibited acts under the proposed section 118(1) of the Bill in relation to infringing copies. Our policy intent is to combat trading in circumvention devices. We do not intend to criminalize transfers made without payment of consideration or distribution of circumvention devices in a non-business context. Furthermore, the requirement that the trade or business should consist of dealing in circumvention</p>

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	Commerce (AmCham)	<p>MPA, an organization in the software game industry and IIPA consider that it should be a criminal offence where there is large-scale trafficking in circumvention devices but without money changing hands and in circumstances in which it is difficult to prove that the defendant's activities amount to "trade or business". MPA proposes that as long as such activities are undertaken on a "commercial scale", the defendant should be criminally liable. IIPA proposes that there should be criminal liability where there is high-volume trafficking of circumvention devices if carried out within the context of any trade or business, even if no money changes hands.</p> <p>The organization in the software game industry proposes that it should be a criminal offence where a circumvention device is exhibited in public or distributed otherwise than in the course of business to such extent as to affect prejudicially the copyright owner.</p> <p>AmCham considers that a distributor of circumvention devices could escape criminal liability provided that he also distributes other items, i.e., non-pirated works or distributes on</p>	<p>devices does not require that the only goods traded by the defendant are circumvention devices. As long as his business consists of trading in such prohibited articles, he will come within the scope of the offence.</p> <p>We do not think that using the formulation of "commercial scale" is appropriate as its precise meaning is unclear. It could be interpreted as referring to the commercial nature of the transaction (as opposed to domestic) or the scale of the transaction (involving substantial quantities).</p> <p>We believe that the proposed offence in section 273C strikes a right balance between protecting copyright works to which TPMs have been applied and the public's concern that circumvention devices could inhibit legitimate use of copyright works.</p>

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		a not-for-profit basis. In this situation, it is arguable that the “free” distribution of devices is not for the purpose of trade or business and/or by distributing other items, the trade or business does not consist of dealing in circumvention devices.	
6.1	<ul style="list-style-type: none"> ● Business Software Alliance 	<p>Publication of information relating to <u>circumvention of TPMs</u></p> <p>Takes the view that a person should be liable to civil action if he publishes information to assist or enable circumvention of TPMs provided that such restriction does not prejudice the rights of free speech.</p>	<p>We believe that the proposed prohibited acts against circumvention of technological measures have struck a reasonable balance between the interests of copyright owners and those of the community as a whole. The anti-circumvention provisions in the UK copyright law do not make it a civil liability to publish information to assist or enable circumvention of TPMs.</p>
7.1	<ul style="list-style-type: none"> ● Motion Picture Association (MPA) ● Business Software Alliance (BSA) ● An organization in the software game industry ● International Federation of the Phonographic Industry (IFPI) 	<p>Meaning of “relevant device” under sections <u>273B and 273C</u></p> <p>All point out that the definition of “circumvention device” in the criminal provision (section 272C(2)) is narrower than that in the civil provision (section 273B(2)). The definition in the civil provision should be</p>	<p>Our intention is to apply a more stringent standard to the criminal provisions. We will consider copyright owners’ views and if the definition of circumvention device in the civil and criminal provisions should be refined.</p>

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	<ul style="list-style-type: none"> • International Intellectual Property Alliance (IIPA) • American Chamber of Commerce (Amcham) 	<p>used in both cases to ensure effectiveness of the criminal provision.</p> <p>The organization in the software game industry further comment that it would be difficult for prosecution to prove beyond reasonable doubt that a circumvention device is primarily designed, produced or adapted for the purpose of facilitating circumvention. Furthermore, the copyright owner may not be the best party to provide such evidence as he is not the designer of such devices. The other two tests used in the civil provision are much simpler and should be adopted in the criminal provision.</p> <p>Amcham further points out that the US copyright law does not provide a different definition of circumvention device in the civil and criminal provisions against circumvention.</p>	
7.2	<ul style="list-style-type: none"> • The Law Society of Hong Kong 	<p>Has doubts on the tests for circumvention devices –</p> <p>a) Section 273B(2) covers any device that only has a “limited commercially significant purpose or use other than to</p>	<p>Section 273B imposes civil liability on manufacturers and traders of circumvention devices. The test of “limited commercially significant purpose” is to avoid prohibiting devices that have a commercially significant purpose other than to circumvent TPMs. Without this</p>

Circumvention of Technological Measures for Copyright Protection			
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		<p>circumvent the measure". Since it is a requirement that the person knows that the relevant device will be used to circumvent the TPM, whether or not it has any other purpose, commercially significant or otherwise, is irrelevant; and</p> <p>b) Section 273C(2) covers any circumvention device "primarily designed, produced or adapted for the purpose of enabling or facilitating circumvention". The basis of this is unclear if in fact the device circumvents.</p>	<p>element, traders would be concerned that they might be liable for selling devices having legitimate significant commercial purposes although such devices might possibly be applied by users for illegitimate purposes.</p> <p>Section 273C imposes criminal liability on manufacturers and traders of circumvention device. As explained above, our intention is to apply a more stringent standard to the criminal provision.</p>
8.1	<ul style="list-style-type: none"> ● International Federation of the Phonographic Industry (IFPI) ● International Federation of the Phonographic Industry (Hong Kong Group) Limited (IFPI (HK Group)) [30 April 2006, 18 July 2006] ● Hong Kong Cable Television Limited (Cable TV) ● Business Software Alliance (BSA) ● Hong Kong Information Technology Federation 	<p><u>Exceptions to the civil and criminal liability</u></p> <p>General</p> <p>IFPI, Cable TV and IIPA consider that exceptions to circumvention should be narrowed down. IFPI (HK Group) and Cable TV comment that given the mechanism in section 273H, there is no urgency to provide the wide range of exemptions.</p> <p>BSA, HKITF and an organization in the software game industry submit that a blanket</p>	<p>We need to provide limited exceptions in order not to hinder the development of technology or prohibit users' legitimate use of copyright works. The present exceptions are proposed taking into account submissions received by us and making reference to the legislative provisions in other jurisdictions.</p> <p>We do not consider that a primary consideration should be added to the exemptions. When formulating the exemptions, we have taken into account the</p>

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	<p>(HKITF)</p> <ul style="list-style-type: none"> • An organization in the software game industry • The Law Society of Hong Kong (Law Society) • International Intellectual Property Alliance (IIPA) • Joint Industry Response 	<p>provision should be included to the effect that all exempted acts in sections 273D, 273E and 273F should be interpreted to be subject to a primary consideration – the exempted act does not unreasonably prejudice the legitimate interests of the copyright owner. In IFPI (HK Group)'s submission dated 18 July 2006, it is stated that exception shall only be allowed to the extent and limit which will not affect prejudicially the rights and legitimate interests of the right owners. The Joint Industry Response shares similar views.</p> <p>The Law Society is not convinced that the exemptions are necessary insofar as those activities may already be licensed or constitute fair dealing under the existing law. It is concerned that the exemptions would be used to cloak otherwise illegitimate acts.</p>	<p>legitimate interests of the copyright owners and the legitimate rights of users. The exceptions are carefully crafted to avoid them being abused for illegitimate purposes.</p>
8.2	<ul style="list-style-type: none"> • Hong Kong Video Development Foundation Ltd (HKVDF) • IFPI (Hong Kong Group) 	<p>Both consider that exemptions should only apply to access control measures and not copy protection measures. They refer to the US anti-circumvention provisions in support.</p>	<p>In the US, the prohibition against the act of circumvention only covers access control measures. On the other hand, the prohibition against the manufacture and dealing of circumvention devices covers both access control and copy protection measures.</p>

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			<p>Insofar as the US exemptions are concerned, different from the observations of HKVDF, we note that some exemptions apply to access control measures only whilst others cover both types of measures.</p> <p>As the scope of the prohibitions in our Bill is different from that under the US regime, we do not think that the scope of the exemptions under the two jurisdictions is directly comparable.</p>
8.3	<ul style="list-style-type: none"> • International Federation of the Phonographic Industry (IFPI) • International Federation of the Phonographic Industry (Hong Kong Group) Limited (IFPI (HK Group)) • Motion Picture Association (MPA) • An organization in the software industry • International Intellectual Property Alliance (IIPA) 	<p><i>Acts to be excepted</i></p> <p>IFPI, IFPI (Hong Kong Group) and MPA take the view that exceptions should only apply to the act of circumvention and should not extend to dealing in circumvention devices.</p> <p>MPA points out that the term “collaboration” is not defined in the Bill.</p> <p>An organization from the software game industry comments that it is unclear how the exemptions using the “works collaboratively” concept could be proved in practice. It proposes that any person who wishes to rely</p>	<p>The exceptions for dealing in circumvention devices are essentially provided to cater for the needs of persons whose circumvention acts are exempted from liability (section 273D). We are aware that the exceptions should be narrowly crafted so as not to create a legal loophole. In appropriate cases, persons providing the circumvention device should work collaboratively with the person who enjoys the act of circumvention exemption. Other exceptions require that the sole purpose of the circumvention device should</p>

Circumvention of Technological Measures for Copyright Protection		
Organizations / Individuals	Views / Concerns	Administration's Response
	<p>on the exception should sign a declaration (stating, <i>inter alia</i>, the exception which he relies on) before the supplier could provide the circumvention device to him. This is the approach used in Australia.</p> <p>IIPA considers that a prohibited act should not benefit from an exception if it also constitutes an infringement of copyright.</p>	<p>be used for a legitimate purpose (e.g. identifying and disabling a spyware).</p> <p>We do not consider it necessary to define "collaboration" but will rely on its ordinary meaning (i.e. to work with another or others on a joint project).</p> <p>In practice, a defendant who wishes to rely on any exception would be required to adduce sufficient evidence to raise an issue. A mere claim to the exceptions is not sufficient.</p> <p>We have considered the Australian approach when formulating the proposed sections in our Bill. We are concerned that declarations might be abused and used as a shield by persons who trade in circumvention devices for illegitimate purposes. Furthermore, to enable the declarations to be used as evidence in future enforcement actions/court proceedings, they need to contain detailed personal data (e.g. names and addresses and other identification particulars). Consumers, in particular those purchasing common items like filtering software and</p>

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Organizations / Individuals

Views / Concerns

Administration's Response

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	Organizations / Individuals	Views / Concerns	Administration's Response
			<p>“anti-spyware” may find this requirement objectionable.</p> <p>We will further consider the proposal to add the condition of no copyright infringement to the exemptions.</p>
8.4	<ul style="list-style-type: none"> ● Motion Picture Association (MPA) ● Business Software Alliance (BSA) 	<p><i>Interoperability exception</i></p> <p>MPA proposes that the exemption of achieving interoperability between computer programs should, in addition to the conditions in the proposed section 273D(1), include the following –</p> <p>a) The person performing the act is authorized by the copyright owner to have access to that copy of computer program; and</p> <p>b) The identification or analysis is carried out without infringing copyright in the computer program.</p> <p>BSA proposes that the exemption should be qualified to the effect that the act concerned and the issue of information derived from the circumvention should not prejudicially affect the interest of the copyright owner.</p>	<p>This exception to the anti-circumvention provision is to ensure that legitimate software development activities would not be undermined. We will consider if the proposed section 273D(1) should be improved to clarify this intention.</p> <p>As the proposed section is carefully crafted to prevent abuse, we do not consider it necessary to impose the condition that the act concerned and the issue of information derived from the circumvention should not prejudicially affect the interest of the copyright owner as proposed by BSA.</p>

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8.5	<ul style="list-style-type: none"> • Motion Picture Association (MPA) • Business Software Alliance (BSA) 	<p><i>Security testing</i></p> <p>MPA proposes that the exemption of security testing should be subject to a further condition that the testing, investigation and correction of security flaws or vulnerability should be carried out without infringing copyright in any work.</p> <p>BSA proposes that the exemption should be subject to the condition that the copy of the work in relation to which the act of circumvention is done should not be a pirated copy. It also recommends that the act concerned and the issue of information should not prejudice the interest of the copyright owner.</p>	<p>Testing, investigating and correcting security flaws probably involve restricted acts - copying and adapting the computer program. Section 61 provides a permitted act for a lawful user to copy or adapt computer programs if it is necessary for his lawful use. If the person performing security testing is a lawful user or his agent, there will be no infringement involved. Though IT professionals who perform security testing for their clients could make enquiries with their clients on whether the computer programs involved are non-infringing copy or whether their clients are lawful users of the programs, there is no way that they can ascertain these facts if their clients fail to provide the information. The suggestions of MPA and BSA would place an onerous burden on such IT professionals and may affect the normal operation of the IT professionals engaged in the field of security testing.</p> <p>As the proposed section is carefully crafted to prevent abuse, we do not consider it</p>

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	Organizations / Individuals	Views / Concerns	Administration's Response
			necessary to impose the condition that the act concerned and the issue of information derived from the circumvention should not prejudicially affect the interest of the copyright owner as proposed by BSA.
8.6	<ul style="list-style-type: none"> ● Hong Kong Video Development Foundation Ltd (HKVDF) ● Motion Picture Association (MPA) ● International Federation of the Phonographic Industry (Hong Kong Group) Limited (IFPI (HK Group)) ● Business Software Alliance (BSA) ● Joint Industry Response 	<p><i>Research into cryptography</i></p> <p>HKVDF suggests that the exemption relating to encryption research should be subject to the following conditions –</p> <ul style="list-style-type: none"> a) Good faith b) Consent of the copyright owner <p>HKVDF further comments that whilst encryption research would be unlikely to prejudice the interests of copyright owners, any publication of the research results would.</p> <p>MPA and IFPI (Hong Kong Group) propose that the following conditions have to be satisfied before a person could rely on the exemption –</p> <ul style="list-style-type: none"> a) The research should be carried out on a copy which the researcher has lawfully 	<p>Regarding the good faith requirement, we believe that it is implicit in all exemptions.</p> <p>In formulating the anti-circumvention provisions, we are mindful that the provisions should not hinder research activities and the advancement of technology. We do not agree with the suggestion to impose a condition that consent from copyright owners should be obtained before the exemption for cryptography research could apply as this might hinder such research and the advancement of the state of knowledge in this field.</p> <p>Research into cryptography involves identification and analysis of deficiencies or inadequacies of existing encryption technology which would lead to advancement of the state of knowledge in</p>

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		<p>obtained;</p> <p>b) The circumvention is essential to the research objective;</p> <p>c) A good faith effort to obtain authorization for circumvention should be made; and</p> <p>d) The research activities should not involve infringement of copyright.</p> <p>MPA takes the view that the proposed exemption gives a free-lance cryptographic researcher, unrelated to any legitimate educational establishments, a greater freedom to circumvent than a researcher in an educational establishment. A free-lance researcher could do an act of circumvention as long as the act and the dissemination of information derived from the research is not prejudicial to the copyright owner.</p> <p>MPA further suggests that a definition of "the field of cryptography" be introduced so that the scope of this exemption would not be too wide.</p>	<p>the field. Publication of the research results in academic journals and conferences is an integral part of academic research activities. Academic researchers have expressed to us that if the exemption could only apply when the research and the dissemination of research results would not prejudicially affect copyright owners, researchers might be worried about the possible liability and refrain from doing the research because what would constitute "prejudicial effect" might not be clear to the academic researchers. We have therefore provided a clear and explicit exemption provision to facilitate research into cryptography undertaken by universities. We do not agree with IFPI (Hong Kong Group)'s suggestion that dissemination of research results should be prohibited in all circumstances save with the consent of the concerned right owners.</p> <p>For research not conducted by universities, the act of circumvention and the dissemination of research results should not prejudicially affect the copyright owner. Dissemination of research results by a</p>

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		<p>IFPI (Hong Kong Group) comments that dissemination of research results even in the academic journals or conferences would be prejudicial to the interest of the rights owner and could even jeopardize the security of our banking system and secured on-line transactions. Therefore, dissemination should be prohibited in all circumstances save with the consent of the right owner.</p> <p>BSA considers the exemption too wide and could allow dealing in devices or provision of services under the guise of research into cryptography. It suggests that the exemption should be limited to activities that do not affect prejudicially the rights of copyright owner.</p> <p>The Joint Industry Response suggests that the exception should follow the UK and USA approach by subjecting the publication of related information to the "good faith" requirement and the test that it does not prejudicially affect right owners.</p>	<p>free-lance researcher is therefore subject to more stringent conditions than educational establishments.</p> <p>We do not consider it appropriate to impose a legal definition for "the field of cryptography" for fear that it may not catch up with the advances of technology which would render the legal definition outdated.</p> <p>The intention of introducing this exception is to ensure that the anti-circumvention provisions would not hinder technological development and advances in the state of knowledge in this field. We agree that this proposed exception should only apply to those acts of circumvention which are essential to the research activities, and no copyright infringement should be involved in the course of the activities. We will consider if any improvements need to be made to this exception to clarify the intention.</p>

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8.7	<ul style="list-style-type: none"> ● Motion Picture Association (MPA) ● Business Software Alliance (BSA) 	<p><i>Personally identifying information</i></p> <p>MPA proposes key phrases like “personally identifying information” should be defined.</p> <p>BSA proposes that the term should be deleted as it could be easily confused with “personal data” used in the Personal Data (Privacy) Ordinance.</p> <p>MPA further proposes the following –</p> <ul style="list-style-type: none"> a) exemption should only apply if the TPM does not provide users with the option to avoid such collection or dissemination; b) the exemption should not apply if the act of circumvention confers on anyone the capacity to gain access to a work that he is otherwise not authorized to access; and c) the exemption should not apply to making or dealing of circumvention devices as these devices could be labelled as having the “sole purpose” of identifying and disabling spyware whether or not they have other illegitimate use. 	<p>The elaboration in the subsection (i.e. that the measure, or the copyright work in question, tracks and records the manner of a person's use of a computer network) should be adequate to explain the meaning of the term “personally identifying information”. We do not think that it would cause confusion with the term “personal data” used in the Personal Data (Privacy) Ordinance. We would like to point out that the same term “personally identifiable information” is used in the US and Singapore copyright law without any definition.</p> <p>As regards MPA's three suggested conditions for this exemption, our response is as follows –</p> <ul style="list-style-type: none"> a) The proposed section 273D(5) states that the exception would not apply if users are given a conspicuous notice of the collection or dissemination of personally identifying information. The effect of this condition is substantially the same as the proposed requirement that “users are not

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		<p>BSA is concerned that the exemption would affect legitimate measures put in place by organizations to track the computer usage of their employees for the purpose of safeguarding computer networks and corporate security.</p>	<p>provided with the option to avoid such collection or dissemination". We therefore do not consider it necessary to add this proposed requirement.</p> <p>b) Our proposed exemption requires that the sole purpose of the circumvention is to identify/disable the spyware. This already serves to limit the purpose of the circumvention and is more appropriate than using the concept of "unauthorized access" to limit the scope of the exemption.</p> <p>c) Whether a circumvention device is solely for the purpose of detecting and disabling spyware is to be determined objectively. The label applied on the product is not determinative of the matter.</p> <p>Our intention is not to affect legitimate measures put in place by organization to track the computer usage of their employees for the purpose of safeguarding computer networks and corporate security. We will further consider if the existing</p>

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	Organizations / Individuals	Views / Concerns	Administration's Response
			wording of the exemption provisions adequately reflect this intent.
8.8	<ul style="list-style-type: none"> ● Motion Picture Association (MPA) 	<p><i>Protection of minors</i></p> <p>Agrees to the exception but considers that it should be made clear that the exception does not extend to the use of a device that would fall within the meaning of “relevant device” in the proposed section 273B(2). Circumvention should only be permitted if it is incidental to a device’s function of protecting minors.</p>	A filtering software which is designed for the purpose of protecting minors may incorporate a “relevant device” under section 273E(1) (i.e., any <i>device, product, component or means</i> that is used for the purpose of circumvention). The use of this filtering software or the commercial sale of this software may attract civil or even criminal liability under sections 273A to 273C. Therefore, we need to provide exceptions for this kind of software containing components with such function.
8.9	<ul style="list-style-type: none"> ● International Federation of the Phonographic Industry ● International Federation of the Phonographic Industry (Hong Kong Group) Limited (IFPI (HK Group)) ● Cable and Satellite Broadcasting Association of Asia (CASBAA) ● PCCW Limited (PCCW) ● Television Broadcasting Limited (TVB) 	<p><i>Time-shifting</i></p> <p>All consider that there should be no exception for devices allowing the recording of broadcasts (Section 273F(12)).</p> <p>CASBAA and TVB take the view that the exception exempts legitimate time-shifting activities but also other activities circumventing a wide range of digital rights management (DRM) systems. A DRM</p>	It is a permitted act under section 79 for a person to make for private and domestic use a recording of a broadcast for the purpose of enabling it to be viewed at a more convenient time (“time-shifting”). Where a broadcast is protected by a TPM which prohibits such recording, viewers may need to use circumvention devices. Making it a criminal offence for traders to sell such circumvention devices would effectively prohibits time-shifting in

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<ul style="list-style-type: none"> • Hong Kong Cable Television Limited (Cable TV) • Motion Picture Association (MPA) • International Intellectual Property Alliance (IIPA) • The Law Society of Hong Kong (Law Society) • American Chamber of Commerce (AmCham) • Joint Industry Response 	<p>system could have multiple functions e.g. it could allow recording of a program broadcast as part of a linear stream of free-to-air programming, prohibit recording of a program sold as pay-per-view video-on-demand system or allowing the making of a single copy on the viewer's recorder but prohibiting its transfer. Given the industry's existing licensing agreements which specifically provides for allowing time-shifting of linear programme streams, CASBAA and TVB believe that legitimate time-shifting activities could be safeguarded and proposes that this exception should be deleted. They further propose that, if it is considered necessary, provisions should be made in the subsidiary legislation on broadcasting by prohibiting broadcasters from encoding DRM systems that would prevent viewers from making time-shifting recordings.</p> <p>PCCW considers that the exemption potentially allows the circumvention of TPMs that prohibit the recording of on-demand programmes. It considers that there could be no legitimate "time-shifting" for on-demand programmes.</p>	<p>respect of broadcasts that are protected by TPMs. Hence, we include section 273F(12) in the Bill to ensure that users' legitimate interests to record broadcasts and cable programmes for private time-shifting purposes would not be jeopardized.</p> <p>We would like to point out that the issue of concern is to protect copyright owners against circumvention activities whilst balancing users' legitimate interests to record broadcast and cable programmes for private time shifting purposes. We believe that the proposed exception is fully consistent with the requirements under the WIPO Internet Treaties. We consider it appropriate to handle this matter under the Copyright Ordinance rather than the broadcasting regulatory regime as suggested by some broadcasters.</p> <p>Nonetheless, we note copyright owners' concerns about the wording of the existing section 273F(12) which may make the scope of the exceptions wider than intended. In particular, we agree that video-on-demand pay-per-view services</p>

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		<p>Law Society and Cable TV consider that the exemption is too broad and goes beyond the time-shifting exemption in section 79.</p> <p>Cable TV comments that the exception deprives a television service provider of its rights to –</p> <ul style="list-style-type: none"> a) prohibit recording of its programmes at commercial premises, recording of video-on-demand programmes and recording for “space-shifting” purposes; and b) market and distribute in such novel ways as the digital technology allows. <p>Cable TV proposes that the permitted act of “time-shifting” could instead be dealt with by including a condition in the approval from the Broadcasting Authority and Office of the Telecommunications Authority for deployment of a particular type of decoder.</p> <p>IIPA considers that this exception would discourage right holders from exploring new channels of digital distribution and could</p>	<p>may require special treatment from other broadcast and cable programmes as users are free to choose the time which is convenient to them to enjoy the concerned programmes. We will discuss with the concerned copyright owners if any improvements should be made to the provision.</p>

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		<p>restrict consumer choice. AmCham shares a similar view and points out that no other WIPO member has implemented this type of exemption. It also suggests that time-shifting could be protected by appropriate regulatory action under Hong Kong's broadcasting regulations, and that this is in line with the regulatory approach taken in the US.</p> <p>The Joint Industry Response comments that the exception denies effective protection to TPMs that govern all broadcast materials and removes the ability of copyright owners to prevent widespread unauthorized digital diffusion of their works. The exception is unnecessary because other means are readily available to the government to safeguard consumers' rights to "time-shift". For the above reasons, the exception is inconsistent with the requirements of the Internet Treaties and should be removed.</p>	

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<ul style="list-style-type: none"> - to extend existing civil rights of copyright owners against circumvention of technological measures used to protect copyright works from copying infringement to cover access control measures and the act of circumvention - to introduce a new criminal offence against commercial dealing of devices, products or components and the provision of services on a commercial scale which circumvent technological measures applied to a copy of a copyright work 			
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8.10	<ul style="list-style-type: none"> • Cable and Satellite Broadcasting Association of Asia (CASBAA) • Television Broadcasting Limited (TVB) • PCCW Limited (PCCW) • Hong Kong Cable Television Limited (Cable TV) 	<p><i>Unauthorised decoders</i></p> <p>All object to section 273C(2)(b) which exempts cable television set-up boxes. They take the view that including TV decoders in the Copyright Ordinance would give protection to their works where it is not possible to use the protection afforded by the Broadcasting Ordinance. They quoted the example of commercial display of copyrighted TV programmes pirated from overseas sources (i.e. broadcast signals intended for decoding and viewing outside Hong Kong). They comment that duplication of enforcement efforts could be avoided by proper communications and arrangements within the Administration.</p>	<p>Commercial dealing of unauthorized decoders for reception of licensed pay TV services already attracts criminal liability under section 6 of the Broadcasting Ordinance (Cap. 562). To avoid duplication of enforcement resources, we do not propose the criminal provision against commercial dealing of circumvention devices under the new section 273C to cover such decoders.</p> <p>Under section 7(1) of the Broadcasting Ordinance, a person shall not, in the course of trade or business, import, export, manufacture, sell, offer for sale or let for hire any decoder to receive a broadcasting service which is not licensed on a subscription basis. Hence, commercial dealing of decoders used for reception of overseas broadcast/cable programmes not licensed in Hong Kong but with footprints covering Hong Kong already attract criminal liability under the Broadcasting Ordinance. For the reason as explained above, we do not propose applying the criminal provision against commercial dealing of circumvention devices to cover such decoders.</p>

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	Organizations / Individuals	Views / Concerns	Administration's Response
	<ul style="list-style-type: none"> • PCCW Limited (PCCW) 	<p>Suggests that business end-users who use unauthorized decoders for unauthorized decoding and viewing of broadcast signals intended for decoding and viewing outside Hong Kong should be subject to criminal liability.</p>	<p>It should be noted that copyright owners can still seek civil remedies against the dealers engaged in commercial dealing of the abovementioned decoders under the new section 273B.</p> <p>The existing section 273C aims to combat commercial dealing of circumvention devices. We do not intend to criminalize possession of circumvention devices for business end-use.</p>
8.11	<ul style="list-style-type: none"> • Motion Picture Association (MPA) • Hong Kong Information Technology Federation (HKITF) • An organization from the software game industry [27 April 2006, 17 July 2006, 20 July 2006] • Hong Kong Video Development Foundation Ltd (HKVDF) • International Federation of the Phonographic Industry (Hong 	<p><i>Exception for parallel imports</i></p> <p>MPA and HKITF consider that exempting a TPM that has a function of controlling market segmentation would allow circumvention of any access control TPM and permit trafficking in circumvention devices.</p> <p>MPA further opines that –</p> <p>a) the exceptions relating to parallel imports are incompatible with WCT and WPPT to the extent that the TPMs effectively control access to, or the exercise of exclusive rights in copyright works;</p>	<p>All along there is no liability to import parallel imported copyright works for private and domestic use. Computer programs are presently fully liberalized under the parallel importation regime in our Copyright Ordinance. Furthermore, we now propose under the Bill that importation and/or use of parallel imported copies of all types of copyright works by business end-users (except movies, TV dramas, musical sound or visual recordings that are intended to be used for public playing) should also be liberalized.</p>

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	Organizations / Individuals	Views / Concerns	Administration's Response
	<ul style="list-style-type: none"> • Kong Group) Limited (IFPI (HK Group)) • Business Software Alliance (BSA) • International Intellectual Property Alliance (IIPA) • Joint submission (dated 15.06.2006) from – <ul style="list-style-type: none"> – IFPI (HK Group) – HKVDF – International Group Holding Ltd – HK Comics and Animation Federation Ltd – HKIPA – HKRRLS – Association of American Publishers – HK Publishing Federation Ltd – the Anglo-Chinese Textbook Publishers Organization – Hong Kong Educational Publishers Association – Filmmakers and Film Industry Response Group (the “Joint Submission”) 	<ul style="list-style-type: none"> b) the proposed exceptions would render largely ineffective the familiar regional coding system now employed on some DVDs to enable the orderly and sequential roll-out of audio-visual titles in different markets; c) regional coding is often integrated with other forms of technological protection in a single TPM system. Although the proposed section 273D(7) makes the exception applicable only where “the sole purpose of the act of circumvention is to overcome the restriction which controls market segmentation so as to gain access to the work”, the sole purpose may not be the sole effect. The proposed section 273D(7)(c) would legitimize the act of circumvention that would render the underlying work readily accessible in unprotected form; and d) the proposed section 273F(11) provides a far boarder exception than the proposed section 273D(7). This would exempt from criminal liability any act of trafficking in any product or service that is 	<p>Unless an exemption for circumventing TPMs containing regional coding are applicable to all types of copyright works alike, the proposed liberalization would not be able to benefit business end-users. Furthermore, domestic end-users who are able to use parallel imported copyright works without incurring any liability would be prohibited from doing so where regional coding is applied to a copyright work.</p> <p>We do not agree that the proposed exceptions for parallel imports are incompatible with WCT and WPPT.</p> <p>Movies made available through a Video-on-Demand service should not constitute parallel imports and it is not our intention for sections 273D(7) and 273(F)(11) to cover movies provided by such means. However, the sections should apply to parallel imported DVDs and VCDs.</p> <p>We would like to make it clear that we have no intention to criminalize the commercial dealing of devices that bypass the regional coding system now commonly</p>

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		<p>capable of circumventing regional coding, even if it is also designed, intended or capable of circumventing other TPMs.</p> <p>MPA and IIPA give the comment that almost any TPMs could be categorised as having the purpose of “controlling market segmentation” e.g. a movie made available through a Video-on-Demand service is often accompanied by a technological protection measure to prevent recipients from making a permanent copy, thus segmenting the market from those who are entitled to make a permanent copy. The proposed exemptions would open a huge gap in legal protection of TPMs.</p> <p>An organization from the software game industry indicates that it is satisfied with the exemption in section 273D(7). It proposes that the exemption in section 273F(11) should be drafted using the same formulation – requiring that the sole purpose of the circumvention device is to be used to circumvent TPMs that control market segmentation. BSA puts forward a similar proposal.</p>	<p>employed on DVDs or VCDs (e.g. all-area-code DVD players) or to impose civil liability on users who view parallel imported DVDs or VCDs using all-area-code DVD players.</p> <p>Section 273D(7) is an exemption for the act of circumvention itself. The act of circumvention normally takes place on every occasion when the user uses parallel imported copyright works or pirated copies. The exemption therefore only applies when he uses the circumvention device solely for the purpose of gaining access to parallel imported works. The current formulation of the proposed section 273(F)(11) would encourage copyright owners not to integrate the regional coding measures into the TPM so that the TPM could enjoy the criminal law protection. However, we will further consider if the “sole purpose test” is suitable for the proposed exemption under section 273F(11) having regard to the possibility that regional coding and other protection measures may be integrated in the same TPM system.</p>

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	Organizations / Individuals	Views / Concerns	Administration's Response
		<p>The organization from the software industry supplements in its submissions dated 17 and 20 July 2006 that regional control codes are employed for market segmentation reasons that also benefit consumers e.g. to facilitate localization of the product to suit the cultural tastes and preference of the region's consumers. It considers that the real objective of modified game consoles is to enable the playing of pirated video games instead of playing parallel imported copies. It comments that the exception at section 273F(11) is problematic and would present significant enforcement difficulties because it would be extremely difficult to prove that the circumvention device only enables the playing of parallel imported games, and that it in fact does not go beyond this purpose.</p> <p>HKVDF and IFPI (HK Group) suggest that two protection regimes for regional coding system should be created – one dealing with computer programs and computer games (fully liberalized under the Copyright Ordinance) and the other dealing with other types of copyright works (not yet liberalized).</p>	<p>We note copyright owners' concerns about the scope of the proposed exemptions in sections 273D(7) and 273(F)(11) for fear that this would open a loophole of the legal protection for TPMs. We will consider if amendments should be made to the concerned provisions.</p>

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		<p>The Joint Submission opines that any geographical region coding system must be within the definition of technological measures as it enforces the terms and conditions of the use of the work under the license of the copyright owner in the digital environment. The local film industry considers that most multi-zones DVD players are not only for limited commercially significant purposes or use other than to circumvent or facilitate circumvention of a TPM. The industry does not object to acquisition of such DVD players.</p>	
8.12	<ul style="list-style-type: none"> • PCCW Limited (PCCW) 	<p>Comments that section 273D(7) applies to all copyright works. It is not limited to physical articles. This section should make it clear that the exception does not apply to broadcasts, cable programmes, their underlying works and devices for circumvention of such transmissions.</p>	<p>The exceptions as provided for in sections 273D(7) and 273(F)(11) are intended to ensure that the anti-circumvention <i>provisions</i> would not jeopardize users' legitimate access to parallel imported copyright works. These provisions are not intended to apply to broadcasts and cable programmes. However, if the underlying works included in these programmes are recorded as physical articles which are parallel imported, the provisions would apply. We will consider if clarification is required in the existing section 273D(7).</p>

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8.13	<ul style="list-style-type: none"> ● Motion Picture Association (MPA) ● Law Society of Hong Kong (Law Society) ● An organization from the software game industry ● International Intellectual Property Alliance (IIPA) 	<p><i>Further exception by notice</i></p> <p>MPA, an organization from the software game industry, IIPA and Law Society have serious concerns about the “further exceptions by notice” system in section 273H. It is concerned that the powers conferred on the Secretary for Commerce, Industry and Technology (SCIT) would be unbounded.</p> <p>MPA further considers that –</p> <ul style="list-style-type: none"> a) the changes made by notice should expire after a relatively brief period; b) there should be transparency in the process for the exercise of power by SCIT; and c) the power should be exercised taking into account both the benefits and possible adverse effects of TPMs before arriving at a balanced view. <p>The organization from the software game industry is of the view that the rule-making power of SCIT might contravene Articles 73, 80 and 85 of the Basic Law. It further</p>	<p>Section 273H confers rule-making power on SCIT so that possible abuses arising from the use of TPMs to the detriment of legitimate users of copyright works could be prevented. Before exercising the rule-making powers, SCIT would consider submissions of both copyright owners and users and all the facts and circumstances of the case in order to strike a right balance between various conflicting interests. The relevant stakeholders will be consulted and given the opportunity to make submissions before a decision is made. It should be noted the notice to be made by SCIT is subsidiary legislation subject to the negative vetting of the Legislative Council.</p> <p>We do not consider it appropriate to set an expiry period for such notice in the Copyright Ordinance. The duration of the notice will depend on the facts and circumstances of each case. This is an issue which will be discussed with the relevant parties when SCIT is requested to exercise his power under section 273H.</p>

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	Organizations / Individuals	Views / Concerns	Administration's Response
		proposes that the UK approach be used. The Secretary of State in UK is empowered, following receipt of a complaint, to give directions to the copyright owner for the purpose of establishing whether any voluntary measure relevant to the copyright work subsists. If no such measure subsists, the Secretary could direct the copyright owner to make available the work to beneficiaries of the permitted act.	We do not agree that the proposed rule-making power for SCIT under section 273H is in contravention of the Basic Law since the relevant notices made by SCIT are subject to the negative vetting of LegCo under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) and any person aggrieved by SCIT's exercise of the rule-making power would have access to court to challenge the legality of the notices by way of judicial review.
9.1	<ul style="list-style-type: none"> ● Cable and Satellite Broadcasting Association of Asia (CASBAA) ● Motion Picture Association (MPA) ● Business Software Alliance (BSA) ● 	Propose minor textual changes to certain provisions.	We will study these suggestions in detail.
10.1	<p><u>Trade Association</u></p> <ul style="list-style-type: none"> ● Hong Kong General Chambers of Commerce (HKGCC) ● Chinese Manufacturers' Association (CMA) 	HKGCC supports the intention of the Bill to extend civil rights against circumvention and create a new criminal offence against circumvention for commercial purposes. It requests the Government to note the concerns of the cable and satellite broadcasters about the time-sifting exemption and work out a	We believe that the proposed anti-circumvention provisions have struck a reasonable balance between the interests of copyright owners on the one hand and consumers' legitimate use of copyright works and the benefits of research activities on the other.

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Organizations / Individuals	Views / Concerns	Administration's Response
<p><u>Professional Body</u></p> <ul style="list-style-type: none"> • The Institute of Electrical and Electronics Engineers (Hong Kong Joint Chapter) CAS/COM (IEEE) <p><u>Other organization</u></p> <ul style="list-style-type: none"> • Consumer Council 	<p>satisfactory solution with the industry.</p> <p>CMA does not agree to the new anti-circumvention provisions. It considers that the Copyright Ordinance should be used for protection of copyright works and not TPMs. In view of rapid advancement in technology, introducing criminal and civil liabilities against circumvention of TPMs might lead to unforeseeable consequences.</p> <p>IEEE raises their objection to the introduction of civil and criminal liabilities for circumvention of TPMs. They consider that it is the copyright owners' responsibility to protect their works from circumvention. The anti-circumvention provisions have the effect of suppressing the rights of -members of the public.</p> <p>Consumer Council considers that no civil remedies or criminal sanctions should be introduced against circumvention of technological measures because this would prevent the use of genuine parallel imports. Hence, it supports the proposed exceptions for parallel imports in the Bill. It also cautions</p>	<p>We will maintain discussion with the broadcasting industry on the proposed time-shifting exception.</p>

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		that indiscriminatory prohibition against circumvention technology might inhibit market advancement in technology.	
11.1	<p><u>Educational Bodies</u></p> <ul style="list-style-type: none"> • The Joint University Librarians Advisory Committee (JULAC) • Heads of Universities Committee (HUCOM) Task Force on Copyright in Education (Task Force) • Hong Kong Library Association (HKLA) 	<p>All support the proposal in the Bill and considers that it has struck an adequate balance between protection of intellectual property and dissemination of information. HUCOM Task Force also welcomes the exemptions for circumvention activities proposed in the Bill.</p> <p>JULAC and HUCOM Task Force propose the following –</p> <p>a) Non-profit making libraries should be exempted from liability for circumventing TPMs so that they can perform their roles of preservation, archiving and distribution of information. Also, circumvention of technological access controls is required so that digital works legally purchased abroad can be used locally; and</p> <p>b) Media shifting is essential not only to replacement of copies, but should also allow for preservation and back-up purposes.</p>	<p>One of the elements of section 273A (which imposes civil liability on a person who circumvent effective TPMs) is that the circumventor knows or has reasonable grounds to believe that the circumvention act will induce, enable, facilitate or conceal an infringement of copyright in the work (section 273A(1)(b)). Librarians that circumvent TPMs for doing a permitted act will not be subject to liability. The permitted acts for libraries and archives are set out in sections 46 – 53 of our Copyright Ordinance.</p> <p>Relating to use of parallel imported copies of copyright works, exemption to the act of circumvention is contained in the proposed section 273D(7).</p> <p>Under the existing section 51 of the Copyright Ordinance, librarians and archivists may, subject to prescribed conditions, make a copy of any item in the</p>

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	Organizations / Individuals	Views / Concerns	Administration's Response
			<p>permanent collection of the library or archive for, <i>inter alia</i>, preservation and replacement purposes.</p> <p>We will take into account the need for media shifting when prescribing conditions for section 51 of the Copyright Ordinance in due course. Any regulations made could not however exceed the ambit of section 51.</p>
11.2	<ul style="list-style-type: none"> • Heads of Universities Committee (HUCOM) Task Force on Copyright in Education (Task Force) 	<p>HUCOM Task Force considers that if the provision of circumvention devices or provision of circumvention services are criminalized, no such devices or services (which are required by the educational sector for purposes other than infringement) would be available in the market. They wish to contact the Government where this occurs so that the Secretary for Commerce, Industry and Technology (SCIT) could consider exercising his power under section 273H.</p>	Noted.

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12.1	<p><u>Professional Bodies</u></p> <ul style="list-style-type: none"> • Professional Information Security Association (PISA) 	<p>PISA agrees with the objective to improve copyright protection in Hong Kong but expresses the following reservations –</p> <p>a) Although sections 273D – 273H provides exceptions for circumvention of TPMs, the burden of proving security flaws or vulnerability exists falls on the IT security professionals. With ever-changing technology advancements, it is difficult to define security flaws or vulnerability clearly. Therefore, implications about creating a new access control right should be considered carefully; and</p> <p>b) The rights of the public to access a combination of open source works when mixed with copyrighted works is unclear.</p>	<p>The protection of access control measures is in line with international developments. Jurisdictions including US, European Community, Australia and Singapore offer protection in this respect.</p> <p>We understand that circumvention of TPMs is required for security testing of computer networks and an exemption is required. However, the exemption must be appropriately crafted in order to avoid abuses by infringers. The meaning of “security flaws and vulnerability” is not rigid and may change in line with technological developments.</p> <p>Provided that the TPM is applied to copyright work(s) to prevent infringement of copyright, the TPM will be subject to the anti-circumvention provisions (section 273(2) and (3)). It is immaterial whether the copyright work(s) is mixed with other open source materials.</p>