

A Limited Copyright Exception for Digital Media Shifting

“Media shifting”¹ refers to the practice of copying genuine copyright material from one medium to another, such as copying legitimate musical recordings from an audio CD to a portable music player. This often involves a change in the format e.g. in the case of sound recordings, from CD digital audio format to MP3² format.

2. With advances in technology, the way consumers use copyright works in digital form has changed. In recent years, a great variety of personal compact digital media products have come onto the market (one such example is the ‘iPod’). These products started out with music devices based on the MP3 digital music compression format and have now developed to cover high quality video players. Some devices (including mobile phones) are able to support the playing of digital sound and video as well as interactive digital games.

Possible Format Shifting Exception in Hong Kong

3. Under the existing law, except as allowed by permitted acts, any copying of copyright works without the authorisation of the copyright owners may attract civil liability³. However, users generally consider such restriction unreasonable in the context of media shifting for private and personal use. They argue that so long as they own a legitimate copy of the work, they should be entitled to convert the work to other format for personal use on their own digital portable device such that they could enjoy the work at a time or a place convenient to them.

4. On the other hand, copyright owners, particularly those in the music and movie industries, are concerned that a media shifting exception may open the floodgate for uncontrolled unauthorised sharing of copyright works. Whilst there is growing recognition by the industry worldwide that media shifting by consumers is a fact of life, some copyright owners

¹ The terms "media shifting" and "format shifting" are often used interchangeably.

² MP3, or MPEG-1 Audio Layer 3, is a digital audio encoding format.

³ Unauthorised copying of copyright works for sale or hire may attract criminal liability, apart from civil liability, under the Copyright Ordinance.

remain adamant that the current civil remedies, though difficult to enforce, should be kept if only as a deterrent.

Situations in other jurisdictions

5. The issue of whether a “media shifting” exception should be introduced was not included in the public consultation document we released in December 2006. Since then, some overseas jurisdictions have either introduced or proposed specific media shifting exceptions under their copyright legislation. For example, copyright legislation in Australia now allows owners of legitimate copies of sound recordings and certain types of other copyright materials to make a copy of the recordings or materials for private and domestic use under certain specified circumstances. In New Zealand, a legislative proposal which provides for a media shifting exception for sound recordings is being scrutinised by the Parliament. In the UK, a consultation paper on “proposed changes to copyright exceptions” was released in January 2008, which includes a proposal on a media shifting exception. The consultation has just ended on 8 April.

6. The Appendix sets out the existing/proposed exceptions in these countries.

Considerations and recommendation

7. Advances in technology have altered the way in which musical and visual works are recorded and the way consumers enjoy such works. We consider a very limited media shifting exception could afford greater certainty to users, without prejudicing the interests of copyright owners. In this connection, we propose to introduce an exception that allows limited copying⁴ of copyright works that consumers legally own for personal and private use subject to specified conditions⁵.

⁴ This may include limits in respect of the types of copyright works to which the exception applies, and the number and format of copies which may be allowed.

⁵ For example, similar to other existing exceptions under the Copyright Ordinance, where a copy of copyright work that is legitimately made by virtue of the exception is subsequently dealt with (such as sold, let for hire or exposed for sale or hire), it would become an infringing copy. For other possible conditions, please refer to the major conditions / restrictions as set out in the Appendix.

8. In considering the possible exception, we need to take into account the following –

- (a) any exceptions must be fully compliant with the “three-step test” requirement under the TRIPS Agreement of the WTO. Hence, the relevant provisions would need to be carefully formulated having regard to similar provisions in other jurisdictions so as to ensure that Hong Kong remains fully TRIPS-compliant; and
- (b) at present, copyright owners have the option of using “technological measures”⁶ to prevent copyright infringement. The Copyright (Amendment) Ordinance 2007 introduces additional protection for such technological measures, including prohibition against activities that circumvent the technological measures applied by copyright owners. We consider that the proposed new exception should not confer any right to circumvent such technological measures so as to enable copyright owners to develop appropriate business model in face of the proposed new exception.

Views sought

9. Public views are sought on whether an exception for media shifting for personal and private use should be introduced into the copyright law of Hong Kong to facilitate reasonable use of copyright works, and if so, (a) the scope (i.e. the types and formats) of copyright works to be covered; and (b) the limitations/restrictions that should be imposed in relation to such an exception (e.g. the pre-condition for users to own a legitimate copy, the requirement for users to retain the legitimate

⁶ “Technological measures” include measures that prevent or restrict unauthorised copying of copyright works (“copy protection measures”) and measures that protect copyright works from unauthorised access (“access control measures”).

copy, the number of permitted copy in other format(s), the restrictions against any file sharing, etc⁷).

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Commerce and Economic Development Bureau
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⁷ For further reference, please see the limitations/restrictions for media shifting exceptions in other jurisdictions, as set out in the Appendix.

Media shifting exception in Australia, New Zealand and United Kingdom

	Australia (existing exception)	New Zealand (proposed exception)	United Kingdom (proposed exception)
Scope of exception	<p>(1) The owner of a non-infringing copy of a <i>book, newspaper or periodical publication</i> may make <i>a copy</i> of a work contained in the book, newspaper or periodical publication into <i>a different format</i>, for his private and domestic use (including the private and domestic use of his family and household member).</p> <p>(2) The owner of a non-infringing copy of a <i>photograph</i> may make <i>a copy</i> of the photograph, in <i>hard copy form if the original photograph is in electronic form</i> or in <i>electronic form if the original photograph is in hardcopy form</i>, for his private and domestic use (including the private and domestic use of his family and household member).</p> <p>(3) The owner of a non-infringing copy of a <i>videotape embodying a cinematograph film in analog form</i> may make <i>a copy</i> of the film in <i>electronic form</i>, for his private and domestic use (including the private and domestic use of his family and household member).</p> <p>(4) The owner of a non-infringing copy of a <i>sound recording</i> may make <i>a copy</i> of that recording <i>multiple times</i> into <i>any format</i> for his private and domestic use (including the private and domestic use of his family and household member) on <i>devices he owns</i>.</p>	<p>The owner of a non-infringing copy of a <i>sound recording</i> may make <i>one copy</i> of that recording in <i>each device he owns</i> for his personal use (and the personal use of a member of his household).</p>	<p>Allow consumers to make <i>a copy of a copyright work</i> they legally own for personal and private use, so that they can make the work accessible in <i>another format</i> for playback on <i>a device in their lawful possession</i>.</p> <p>Questions such as the classes of work (e.g. sound recordings, films and/or other types of works) to be covered and number of format shifts to be allowed are subjects of the consultation.</p>

	<p style="text-align: center;">Australia (existing exception)</p>	<p style="text-align: center;">New Zealand (proposed exception)</p>	<p style="text-align: center;">United Kingdom (proposed exception)</p>
<p>Major conditions/restrictions</p>	<p><u>For works in (1) to (3)</u></p> <ul style="list-style-type: none"> • There should be <i>no more than one copy in each format</i>. • Dealing with (such as sale, hire or distribution of) the private use copy or subsequent disposal of the original copy (such as to sell or give away the original copy) is not allowed. <p><u>For work in (4)</u></p> <ul style="list-style-type: none"> • The original copy of sound recording must not be made by downloading over the Internet a digital recording of a radio broadcast or similar program. • Dealing with, playing in the public or broadcasting the original copy or private use copy is not allowed. 	<ul style="list-style-type: none"> • There should be <i>no more than one copy for each device</i>. • The sound recording is not borrowed or hired. • The owner must acquire the sound recording legitimately. • The owner of the sound recording must retain the ownership of both the original copy and any copy made under the exception. • The proposed exception does not apply if there are express contractual provisions to the contrary. 	<ul style="list-style-type: none"> • <i>Only one copy</i> of a work is allowed <i>on each device</i>. • The owner would not be permitted to sell, loan, or give away the copy or share it more widely (for example in a file sharing system or on the Internet). • The owner would not be permitted to retain the copy if he was no longer in possession of the original. • Third parties would not be able to copy works on behalf of consumers. • Copying for friends and family would not be covered.