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Our Ref: LS/RLR/Committees/IPPC/2020/MinLaw/TL/jc/lf

16 October 2020

Intellectual Property Policy Division
Ministry of Law
100 High Street,
#08-02, The Treasury
Singapore 179434

BY EMAIL
MLAW_Consultation@mlaw.gov.sg

Dear Sirs,

2020 Public Consultation on the Copyright (Excluded Works) Order

1. We refer to the Ministry of Law's public consultation on the Copyright (Excluded Works) Order ("the Consultation").
2. The Law Society of Singapore's Intellectual Property Practice Committee 2020 has considered the Consultation paper and prepared the enclosed submission in response. The submission is supported by the Council of the Law Society of Singapore.
3. If you have any questions or require further assistance on the matter, please contact Ms Ting Lim, Manager of the Representation and Law Reform Department by email at huiting@lawsoc.org.sg.
4. Thank you.

Yours sincerely,

Jonathan Foong
Chairperson, Intellectual Property Practice Committee

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The Law Society of Singapore’s Intellectual Property Practice Committee’s response to the Ministry of Law’s (“MinLaw”) public consultation on the Copyright (Excluded Works) Order (“Consultation Paper”)

Preamble

Singapore’s Copyright Act (Cap 63, Revised Edition 2006) (“Copyright Act”) has many exceptions to infringement. Their presence balances the rights of owners and users. At a higher or more general level, the balance is between a right to property versus rights to freedom of expression, access to information or right to education. Many of these rights are embedded in the exceptions to infringement provisions of the Copyright Act (e.g. Part III, Divisions 4 to 7, and Part IV, sections 109 – 111). At a more specific level, the balance concerns the contractual rights of parties. We need to ask ourselves if there are rights of a licensee which we may need to imply. Such a question will apply when an IT product has become obsolete or inaccessible through no fault of the licensee.

Technological protection measures (“TPMs”) are self-help measures. They allow copyright owners to build technology forts against infringers. If unfettered, they could deny users of their rights. This must not be allowed to happen. Our position is that copyright owners must not be able to construct a technological fence around their property when users have a right of easement.

In summary, the objective of the Order and any subsidiary legislation is to preserve users’ rights recognized in the Copyright Act. Any amendments to the Order and any subsidiary legislation must further this objective.

We have limited our comments (set out below) to specific areas or details of the Consultation Paper.

We have adopted the numbering set out in the Consultation Paper. The first column is the serial number while the second column sets out the questions posed. Our comments and feedback to the relevant questions are set out in column 3. Where the questions or issues posed in the Consultation Paper are not found in the table below, we are either in accord with MinLaw or do not have any comments to these questions.

Please do not hesitate to contact us if you require any further information or clarification on our feedback.

S/N	Consultation Paper ¹ (Questions)	Comments
PROPOSAL 1: SOFTWARE RELIANT ON OBSOLETE SYSTEMS		
1.	<p>Should these exceptions in the Copyright (Excluded Works) Order (“EWO”) to enable the use of obsolete software be retained, expanded, limited, or removed? (optional)</p> <p>Please elaborate on why these exceptions are or are not useful (for example, if you or someone you know relies on these exceptions, or intend to rely on these exceptions in the future).</p>	<p>We are of the view that it would be desirable to retain these exceptions in the EWO.</p> <p>As products or services in the IT industry develop at a very fast pace, we have not encountered any problems where continued reliance on an obsolete system is necessary. However, it is advisable to retain this exception so as not to inconvenience the user who needs it.</p>
PROPOSAL 2: READ-ALoud AND ASSISTIVE FUNCTIONALITY FOR DIGITAL E-BOOKS		
2.	<p>Should this exception in the EWO to enable assistive and read-aloud functionality for e-books be retained, expanded, limited, or removed? (optional)</p> <p>Please elaborate on why this exception is or is not useful (for</p>	<p>We are of the view that it would be desirable to retain this exception in the EWO.</p> <p>There are exceptions to infringement which enable the visually impaired access to</p>

¹ “Public Consultation on the Copyright (Excluded Works) Order, dated 7 September 2020, Accessible at https://www.mlaw.gov.sg/files/EWO2020_PublicConsultation.pdf

	<p>example, if you or someone you know relies on this exception, or intend to rely on this exception in the future).</p>	<p>information (see sections 54 and 54A of the Copyright Act). To allow copyright owners to sue for circumventing TPMs would be to make these exceptions redundant.</p> <p>Furthermore, Singapore is a member of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.</p>
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PROPOSAL 3: USE OF SHORT CLIPS FROM FILMS OR SHOWS FOR EDUCATIONAL PURPOSES

<p>3.</p>	<p>Should this exception in the EWO to enable the use of video clips for educational purposes be retained, expanded, limited, or removed? (optional)</p> <p>Please elaborate on why this exception is or is not useful (for example, if you or someone you know relies on this exception, or intends to rely on this exception in the future).</p>	<p>We are of the view that it would be desirable to retain this exception in the EWO.</p> <p>The need to circumvent TPMs for media or film studies courses would be essential for instruction. To remove or limit this exception would go against the purpose of section 115A of the Copyright Act. The current Orders 3(d) and 3(e) in the EWO already contain sufficient safeguards to prevent any abuse.</p>
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PROPOSAL 4: ENABLING USE OF SHORT VIDEO CLIPS FOR CRITICISM OR COMMENTARY

<p>4.</p>	<p>Should this exception in the EWO to enable the use of video clips for criticism or commentary be retained, expanded, limited, or removed? (optional)</p> <p>Please elaborate on why this exception is or is not useful (for example, if you or someone you know relies on this exception, or intends to rely on this exception in the future).</p>	<p>We are of the view that it would be desirable to expand this exception in the EWO.</p> <p>The exception in Order 3(f) of the EWO is much narrower than the fair dealing provisions in sections 110 and 111 of the Copyright Act. These provisions are for criticism and review generally, or for news reporting. To limit the exception in Order 3(f) to “<i>in the making of a documentary</i>” is not rational and may frustrate the purpose of the exceptions in the Copyright Act.</p>
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PROPOSAL 5: INVESTIGATING AND FIXING CYBERSECURITY FLAWS

<p>5.</p>	<p>Should this exception in the EWO to enable cybersecurity research be retained, expanded, limited, or removed? (optional)</p> <p>Please elaborate on why this exception is or is not useful (for example, if you or someone you know relies on this exception, or</p>	<p>We should either expand or limit the scope for this exception. For expansion, this is done by the removal of the “<i>cybersecurity professional</i>” condition. Alternatively, the definition of this term should be limited. This will be elaborated below.</p> <p>We are of the view that the definition of “<i>cybersecurity professional</i>” is problematic. Not only is it nebulous, it includes a student of the subject. Unlike professionals such as</p>
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	<p>intends to rely on this exception in the future).</p>	<p>accountants, architects and doctors, we are not aware of similar bodies governing cybersecurity professionals.</p> <p>We thus propose to either:</p> <ul style="list-style-type: none">A. Expand the scope by deleting the requirement that the research has to be done by a cybersecurity professional or someone under his supervision; orB. limit it by incorporating the concept of licensed cybersecurity service providers in the Cybersecurity Act 2018 (No. 9 of 2018) (“Cybersecurity Act”). <p>If we are to expand the scope, the existing twin conditions in paragraph 3(g) of the Order:</p> <ul style="list-style-type: none">1. Good faith; and2. Purpose of research on cybersecurity <p>already provide adequate safeguards. Both need to be fulfilled for the exception to apply.</p> <p>If we are to limit the scope, the definition of “<i>cybersecurity professional</i>” should be amended. We suggest that the term should be defined as a person licensed to provide cybersecurity service by virtue of section 26 of the Cybersecurity Act.</p> <p>Finally, we are of the view that the subject matters of the exception may be too wide.</p>
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		<p>Sections 39B and 39C of the Copyright Act only applies to computer programs while the exception applies to “<i>any computer program, work or other subject matter in digital form, sound recording or cinematograph film</i>”. An exception to section 261C(1)(a) of the Copyright Act should not be broader than the rights given to lawful users in the Act.</p>
<p>PROPOSAL 6: REPLACEMENT OR REPAIR OF ESSENTIAL OR EMERGENCY SYSTEM SOFTWARE</p>		
<p>6.</p>	<p>Should this exception in the EWO to enable repair or replacement of essential and emergency systems be retained, expanded, limited, or removed? (optional)</p> <p>Please elaborate on why this exception is or is not useful (for example, if you or someone you know relies on this exception, or intends to rely on this exception in the future).</p>	<p>We are of the view that it would be desirable to retain this exception in the EWO.</p> <p>While we have not consulted security companies regarding this issue, we are of the view that, prima facie, such a provision is useful. For certainty, we should define the words “<i>essential</i>” and “<i>emergency system</i>” found in Order 3(h) of the EWO.</p>
<p>MISCELLANEOUS</p>		
<p>7.</p>	<p>Please let us know if you think there are any other uses that should be enabled by the EWO, and why.</p>	<p>We should impose a duty on copyright owners using digital rights management systems to prevent infringement, to “<i>unlock</i>” the impediment when requested by users asserting their rights granted by the Copyright Act.</p>