

Legislative Council Bills Committee
Copyright (Suspension of Amendments) Bill 2001

Criminal Provisions in Seven Jurisdictions
on Copyright Protection for Computer Programs

Purpose

This paper compares the criminal provisions of Hong Kong on copyright protection for computer programs with those of Taiwan, Korea, India, Germany, Japan, Singapore and the United States.

Background

2. At the Bills Committee meeting held on 22 May, we explained that Article 61 of TRIPS only stipulates the basic criminal sanctions required; it does not preclude members from imposing more stringent legislation to combat rampant copyright piracy activities. In this connection, a Member queried whether the amended Copyright Ordinance as it applies to computer programs is imposing too high a standard when compared with other economies including Taiwan, Korea and Singapore.

Comparison with criminal provisions of other jurisdictions

3. Broadly speaking, the level of protection for computer programs in Taiwan, Korea, India, Japan, Germany and the United States is comparable to that in Hong Kong. All these economies provide criminal sanction against the unauthorized reproduction¹ of a computer program. Furthermore, in Taiwan, Korea, India and Japan there is criminal sanction against the use of an infringing copy of a computer program for business purposes (in India for private use as well). Like Hong Kong, the laws of these jurisdictions provide no special exemption for charitable bodies for committing such acts.

¹ It should be noted that the use of a computer program normally involves installation of a copy of the program in the computer. In such cases, unauthorised installation amounts to unauthorised reproduction.

4. The key criminal provisions in each economy under study are outlined in the paragraphs below. Further details are set out at Annex.

5. In Korea, a person who unlawfully reproduces a computer program, or knowingly uses an infringing copy of a computer program for his business, is liable to imprisonment of up to 3 years or a fine of up to 50 million won or both.

6. In Taiwan, a person commits an offence if he infringes the economic rights in a computer program of another person by unauthorised reproduction. The penalty is imprisonment between 6 months and 3 years and a fine of up to NT\$200,000. Furthermore, a person who knowingly uses an infringing copy of a computer program for direct profit-making purposes commits an offence. The penalty is imprisonment of up to 2 years and a fine of up to NT\$100,000.

7. In India, a person commits an offence if he knowingly infringes the copyright in a computer program by reproduction. The maximum penalty is imprisonment of between 6 months and 3 years and a fine between 50,000 rupees and 2 lakh rupees. In addition, a person who knowingly uses an infringing copy of a computer program shall be liable to imprisonment between 7 days and 3 years with a fine of between 50,000 rupees and two lakh rupees.

8. In Japan, a person who reproduces a computer program unlawfully or knowingly uses in the conduct of business an infringing copy of a computer program commits an offence and shall be liable to imprisonment of up to 3 years or a fine of up to 3 million yen.

9. In Germany, a person who reproduces a computer program unlawfully shall be liable to imprisonment of up to 3 years or a fine. If such infringing act is committed on a commercial basis, the penalty is imprisonment of up to 5 years or a fine.

10. In the United States, a person commits an offence if he wilfully infringes copyright by reproducing 1 or more copies of a computer program with retail value exceeding US\$1,000. The term of imprisonment imposed can be up to 6 years if there is repeated conviction

and the fine imposed can be up to US\$250,000 per individual or US\$500,000 per organization. If a person wilfully infringes copyright, say, by reproducing a computer program for the purpose of commercial advantage or private financial gain, the term of imprisonment imposed can be up to 10 years if there is repeated conviction and the fine imposed can be up to US\$250,000 per individual or US\$500,000 per organization.

11. In Singapore, a person commits an offence if he possesses an article which he knows or ought reasonably know that it is an infringing of a computer program for the purpose of selling or distributing it. In addition, a person commits an offence if he makes for sale or hire an infringing copy of a computer program which he knows or ought reasonably know it is an infringing copy. In both cases, the maximum penalty is imprisonment of up to 5 years and a fine of S\$100,000.

Commerce and Industry Bureau
May 2001

Analysis of Legislative Provisions in Seven Jurisdictions for Protecting Copyright in Computer Programs

Introduction

This note outlines the law in seven jurisdictions for protecting copyright in computer programs. These are Korea, Taiwan, Singapore, India, Germany, Japan and USA. The observations below represent our understanding of the position in these jurisdictions based on our examination of their relevant legislation. Being not qualified to give advice on the law of these jurisdictions, we emphasise that the observations made may not be an authoritative interpretation of their law.

Copyright Protection for Computer Programs

Korea

2. Under the Computer Program Protection Act, a person commits an offence if he, inter alia –
 - (a) infringes the copyright in a computer program by reproduction (subparagraph 1 of Article 34(1)); or
 - (b) knowingly uses an infringing copy of a computer program in a computer for his business (subparagraph 2 of Article 34(1)).

The wrongdoer is punishable by imprisonment of up to 3 years and a fine of up to 50 million won (Article 34(1)).

Taiwan

3. Under the Copyright Law, “computer program” is a kind of copyright work (Article 5). A person commits an offence if he, inter alia –
 - (a) infringes the economic rights in a work of another person by

means of reproducing that work (which includes a computer program). The penalty is imprisonment between 6 months and 3 years and a fine of up to NT\$200,000 (Article 91); or

- (b) uses a copy of a computer program for direct profit-making purpose with the knowledge that it infringes the economic rights in that computer program. The penalty is imprisonment of up to 2 years and a fine of up to NT\$100,000 (Articles 87(5) and 93).

Furthermore, if a person commits an offence in (a) in his regular business, then the penalty will be imprisonment of between 1 and 7 years and a fine of up to NT\$450,000 (Article 94).

Singapore

4. Under the Copyright Act, “work” includes a literary work (section 7(1)) and “literary work” in turn includes a computer program (section 7(1)). A person commits an offence if he, inter alia –

- (a) makes for sale or hire an infringing copy of a copyright work (which includes a computer program) which he knows or ought reasonably know that it is an infringing copy (section 136(1)(a)); or
- (b) possesses¹ an article which he knows or ought reasonably know that it is an infringing copy (which includes a copy of a computer program) for the purpose of selling or distributing (section 136(2)).

The maximum penalty is imprisonment of 5 years and a fine of S\$100,000 (section 136(2)).

5. In addition, any person who publishes an advertisement for the supply of a copy of a computer program which is an infringing copy

¹ Under s.136(7) of Singapore’s Copyright Act, a person who has in his possession 5 or more infringing copies of any work or other subject-matter shall, unless the contrary is proved, be presumed -
(a) to be in possession of such copies otherwise than for private and domestic use; or
(b) to be in possession of such copies for the purpose of sale.

commits an offence. The maximum penalty is a fine of S\$20,000 and imprisonment of 2 years (section 139).

India

6. Under the Copyright Act, “work” includes a literary work (section 2(y)) and “literary work” in turn includes “computer program” (section 2(0)). A person commits an offence if he, inter alia –

- (a) knowingly infringes the copyright in a work (which includes a computer program) by reproduction (sections 51(a)(i) and 63). The penalty is imprisonment for a term between 6 months and 3 years and a fine between 50,000 rupees and 2 lakh rupees. However, the court is given the discretion to impose a term of imprisonment of less than 6 months and a fine of less than 50,000 rupees if the infringement has not been made for gain or in the course of trade or business (section 63); or
- (b) knowingly uses an infringing copy of a computer program on a computer. The penalty is imprisonment between 7 days and 3 years with a fine of between 50,000 rupees and two lakh rupees . However, the court is given the discretion not to impose any custodial sentence but only to impose a fine of up to 50,000 rupees if the computer program has not been used for gain or in the course of trade or business (section 63B).

Germany

7. Under the Copyright Law, protected literary, scientific and artistic copyright works include computer programs (Article 2(1)). A person who reproduces a work (which includes a computer program) without the copyright owner’s consent commits an offence and is liable to imprisonment for up to 3 years or a fine (Article 106(1)). If such infringing act is committed on a commercial basis, the penalty is imprisonment of up to 5 years or a fine (Article 108a(1)). There is the requirement that a person who commits the infringing act has to be intentional (Section 15 of the Penal Code of Germany).

Japan

8. Under the Copyright Law, “works” include computer programs (Article 2(1)(*xbis*) and 10(1)(ix)). A person commits an offence if he, *inter alia* –

- (a) infringes the copyright of a work (including a computer program) by reproduction (Article 119(i)) otherwise than reproducing one copy himself for his private use (Article 30); or
- (b) distributes or possesses for distribution infringing copies (which include infringing copies of a computer program) (Articles 119(i) and 113(1)(ii)); or
- (c) uses on a computer, in the conduct of business, an infringing copy of computer program (Articles 119(i) and 113(2)).

The penalty is imprisonment of up to 3 years or a fine of up to 3 million yen (Article 119(i)). Like Germany, there appears to be a requirement that a person who commits the infringing act must be intentional under Japan’s criminal code.

USA

9. Under the Copyright Law, copyright subsists in literary works, which include computer programs. A person commits an offence if he, *inter alia*, willfully infringes a copyright –

- (a) for the purposes of commercial advantage² or private financial gain (17 U.S.C. section 506(a)(1)). The term of imprisonment imposed can be up to 10 years if there is repeated conviction and the fine imposed can be up to US\$250,000 per individual or US\$500,000 per organization (18 U.S.C. section 2319(b)); or
- (b) by reproduction or distribution, including by electronic means,

² Where reproduction of computer program is concerned, it appears this can cover corporate end-user piracy where the commercial advantage is the avoidance of the cost of purchasing legitimate products for installation in computers for commercial use.

during any 180-day period, of 1 or more copies of 1 or more copyrighted works, which have a total retail value of more than \$1,000³ (17 U.S.C. section 506(a)(2)). The term of imprisonment imposed can be up to 6 years if there is repeated conviction and the fine imposed can be up to US\$250,000 per individual or US\$500,000 per organization (18 U.S.C. section 2319(c)).

³ It appears this can cover the situation where a financial motive for copyright infringement is not apparent, as is sometimes the case with end user piracy outside the corporate context.