

**Hong Kong Legislative Council
Commerce and Industry Committee**

Special Meeting on the Enforcement of the
Intellectual Property (Miscellaneous Amendments) Bill 2000

Business Software Alliance Hong Kong Submission
April 12, 2001

The Business Software Alliance Hong Kong (BSA) appreciates the opportunity to comment on the implementation of the Intellectual Property (Miscellaneous Amendments) Bill 2000 (the Bill). Passage of the Bill and its enforcement are critical steps in the Government's efforts to develop Hong Kong's software and broader information technology industries. These industries are fundamental components of Hong Kong's drive to develop itself into a leading-edge knowledge based economy.

Putting Corporate End User Piracy into Context

Industry studies show that the software piracy rate in Hong Kong in 1999 was 56%, meaning that well over half of all software in use was pirated. Software piracy comes in several forms, including:

- Corporate End User Piracy - the unauthorized use of software in the business environment. Unauthorized copies of software are introduced into the business environment in a number of ways, including by loading software onto more computers than is permitted under the license agreement; purchasing computers with unauthorized software preloaded onto them; making software available on a network server to more users than are permitted under the license agreement; or downloading unauthorized copies of software off the Internet.
- Hard Disk Loading Piracy - the unauthorized loading of software onto personal computers before they are sold.
- Counterfeiting - the manufacture, distribution or sale of "copies" of products, ranging from obvious fakes to fakes that are made to look like the original products.
- Internet-based Piracy - the unauthorized distribution of electronic copies of software over the web or the use of the web to advertise the sale of counterfeit software.

Of these, corporate end user piracy is by far the most damaging to the software industry, accounting for well over half of the roughly HK\$850 million in losses due to software piracy in 1999. Any effort to address this overwhelming problem must include: (a) clear laws prohibiting corporate end user piracy, including the imposition of criminal sanctions where businesses know or should know that their software use is unauthorized; (b) public education and licensing programs that ensure business understand the law, how to comply with it, and the various software licensing options available to them; and (c) vigorous and public enforcement of the law.

Clarification of the Law

The criminalization of corporate end user piracy is necessary to create a meaningful deterrent against this illegal activity and is an established standard of protection around the world. Hong Kong's efforts to clarify its law in this regard are consistent with its international obligations and international practice:

- Article 61 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) requires the criminalization of knowing copyright piracy on a commercial scale, including the unauthorized use of software in a corporate environment.
- Nearly every country and territory in Asia criminalizes corporate end user piracy, including Korea, Japan, Taiwan, and Thailand. Many governments see this problem as the single greatest barrier to the development of their software industry and are focusing increasing attention on solving it.
- In 2000, the Malaysian government launched a high profile criminal enforcement campaign against corporate end user piracy to drive public awareness on the need to ensure legal use of software in businesses.
- In February, Korea's President Kim ordered his government to "stamp out" software piracy by severely punishing corporate end user pirates. The Korean authorities are currently in the middle of a special enforcement period during which 3,000 companies will be raided by prosecutors. These efforts are intended to lower the piracy rate and improve Korea's reputation as a healthy environment for IT development. Korea's software piracy rate was 50% in 1999.
- In March, China's National Copyright Administration directed provincial and local copyright authorities for the first time to begin cracking down on corporate end user piracy. The Chinese Copyright Law is also being amended at this time to clarify that corporate end user piracy is illegal.

Prior to the passage of the Bill last June, the Hong Kong Copyright Ordinance criminalized corporate end user piracy. The Bill was proposed and ultimately passed, however, to ensure that a potential loophole could not be used to evade liability. This clarification was fully supported by software developers and is yet another example of how the Hong Kong Government is putting in place an intellectual property system to permit the development of world-class information technology industry. The Business Software Alliance commends the Government for its work in this area.

Public Education and Software Licensing Programs

The second element in an effective program for addressing the problem of corporate end user piracy is public education. Since the Bill was passed last June, the Government and the software industry, sometimes on their own and sometimes together, have launched the world's most extensive software asset management (SAM) training program. These efforts have primarily focused on helping small and medium sized enterprises understand the law, how to comply with the law, and how to make the most out of their software assets. They include:

- In November, the Intellectual Property Department, the Customs & Excise Department and BSA held the world's largest SAM training program, reaching over reaching over 4,000 representatives of Hong Kong businesses. The Commissioner of Customs & Excise sent an invitation to the training program, and a notice of the law's provisions, to over 40,000 Hong Kong companies.
- Also in November, BSA launched its Certification Program, Which provides companies certified as having effective software asset management practices preferential treatment when contracting with well known Hong Kong enterprises.
- During the two weeks in March, 21 SAM training sessions were held at the Intellectual Property Department, reaching over 2,500 business representatives. The training of over 6,500 business representatives on SAM over the past 5 months represents by far the largest undertaking of its kind in the world.
- BSA has made fact sheets on Hong Kong law and software asset management guides available to anyone who wants them for years. Over the past several months BSA has enhanced these offerings by developing a more in depth SAM Help Kit that is available to anyone for free.
- BSA has made a wide array of information on the law and SAM techniques available on its website at www.bsa.org/hongkong.
- The Hong Kong Government has done an excellent job of raising public awareness of the law and compliance with it through its radio and television spots and the helpful Questions and Answers on the Bill on its website.
- BSA has worked with a number of IT vendors to help them make SAM services available to Hong Kong businesses. Some of these vendors are identified on the BSA website.

In March, BSA was told by many small and medium sized entities that they did not feel they had enough time to comply with the law, despite the nine month delay in its implementation. In recognition of these concerns BSA and its members:

- Extended its SAM educational program through the end of April. On April 24th, an additional series of SAM training seminars will be held to provide SMEs the training they need to comply with the law. Details can be found on the BSA website. We hope to reach over 7,000 additional business representatives during this training.
- Promised to make significant efforts to ensure that adequate copies of modern software products are available in the marketplace during this month. Should any consumer not be able to find the products they want in the marketplace, we urge them to contact the relevant software vendor directly. Please see the BSA website for Hong Kong contact details for individual vendors.
- Promised not to make any criminal complaints to the Customs & Excise Department during this month to give companies four additional weeks to bring their software use into compliance with the law.
- Committed to providing anyone who wants them with SAM resources, including both written materials (guides, etc.), presentation materials, and SAM seminar-based training.

BSA members have a wide array of licensing schemes available to the public, ranging from licenses for individual packaged products, to special volume licenses, to site licenses. Moreover, many BSA members have developed very attractive discount licensing programs for academic use and for use in charitable organizations. Individual companies, students, educational institutions, and charities are urged to contact BSA members directly to determine what licensing program best suits their particular needs.

Enforcement

The passage of any law has little meaning unless it is properly enforced. The Bill is an important clarification of Hong Kong law and a critical step in the larger effort to crack down on software piracy. If enforcement of the law does not take place, the information technology industry and Hong Kong's international reputation as a healthy environment for technology-based industries will suffer. BSA stands ready to support the Customs & Excise Department's efforts to enforce the law in any way it can.

Conclusion

The passage of the Bill, its entry into force on April 1st, and the enforcement of the law as clarified are by far the most important steps the government can take to address the overwhelming problem of software piracy in Hong Kong. The Hong Kong Government should be commended for taking these steps. More importantly, the Government should be commended for the unparalleled efforts it has made since the Bill was passed in June to prepare businesses for its entry into force. BSA is active in over 65 countries and territories in the world, and it is clear that no government has ever done more to prepare businesses for the need to ensure their software use is legal. Hong Kong is a model for other governments who want to ensure their companies - particularly their small and medium sized enterprises - have the tools they need to ensure compliance with the law.

For the sake of the development of the software industry in Hong Kong, BSA urges the Legislative Council and the Government to refrain from taking any steps that might slow the full implementation of the clarification that corporate end user piracy is subject to criminal penalties.