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Business Software Alliance

Submission to LegCo on Copyright (Amendment) Bill 2003
June 20, 2003

Thank you for inviting the Business Software Alliance (BSA) to comment on draft Copyright (Amendment) Bill 2003, tabled in Legco in February of this year.

Executive Summary

As addressed below, the BSA has a number of serious concerns regarding the draft legislation, which would roll back copyright protection for computer software (as well as other copyright works) in Hong Kong at a time when the already high software piracy rate is increasing. Such a move is unjustified and would move Hong Kong in the wrong direction and, potentially, out of compliance with its international obligations. BSA's concerns are detailed fully below and can be briefly summarized as follows:

- The software piracy rate in Hong Kong was estimated to be 56% in 2002. This is very high relative to other developed economies in Asia and even higher than when the April 2001 law on end user liability first went into effect (at that time, the estimated software piracy rate was 53%). Under the circumstances, legislative amendments that would narrow the scope of copyright protection in Hong Kong are unjustified and inconsistent with Hong Kong's broader vision of building a knowledge-based economy where creativity and innovation can thrive.

- Copyright (Amendment) Bill 2003 contains a number of provisions that the BSA views as problematic including:

    - Language limiting liability to cases involving a specific and clearly identifiable "profit" or "financial reward." This would narrow the current law in some respects and eliminate criminal liability for certain acts that clearly should be covered.

    - A broadly worded defense for employees who knowingly use pirated software in business. While BSA agrees that the criminal law should be used to target decision-makers in businesses (and not lower level employees with limited

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bargaining power), experience has shown that the law is not unfair in application and, if anything, is too narrow to constitute an effective deterrent. BSA's concern is that (1) narrowing the law in this way would send the wrong signal to the public concerning the importance of strong IPR protection; and (2) the employee defense could be misused to allow decision-makers to unjustly escape criminal liability.

- Broad language (in Section 118A(5)) that would inadvertently eliminate criminal end user liability for an enormous range of computer software made available over the Internet. BSA believes it is critical that the government and LegCo refine or eliminate the relevant language to avoid unintentionally creating a huge gap in Hong Kong's copyright protection scheme.

- If anything, the law on criminal end user piracy needs to be refined in a manner that would facilitate successful investigations and prosecutions, given that in the last two years there has not been a single successful contested prosecution in this area.

General Comments on Software Piracy in Hong Kong and Enforcement Efforts to Date

The BSA's concerns regarding Copyright (Amendment) Bill 2003 should be viewed in the context of the overall software piracy problem in Hong Kong and the serious challenges the government has encountered in its enforcement efforts against organization end user piracy. BSA's overarching concern is that any legislation that would narrow the scope of existing law in this area is unjustified at a time when experience has demonstrated the current law to be ineffective in application – this is particularly true where, as here, the proposed amendments are designed to address concerns expressed by some during the legislative process two years ago, and before any actual experience with end user investigations and prosecutions.

In 2002, the software piracy rate in Hong Kong was estimated by International Planning and Research Association to be 56%, resulting in losses to the industry of over US$80 million in Hong Kong alone (most of which losses are attributable to organization end user piracy). A 56% software piracy rate is very high for an advanced, knowledge-based economy such as Hong Kong, which aspires to and can become an IT hub for the region. Moreover, the

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2002 figure represents a three-point *increase* in the rate of software piracy over the prior year.

Notably, during the same time period other markets in the region managed to reduce their software piracy rates, putting Hong Kong well behind other advanced economies in Asia. The 2002 study shows that Japan has a piracy rate of 35%. Singapore is at 48% (a drop of three points from the period year, creating an eight-point gap between the two markets; Taiwan is at 43% (a drop of 10 points from the prior year and a full 13 points lower than Hong Kong); Korea is at 50%, Australia is at 32% and New Zealand is at 24%. In fact, Hong Kong's piracy rate is higher than the average rate for the entire region.

The Hong Kong government has recognized that high levels of piracy cause considerable damage to Hong Kong's competitiveness and reputation as an international city and a commercial hub, and undermine the government's efforts to foster creativity and innovation in the IT sector. (Indeed, an economic impact study commissioned by BSA and released in April by the international research group IDC confirms that reducing the piracy rate can have a significant positive impact on local economic development and growth of the IT industry as a whole; the study can be found at www.bsa.org/idcstudy.) It is precisely for that reason that the government has made significant efforts to reduce the level of software piracy, including by introducing new legislation on criminal end user liability in April 2001, engaging in broad reach education campaigns, and allocating resources for enforcement. The government should be commended for its efforts to address this serious problem.

The BSA is concerned, however, that despite the government's considerable efforts to address the problem little meaningful progress has been made in the last year or two to reduce the rate of organization end user software piracy, as reflected by the three-point increase in Hong Kong's software piracy rate between 2001 and 2002. Enforcement officials have carried out a number of raids against business end users, but only a handful of cases have proceeded to judgment and every single contested case has resulted in acquittal. Due to challenges faced in these prior cases, enforcement activity was essentially suspended for a period during 2002 and early 2003, this new legislation which would narrow the scope of the copyright ordinance was introduced. BSA members are concerned that these events may have contributed to a sense of complacency within the Hong Kong business community regarding software

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legalization. All of these circumstances combined raise a question regarding Hong Kong's compliance with its international obligations.

Specific Comments on Copyright (Amendment) Bill 2003

Copyright (Amendment) Bill 2003 is expressly intended to narrow the scope of the existing law and thus would roll back copyright protection for computer software in Hong Kong. The new legislation has been proposed despite indications (described above) that the existing law passed in April 2001 is an ineffective deterrent to business end user piracy. Under the circumstances, it appears there is a need to further refine the law in a manner that will facilitate the successful investigation and prosecution of this type of piracy – rather than narrow the law as currently proposed. Set forth below are BSA's comments on specific aspects of the draft legislation.

Definition of Business End User Piracy:

The draft bill includes provisions that attempt to define the scope of end user liability in the business environment, including a definition of the phrase "for the purpose of or in the course of trade or business." BSA believes this language is unnecessary and unclear, and would only make it more difficult for prosecutors to prove the elements of the offense in a prosecution against organization end user software piracy. As noted, experience has shown that the offense is very difficult to prove even under the existing law, which is broader than the proposed redraft in Copyright (Amendment) Bill 2003.

More specifically, Section 118A(1) provides in part that a "person commits an offence if, without license of the copyright owner -- (a) *for the purpose of or in the course of any trade or business*, he possesses an infringing copy of a . . . computer program . . . and (b) he so possesses the infringing copy with a view to the copyright work being used in doing any act for the purpose of or in the course of *the* trade or business." (Emphasis added.) The draft legislation further provides in Section 196A that a reference to a person doing an act "for the purpose of or in the course of a trade or business" is a reference to:

(a) a person who is engaged in a trade or a business of any description or nature whatsoever, who does the act for the purpose of or in the course of *the trade or business in which he is engaged* (emphasis added); or

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(b) an employee of a person who is engaged in a trade or a business of any description or nature whatsoever, who does the act for the purpose of or in the course of that employment.

The proposed definition is problematic for three reasons.

- First, the phrase "for the purpose of or in the course of a trade or business" is unambiguous and need not be defined. Thus, there does not appear to be any reason for the addition of Section 196A.

- Second, it is not clear that the language would cover situations in which business owners possess infringing software for a clearly commercial purpose, but not necessarily for the purpose of or in the course of the *specific trade or business* in which the individual is engaged. For example, would the language cover a shipping company that relies upon in-house resources to redesign office space and uses infringing copies of design software to carry out the project?

- Third, and more generally, this language would unnecessarily complicate the job of the prosecutor by introducing additional hurdles in proving the offense, as well as opportunities for defendants to unjustly escape liability. One can anticipate that defense counsel would routinely attempt to create a question of fact with respect to whether a particular piece of infringing software found in the defendant's possession was intended for use in the defendant's *specific* trade or business.

BSA believes that these concerns could be easily resolved by omitting the definition contained in Section 196A and slightly revising Section 118A(1)(b) to read as follows: "he so possesses the infringing copy with a view to the copyright work being used in doing any act for the purpose of or in the course of ~~the~~ trade or business." This phrasing would be in keeping with the underlying purpose of the legislation to facilitate the effective investigation and prosecution of business end user piracy. Accordingly, we urge that this minor but important suggested change be made to draft Copyright (Amendment) Bill 2003.

Exempting Employees who Knowingly Use Pirated Software from Liability:

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The proposed bill would create a defense for an employee charged with business end user piracy if the person charged can "prove that his possession of the infringing copy . . . occurred in the course of employment and that the infringing copy was provided to him by or on behalf of his employer for use in the course of his employment." BSA opposes the creation of this new defense and for the following reasons believes the current legislative framework should be maintained:

- As an initial matter, BSA appreciates that the employee defense has been proposed in response to concerns expressed during the legislative process that the law on end user liability would be unduly harsh in relation to lower level employees. BSA respectfully submits that these views were expressed over two years ago, in the absence of any actual experience under the law. The BSA is unaware of a single case during the last two years in which these concerns have proved to have been justified.

- In addition, employees who *unknowingly* use pirated software installed on their employers' computers are already sufficiently protected because they lack the requisite knowledge or *mens rea* to face criminal liability. On the other hand, employees who *knowingly* use pirated software are parties to criminal conduct and should be held responsible – just as employees who engage in theft to support their employers are held liable.

- The proposed exemption purportedly would be unavailable to officers, directors or managers. BSA is concerned, however, that the defense as drafted might allow decision-makers in businesses to insulate themselves from liability. BSA's concern is a practical one, relating to what is likely to happen in actual prosecutions. Experience in copyright enforcement has shown that senior managers frequently attempt to distance themselves from potential liability (whether civil or criminal) by claiming to have established effective software asset management practices and delegating to others the day-to-day responsibility of acquiring and installing licensed software for the business. Whether an individual can prove lack of knowledge of infringement largely depends upon his own credibility. Assuming a manager testifies credibly regarding his lack of knowledge, the question then becomes who else in the business was in a position of sufficient responsibility to face criminal charges. This is where the proposed defense would likely create practical problems for

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prosecutors – for example, even if a suspect's knowledge were undisputed, he would likely seek to escape liability by arguing that he did not occupy a sufficiently managerial role in the business and thus should be exempt from liability under the employee defense.

Accordingly, BSA urges the removal of this defense from the legislation to avoid inadvertently complicating future criminal prosecutions.

Language Requiring Specific Profit Motive:

Draft Copyright (Amendment) Bill 2003 also includes language in various sections that would exempt from criminal liability certain acts which infringe copyright but which are not necessarily motivated by a specific or clearly identifiable "profit or financial reward" (language that very clearly implies the need for a cash transaction). As one example, under the proposed legislation an individual would be criminally liable for transporting or storing infringing copies of software programs, but only if he did so "for profit or financial reward." (*See* Section 118(1)(d).) There may be cases in which an individual acting as a middleman between criminal syndicates agrees to transport or store numerous copies of infringing works "for free" but knowing that he will ultimately receive some benefit or advantage of a non-financial nature. Additionally, today's software counterfeiters are often organized criminal syndicates that sometimes engage in serious criminal activities that may not involve a specifically identifiable financial transaction – for instance, a counterfeiter may accept as "payment" for infringing goods something other than cash that has value to the counterfeiter (e.g., counterfeiters may barter using infringing goods). The criminal law should clearly reach this type of conduct. And, notably, the existing law (which is tied to activities in the course of trade or business) does encompass such activities.

The BSA respectfully suggests that, in order to address this potential gap in the legislation, the phrase "for profit or financial reward" in Copyright (Amendment) Bill 2003 be amended as appropriate to read as follows: "for profit, ~~or~~ financial reward, or any other material advantage."

Ambiguous Language Contained in Section 118A(5):

BSA is very concerned that Section 118A(5) of Copyright (Amendment) Bill 2003 might have the unintended consequence of significantly diminishing the scope of copyright protection for computer software in Hong Kong. Specifically, section 118A(5) provides that criminal liability will not obtain in

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any organization end user piracy case involving the possession of an infringing copy of a computer program if

> the computer program incorporates the whole or any part of another work, not being a computer program itself, and is technically required for the viewing or listening to of the other work by a member of the public to whom a copy of that work is made available.

BSA understands that this section is meant to cover situations in which Internet users are required to access computer programs online in order to download and view and/or listen to other works that are not computer programs, and that the law is meant to extend both to situations in which a person wishes to access materials dynamically while online (i.e., the making of transient copies) and to situations in which the person wishes to save the material to his hard disk for later use. In this respect, the Section 118A(5) appears to represent an extension of existing Section 65, which deals with the making of transient copies online. As explained below, however, both provisions are problematic as drafted.

One might argue that proposed Section 118A(5) is not overbroad as applied to computer software because (1) it is limited to situations involving works "made available to the public" as that term is used in Section 26 of the Copyright Ordinance, and (2) to fall within the exception, the computer program must have the work incorporated within it and the computer program must be technically essential for viewing or listening to the other work. Before addressing these points specifically with respect to proposed Section 118A(5), it is important to consider related provisions of the existing Copyright Ordinance (e.g., Sections 23, 26, and 65):

- Section 23 of the Ordinance provides that "the copying of the work is an act restricted by copyright in every description of the work," and this extends to "reproducing the work in any material form . . . storing the work in any medium by electronic means . . . [or] the making of copies which are transient or are incidental to some other use of the work." *See* Section 23(1), (2) and (6). This provision merely codifies the copyright owner's exclusive right of reproduction.

- Section 26 of the Ordinance further confirms the exclusivity of the reproduction right and provides in part as follows:

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(1) The making available of copies of the work to the public is an act restricted by copyright in every description of copyright work.
(2) References in this Part to the making available of copies of a work to the public are to the making available of copies of the work, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the work from a place and at a time individually chosen by them (such as the making available of copies of works through the service commonly known as the INTERNET).

Thus, Section 26 appears designed to confirm that copyright owners are protected from the unauthorized distribution of copyright works over the Internet through the act of making them available in that context. Importantly, the provision does *not* state that the "making available of copies of the work to the public" refers only to those situations in which the work is made available by or with the authorization of the copyright owner. (One might argue that Section 26(1) addresses this by providing that the act of "making available" is within the control of the right holder, which implies that the making available is done with his or her consent. This does not fully address the concern, however, as discussed in the following section.)

- Section 65 of the Ordinance provides that "[n]othwithstanding section 23, copyright in a work is not infringed by the making of a transient and incidental copy which is technically required for the viewing or listening of the work by a member of the public to whom a copy of the work is made available." As explained in the following section, Section 65, read in combination with Section 26, appears to inadvertently eliminate or substantially reduce protection for essentially any copyright work that is available online and accessible in transient form, and thus should be either removed from the ordinance or redrafted.

Access of Transient Copies Online and Section 65 of the Ordinance

As an initial matter, BSA objects to proposed 118A(5) because it appears unnecessary. Internet users have access to free browsers to allow them to "surf" the Net, and where additional programs are necessary (e.g., applets) to view or experience a website, the website operator makes them available

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subject to an express or implied license. Thus, there is no established reason to be concerned about the use of software to view other works lawfully posted on the web. Given that there is no need for a statutory provision to cover basic web surfing, it is unclear why Section 65 is included within the Copyright Ordinance (at least in relation to computer software).

BSA also takes this opportunity to note that the wording of Section 65 is contrary to its apparent intent, and has the potential to dramatically reduce the scope of protection for any copyright work available in digital format. In particular:

- Section 65 provides that a transient copy of an otherwise protected work is not infringing provided that it (1) was made available to the public, as that phrase is understood in Section 26; and (2) is "technically required for the viewing or listening of the work."

- However, as noted Section 26 is not expressly limited to situations in which the copy is made available *by or with the permission* of the copyright owner. One might argue that Section 26(1) addresses this by providing that the act of "making available" is within the control of the right holder, which implies that the making available is done with his or her consent. However, to the extent the law creates exceptions, as has been done in existing Section 65 (and is proposed in draft Section 118A(5), discussed below), the law should also make clear that the exceptions apply only to those cases where the work has been made available with the consent of the right holder and only to the extent contemplated by the right holder. A general reference to the reproduction right, the act or even Section 26 does not make clear that the provision applies only to works made available with the consent of the right holder.

- Regrettably, members of the public today can readily access enormous quantities of infringing works online, including software programs, music files, and movies. Recent global law enforcement action against prominent warez groups vividly illustrates the massive problem this poses for the software industry and other copyright owners.

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- By operation of Sections 26 and 65, individuals could arguably make transient copies of pirated software online without fear of liability. Given the technology available today, this could easily extend to the commercial use of software (or other copyright works such as music or movies) in the business environment.

- Notably, even if it were absolutely clear that Section 65 applied only to works "made available to the public" by or with the consent of the copyright owner, the language is still overly broad and arguably would allow for end user piracy on a commercial scale. For example, imagine that a software company licensed a program to a single user and allowed the user to access a transient copy online by running the copy dynamically in his computer's random access memory (RAM). That does not mean the single licensed user would then be allowed to provide others with access – for instance, by downloading a transient copy of the program to a server and enabling multiple users to access it; arguably, however, this would be permitted under Section 65. (Similarly, Section 65 would potentially allow commercial scale piracy of other copyright works such as music, movies, or video games.)

For the reasons cited, Section 65 should be redrafted or eliminated.

Making of Permanent Copies Online and Draft Section 118A(5)

BSA understands that the intention of draft Section 118A(5), rather than to address casual web surfing, is to allow individuals to download content from the Internet and make permanent copies of those works on their computer hard drives. But BSA's concern is that the current language extends well beyond the intent of the drafters and has the potential to eliminate coverage for a huge range of computer software.

More specifically, like current Section 65, draft Section 118A(5), read in combination with existing Section 26, arguably would exempt from coverage *any* computer program which both (1) is available over the Internet, and (2) contains another work that is not a computer program itself and is technically required for the viewing of or listening to of the other work – even if the computer program and the associated work constitute infringing copies.

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Computer programs frequently contain works or parts of works that are arguably not "computer programs themselves." These can include numerous things that arise in commonly used programs, such as clip art, pictures, help files, video clips, sound clips, etc. In each of these cases the software program is "technically required for the viewing or listening to of the other work." And so, under the proposed amendment, business owners in Hong Kong would be free to permanently download a wide range of pirated software from the web without fear of criminal liability. Plainly, that cannot be what is intended.

Notably, like Section 65 (discussed above), draft Section 118A(5) would still be an inappropriate intrusion on software companies' exclusive right of reproduction even if the law were made clear that it applied only in situations in which the work is "made available to the public" by or with the permission of the copyright owner. Assuming that were the case, Section 65 would represent a more limited exception to infringement, providing the Internet user with the right to make a transient and incidental copy of a non-infringing work (say, a software program, or a movie clip and an associated software program) while viewing that work dynamically online. It would follow that downloading and making a permanent copy of that work on a computer hard drive would constitute the making of an infringing copy if done without the authorization of the copyright owner, given that Section 65 applies only to transient copies. That is appropriate because copyright owners do not automatically authorize the making of permanent copies of a work merely by making copyright materials available online. For instance, the fact that a user can listen to a song online does not entitle the user to permanently download the song, or the fact that a user can test or sample a piece of software online does not mean the user is entitled to a permanent copy of the work for whatever use he or she would like.

Indeed, there may be situations in which software companies or other copyright owners wish to provide end users with limited rights to make transient but not permanent copies of works in the online environment. For example, a software company may wish to grant users with access to a transient copy of a program to use on a trial basis, as a means of marketing the program to the user for a longer term or perpetual license.

The same problem arises with respect to the making of permanent copies. A software company might license a program to a single user and allow the user to access the program online and download a permanent copy of the program to his or her hard drive. As discussed with regard to Section 65, however, that

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would not mean the end user would then be free to provide multiple additional users with access to the same program without fear of criminal liability. But that is precisely what would arguably be permitted under draft Section 118A(5). To illustrate this point, assume a business owner purchased a single license to use a software program and the license permitted the user to download a permanent copy of the program from the Internet. Further assume that the business owner made a permanent copy of the program on a network server and then enabled every employee in the company to access and run the program in the course of business. The business owner could argue that such use would not be subject to criminal liability by operation of draft Section 118A(5).

The expanding use of the Internet as a means of marketing and delivering copyright material – not just business software but also music, movies, video games and other works – will only increase the frequency of situations like this and further highlights the need for forward-looking legislation in this area that will provide clear guidance and protect the legitimate interests of copyright owners.

Because section 118A(5), literally construed, plainly runs counter to the broader intent of section 118A (and, in any case, is unnecessary), this provision should either be deleted or substantially rewritten.

Need for Refinement of Existing Law

Experience has revealed serious obstacles to the successful criminal prosecution of business end user piracy under the existing law. As noted, the law will be a deterrent only if it can be enforced effectively, and only if it leads to convictions and meaningful sentences. In light of experience under the existing ordinance, BSA suggests that the government and LegCo consider refining the law in a manner that would facilitate prosecutions. One approach would be to amend the law to clarify the circumstances under which the failure to prove ownership of licenses can result in criminal sanctions.

BSA respectfully submits that the serious software piracy problem in Hong Kong is a sufficiently strong justification for considering legislative refinements that would facilitate successful prosecutions in a manner consistent with due process and Hong Kong's criminal justice system. Indeed, as a matter of public policy the Hong Kong government has in a number of areas created rebuttable presumptions or shifted the burden of proof to defendants in order to effectively address other persistent forms of criminality

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(*see, e.g.*, Immigration Ordinance, Section 62; Road Traffic Ordinance, Section 14; Money Lenders Ordinance, Section 7; Gambling Ordinance, Sections 5, 7, 9 and 10).

Conclusion

Taken as a whole, the lack of successful business end user prosecutions and the rolling back of copyright protection for computer software indicate that Hong Kong is moving in the wrong direction and call into question Hong Kong's compliance with its international obligations. BSA urges the government and LegCo to take steps to make the overall commitment to tackle business end user piracy meaningful. These steps include: (a) refraining from rolling back copyright protection for software through amendments to existing legislation; and (b) amending the law to clarify the circumstances under which the failure to prove ownership of licenses can result in criminal sanctions.