

Business Software Alliance Hong Kong

RESPONSE TO CONSULTATION DOCUMENT:

REVIEW OF CERTAIN PROVISIONS OF COPYRIGHT ORDINANCE

December 2001

General Comments

The Business Software Alliance Hong Kong (BSA) respectfully submits the following comments in response to the Review of Certain Provisions of Copyright Ordinance, a Consultation Document issued by the HKSAR Commerce and Industry Bureau in October 2001.

Before sharing our views on this important issue, we would like to highlight the following factors, which form the basis of our views on the Consultation Document:

1. Hong Kong has appropriately set its sights on developing itself into a knowledge-based economy that can lead the region in the use and development of information technology. Developing its software industry is central to reaching this goal, something that cannot be achieved when the software piracy rate is well above 50%, where at least one out of every two application programs in use is unauthorized. High business piracy eliminates the economic incentives developers must have to invest time, energy and resources into the creation of innovative programs, and is the single greatest barrier to the development of the software industry in Hong Kong. The criminalization of business end user piracy is of critical importance to addressing this problem.
2. This level of protection is also important to Hong Kong's consistency with international standards of protection and treaty obligations. Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, administered by the World Trade Organization (WTO), requires WTO members like Hong Kong to criminalize copyright piracy on a commercial scale, including the knowing use of software in a business environment. This international obligation reflects international standards of protection, as nearly every country in this region either criminalizes corporate end user piracy or is actively considering legislation to do so. Hong Kong has long met this standard of protection and the recent amendments were intended to clarify this point; any movement to roll back this protection would call into question whether it meets its international obligations.

3. While we recognize the importance of receiving timely dissemination of information, and the role that the Internet can play in achieving this goal, the rules for determining liability for intellectual property rights should be structured to provide at least as robust protection in the online world as is the case in the offline world. Due recognition should be given to the fact that users of the Internet are permitted to enjoy and use content on the web under express or implied licenses or under other concepts such as fair use. Exceptions or limitations on rights or liability should not be considered where these other mechanisms already address the need or concern at issue, and they should not be granted without careful review and appropriate balancing of interests.
4. Software piracy continues to be a serious concern for Hong Kong and its economic development. In fact, recent industry surveys of the availability of counterfeit works in the marketplace in Hong Kong indicate that retail sale of counterfeit products may be on the rise. As a result, there is a continuing need to provide a strong and effective enforcement to deter such piracy. The current legislative framework and its vigorous enforcement are critical in this regard.

The BSA is committed to supporting the development of the software industry in Hong Kong, which effort is closely related to Hong Kong's goal of creating a knowledge-based society. Hong Kong will achieve this goal when its software industry thrives, when small and medium sized enterprises deploy IT to enhance their competitiveness, and when the community genuinely appreciates and respects intellectual property. The Hong Kong Government has been a leader in its efforts to make intellectual property work for the entire society, and we look forward to continuing to support these efforts going forward. Rolling back copyright protection in software moves Hong Kong in the wrong direction and we therefore urge the government and Legco not to weaken the rights and protection currently provided under the law.

Chapter 1 Criminal Provisions Related to End-user Piracy

1.6(a) -- Whether criminal sanctions should apply to the possession of an infringing copy of a copyright work in "business" activities of a non-profit making nature

BSA believes that the current legislative framework should be maintained. All entities should be expected to refrain from knowing violations of the law, regardless of whether their activities might be considered to be not-for-profit or for-profit. In fact, the damage done to right holders by any entity that makes unlawful use of software is the same regardless of its profit-making status. It should follow that the penalties should be the same. In any event, attempting to

distinguish between entities in this regard would result in difficult and sometimes impossible line drawing problems, and generally lower the deterrence of the law. While the price of software is not the determinative factor in piracy decisions and no justification for illegal activity, it should be recognized that software companies usually grant certain types of non-profit groups and related individuals (e.g., schools and students) significantly discounted rates.

1.6(b) -- Whether employees in possession of an infringing copy supplied by the employer for use in business should be criminally liable

BSA believes that the current legislative framework should be maintained. Knowledge is effectively an element for criminal liability for software piracy under Hong Kong law. Employees who knowingly use pirated software are parties to this criminal conduct and should be held responsible, just as employees who engage in theft to support their employers are held liable. Sales persons working in the retail sale of counterfeit software could be held criminally liable for their actions, and so should employees of companies who knowingly use illegal software. Removing this potential liability would greatly reduce the deterrent effect of the law, making it far more difficult to identify and stop this damaging activity. BSA respectfully disagrees with those who might argue that the current economic times should exculpate employees who engage in the knowing piracy of software. Difficult economic circumstances are no justification for the theft of property, and any movement in that direction would open the door to an abuse of this flexibility and a general weakening of the law.

1.6 (c) -- Whether the end-user criminal provisions should apply only to copyright works afflicted by rampant piracy.

Software is subject to rampant piracy. However, applying the “rampant piracy” standard would be unworkable in practice. Would the standard, for example, apply to all software or to individual software titles? What might be considered “rampant” for one type of work may not be for another, making line drawing difficult if not impossible.

1.6(d) -- Whether certain acts of an end-user, which infringe copyright but which do not give the end-user any commercial advantage or private gain, should be exempt from criminal liability.

BSA believes that the law should not be modified in this respect. This issue is similar to that in 1.6(a), except that 1.6(a) regards the status of the infringer and this issue focuses on the benefit to the infringer. Many of the objections to the 1.6(a) are therefore applicable here. Two objections should be highlighted. First, basing criminal liability on the level of commercial advantage or private gain would create difficult, and in some cases impossible, line drawing problems. Second, even if no line drawing problems were present, focusing criminal liability

on the gains to the wrong doer ignores the tremendous losses right holders face because of infringement. As long as the infringement meets the current elements of criminality, it should be punished. Allowing an infringer to escape liability (regardless of the losses caused) merely because he or she engaged in the illegal conduct for the thrill of it or for some other non-monetary reason would make a mockery of the rule.

1.6(e) -- Whether the expression “or the purpose of, in the course of, or in connection with, any trade or business” introduced by the Amending Ordinance has cast the criminal net too wide.

BSA suggests that the term “in connection with” remain in the law since this would ensure that all infringement related to the operation of a business fall within the scope of the provision.

Chapter 2 – Permitted Acts for Educational Purposes

BSA believes that the issues raised should be resolved through discussion and agreement between the relevant copyright-holders and educational communities. Should those discussions prove unworkable, legislative solutions may be appropriate. As a general matter, BSA believes that licensing schemes should be used when they are available.

Chapter 3 – Permitted Acts for Visually Impaired Persons

BSA has no comments on this issue.

Chapter 4 – Permitted Acts Related to Free Public Showing or Playing of Broadcast or Cable Programmes

BSA has no comments on this issue.

Chapter 5 – Parallel Importation of Copyright works other than Computer Software

BSA notes that a reference is made to eliminating all restrictions on the parallel importation of computer software. While BSA is neutral to this proposal, it urges the government to address a number of issues in the context of this effort:

- First, removing protection for parallel imports may have the unintended effect of increasing the trade in counterfeit copies of software products. There have been well known instances of people purchasing parallel imported products only to find out that they were clever copies of original goods. Should this change in the law be made, we ask that the government be even more diligent in stopping the trade in counterfeit copies of software products.

- The parties most affected by this change will be Hong Kong distributors of legal software. In some cases, they expend considerable funds marketing the software products they sell and possibly even providing after sales support and service. The price of the software they sell may reflect the costs of doing this activity. Allowing people to parallel import software could result in a situation where the importers are free riding on their marketing and after sales support and service, undercutting their business in an unfair way. We applaud the government's effort to reach out to distributors to determine the real effect of this change in the law on their interests and suggest that this effort continue.
- Consumers should be aware that parallel imported software may not receive technical support from the local technical support team. Consumers should be given the information necessary to help them identify parallel imported software.
- BSA understands that its members generally apply universal pricing for individual products to distributors around the world, and that differences in the price of a particular product from market to market are for the most part due to the differences in the cost of doing business in different markets (e.g., advertising, distribution, storage) and differences in margins for resellers and distributors from market to market. One should not assume, therefore, that allowing parallel importation of software will have a significant affect on the price of software to consumers.
- BSA members do not support price gouging in the marketplace. Should any consumer feel that they are being offered an unfair price, they are urged to contact the BSA member involved, which can give them the names of reputable dealers.

Putting software aside, BSA recognizes that the other content based industries do have legitimate concerns with respect to the removal of parallel import protection for their products.

Chapter 6 – Unauthorised reception of Subscription television programmes

BSA has no comments on this issue.

Chapter 7 – Licensing Bodies

7.13 (b) – Whether licensing bodies should be mandated to be registered and to publish their scales of royalty charges

BSA urges clarification of what constitutes a “licensing body” under the law. In any event this term should not include an affiliate or a subsidiary of a right holder

empowered to carry out or facilitate the licensing of the rights of the right holder.
BSA does not support the mandatory registration of licensing societies.

Conclusion

BSA is grateful for the opportunity to provide these comments.