



SUBMISSIONS ON THE HONG KONG GOVERNMENT'S REFINED PROPOSALS TO STRENGTHEN COPYRIGHT PROTECTION IN THE DIGITAL ENVIRONMENT

Introduction

The Business Software Alliance ("BSA") welcomes this opportunity to comment on the Administration's refined proposals ("Refined Proposals") for strengthening Hong Kong's copyright protection in the digital environment.

About BSA

The Business Software Alliance (www.bsa.org) is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce. BSA members include Adobe, Agilent Technologies, Altium, Apple, Aquafold, Autodesk, AVG, Bentley Systems, CA, Cadence, Cisco Systems, CNC Software/Mastercam, Corel, CyberLink, Dassault Systèmes SolidWorks Corporation, Dell, Embarcadero, Frontline PCB Solutions - An Orbotech Valor Company, HP, IBM, Intel, Intuit, McAfee, Microsoft, Minitab, PTC, Quark, Quest Software, Rosetta Stone, SAP, Siemens, Sybase, Symantec, Synopsys, and The MathWorks.

General View

In 1996, in direct response to the growing threat of Internet piracy, the World Intellectual Property Organization (WIPO) adopted new copyright treaties to enable better enforcement against digital and online piracy. More than 1.2 billion people around the globe now have Internet access — increasing the power and potential of software but also opening new doors for pirates to distribute their wares. In order to ensure protection of copyrighted works in the digital age, countries need to update national copyright laws to implement their WIPO obligations. Among other things, these measures are required to ensure that protected works are not made available online without the author's permission, and that access and copy protection tools are not hacked or circumvented.

BSA welcomes the Administration's continuing commitment to the review of Hong Kong's legislative protection of copyright works in a digital environment. However, the BSA notes that the Administration's consultation process will, by the time that the proposed amendments are presented to the Legislative Council in the second half of 2010, have taken well over 3 years to produce legislative amendments. BSA understands that this is a significant and complex policy area, however BSA is



concerned with the length of this process, since the failure to implement timely legislative responses to the challenges created by a dynamic and constantly-evolving online environment will inevitably result in continued growth in digital piracy.

In 2008, the worldwide PC software piracy rate went up from 38 percent in 2007 to 41 percent in 2008. The monetary value of “losses” to the software industry from PC software piracy broke the US\$50 billion level for the first time. Increased Internet access, particularly high-speed “broadband” access, will increase the supply of pirated software. In 2008, according to IDC, the number of Internet users worldwide grew by 135 million, with almost 100 million of them in emerging markets. One company, CacheLogic, of the U.K., has measured Internet traffic for tier 1 ISPs, and found that more than 60% of Internet traffic is from P2P protocols, meaning that there is already immense traffic in pirated music, videos, TV shows, and software.

Over the next five years, another 460 million people in emerging countries will come online. Of the 150 million new broadband households expected to come online, more than half will be in emerging markets. The increase in broadband speeds will mean even more bandwidth will become available to online pirates.

The increased distribution of pirated software is not only a piracy problem, it is also a serious threat to computer security and privacy on the Internet. In a 2006 study, IDC found that 29 percent of Web sites and 61 percent of peer-to-peer sites offering pirated software tried to infect test computers with “Trojans,” spyware, keyloggers, and other tools of identity theft.

On-line piracy presents a serious and immediate threat to software developers as well as other copyright based industries. Too many individuals now treat illicit acquisition of copyrighted works on-line as a routine matter, ignoring the fact that they are engaging in illegal acts. But it is important not to lose track of the fact that the vast majority of individuals and businesses use software, computers and the Internet for a myriad of legal and legitimate personal and business reasons.

With changing distribution models, trends in computing (such as “cloud computing”), and evolving technology, it is important that national laws can effectively combat copyright infringement in the digital environment, while balancing the need to shield OSPs from inappropriate liability and the need not to interfere with the legitimate enjoyment and use of the Internet.

Due care must be taken to ensure that any policies or proposed solutions to address on-line content piracy meet the following 2 objectives:

- to effectively deter illicit downloading, uploading, making available and use of content; and

- to ensure existing technologies function as designed, that innovation and the development of new technologies and services are not obstructed, and that user's enjoyment of software, computers and the Internet is not diminished.

To achieve such a balance, BSA advocates the following principles:

1. some anti-piracy content identification and filtering technologies may play a useful role in deterring piracy in some limited cases, but they are not a "silver bullet" solution to piracy. Mandated use of any such technologies is not justified. Rather, addressing piracy effectively requires ongoing voluntary inter-industry efforts.
2. in appropriate circumstances, BSA supports:
 - automated educational notification mechanisms for alleged online infringers and a requirement for ISPs to preserve evidence of repeated infringements such as a user's IP address to enable anti-piracy court proceedings and administrative anti-piracy procedures or appropriate enforcement actions, subject to appropriate safeguards, including those governing privacy;
 - the imposition of appropriate sanctions, including blocking a user or a site and the suspension or termination of Internet service for individual repeat offenders provided that such sanctions are based on either a breach of contract (ie the terms of subscriber's contract with the service provider) or through a decision by an administrative or judicial entity where all parties will be given an opportunity to be heard and present evidence and that all decisions can be appealed before an impartial court.

Summary of Response to Refined Proposals

In summary,

- (i) BSA supports the implementation of criminal sanction against those who initiate unauthorised communication of copyright works but any proposed exceptions to facilitate the reasonable use of copyright works should be carefully considered, based on demonstrated need and only be introduced after full consultation with stakeholders.
- (ii) BSA welcomes a legislated limitation of liability scheme that is underpinned by a voluntary Code of Practice for OSPs in combating online infringements. This model affords certainty to OSPs, and flexibility to cater for new technologies and learnings following implementation. However, BSA remains

of the view that a “graduated response” system is critical to addressing the problem of online piracy, especially for P2P infringement. This is particularly important given the Administration’s decision to restrict criminal liability to “initiators” of unauthorised “communications”. This restriction means that there will be no criminal liability in relation to the downloading/browsing of infringing materials via electronic transmission, and will also make the new criminal offence difficult to apply in the P2P context - where the identity of the “initiator” is difficult to ascertain, and where each user is likely to be both uploading and downloading.

- (iii) BSA remains opposed to the introduction of exception for temporary reproduction of copyright works by OSPs for the reasons set out in our 2008 submission. However, if the Administration wishes to enact legislation on this point, then BSA reiterates the position set out in our earlier submission that the appropriate way to do so would be to enact a limitation of liability provision similar to s 512(b) of Title 17 of the United States Code. We do not express a view on the proposed media shifting exception for sound recordings, although we remain firmly opposed to the introduction of any media or format shifting exception that applies to computer programs.
- (iv) BSA also reiterates its position that, given the difficulties in dealing with online piracy and P2P infringement activities, the enactment of statutory damages would be an effective mechanism to deter Internet users from further infringements.

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The Refined Proposals

(a) Recognising copyright owners' right to communicate their works through any mode of electronic transmission, with criminal sanctions against infringement.

BSA supports the Administration's Refined Proposals to introduce a technology-neutral right of communication to the public that covers all modes of electronic transmission for copyright works.

We also welcome the Administration's proposed criminal sanction to be made available against those who initiate unauthorized communication of copyright works to the public:

- in the course of business conducted for profit; or
- where it is made to such an extent as to affect prejudicially the copyright owners.

However, any exceptions to facilitate the use of copyright works must be reasonable, not broad nor vague, be clearly demonstrated as necessary in Hong Kong, and should only be implemented after full consultation with stakeholders.

(b) Introducing a statutory limitation of liability regime for OSPs in dealing with online piracy

BSA welcomes the Administration's introduction of a statutory regime which gives OSPs the assurance that compliance with certain conditions prescribed in a Code of Practice would qualify them for limitation of liability for copyright infringement. However, it is important that the drafting of the law and Code must progress in parallel and any implementation of a safe harbor must be contingent upon stakeholders agreeing to the Code within a clearly defined timeframe.

The Australian experience with its safe harbour provisions highlights the practical importance of having a Code of Practice in place at the same time as the enactment of the safe harbour. When the Australian Copyright Act was amended to provide a safe harbour for OSPs, the legislation provided that the safe harbour applied only if an OSP adopted and reasonably implemented a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers and complied with a Code of Practice if there was a relevant industry code in force. As no Code of Practice has been agreed in Australia to date, there has been significant uncertainty for copyright owners and OSPs alike and led to ongoing litigation between OSPs and rights holders (for example, the AFACT v iiNet case currently being heard in the

Federal Court of Australia) over what adoption and implementation of policy means and what circumstances are appropriate to terminate the accounts of repeat infringers.

Statutory limitation of liability regime

Implementation of the proposed “safe harbor” for OSPs should be contingent on a Code – that contains certain minimum criteria and is endorsed by the Administration - being in place. A Code that does not contain such minimum criteria ought not be endorsed by the Administration.

BSA considers that the best way to facilitate full and productive cooperation between OSPs, copyright owners and copyright users is to:

- codify in the Copyright Ordinance the factors relevant to a court’s determination of whether a person has authorised copyright infringement; and
- enact a limitation of liability scheme similar to that contained in the US Digital Millennium Copyright Act (“DMCA”).

In this respect, any package of legislative reform should include the following criteria:

1. OSPs should be held responsible for acts of infringement occurring over their networks if they have actual knowledge of these acts, or where they are aware of facts or circumstances from which the infringing activity is apparent, and do not take steps to prevent or stop the infringement.
2. Any limitation on the liability of OSPs for online infringement should apply to monetary relief only; injunctive relief should always remain available to copyright owners.
3. There should be a mechanism for dealing with acts of infringement where the content does not reside on the OSP’s servers, including infringement over P2P networks, in which case a graduated response procedure for dealing with repeat infringement will be more appropriate (please see our discussion in the next section). Under this mechanism subscribers must be afforded a reasonable opportunity to challenge allegations of infringement. Before sanctions are imposed, subscribers must have an opportunity to appeal the decision to an impartial court. Sanctions, such as termination of Internet service, should be stayed until the court has decided the appeal.
4. OSPs must act expeditiously once they receive notices of infringements. Time is of the essence when we are dealing with online infringement.

5. OSPs must be required to preserve relevant information for a reasonable and sufficient period of time necessary to implement a graduated response for responding to repeat infringement. Such information should include information relating to rightholder notices of infringement and any subsequent action (such as the transmission of notices or warnings to subscribers) taken by the OSP, and information sufficient to identify the subscribers responsible for the relevant accounts. However, due consideration must be given to Hong Kong's Personal Data (Privacy) Ordinance.

Code of Practice - "Notice and Takedown" and "Graduated Response"

It is important that the proposed Code of Practice reflects and supports the legislative changes to be made to the Copyright Ordinance and has the flexibility to respond to the ever-changing mode of online piracy.

For infringing content hosted on their own servers, OSPs should implement an effective 'notice and takedown' procedure which enables the OSPs to act expeditiously upon receiving notice of infringement, or upon becoming aware of facts or circumstances from which infringement is apparent.

Procedural requirements relating to rightholder notices should not be burdensome and should be limited to the minimum necessary to allow for a quick and efficient takedown. Any removed content should not be reinstated unless a subscriber can provide sufficient information to identify himself and declare that the content was removed as a result of mistake or misidentification and that he is willing to litigate the issue in court.

Where "notice and takedown" is not an appropriate procedure, such as where content is being "streamed" live or where infringing content does not reside on the OSP's servers including infringement over P2P networks (as in such cases there is no content to "take down"), BSA's view is that OSPs should be required to implement a graduated response procedure that includes warnings and both interim and ultimate deterrent sanctions, with appropriate safeguards for privacy and due process.

The Administration has expressed the view that the "graduated response" system is clouded by debates over its implications on civil rights and liberties even in jurisdictions where legislation introducing the system has been passed and hence decided that it is not an opportune time to consider introducing such a system in Hong Kong.

Although it is true that there has been significant negative public and new media response to "three strikes" around the world, it is important to keep such debates in context. For example, the countries in which there is true heightened public opposition, particularly Sweden (with a large youth population that has substantially

supported illegal filesharing and is home to various P2P technologies) and Germany (where historically, privacy issues dominated such debates), are not typical of worldwide practice or sentiment on this issue.

It is often the case that criticism of graduated response systems is not directed at the system itself, but rather at the procedural measures by which such a system is implemented – such as the lack of due process, which are “rectifiable” issues.

BSA notes that a graduated response system would be an effective educational tool in addition to its enforcement function. In particular, graduated response can be used to educate consumers who are using illicit means to obtain copyrighted materials which could in economic damage to economies that are increasingly based on the value of intellectual property, and can help redirect them to legitimate routes. Experience has shown that consumers respond positively to such messages - particularly where they have the expectation that repeat offenses will result in concrete detriments being imposed.

As far as we are aware, 15 countries (including Singapore) are considering graduated response and France, South Korea and Taiwan have enacted or are in the process of enacting a graduated response system. In contrast to the controversy in France, for example, in South Korea the 3-strikes law was enacted along with a more controversial defamation law which drew more public criticism (the concerns with both laws were more about censorship than copyright). In Taiwan, as in South Korea, the law was enacted among other laws and appears to be drawing little public reaction. Even in Sweden, which as we have noted above should not be regarded as typical in this area, although the government has rejected “three strikes”, it has established a judicial process (the IPRED law) for rights holders to get user information from OSPs to pursue copyright enforcement.

BSA is strongly of the view that a modified “graduated response” system can be tailored for use in Hong Kong in such a way that there is an appropriate balance between deterring repeat infringement on the Internet and respecting the civil “rights” of Internet users.

In BSA’s view, the following modified mechanism is a suitable “graduated response” system which should included in any package of legislative reform:

1. OSPs would accept notices from content holders or their agents for P2P and other identified infringements by the OSP’s subscribers.
2. OSPs would then notify their subscribers of such notices (by forwarding such notices or otherwise providing the subscriber with the details of such notice).
3. Subscribers will be afforded a reasonable opportunity to challenge allegations of infringement.

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4. In the event of repeat infringement, the warnings and manner in which the notices are delivered will be escalated. For example, the first notice might be sent to the email account(s) of record, and subsequent notices might also be sent via a redirect screen to educational information, certified mail, auto-voice dialer, live telephone, notice with the monthly bill, a redirect screen that requires user action before permitting access to the Internet.
5. In any event, the notices and contractual responses should be designed in a manner to educate the subscriber about the dangers of the alleged conduct, identify for the subscriber the consequences of continuing such behavior, inform the subscriber of ways to avoid such behavior (including how to consume content legally), and deter the subscriber from continuing to engage in infringing conduct.
6. The responses should ultimately include measures such as reduction in bandwidth, suspension or termination in accordance with the OSP's terms of service. The subscriber shall be entitled to implement a review process to determine whether the response is in error in accordance with the OSP's terms of service. To be clear, BSA opposes the termination of OSP services or any other sanctions or penalties imposed on alleged infringers without due process and, at a minimum, a right of appeal to a judicial authority, except when such penalties are imposed as a result of a breach of contract with the service provider.

To facilitate the implementation of this "graduated response" procedure, OSPs should adopt and implement terms of service sufficient to implement the above process and comply with their obligations under the law. These terms should be clearly communicated to subscribers and expressly prohibit the use of the service for copyright infringement. Under the terms of service, OSPs should also be entitled to collect and disclose subscriber information sufficient to allow the initiation of legal actions by rightholders, but subject to appropriate safeguards such as those governing privacy. Contractual mechanisms are a helpful and efficient way of dealing with online piracy.

(c) Prescribing additional factors for considering the award of additional damages

In its Refined Proposals, the Administration recommended prescribing, in the Copyright Ordinance, additional factors that would assist the Court in awarding additional damages, particularly in online infringement cases. BSA would welcome the opportunity to further discuss with the Administration the specific factors that ought to be introduced, taking into account the difficulties copyright owners may



encounter in proving the actual loss sustained in infringement cases occurring in the digital environment.

In rejecting the introduction of statutory damages, the Administration commented that the copyright owners have failed to come up with solutions that could help overcome the difficulty in specifying a range (or ranges) of statutory damages that could do justice over a wide spectrum of infringements.

BSA would like to draw the Administration's attention to its last submission in 2008 which sets out various examples of how other jurisdictions that have enacted statutory damages provisions in their copyright law determine the range of statutory damages. For example, the United States and Canada have been incorporating a state of mind requirement into the statutory damages computation and this assists greatly with ensuring that statutory damages reflect the culpability of the infringer. In the United States, the basic range of statutory damages is USD\$750 to USD\$30,000 per work, but in the case of innocent infringers, the minimum award is reduced to USD\$200 per work and in the case of wilful infringers, the maximum award is increased to USD\$150,000 per work.¹ BSA submits that this approach has proven to be effective in practice and ought to allay the Administration's stated concern on this issue.

BSA therefore urges the Administration to reconsider the introduction of a statutory damages regime in Hong Kong's Copyright Ordinance.

Further consultation

Finally, BSA thanks the Administration for its consideration of this submission, and welcomes the opportunity to further discuss the points we have raised.

Business Software Alliance (Hong Kong)
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¹ See section 504(c) of Title 17 of the United States Code.