Comments by the Business Software Alliance on
Copyright (Amendment) Bill 2001 Concerning the
Proposal to Liberalize Parallel Importation of Computer Software
(26 August 2002)

The Business Software Alliance (BSA) respectfully submits the following comments on Copyright (Amendment) Bill 2001, which proposes to remove civil and criminal liabilities related to parallel importation of and subsequent dealings in computer software under the Copyright Ordinance (Cap. 528).

At an earlier stage of the drafting process the BSA, which represents the leading software companies in Hong Kong and around the world, provided comments to the Hong Kong Government on both: (1) the general concept of removing parallel importation protection for software and (2) specific aspects of the Bill, in particular, Section 118A. We wish to reiterate and amplify those comments here. In addition, and as indicated in the attached reply slip, we also request an opportunity to make a presentation on this issue to the Bills Committee at its meeting on Monday, 16 September 2002.

General Comments on the Removal of Parallel Importation Protection for Software

We understand that Copyright (Amendment) Bill 2001 is based in part on the view that permitting the parallel importation of software products would increase competition and the availability of such products in the market, resulting in lower prices and greater choice for consumers. We have stated in prior communications with the Hong Kong Government that the BSA is generally neutral with respect to this issue. We have noted, however, that for the following reasons doing away with such protections would not necessarily result in decreased prices and, moreover, might have the unintended consequence of increasing the availability of counterfeit or otherwise infringing products:

First, the 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.

Second, BSA members do not support price gouging in the marketplace. Should consumers feel that they are being offered an unfair price, they are urged to contact the appropriate BSA member, who can provide names of reputable dealers.

Third, the parties most affected by this change will be Hong Kong distributors of software. In some cases, these local vendors expend considerable funds marketing the software products they sell and sometimes even providing after sales support and services. The price of the software they sell may reflect the costs of conducting this activity. Thus,

allowing the parallel importation of software could result in importers "free riding" on the marketing and after sales support and service of local Hong Kong distributors, unfairly undercutting the distributors' business.

Fourth, removing protection for parallel imports may have the unintended effect of increasing the trade in counterfeit or otherwise infringing 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, or stolen goods. This problem is not limited to software, but should be considered by the Legislative Council in making this decision. Should this change in the law be made, BSA asks that the government be even more diligent in stopping the trade in counterfeit copies of software products, and ensuring that consumers are fully informed about the differences between parallel imports and software put on the Hong Kong market with the consent of the right holder.

Specific Comments on Section 118A:

In addition to these general comments on the concept of removing parallel importation protection for computer software, the BSA has specific concerns regarding the wording of Section 118A of the proposed Bill. This clause appears designed to prevent a situation in which parallel importation protection is removed from the law with respect to software, but criminal liability still attaches because software licenses specifically prohibit the use of parallel imported software in Hong Kong. While we understand the intent of Section 118A, for two reasons we suggest the provision should be removed from the Bill: First, as written Section 118A is over-inclusive and, when considered in relation to other provisions of the Copyright Ordinance (discussed below), has the potential to dramatically diminish the protection of software in Hong Kong. Second, the provision does not appear to meet its intended objective.

The provision is over-inclusive because it could be interpreted to void all use limitations in software licenses as they apply in Hong Kong. Software licenses by their very nature include limitations on use, including limitations and conditions related to term, the machine a piece of software can be used on, copying, reverse engineering, record keeping, maintenance, distribution, etc. There are valid commercial reasons for all these limitations. Limitations on copying and the machine software can be used on, for example, allow software developers to tailor license agreements to specific customer segments within Hong Kong and other markets, thereby mapping to the individual needs of particular users at the most attractive price.

Section 118A, however, effectively voids for the purpose of criminal enforcement *any* term that "[has] the effect of restricting or prohibiting the use of the program in Hong Kong" and, notwithstanding such restriction or prohibition, deems the user to have a "*contractual right* to use the program in Hong Kong for the purposes of section 60(2) [of the Copyright Ordinance]." (Emphasis added.) Notably, under section 60(2) anyone with a "contractual right" to use the computer program is considered a "lawful user" of the program for purposes of both section 60 and section 61 of the Copyright Ordinance.

While section 60 deals only with making back-up copies, section 61 provides that any "lawful user" of a copy of a computer program "may copy or adapt the program without infringing the copyright in the program if the copying or adapting is necessary for his lawful use." Section 118A was drafted to ensure that the removal of parallel import protection from the law could not be circumvented through territorial restrictions in license agreements, but its wording arguably goes beyond this function. Section 118A might have the unintended consequence of decriminalizing acts that would classically be considered actionable criminal offenses. For instance, a license agreement that prohibits multiple desktops from accessing a piece of software on a server could be considered a restriction or prohibition on the use of the software in Hong Kong and thus voided under section 118A; a company that violated the license agreement by allowing hundreds of unauthorized uses in the corporate environment might therefore escape criminal sanction. This result would both be at odds with the objective of criminalizing unauthorized use of software in the corporate environment and an unintended extension of the effect of section 118A beyond parallel imports.[1] Therefore, as a technical matter, the provision could go far beyond the intent of the drafters and eliminate significant portions of criminal copyright protection for software, in which case there would be a dramatic reduction in the level of protection for software in Hong Kong.

The draft provision also arguably fails to meet its stated objective as written. Its operation is triggered by "a person [having] a contractual right to use a computer program." It is unclear what this means or how this provision would operate in practice. Consider, for example, a situation involving a software license agreement that expressly denies the end user any rights if the program is taken outside its intended market, for example by stating that the license has no effect if the product is opened and first used outside the intended market. Where an end user purchases parallel imported software outside the intended market for that product, under principles of contract law the end user would not have had a "contractual right" to use the software in the first instance. Thus, one could imagine a contractual provision that would have the effect of avoiding the trigger of Section 118A and the intent of the drafters.

In summary, Section 118A as written could significantly undercut the level of protection for software in Hong Kong. Even if it would not have such a dramatic negative effect on the protection of software, we question whether it would effectively meet the intent of the drafters. We therefore respectfully suggest that for technical reasons it be removed from the Bill.

Thank you for the opportunity to provide our views on this important issue.

[1] One might argue in response to this concern that using a single program on multiple computers would not be "necessary for [the user's] lawful use" for purposes of section 61(1), and thus would remain illegal under section 118A as currently drafted. However, the interaction between proposed section 118A and sections 60 and 61 of the Copyright Ordinance seems at least to create an ambiguity regarding the proper interpretation of the phrase "lawful use" as it appears in section 61(1).