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Business Software Alliance

Response to 7 January 2004 Letter from CITB on Proposed Revisions to Copyright (Amendment) Bill 2003
12 February 2004

1. Introduction

1.1 Thank you for your letter of 7 January 2004 inviting the Business Software Alliance (BSA) to comment on certain proposed amendments to the Copyright (Amendment) Bill 2003 ("Bill"), namely new sections 118, 118A and 118C.

1.2 In addition to responding on the proposed amended sections, we will provide supplementary comments to our submission of 20 June 2003 in response to your paper dated 26 January 2004 that sets out the Administration's response to views and concerns previously raised by interested groups (CB(1)191/03-04(1)).

1.3 Before commenting specifically on the proposed text, however, we wish to express a general concern that the Administration has not in this proposed revision addressed the most significant and substantive issues that we raised in prior communications and in our 20 June 2003 submission to the Legislative Council. BSA's fundamental concern, as expressed previously and addressed more fully below, is that the existing law relating to business end user piracy is arguably too narrow and therefore ineffective in practice. As a consequence, little progress has been made in addressing this damaging form of piracy since the April 2001 amendments went into effect. BSA believes that the Bill, which is expressly intended to narrow the current law, would exacerbate this situation and represent a step backward for Hong Kong – absent further amendments designed to facilitate the effective investigation and prosecution of these cases. We have included in our comments below various formulations of proposed language that BSA believes would address the shortcomings of the current law in a manner consistent with the strong tradition of due process inherent in Hong Kong's criminal justice system. We urge the Administration and LegCo to consider these suggested revisions, with a view toward achieving the government's stated goal of creating a meaningful deterrent to business end user piracy as required by international obligations.

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2. Revised section 118 generally

2.1 It is our concern that section 118 has been revised in such a way that it is now confusing, redundant in parts, and potentially more narrow than the previous draft in ways not intended.

2.2 In particular, certain subsections under new section 118 now incorporate both the term "for the purpose of or in the course of any trade or business" as well as the term "for profit or reward" (*e.g.* new sections 118(1)(e), 118(1)(f), 118(2)(a), 118(2)(b) and 118(2)(c)). We do not see the need for both terms to be used. If the legislative intention is simply to require a "profit or reward" motivation for criminal liability to arise for certain activities, then it is both ambiguous and confusing to add terminology necessitating an additional requirement that the activity be carried out "for the purpose of or in the course of any trade or business". The use of both terms confuses the legal elements of the offence and potentially creates an additional legal requirement that was not intended.

2.3 Further, as the notion of "profit or reward" appears elsewhere in the Bill and Ordinance, the proposed revisions to section 118 are likely to have broader implications. For example, proposed amendments to section 198(1) include a new definition of "business" that includes "business conducted otherwise than for profit" – thus if the "profit or reward" language is concurrently used, this will result in ambiguity in the law and potential inconsistency in its application. Importantly, this lack of clarity would likely impede the effective prosecution of actual cases.

2.4 We therefore ask that where both terms ("for the purpose of or in the course of any trade or business" and "for profit or reward") appear in revised section 118, one of those terms be removed throughout, and corresponding amendments be made to other affected sections in the Bill.

3. Definition of Business End User Piracy

3.1 Our concern with previously proposed section 118A(1) was that, when read together with the definition of "for the purpose of or in the course of trade or business" in section 196A, it would make prosecutions more difficult, as it would have allowed defendants the ability to argue that unlicensed software found at their premises was not needed or used for the *specific* trade or business in which they were engaged.

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3.2 New section 118A(1) adequately addresses this concern, by specifying that if a person possesses an infringing copy of any one of the four categories of covered works with a view to its being used in doing any act for the purpose of or in the course of *any* trade or business, he should be held liable. We appreciate the Administration's proposed amendment.

3.3 However, in our earlier submission, we also noted that the definition of business end user piracy in section 196A was problematic and unnecessary and therefore should be removed from the Bill. Given the amendments currently proposed by the Administration to section 118A(1), it is further apparent that, if retained, section 196A will cause real ambiguity in every instance where the phrase "for the purpose of or in the course of trade or business" appears. We therefore reiterate that section 196A should be deleted in its entirety.

4 Proving Infringement in Business End User Piracy Cases

4.1 As stated in our earlier submission, since the enactment of legislation on criminal end-user liability in April 2001, there have been only a handful of criminal end user piracy cases that have actually proceeded to trial and every contested case has ended in acquittal. The last business end user piracy case that even proceeded to trial was over one year ago, and BSA members are not aware of any cases that are scheduled for trial in the near future. It is apparent that the lack of progress with business end user piracy investigations and prosecutions is in no small measure due to the challenges associated with applying the law in its current form.

4.2 BSA believes that the law in relation to business end user piracy can and should be refined in such a manner to facilitate prosecutions in this area. Given the government's priority to build a knowledge-based economy, including by strengthening IPR protection and reducing the piracy rate, these refinements should be incorporated into the Bill. This could be accomplished in a number of ways, taking into account the importance of the licensing relationship between software companies and end users. With this objective, we have prepared two separate legislative proposals, and we urge the Administration to consider incorporating either one or the other of the proposals into the existing Bill. These provisions are set out in Annex A hereto.

4.3 Broadly speaking, the proposed language in Annex A would clarify the circumstances under which the failure to demonstrate ownership of

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licenses could support an inference of infringement. As noted in our earlier submission, the Government has in a number of areas adopted this approach in order to more effectively address other persistent forms of criminality (*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) and is proposing this approach in some aspects of the Bill (*e.g.*, proposed new section 118(4) and 118(6)).

4.4 More specifically:

i. As one approach, it would assist interpretation if the phrase "*infringing copy of a copyright work that is a computer program*" (as used in revised section 118A) were defined, particularly given the unique technical and evidentiary issues associated with end user software piracy cases, and have suggested a possible definition (*see* **Annex A, Option 1**).

ii. As an alternative approach, BSA believes it would also be appropriate to amend the law to include provisions requiring businesses to retain records relating to their software assets for a reasonable time period. We note that existing laws already require businesses to keep certain records – for example, as a matter of corporate governance, companies are required to keep proper books of account with respect to all sums of money received and expended, all sales and purchases of goods by the company, and all assets and liabilities of the company for a period of 7 years (Companies Ordinance, Section 121). Similarly, persons conducting a trade or business are required to keep books of account recording, among other things, receipts and payments for a period of 7 years (Inland Revenue Ordinance, Section 51C).[1] Software asset management is another form of responsible corporate governance – as the government has appropriately emphasized in IPR awareness campaigns. Under these circumstances, we believe that a provision requiring businesses to retain records of software assets would be consistent with existing record retention obligations and not unduly burdensome. Any such requirement would need to be accompanied by a provision specifying factors that could be taken as indicia of infringement.

[1] There is also legislation requiring businesses to conduct workplace risk assessments and to maintain records of those assessments (*see* Occupational Safety and Health (Display Screen Equipment) Regulation, Section 4).

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We have proposed language along these lines **Annex A, Option 2**. Significantly, similar language is already present elsewhere in the Copyright Ordinance (*e.g.* section 36, section 118(6), section 116, section 108), and thus it appears this change could be introduced in a manner consistent with Hong Kong's strong tradition of due process in criminal proceedings.

4.5 Any new copyright legislation should take into account the practical challenges associated with end user enforcement, particularly the challenges experienced by Customs & Excise and the Department of Justice, and be designed to facilitate, rather than to hinder, the protection of IPR. We therefore strongly urge the Administration and Legislative Council to seriously consider introducing into the Bill language such as that proposed in either Option 1, or alternatively Option 2, in Annex A.

5. Exempting Employees who Knowingly Use Pirated Software from Liability:

5.1 A related issue concerns the proposed introduction of an employee defence (section 118A(4)) into the law.

5.2 As stated in our earlier submission, we fully appreciate the policy objective behind the introduction of this defence. However, as drafted, the defence will allow decision-makers in businesses increased opportunity to insulate themselves from liability – for example, businesses could be structured in a way that would allow senior members of the organisation to deliberately distance themselves from the IT operations of the business, or to argue that they did not occupy a sufficiently managerial role in the business and thus should be exempt from liability under the employee defence. Further, if such an exemption were provided, employees would have no motivation to object to using infringing copies of copyright works in a business environment.

5.3 Importantly, this is not just a theoretical concern but a reflection of experience in actual cases in Hong Kong. As noted, the government faces real obstacles in the prosecution of businesses for the use of unlicensed software, and the managers of those businesses. The result is that fewer cases are being pursued by justice and enforcement officials, resulting in a law with little or no deterrent impact. Indeed, BSA members understand that decisions have been made not to proceed with prosecutions in a number of cases – following a raid action – based upon the theory that

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persons in positions of responsibility generally lack direct involvement in software procurement and installation and therefore lack the requisite knowledge for criminal liability. These cases highlight the further difficulties that would be introduced with a specific employee defence.

5.4 We reiterate that the proposed defence should be removed or modified, given clear indications that even the existing law has proved too narrow to be effective.

5.5 Rather than include an express employee defence which would be problematic for reasons we have identified, another means of addressing the policy concern that the law on end-user liability will be unduly harsh in relation to lower level staff would be to introduce "whistle blower" protection for employees.

5.6 Employee protection provisions can be designed to prohibit an employer from discharging or otherwise discriminating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in specified "protected" activities. The protected activities typically include initiating, assisting or participating in proceedings for the enforcement of section 118A.

5.7 One example of how to achieve this would be to introduce the following language into section 118A:

"No employer shall terminate the contract of employment with or in any manner discriminate against any employee solely on the ground that such employee:

(a) has filed any complaint or instituted or caused to be instituted any investigation or proceeding under or related to an offence under subsection (1);

(b) has testified or is about to testify in any proceeding under or related to an offence under subsection (1); or

(c) has provided information or other assistance in connection with an investigation or proceeding under or related to an offence under subsection (1)."

5.8 The presence of "whistle blower" protection would mean that lower level employees who are aware of the use of pirated products by their employers could reject the use of those products without fear of retaliation

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by their employers, thus addressing the concerns raised to the Government during the prior public consultation exercise.

5.9 In addition, "whistle blower" protection would promote corporate accountability by advancing occupational free speech and ethical conduct and empowering citizen activists with the view to upholding the protection of legitimate interests of copyright owners.

5.10 We note that in the United States, "whistle blower" legislation is not uncommon. Under laws administered by the Occupational Safety and Health Administration, for example, there is employee protection for reporting safety concerns involving the airline or pipeline industries, for reporting protected environmental concerns including asbestos in schools, and for reporting potential securities fraud.

5.11 There is also "whistle blower" legislation in the United Kingdom – *e.g.*, Public Interest Disclosure Act 1998.

5.12 We urge the Administration to remove or modify the proposed defence under section 118A(4), and to instead introduce employee protection provisions along the lines suggested above.

6. Language Requiring Specific Profit Motive

6.1 Our concern with various sections of the Bill that require acts to be motivated by "profit or financial reward" for criminal liability to attach (*e.g.* new section 118(7)) is that they imply the need for a monetary transaction. In response, the Administration has proposed removing the word "financial" from the phrase "profit or financial reward", and has introduced a definition for "reward".

6.2 It is our view that as the policy intention is to also catch rewards of a non-financial nature (as stated in CITB Paper CB(1)191/03-04(1), item 5.2), this should be made expressly clear in the wording. We therefore suggest amending new section 118(7) (and other similar provisions) to read as follows:

"(7) In this section, "reward" means a reward other than a reward of a merely nominal value, *and includes a reward of a non-financial nature*." (emphasis added)

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6.3 Note, however, that as discussed above at 2.1 to 2.4, "profit or reward" language may not be necessary if the changes we propose to section 118 are adopted.

7. Non-permanent and permanent copies of works made available

7.1 Section 118A(5) was originally introduced into the Bill to exempt from criminal liability the possession of computer programs that are required for the viewing or listening of other works.

7.2 Our concern with the prior draft section 118A(5) was that, when read in conjunction with existing provisions in the law (sections 23, 26 and 65), the exemption is unduly wide and covers situations not originally intended.

7.3 During discussions with BSA, the Administration recognized that the previous draft provided a broader exemption than intended. As a result, alternative language designed to better align with the Administration's original intent has been proposed under new section 118A(6).

7.4 The BSA appreciates the Administration's effort to address this issue but finds that newly proposed section 118A(6) is ambiguous and does not fully address the concern. We suggest the following alternate wording:

"(6) Subsection (1) does not apply to the possession of a copy of a computer program that has been made available to the public within the meaning of section 26(2) with the authorisation or consent of the copyright owner, together with another work (not being a computer program itself and not otherwise offending subsection (1)), solely to enable that other work to be viewed or listened to, provided that the person so possessing the copy of the computer program:

(a) does so only with the view to the computer program being used for viewing or listening to the other work; and

(b) does not otherwise offend the exclusive rights of the owner of the copyright in the computer program within the meaning of section 3."

7.5 This suggested amendment would make clear that only legitimate copies of computer programs and associated works may be downloaded, and that transient or permanent copies of computer programs technically needed for viewing or listening other works (with have been downloaded legitimately) must only be used for that limited purpose.

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7.6 Corresponding amendments will need to be made to section 65. We would also suggest that the explanatory memorandum to the Bill be drafted to reflect the very limited circumstances intended to be covered by the exemption in proposed section 118(A)(6).

7.7 As a broader issue, we note that the Bill (and the existing Ordinance) attempt to legislate in relation to the Internet. However, with the convergence of technologies and the increasing use of digital methods to transmit and receive information, we strongly urge the Government to consider separate legislation to deal with the issues arising. A piecemeal approach, without farther vision, may cause difficulties in future.

We appreciate this opportunity to comment further on the Copyright (Amendment) Bill 2003 and look forward to continued participation in the consultation process.

Business Software Alliance
Hong Kong Committee
10 February 2004

Cc: Mr. Sin Chung Kai
Legislative Councillor and Bills Committee Chairman

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Annex A

Option 1

Add the following proposed subsection to revised section 118A:

(7) For purposes of subsection (1), "infringing copy of a copyright work that is a computer program" includes any computer program in the person's possession for which the person is unable to provide proof of a valid license issued by the copyright owner.

Alternatively, Option 2

Add the following proposed subsections to revised section 118A:

(7) A person who conducts a trade or business shall keep records of all computer programs licensed for the purpose of any trade or business, and shall retain that record for a period of at least 1 year after the computer program in question ceases to be used by him or his employees. In this section, "records" include purchase receipts, certificates of authenticity, and end user licenses in any media.

(8) For the purposes of any proceedings for an offence under subsection (1), the following factors shall be relevant to the court:

- *(a) whether the person charged with an offence under subsection (1) had any reasonable grounds to be satisfied in the circumstances of the case that the copy was not an infringing copy;*
- *(b) whether there were circumstances which would have led the person charged with an offence under subsection (1) reasonably to suspect that the copy was an infringing copy;*
- *(c) the completeness, accuracy and reliability of the records retained by the person charged with an offence under subsection (1), pursuant to subsection (7)."*