BSA
BUSINESS SOFTWARE ALLIANCE

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By Email (mleung@legco.gov.hk)

Hon. Mr Chan Kam-lam
Bills Committee on Copyright (Amendment) Bill 2011
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Sirs,

Business Software Alliance - Submission in response to the Copyright Bill 2011

Introduction

The Business Software Alliance ("**BSA**") welcomes the opportunity to comment on the detailed legislative amendments to the Copyright Ordinance contained in the Copyright (Amendment) Bill 2011 ("**Copyright Bill**") to the Legislative Council.

About BSA

The Business Software Alliance (www.bsa.org) is the world's foremost advocate for the software industry, working in 80 countries to expand software markets and create conditions for innovation and growth. Governments and industry partners look to BSA for thoughtful approaches to key policy and legal issues, recognizing that software plays a critical role in driving economic and social progress in all nations. BSA's member companies invest billions of dollars a year in local economies, good jobs, and next-generation solutions that will help people around the world be more productive, connected, and secure. BSA members include Adobe, Agilent Technologies, Apple, Aquafold, ARM, Arphic Technology, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, Cadence, Cisco, CNC/Mastercam, Corel, Dassault Systèmes SolidWorks Corporation, Dell, Intel, Intuit, Kaspersky Lab, McAfee, Microsoft, Minitab, NedGraphics, Orbotech, PTC, Progress Software, Quark, Quest Software, Rosetta Stone, Siemens, Software Industry Info. Center, Sybase, Symantec, and The MathWorks.

1. General view

BSA wishes to express its support of the Hong Kong Government's efforts in bringing its copyright law up to date with evolving technology and to address challenges presented by copyright protection in a digital age in Hong Kong.

BSA's comments in this submission reinforce our prior submissions provided during the consultation stage of the Copyright Bill, and highlight major concerns and aspects of the Copyright Bill that BSA believes would benefit from further consideration. We would appreciate further opportunities in future time to provide our comments on the drafting of the Copyright Bill in more detail.

2. The right for communication (section 28A)

BSA welcomes the Hong Kong Government's proposal to introduce a new technology-neutral right of communication to the public that covers all modes of electronic transmission.

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BSA believes that the copyright law in Hong Kong is in urgent need to be updated to keep pace with advances in information technology. The scope of the existing broadcasting, cable programme and making available rights in the Copyright Ordinance are not adequate to cover new forms for communicating copyright works.

Copyright owners need to be confident that works communicated by these new technologies are protected before they embrace these new technologies fully. This is particularly so in the digital environment where the ability to control the communication of copyright works is becoming increasingly important to their exploitation.

Also, the current static modes of right of transmissions under the Copyright Ordinance are not adequate or flexible to cope with evolving developing technologies.

The copyright laws in the United Kingdom, Australia, New Zealand and Singapore have already been updated to include a technology-neutral right of communication to the public thus allowing their laws to be flexible to cope with future development of technologies.[1]

One initial observation is the need for a clear definition that this newly created right of communication would not subsume the other rights of copyright owners currently available under the Copyright Ordinance. This would provide useful guidance and clarity to copyright owners and users in Hong Kong.

3. Limitation on liability of service providers and notice of alleged infringement

While BSA supports the introduction of a "safe harbour" for OSPs, it is important that the Bill sets out the mechanism in clear and unequivocal language. For instance, it is unclear and ambiguous as to what OSPs are expected to do to "limit or stop" an infringement under section 88B(2)(a). By comparison, the U.S. Digital Millennium Copyright Act (DMCA) has much clearer language by requiring OSPs to "remove or disable access to the infringing material".

With regard to counter-notices, the current draft states that OSPs "may", but are not obligated to, send notices to account holders for their submission of a counter-notice. There is also no provision for the copyright holder who sent the original notice to be informed if there is a counter-notice or if the OSP determines that it is appropriate to restore the content. A clearly set out mechanism would be hugely helpful for stakeholders to understand their rights and obligations under the "safe harbour" regime.

The proposed Code of Practice has not yet been published and we are unsure whether it will adequately address these and other similar issues. It is absolutely critical that the Code of Practice and Copyright Bill be reviewed concurrently to allow a comprehensive review.

4. Provision for repeat offenders

We note that the Copyright Bill contains no requirements for OSPs to implement a policy to deal with repeat end-user offenders / infringers in order to enjoy the exemption from liability provided under the Copyright Bill. Again, we do not know if this issue will be addressed in the Code of Practice.

Our research and experience shows that the substantial portion of online infringements are conducted by repeat end-user offenders / infringers, the same set of individuals or organisations. BSA is extremely concerned that without any obligation on service

[1] UK:Copyright, Design & Patent Act 1988 s16(1)(d) & s20; Australia: Copyright Act 1968 s31(1)(a)(iv); New Zealand: Copyright Act 1994 s16(1)(f); Singapore: Copyright Act 1987 s26(a)(iv).

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providers to address repeat end-user offenders / infringers using their networks, there will be limited or no deterrence of online infringement.

In order for OSPs to take advantage of the statutory limitation of liability provisions under the Copyright Bill, they should be required to have a legally binding policy or agreement with their end-user subscribers that they are entitled to terminate or suspend an end-user subscriber's account if they repeatedly post infringing materials. To prevent abuse and ensure termination occurs only in egregious circumstances, the person accused of being a repeat infringer should have an opportunity challenge the allegations before an impartial legal authority, preferably a court, and be provided a fair hearing subject to established rules and procedures **before** service is suspended or terminated.

5. Factors for additional damages and statutory damages

BSA supports including additional factors to help the court determine whether to award additional damages in a civil infringement action set out in sections 108 and 221. BSA would advocate as a further factor a basis to award additional damages by the courts, namely, the need to deter similar infringements of copyright. We note that this factor is expressly provided for under section 115 of the Copyright Act in Australia.

BSA is however disappointed to note that the Government did not take up the proposal of introducing a statutory damages regime in the Copyright Ordinance, which could be an effective remedy for copyright owners in infringement actions. BSA would urge the Government to consider the introduction of statutory damages for copyright infringement involving the Internet, and set out in the Appendix an extract of our previous submission on statutory damages for the Committee's consideration.

* * *

We thank the Bills Committee for taking the above initial comments into consideration. We look forward to future opportunities in presenting our views.

Yours faithfully,

Business Software Alliance (Hong Kong)

Appendix – Extracts from BSA Previous Submission on Statutory Damages

BSA supports the introduction of a statutory damages regime in the Copyright Ordinance pursuant to which copyright owners can elect to recover statutory damages as an alternative to the existing monetary remedies of compensatory damages or an account of profits.

Statutory damages are necessary in the copyright context due to the difficulties that rights holders face in proving their actual losses. This is particularly so in the digital environment where "perfect" digital copies of software programs can be made and distributed in a manner that can be difficult for copyright owners to trace.

Copyright owners cannot prove their actual losses attributable to an infringer's activities unless they know the true extent of those activities. Based on the experience of BSA's end-user enforcement program in Hong Kong and other parts of the world, information that would help copyright owners to determine the level of damages is typically held by the infringer and is not readily available to the copyright owner. This information includes the length of time that an infringer has been using unlicensed software and the quantity of unlicensed software involved. Even where copyright owners go to the lengths of obtaining ex parte search orders (Anton Piller orders), evidence obtained from the execution of these orders only helps to prove the existence of copies present on the infringer's computers at the time of the search; it is unlikely to reveal the accumulated number of copies that have been made by the infringer and erased or replaced by new versions over time, nor will it necessarily correspond to fluctuations in the number of computers used by the infringer over time.

Similar problems arise where copyright owners pursue persons who deal in counterfeit software, system builders engaged in illegal hard-disk loading, and pirates who operate on the Internet. Not surprisingly, these persons do not ordinarily keep records of their illegal activities.

A separate difficulty that copyright owners face in recovering their actual losses is the approach that some courts have taken to the calculation of damages in infringement cases. Defendants often raise the argument that copyright owners should only be allowed to recover the lost profit on their wholesale price to distributors. Not only does this approach to the calculation of damages fail to reflect the full amount of damage caused by the infringer throughout the distribution chain, but it imposes a considerable burden on copyright owners to present complex evidence as to their overall cost structure and profit margins. As these are likely to be sensitive commercial matters, and especially in smaller claims, the copyright owner may be deterred from proceeding by the prospect of having to engage in complex discovery, the cost of which far outweighs the possible recovery of damages in the case.

In the same vein, BSA is aware that some courts have allowed users of unlicensed software to rectify their infringement simply by acquiring licensed copies at normal (or even discounted) rates after the infringement, thereby allowing infringers to avoid any damages for past infringement except nominal compensation for the making and use of infringing copies.

These restrictive ways of calculating damages clearly do not deter further infringements as required by Article 41 of the TRIPS Agreement. Instead, they provide a strong financial incentive for infringers to engage in infringement and run the risk of enforcement, knowing that even if that risk materialises, the infringer will likely pay only a fraction of the full retail price of the relevant software in damages.

By contrast, if statutory damages are set at an appropriate level and factors such as the wilfulness of the infringement affect the quantum of the award, the threat of a significant award of statutory damages is likely to deter 'would-be' infringers.

For all of these reasons, BSA considers that there is strong case for statutory damages in copyright infringement matters and therefore urges the Hong Kong Government to implement such a regime in the Copyright Ordinance. BSA considers that the case for statutory damages is clear and that the Hong Kong Government should adopt a statutory damages regime that applies to infringements both within and outside the digital environment as a matter of priority.

Turning now to the features of enacted statutory damages regimes in other jurisdictions: BSA endorses the tiered approach to statutory damages that has been adopted in the United States. There, the monetary range of statutory damages that can be awarded by a court is tied to the wilfulness of the infringement: innocent infringers are liable to a lower range of statutory damages than wilful infringers.[1] In BSA's opinion, this approach to the calculation of statutory damages is useful because it recognises the need for proportionality of penalty. Proportionality of penalty is important in the copyright context because, in BSA's experience, copyright infringements occur on a spectrum ranging from less egregious cases to cases where persons flagrantly contravene copyright laws. To enable copyright owners to recover adequate damages in these most serious cases, BSA considers it appropriate that a statutory damages regime does not contain a cap on the aggregate amount recoverable, as is the case in the United States.

[1] See section 504(c) of the United States' Digital Theft Deterrence and Copyright Damages Improvement Act of 1999.