

HKITF Comments to Commerce and Industry Panel of Legco
On "Preliminary Proposals on Various Copyright-Related Issues"
From the Intellectual Property Department

Introduction

1. The Hong Kong Information Technology Federation (HKITF) welcomes the opportunity for the IT industry to respond to the preliminary proposals on various copyright-related issues from the Intellectual Property Department (IPD). Given the short time for the industry to respond, the following represents the key issues we would like to raise at this stage, and we would like to have the further opportunity to comment on the legislative drafting in due course. For completeness, we are also attaching here our previously submitted views to the last consultation by the IPD on these matters.

Copyright Exemption

2. The Federation is not in favor of the introduction of a general non-exhaustive approach for fair dealing to Hong Kong. We welcome the Government's position on this in its present preliminary proposals. On the introduction of "some fair dealing allowance" for education and public administration, we cannot comment on this proposal without examining the drafting of the proposed exemptions, and knowing more about the factual circumstances under which these exemptions will operate. We need to remind the Government that the definition for such exemptions for education, research, private studies, libraries etc. must be carefully defined and executed, or otherwise they will be prone to abuse.

Defense for Employees, Directors and Partners Against End-user Criminal Liability

3. The Federation does not see the need for the introduction of a specific employee defense, and we believe that employees and employers ought to be treated alike. So, we maintain our objection against the Government's proposal for the introduction of statutory defense for employees. We reiterated that this would send a wrong and confusing message to local and international communities about the relative importance of IP protection and treatment of IP by Hong Kong government. Successful prosecution at present has already been difficult, and likely will become harder if such a defense is allowed.

4. On the other hand, the Federation welcomes the introduction of a new criminal offense against the directors or partners of a company. This encourages more responsible corporate governance, and may facilitate the successful prosecution of operators of infringing businesses if appropriately drafted.

Proof of Infringing Copies of Computer Programs in End-user Liability Cases

5. Software piracy rate in Hong Kong remains at an unacceptably high 52%, according to a study by the Business Software Alliance. Software assets should be one of the forms of corporate asset for which business records are currently required to be maintained. The record-keeping obligations being proposed by our IT industry do not exceed existing obligations under the Companies Ordinance and Inland Revenue Ordinance, and thus such record-keeping should not result in increased costs for businesses to comply.
6. The Federation believes businesses should be responsible for software asset management as one form of proper corporate record keeping under law, to demonstrate that they are using legitimate software. The Government should act now to strengthen the law, as the execution and application of the current law has proven to be ineffective, rather than again "accumulate more enforcement experience first." We urge the Government to reconsider its position on record-keeping of software as this will not only promote good corporate governance but will go a long way to facilitate the effectiveness of our criminal end-user law.

Circumvention of Technological Measures for Copyright Protection

7. The Federation concurs with the Government's view that effective protection against the circumvention of technological measures is essential, but, at the same time, scientific research and technological development should not be hindered. So, we welcome and endorse the Government's proposal to introduce a new criminal offense against the manufacture or provision of service for such circumvention.

The Council

Hong Kong Information Technology Federation

July 15, 2005

[Previously submitted and now attached]

HKITF Response to Public Consultation on "Review of Certain Provisions of Copyright Ordinance"

Introduction

8. The Hong Kong Information Technology Federation (HKITF) supports the government's efforts to consult the public on proposed amendments to the Copyright Ordinance. As a trade association that strives to facilitate an environment that is conducive to the promotion of local IT business, HKITF is supportive of a stringent intellectual property (IP) regime.
9. Having worked closely with the government to promote the development of the local IT industry, we are pleased by the renewed pledge by the Chief Executive, Mr Tung Chee Hwa, in his 2005 Policy Address to promote the development of cultural and creative industries, including the computer software industry.
10. We believe that it is vital that the government strengthen the protection of IP rights as a means of fostering innovation and broader economic development in Hong Kong. This includes ensuring that relevant legislation provides a strong deterrent to piracy and can be enforced effectively against infringers.

Copyright Exemption

11. We understand that the government is considering the introduction of a general fair use defence, and is considering fair use regimes adopted in countries such as the United States.
12. Whilst a "non-exhaustive" approach to fair use may be appropriate in the United States, it will be a radical change for Hong Kong to adopt a similar approach. Unlike in the United States, the general fair use concept will be new to the Hong Kong public, and may be misconstrued as "free use". We appreciate the government's efforts to try and strike the right balance between copyright users on the one hand and copyright owners on the other. However, we believe that the existing approach under the Copyright Ordinance (which lists acts, or dealings in copyright works, which are permitted) provides the public with clearer boundaries of the law and should therefore be retained.

13. Commenting more broadly, and for the reasons elaborated below, we question whether it may be premature to consider fair use issues, when there appears to be a need to strengthen protection for copyright.

Defence for Employees against End-user Criminal Liability

14. We understand that the government is to be commended on its visible anti-piracy efforts, particularly in relation to the retail sale of counterfeit optical disks, but that there remains considerable challenges in relation to enforcement against businesses end-users which use pirated software within their organizations. The fact that there has not been a single successful criminal prosecution against such infringers (except in cases where they have pleaded guilty) demonstrates that the law needs to be refined to facilitate, rather than roll-back, protection in this area.

15. Further, in view of the high software piracy rate in Hong Kong (52%, as estimated in a Global Software Piracy Study commissioned by the Business Software Alliance: www.bsa.org/globalstudy/), this suggests that more needs to be done – particularly as Hong Kong's piracy rate is well behind comparable economies such as Taiwan (43%) and Singapore (43%).

16. HKITF does not see the need for the introduction of a specific employee defence. We do not know of any other major jurisdiction which affords a specific defence for employees with respect to copyright infringement. We are of the view that employees and employers ought to be treated alike. By way of analogy, employees who use stolen goods in the course of employment are criminally liable – if a specific defence is introduced for copyright offences, we feel that this would send the wrong message to local and international communities about the relative importance of IP protection and treatment of IP by Hong Kong government.

Proof of Infringing Copies of Computer Programs in End-user Piracy Cases

17. The IT industry makes a significant contribution to Hong Kong's economy. However, development is being hindered by end-user piracy challenges. In an economic impact study by international research firm International Data Corporation that was commissioned by the Business Software Alliance and released in April 2003 (www.bsa.org/idcstudy/), IDC concluded that reducing the software piracy rate can have a significant positive impact on local economic development and the growth of the IT industry as a whole – this would include local IT businesses, who are facing an increasing challenges. IDC also concluded that in Hong Kong,

reducing the software piracy rate by 10 points could add another US\$630 million to the Hong Kong economy and increase local industry revenues by more than half a billion U.S. dollars by 2006. The study also concluded this would generate an additional US\$40 million in tax revenues for Hong Kong's government and create nearly 1,500 new high-wage, high tech jobs. Industry believes that such reduction in Hong Kong's piracy rate is only possible with a good law and effective enforcement. We see Taiwan as a prime example of this theory - by successfully reduced its piracy rate by 23 points to 43% from 1996 to 2002, Taiwan saw its software industry more than triple from US\$224 million to US\$698 million during this period.

18. To this end, and given the enforcement experience in Hong Kong with respect to end-user software piracy, we support efforts to refine current laws to facilitate enforcement and prosecution. We support and encourage businesses to use IT to manage IT, and where appropriate put in place software asset management tools and processes to enable them to collect information and perform inventory management. We also understand that there are current obligations under the Companies Ordinance and Inland Revenue Ordinance for the keeping of proper books of account (recording corporate assets & liabilities and receipts & payments) and view software asset management as one form of proper corporate record keeping to demonstrate that they are using legitimate software.

Circumvention of Technological Measures for Copyright Protection

19. We believe that there is a need to protect technological measures to prevent unauthorized access to or use of copyrighted material, or the illegal dissemination of protected works. It is important that the integrity of these measures be protected by prohibiting the manufacture, trade in or use of devices or software that are primarily designed to circumvent them. Although existing Hong Kong law provides certain protections against circumvention of copy protection employed in computer programs and other works, it contains a number of areas of potential ambiguity. We support clarification of relevant provisions of both the civil and criminal law to confirm coverage of (1) access control technologies; (2) acts of circumvention; and (3) circumventing components. We note that the WIPO Copyright Treaty includes a requirement to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures" that copyright owners use to "restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

Concluding Comments

20. HKITF is concerned by an indication in the Consultation Document (page 21) that government is considering taking a "wait and see" approach before responding to industry's concerns with software piracy, and asking industry to introduce technological measures (mandatory software registration) as a means to combating piracy in the interim. We do not see such technological measures alone as being a fool-proof and long term solution, and they will not address the issue of unlicensed software currently deployed in the market place. We would encourage the government to work closer with industry to bolster IP protection in the near term.

21. As we together strive for a more vibrant IT industry and improved local economy, we would urge the government to strengthen the legislative regime for IP and foster a healthier legislative environment for local IT businesses, particularly as we continue to face software end-user piracy challenges and new piracy challenges presented in the digital age.

The Council

Hong Kong Information Technology Federation

February 15, 2005