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Abstract

As more and more nations prosecute copyright piracy cases, it is far from clear whether these nations, in seeking to protect legitimate copyright interests, will also recognize the need to achieve three goals in the sentencing of such cases. The first is honesty in sentencing: that is, avoiding situations in which the nominal sentence that a court initially imposes at sentencing may later be substantially reduced through the parole process. The second is reasonable uniformity in sentencing, so that courts do not have wide disparities in the sentences they impose on similar offenders who commit similar criminal offenses. The third is proportionality in sentencing, so that courts can impose suitably different sentences on offenders whose criminal conduct differs in severity. This article compares the sentencing guidelines for copyright piracy in the United States and the Hong Kong Special Administrative Region ("HKSAR"). In this case, it would be inappropriate to examine only the superficial similarities between the two jurisdictions' sentencing practices for copyright offenders. As this Article will show, there are substantial differences not only in the types of guidelines that both jurisdictions have devised, but also in the means by which those guidelines have been developed. This Article will therefore begin by summarizing the features of the U.S. Sentencing Guidelines that are most pertinent in sentencing criminal copyright offenders. It will then examine the emergence of judicially devised sentencing guidelines in the HKSAR. Finally, it will identify the more significant points of similarity and contrast between the two types of guidelines, and evaluate the extent to which both types of guidelines achieve the fundamental goals of honesty, uniformity, and proportionality in sentencing.

SENTENCING GUIDELINES FOR COPYRIGHT PIRATES IN THE UNITED STATES AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION: A COMPARATIVE PERSPECTIVE

*Jonathan J. Rusch**

INTRODUCTION

Since 1996, when the World Intellectual Property Organization ("WIPO") adopted the Copyright Treaty[1] and the Performances and Phonograms Treaty,[2] criminal prosecution has become increasingly popular around the world as a means of combating copyright piracy and vindicating the interests of copyright holders. In a variety of criminal cases involving software and music piracy, for example, courts in Australia,[3] Egypt,[4] Germany,[5] the Hong Kong Special Administrative Region ("HKSAR"),[6] the United Kingdom,[7] and the United States[8] have been meting out sentences that include terms of imprisonment.

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1. World Intellectual Property Organization, WIPO Copyright Treaty, No. CRNR/DC/94, Dec. 20, 1996, *available at* http://www.wipo.org.

2. World Intellectual Property Organization, Performances and Phonograms Treaty, No. CRNR/DC/95, Dec. 20, 1996, *available at* http://www.wipo.org.

3. *See* AAP, *First Australian jail sentence for music piracy*, THE AGE, Aug. 24, 2001, *available at* http://www.theage.com.au/entertainment/2001/08/24/FFXRKTHFPQC.html (three-month term of imprisonment for record-shop owner who sold pirated compact disks, records, and videos).

4. *See* Mats A. Palmgren, *Software Pirates Sentenced in Alexandria*, *available at* http://www.pcworldegypt.com/archive/bsa.htm (five-month term of imprisonment, fine, and confiscation of pirated software for computer resellers who sold pirated software).

5. *See* International Federation of the Phonographic Industry, Press Release, *Jail Sentence and Fine for Operator of W. Europe's Largest Covert Pirate CD Plant*, July 10, 2002, *available at* http://www.ifpi.org (one-year term of imprisonment (suspended for one year) and 10,000 Euro fine for operator of underground pirate CD plant); Mary Lisbeth D'Amico, *German Court Gives Texan Software Pirate Jail Term*, June 15, 1999, *available at* http://www.idg.net (four-year term of imprisonment without probation for man dealing in pirated software).

6. *See, e.g.*, HKSAR v. Cheung Yip Shing, [2001] HKFCI 792 (2001) (dismissing appeals against sentences of twelve-month and thirty-six-month terms of imprisonment).

7. *See* International Federation of the Phonographic Industry, Press Release, *UK Court jails importer of pirate CDs from Eastern Europe*, Feb. 28, 2002, *available at* http://

As more and more nations prosecute copyright piracy cases, it is far from clear whether these nations, in seeking to protect legitimate copyright interests, will also recognize the need to achieve three goals in the sentencing of such cases. The first is honesty in sentencing: that is, avoiding situations in which the nominal sentence that a court initially imposes at sentencing may later be substantially reduced through the parole process. The second is reasonable uniformity in sentencing, so that courts do not have wide disparities in the sentences they impose on similar offenders who commit similar criminal offenses. The third is proportionality in sentencing, so that courts can impose suitably different sentences on offenders whose criminal conduct differs in severity.[9]

To achieve these goals, legal systems often develop some form of sentencing guidelines that confine judicial discretion in sentencing criminal offenders. The means by which those guidelines are developed or promulgated can vary widely. Many common-law jurisdictions continue to treat criminal copyright offenses as they do other criminal offenses. These jurisdictions traditionally have left sentencing judges with vast discretion to impose what they consider to be appropriate sentences on a case-by-case basis. More general principles or concepts which guide judicial discretion are allowed to develop by slow accretion through the common-law process. It is therefore remarkable that one of the largest common-law countries in the world, the United States, has broken so dramatically with that traditional approach and has adopted a legislative and administrative regime that significantly cabins the discretion of federal judges in criminal sentencing.

Because copyright is the field of intellectual property law where criminal enforcement looms largest, it may be instructive to compare the U.S. Sentencing Guidelines for copyright piracy offenders with the sentencing practices of another jurisdiction

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www.ifpi.org/site-content/press/20020228.html (six-month term of imprisonment for importer of thousands of pirated CDs).

8. *See, e.g.*, U.S. Dep't of Justice, Press Release, *Member of "DrinkOrDie" Warez Group Sentenced to 41 Months*," July 2, 2002, *available at* http://www.cybercrime.gov/ob/Pattanay.htm (41-month term of imprisonment for council member and "cracker" (i.e., specialist in stripping or circumventing software copyright protections) in international software piracy ring).

9. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, cmt. at 2 (2001).

that, like the United States, not only has adopted but vigorously enforces criminal copyright laws against pirates. The HKSAR of the People's Republic of China ("PRC") may be especially suitable for this kind of comparison. Like the United States, the HKSAR, even after its reversion to the PRC in 1997, has remained strongly devoted to its common-law legal system.[10] The HKSAR has also demonstrated a strong commitment to criminal copyright enforcement, as part of its efforts to reduce what had been called "one of the highest copyright piracy rates in the world."[11] Moreover, as this Article will show, HKSAR courts have developed a form of sentencing guidelines for copyright offenders that can be usefully compared with the U.S. Sentencing Guidelines.

In comparing the guidelines of these two legal systems, this Article explicitly seeks to avoid certain pitfalls of traditional comparative law scholarship. In the past, many comparatists have favored what Rudolf Schlesinger called "integrative comparison" — that is, comparison of legal systems and institutions that primarily emphasizes similarities rather than differences.[12] This devotion to the primacy of comparison — which largely animates the recent crusade by some comparatists to seek out the "common core" of legal systems[13] — can often lead scholars astray. In some major legal systems, it must be said, law is "an unruly, disjointed corpus" that has no common core.[14] In other legal systems, the basic elements of the systems may have a common lineage, such as the common law, but reflect significant divergences in the structures and operations of those systems.

Other strains of comparative law scholarship do not necessa-

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10. The Basic Law of the HKSAR, which was enacted by the PRC National People's Congress, is "akin to a mini-constitution for the HKSAR." Hong Kong Dep't of Justice, *The Legal System of Hong Kong*, *at* http://www.info.gov.hk/justice/new/legal/index.htm. Under Article 8 of the Basic Law "[T]he laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region." HKSAR Basic Law, Art. 8, *available at*, http://www.info.gov.hk/basic_law/fulltext/index.htm.

11. Reuters, *Hong Kong Firms Scramble to Comply with Software Piracy Laws*, Mar. 29, 2001, *available at* http://www.siliconvalley.com/docs/news/tech/079277.htm.

12. Rudolf B. Schlesinger, *The Past and Future of Comparative Law*, 43 AM. J. COMP. L. 477, 477 (1995).

13. *See, e.g., id.* at 479.

14. *See* J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH xi (1999).

rily favor similarity over difference in the comparative process. They take into account the value of the comparative process, yet move beyond the simplicity of rule-based comparison that has dominated traditional comparative law scholarship.[15] In doing so, they also can show that comparative law can serve ostensibly different purposes. Comparative law scholarship can be constructive, showing how society can devise and operate legal institutions and mechanisms. It can also, as George P. Fletcher has cogently observed, be subversive — facilitating law reform by forcing a society to consider the aspects of its legal culture that are resistant to change and whether those sources of resistance make sense.[16]

In this case, it would be inappropriate to examine only the superficial similarities between the two jurisdictions' sentencing practices for copyright offenders. As this Article will show, there are substantial differences not only in the types of guidelines that both jurisdictions have devised, but also in the means by which those guidelines have been developed. This Article will therefore begin by summarizing the features of the U.S. Sentencing Guidelines that are most pertinent in sentencing criminal copyright offenders. It will then examine the emergence of judicially devised sentencing guidelines in the HKSAR. Finally, it will identify the more significant points of similarity and contrast between the two types of guidelines, and evaluate the extent to which both types of guidelines achieve the fundamental goals of honesty, uniformity, and proportionality in sentencing.

I. *SENTENCING GUIDELINES IN THE UNITED STATES*

In 1984, the United States Congress dramatically altered the process and practices of sentencing in federal criminal prosecutions by enacting the Sentencing Reform Act of 1984.[17] The Act created the U.S. Sentencing Commission as an independent commission in the judicial branch of the federal government.[18] The Commission, which consists of seven voting and one nonvot-

15. *See* JOHN HENRY MERRYMAN, THE LONELINESS OF THE COMPARATIVE LAWYER 6-7 (1999).

16. *See* George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 696, 700 (1998).

17. Pub. L. 98-473, Title II, ch. II, Oct. 12, 1984, 98 Stat. 1897 (codified, as amended, at 18 U.S.C. Sec. 3551 and 28 U.S.C. Secs. 524, 992-994, 1921).

18. *See* 28 U.S.C. Sec. 991(a).

ing member, has two principal purposes.[19] First, the Commission is charged with establishing sentencing policies and practices for the federal criminal justice system that meet three objectives:

> (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.[20]

Second, the Commission is required to develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing, as set forth in 18 U.S.C. Sec. 3553(a)(2).[21]

The most important function that the Commission performs is the promulgation and distribution of Guidelines that federal district courts are to use in determining the sentences to be imposed in criminal cases.[22] The Commission also promulgates and distributes general policy statements for use by federal courts regarding application of Sentencing Guidelines or any other aspect of sentencing or sentencing implementation that would further the purposes of sentencing.[23] For each category of offense, the Commission, among other tasks, establishes a sentencing range (measured in numbers of months of incarceration or other confinement such as home detention) that is consistent with all pertinent provisions of Title 18 of the United States Code.[24]

While the Commission can promulgate Guidelines that address a wide variety of characteristics relating to the offense it-

19. *See* 28 U.S.C. Sec. 991(a).
20. 28 U.S.C. Sec. 991(b)(1).
21. *See* 28 U.S.C. Sec. 991(b)(2).
22. *See* 28 U.S.C. Sec. 994(a)(1).
23. *See* 28 U.S.C. Sec. 994(a)(2)-(3).
24. *See* 28 U.S.C. Sec. 994(b)(1).

self, the Sentencing Reform Act sharply limits the range of offenders' personal characteristics that the Commission can factor into Guidelines and policy statements. The Act adjures neutrality in the Guidelines and policy statements "as to the race, sex, national origin, creed, and socioeconomic status of offenders."[25] The Commission may take eleven other personal characteristics into account only to the extent that those characteristics have relevance to the nature, extent, place of service, or other incidents of an appropriate sentence.[26] These eleven characteristics are: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition (to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant); (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood.[27] The Act further directs the Commission to assure that, in recommending a term (or length of term) of imprisonment, the Guidelines and policy statements "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."[28] These directives reflect a general Congressional intent that guideline sentences be based "on the characteristics of the offense committed, not the character of the defendant."[29]

The approach on which the Commission settled to develop specific Guidelines for specific criminal offenses involves the creation of a Sentencing Table with two dimensions.[30] One axis of the table consists of 43 numbered offense levels, each of which has a specific sentencing range (from zero to six months imprisonment to life imprisonment). Each federal felony offense is assigned to a particular guideline to which the Commission has assigned a numerical base offense level. The sentencing range that a sentencing court may apply to an offense or conviction

25. 28 U.S.C. Sec. 994(d).

26. *See* 28 U.S.C. Sec. 994(d).

27. *See* 28 U.S.C. Sec. 994(d)(1)-(11).

28. 28 U.S.C. Sec. 994(e).

29. ROGER W. HAINES, JR., FRANK O. BOWMAN, III, & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 1241 (2001).

30. *See* U.S. SENTENCING COMM'N, *supra* n.9, ch. 5, pt. A, at 335.

will vary with the base offense level for that offense, as well as additional factors (e.g., amounts of loss or gain or other offense characteristics) that may increase or decrease the numerical value of the offense level.

The other axis of the table consists of six categories of criminal history to which certain point values are assigned. Depending on the number and severity of criminal sentences previously imposed on the defendant, the applicable Guidelines range will vary with the criminal history category into which the defendant fits. For example, if a defendant who had defrauded several victims of a total of U.S.$1 million pleaded guilty to mail fraud,[31] the applicable guideline range could vary from twenty-seven to thirty-three months imprisonment (if the defendant had no prior criminal history) to as much as fifty-seven to seventy-one months imprisonment (if the defendant has an extremely extensive criminal history).[32]

Under the Sentencing Guidelines, a federal judge may depart either upward or downward from a final calculation of the appropriate sentencing range. In the case of a downward departure with which the prosecutors disagree, the prosecutors may appeal that downward departure; in the case of an upward departure, the defendant may appeal the sentence.

The Sentencing Guidelines that pertain to criminal copyright offenses are wholly consistent with this general approach. Guideline Section 2B5.3, to which the principal federal criminal copyright offenses[33] are assigned for sentencing purposes, has a base offense level of 8.[34] If the amount of the copyright infringement exceeds U.S.$2,000 but does not exceed U.S.$5,000, the sentencing judge is to apply a one-level increase. If the infringement amount exceeds U.S.$5,000, the judge is to increase the offense level in accordance with the number of levels in the loss table used in the guideline applicable to theft and fraud offenses (i.e., Guideline Section 2B1.1).[35] If the offense involved the

31. *See* 18 U.S.C. Sec. 1341.

32. *See* U.S. SENTENCING COMM'N, *supra* n.9, Secs. 2B1.1, 3E1.1, and Sentencing Table at 67, 307, 335 (base offense level 6, sixteen-level increase for $1 million loss, and two-level decrease for clear acceptance of responsibility for his offense).

33. *See* 17 U.S.C. Sec. 506(a) and 18 U.S.C. Secs. 2318-20 and 2511.

34. U.S. SENTENCING COMM'N, *supra* n.9, Sec. 2B5.3(a) at 96.

35. *Id.* Sec. 2B5.3(b)(1) at 96-97. This particular Guideline exemplifies the Commission's view that Section 2B3.5 "treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for

manufacture, importation, or uploading of infringing items, the judge is to apply an additional two-level increase; if the resulting offense level is less than 12, the judge is to increase the level to 12.[36] If the offense was not committed for commercial advantage or private financial gain, the judge is to apply a two-level decrease (but may not decrease the resulting offense level below level 8).[37] Finally, if the offense involved either the conscious or reckless risk of serious bodily injury or possession of a dangerous weapon (including a firearm) in connection with the offense, the judge is to apply a two-level increase; if the resulting offense level is less than 13, the judge is to increase it to level 13.[38]

The judge must also take into consideration other factors relating to the copyright defendant's role in the offense. If the defendant played a supervisory, managing, or leading role in the offense, the judge is to apply an increase of two to four levels depending on the extent of that role.[39] On the other hand, the judge is to decrease the offense level by two levels if the defendant was a minor participant in any criminal activity; by four levels if the defendant was a minimal participant in any criminal activity; and by three levels in cases falling between the "minor" and "minimal" participant categories.[40]

Consistent with the admonitions of the Sentencing Reform Act, the Sentencing Guidelines specify that numerous offender characteristics are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, such as age (including youth);[41] education and vocational

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defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes." *Id.* Sec. 2B3.5 Background at 99.

36. *Id.* Sec. 2B5.3(b)(2) at 97.

37. *Id.* Sec. 2B5.3(b)(3) at 97.

38. *Id.*

39. *See id.* Sec. 3B1.1 at 284. If the defendant was an organizer or a leader of a criminal activity that involved five or more participants or was otherwise extensive, the increase is four levels. If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, the increase is three levels. If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than those described in the preceding two sentences, the increase is two levels. *Id.*

40. *Id.* Sec. 3B1.2. at 285. The Commission's Application Notes for this Section make plain that any of these decreases should be applied only if the defendant plays a part in committing the offense "that makes him substantially less culpable than the average participant." *Id.* Application Note 3(A) at 286.

41. *Id.* Sec. 5H1.1. at 377.

skills;[42] mental and emotional conditions;[43] physical condition or appearance (including physique);[44] employment record;[45] family ties and responsibilities and community ties;[46] and military, civic, charitable, or public service, employment-related contributions, or similar prior good works.[47] Other offender characteristics, such as lack of guidance as a youth or similar circumstances indicating a disadvantaged upbringing, are uniformly deemed to be "never relevant grounds for imposing a sentence outside the applicable guideline range."[48] Race, sex, national origin, creed, religion, and socio-economic status are deemed "never relevant in the determination of a sentence."[49]

In view of the Sentencing Guidelines' high degree of specificity, it should not be surprising that there are only two published judicial decisions to date that construe any of the provisions of Guidelines Section 2B3.5. These decisions have focused only on the computation of the retail value of infringing items.[50]

II. *SENTENCING GUIDELINES IN THE HKSAR*

In contrast to the U.S. Sentencing Guidelines process, where the Sentencing Commission plays the decisive role, the wellspring of sentencing guidelines in the HKSAR is the Hong Kong Court of Appeal. In formal terms, the Court of Appeal is the penultimate appellate court in the HKSAR. Usually operating in three three-judge divisions, it hears appeals from the Court of First Instance,[51] the District Court,[52] and other tribu-

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42. *Id.* Sec. 5H1.2. at 378.
43. *Id.* Sec. 5H1.3. at 378.
44. *Id.* Sec. 5H1.4. at 378.
45. *Id.* Sec. 5H1.5. at 379.
46. *Id.* Sec. 5H1.6. at 379.
47. *Id.* Sec. 5H1.11. at 380.
48. *Id.* Sec. 5H1.12 at 380.
49. *Id.* Sec. 5H1.10 at 380.
50. *See* United States v. Cho, 136 F.3d 982, 984 (5th Cir. 1998) (retail value of counterfeit items, rather than loss resulting from defendant's trademark infringement, determined sentencing enhancement under Sec. 2B5.3); United States v. Larracuente, 952 F.2d 672, 674 (2d Cir. 1992) (retail value of tapes copied by criminal copyright infringement defendant, rather than price at which defendant sold the tapes, was appropriate value to use for calculating "retail value" of infringing items under Sec. 2B5.3).
51. The Court of First Instance (formerly the High Court of Justice) has a jurisdiction that is mostly original, although it hears appeals from Magistrates' Courts and some tribunals. In criminal matters of first instance, the Court of First Instance deals

nals. In practice, the Court of Appeal is effectively "the final arbiter of what Hong Kong law is,"[53] including the law of criminal sentencing.

Long before the transfer of Hong Kong's sovereignty to China, the Court of Appeal had established a tradition of occasionally issuing guidelines for sentencing of certain offenses. These guidelines were designed to assist sentencing judges in the application of judicial discretion "and to produce a degree of consistency in sentencing."[54] A sentencing judge who did not disagree with particular guidelines, but who felt that a departure therefrom was warranted in an individual case, could do so if he or she made clear that the court appreciated "the correct scale of sentence" and indicated why it was felt proper to depart.[55] On the other hand, a sentencing judge who disagreed with particular guidelines, or who felt that the guidelines had been superseded by other events, was still required to follow them. If the Court noted why it felt that the guidelines required revision, the Attorney General of Hong Kong could consider inviting the Court of Appeal to make the revision.[56]

Thanks in part to the provisions of Article 8 of the Basic Law, this tradition has carried over to the sentencing process in the HKSAR. The Court of Appeal continues to issue guidelines, though it exercises its authority sparingly.[57] In addition, the

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with serious crimes involving only indictable offenses. PETER WESLEY-SMITH, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM 69 (3d ed. 1998).

52. *Id.* at 68-69. The District Court, which occupies a place between the Magistrates' Courts and the Court of First Instance, is a court of fairly limited civil, equitable, and criminal jurisdiction. Its criminal jurisdiction extends only to "charges relating to indictable offences which have been transferred from magistrates on application by the Secretary of Justice." *Id.* at 68. District Court judges hear cases without a jury and can sentence convicted offenders to terms of not more than seven years imprisonment. Serious offenses such as murder and genocide may be tried only in the Court of First Instance. *Id.* at 68-69.

53. *Id.* at 70.

54. Id. *See also* GRENVILLE CROSS & PATRICK W.S. CHEUNG, SENTENCING IN HONG KONG 61 (1994) (citing R. v. Ng Fung-king, [1993] 2 HKCLR 219, 221 and R. v. Newsome and Bourne, (1970) 54 Cr. App. R. 485, 490).

55. *Id.* (citing R. v. Yau Koon-yau, AR 12/84, and Att'y Gen. v. Lam Ping-chun, AR 10/88).

56. *Id.* at 61-62 (citing R. v. Yeung Kwok-leung and Another, Cr. App. 377/93).

57. *Compare, e.g.*, HKSAR v. Lee Tak-kwan, [1998] HKCA 204 (setting guidelines for trafficking in the drug "ecstasy") *with* Secretary for Justice v. Lam Chi Wah, [1999] HKCA 505 (declining to set any guideline for offenses under Trade Descriptions Ordinance, chap. 362), *available at* http://www.hklii.org/hk/legis/ord/tdo256/) *and* HK-

Court of Appeal has standardized for all types of criminal offenses a one-third reduction of sentence where the defendant pleads guilty.[58]

A. *Secretary for Justice v. Choi Sai Lok*

In tracing the development of guidelines for criminal copyright offenses, the proper point of departure is the Hong Kong Court of Appeal's decision in *Secretary for Justice v. Choi Sai Lok*.[59] This prosecution, which involved possession of infringing copies of copyrighted works, arose under section 118(1)(d) of the Copyright Ordinance.[60] The two defendants were observed carrying three cartons that proved to hold more than 1,200 infringing video compact disks ("CDs") and 100 infringing music CDs. Both defendants eventually admitted to delivering CDs, which they knew were pirated, for another man at a rate of HK $350 per day. One defendant also admitted to packing the CDs before he delivered them, and had been entrusted by his superior with keys to a nearby storeroom, where police found nearly 23,000 more infringing CDs.[61] After both defendants pleaded guilty in the District Court to section 118(1)(d) charges, the District Court sentenced them to suspended terms of imprisonment.[62] The Secretary of Justice then applied for a review of the sentences, with leave to do so from the Chief Judge of the High Court.[63]

The Court of Appeal began by restating what it termed the District Court judge's "clear and concise explanation of his reasons for sentence."[64] The District Court had stated, in pertinent part, that so far as it was aware:

> [t]he Court of Appeal still feels that at this stage no guide-

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SAR v. Tam Hei Lun, [2000] 3 HKCA 745 (declining to set guidelines with respect to computer-related offenses, specifically section 161 of the Crimes Ordinance).

58. *See, e.g.*, HKSAR v. Li Yan, [1998] HKCA 346.

59. [1999] HKCA 386, *available at* http://www.hklii.org.

60. Chap. 528, *available at* http://www.hklii.org/hk/legis/ord/co186/.

61. *See Choi Sai Lok*, [1999] HKCA, at 386.

62. *Id.* The court sentenced the first defendant, Choi Sai Lok, to eighteen months imprisonment (suspended for two years) and the payment of HK $5,000 towards prosecution costs. It sentenced the second defendant, Mak Wai Hon, to eighteen months imprisonment on one charge and two years imprisonment on a second charge (both suspended for two years) and the payment of HK $8,000 towards prosecution costs. *Id.*

63. *Id.*

64. *Id.*

> lines for sentences need be laid down because the circumstances of offences and offenders obviously vary widely. That said, the seriousness with which these offences are now viewed would clearly make some form of custodial sentence the norm rather than the exception when persons are convicted of being involved in this illegal enterprise, although each case has to be considered on its merits; that is, bearing in mind its particular facts and the circumstances of the individual offenders.[65]

The Court of Appeal said that it "entirely agree[d]" with that statement, but emphasized that "custodial sentences of immediate effect should be imposed for offences of this kind unless the circumstances can truly be said to be exceptional."[66] Curiously, the Court made no mention, then or later in the decision, of its prior statement in *Regina v. Li Wan Kei*[67] concerning guidelines for copyright offenses. In *Li Wan Kei*, decided less than twenty-eight months before *Choi Sai Lok*, the Court of Appeal had declined the defendant's invitation to lay down such guidelines, stating not only that it was "not prepared" to do so but that

> [. . .] it would be inappropriate — certainly at this stage. The circumstances of offences and offenders obviously vary widely. Judges in the District Court for the more serious offences will build up their experience dealing with these matters. They will take account of their experience to pass appropriate sentences.[68]

The Court in *Choi Sai Lok* then reviewed another statement by the District Court, in which the sentencing judge had sought to distinguish away a number of copyright piracy cases cited to him. In particular, the judge had noted that "[n]ot only do the numbers of pirated copies understandably differ from the present case, but more to the point the status of the particular defendants were [*sic*] different, being either owners or salesmen, whereas these two defendants were transporters of the goods rather than distributors."[69] The Court of Appeal responded that it had no doubt about distinguishing the proprietors of retail outlets and warehouses who committed copyright piracy from

65. *Id.*
66. *Id.*
67. [1997] HKCA 244.
68. *Id.*
69. *Choi Sai Lok*, [1999] HKCA, at 386.

their employees, or about imposing longer sentences on the proprietors. It disagreed, however, with the District Court's distinction between

> [s]alesmen on the one hand and couriers on the other. The roles played by storemen, packers, delivery men and salesmen may be different, but we do not see much difference between them in terms of criminal culpability. What will justify differences in sentences between them will be, for example, the number of infringing copies involved, the length of time in which they had been engaged in the trade and factors personal to them such as pleas of guilty.[70]

In arriving at the sentences, the District Court had considered the personal circumstances of the defendants — both "family men in their early forties of hitherto good character," who had recently become unemployed after regular employment throughout their working lives and who had admitted what they had done when they were arrested — and what it termed the defendants' status as "transportation workers" rather than "owners" or "salesmen." It therefore had taken eighteen months imprisonment as the starting point for calculating the first defendant's sentence, and concurrent terms of eighteen months and two years imprisonment for the second defendant's sentence, before suspending their sentences.[71] In addition, in making these calculations, the District Court did not offer the standard one-third reduction of the starting points to reflect the plea of guilty.[72]

The Court of Appeal emphatically replied that "an assertion by a defendant that he is a mere employee in the business will not warrant the suspension of an otherwise appropriate sentence of imprisonment."[73] To buttress this point, it quoted from a decision by the Court of First Instance, *Regina v. Ng Wai Ching*.[74] In that case, the Court of First Instance had reviewed the appeals against detention sentences for copyright-related offenses by two defendants. Although both defendants were apparently nineteen-year-old low-level salesmen of pirated CDs, had no

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70. *Id.*
71. *Id.*
72. *See id.*
73. *Id.*
74. Regina v. Ching, [1996] HCMA, at 1309 (Sup. Ct. of Hong Kong, Dec. 11, 1996), *quoting* [1996] HKCFI 632.

prior criminal record, and had pleaded guilty, the Court of First Instance dismissed both appeals. Noting the frequency with which such salesmen were apprehended and pleaded guilty, it expressed regret that the Hong Kong Customs and Excise Department, which is responsible for investigating copyright violations, apparently could not "catch the big fish of the trade and can only bring the minnows before the courts."[75] This latter point prompted the Court of First Instance to devise a syllogism favoring the defendant's detention: (1) salesmen, because they are essential to the success of copyright piracy operators, must be deterred (major premise); (2) fines (in the experience of the courts) do not deter salesmen (minor premise); (3) therefore courts must impose custodial sentences on salesmen, notwithstanding their personal characteristics.[76]

The Court of Appeal, with an implicit nod of approval for this reasoning, added that this "is a clear echo of the thinking behind the sentencing, for example, of couriers in the narcotics trade."[77] It concluded that the sentencing judge was "wrong in principle" in suspending the sentences, specifically citing the lack of any exceptional circumstances that would have justified suspension. It then adjusted downward the starting points for the defendants' sentences to twelve and eighteen months, respectively;[78] further reduced the sentences by one-third for their guilty pleas; and included a further discount of one-quarter since the defendants' application for review of sentence would result in their "having to serve sentences of imprisonment which they would not otherwise have had to serve [. . .]."[79] This resulted in the Court of Appeal's setting aside the sentences imposed below and substituting therefore a six-month term of imprisonment for the first defendant, and six- and nine-month terms of imprisonment (to be served concurrently) for the second defendant, with no costs of prosecution to be paid by either defendant.[80]

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75. *Id.*

76. *See id.*

77. *Choi Sai Lok*, [1999] HKCA, at 386.

78. The Court of Appeal's explanation for doing so was that it thought the sentencing judge would have adopted "slightly lower starting points" had it been imposing sentences of imprisonment with immediate effect. *Id.*

79. *Id.*

80. *Id.*

The Court of Appeal also took pains to emphasize the appropriateness of including a sentence reduction in copyright piracy cases such as the one before it, where the defendant was willing to plead guilty at the outset of the prosecution. It commented that "[t]he preparation of a case of this kind for trial involves considerable efforts in locating the copyright owners of the infringing copies, and obtaining confirmations from them that they are indeed the copyright owners and that the copies seized were not produced under license."[81] It then quoted approvingly its prior decision in *Li Wan Kei*,[82] which had stated that "[i]t may be that [. . .] if there is a full indication of an intention to plead guilty at the very outset which avoids all the elaborate preparation and expense for trial, this also will be reflected in the sentence passed."[83]

B. *Secretary for Justice v. Wong Dak Sun*

At the outset, *Choi Sai Lok* appeared to have provided significant guidance to lower courts on sentencing defendants involved in copyright piracy. Soon after the Court of Appeal's decision, several decisions by the Court of First Instance explicitly relied on it in dismissing appeals against sentences of copyright defendants.[84] Yet within the year, the Court of Appeal found it necessary to reiterate and to extend the principles that it had laid down in *Choi Sai Lok*.

In *Secretary for Justice v. Wong Dak Sun*,[85] the Court of Appeal reviewed a decision by the District Court to suspend sentences, under various provisions of Section 188 of the Copyright Ordinance, against three defendants. Unlike the defendants in *Choi Sai Lok*, these three defendants were not low-level salesmen, but

81. *Id.*

82. [1997] HKCA, at 244.

83. *Id.*

84. *See* HKSAR v. Li Tim Fai, [2000] HKCFI 283 (finding the twelve-month sentence under section 118(1)(e)(ii) of Copyright Ordinance to be neither wrong in principle nor manifestly excessive); *see also*, HKSAR v. Chan Yau Ming, [2000] HKCFI 217 (finding starting point of nine months, under sections 118(1)(e)(ii) and 119(1) of Copyright Ordinance and sections 9(2) and 18(1) of Trade Descriptions Ordinance to be neither wrong in principle not manifestly excessive, but allowing reduction due to defendant's medical condition); *see also*, HKSAR v. Williams George Edward, [2000] HKCFI 181 (finding sentence under sections 118(1)(d) and 119(1) of Copyright Ordinance not to be manifestly excessive).

85. [2000] HKCA 332, *available at* http://www.hklii.org.

were directly involved in the production of large quantities of infringing CDs.[86] One was a director and shareholder of the company producing the infringing CDs, another was the company's general manager, and the third was a manager who played a "hands-on" role in production.[87]

At the time of its decision, the District Court was well aware of *Choi Sai Lok*; indeed, it cited *Choi Sai Lok* in its reasons for decision.[88] Yet those reasons for decision sharply diverged from the principles set forth in *Choi Sai Lok*. In *Wong Dak Sun*, there had been a delay of more than two years between the Commission of the Copyright Offenses and the District Court's sentence. This delay stemmed directly from the defendants' decision to contest the case and take it to trial, which required the prosecutors to gather and prepare proof of the infringing nature of the many CDs found on the company's premises.[89] The District Court nonetheless held the prosecution solely responsible for the delay.

The District Court also cited three other major factors weighing in favor of leniency. First, it characterized the business that the defendants had carried on through the company as being "in other respects a legitimate and insubstantial one," and the incidence of infringing disks as "relatively tiny."[90] Second, it noted that the company, having had its production lines returned to it after seizure by Customs and Excise, had continued to manufacture CDs without further infringement. Third, it speculated that two of the individual defendants did not receive any direct financial benefit from the production of the infringing copies.[91] Accordingly, it imposed what might have been significant sentences of imprisonment (i.e. thirty, eighteen, and twenty-four months, respectively), but stated that "[i]n the circumstances I am prepared to accept, *perhaps over-generously*, that there is justification for suspending the terms of imprisonment

86. When Customs and Excise officers raided the premises of the company with which the three defendants were connected, they found more than 42,000 infringing CDs involving fifty different titles of infringed works, as well as three CD production lines, twenty-three "stampers" (i.e., master copies of infringed works), thirty-nince silk-screen printing machines, and eighteen negative films. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

without offending the principles laid down by the Court of Appeal and without in any way detracting from the seriousness of the offences."[92]

The Court of Appeal's response to this statement was immediate and unusually pointed:

> It seems to this court that the judge had not exaggerated the position when he stated himself as having been over-generous. These were very serious offences, which had been hotly contested over a large number of days in the District Court. The offenders were not small-time salesmen of pirated discs such as the magistrates courts see day in and day out. Such offenders are often sentenced to serve immediate terms in custody, whether or not they have good character, and regardless of their age. Furthermore, they were being sent to prison in 1997 when these offences were committed for precisely the reasons [. . .] given in *Ng Wai Ching*.
> These defendants were not small-time offenders. They were engaged in the production of infringing discs. If they are not to be sent to prison immediately, it offends every principle of fairness and justice that small-time offenders are to be immediately incarcerated.[93]

The Court also strongly reiterated the principle, which "[t]he courts have over and over again stated in recent times," that suspended sentences should not be imposed absent "unusual or exceptional circumstances which can justify a departure from an immediate prison sentence."[94]

The Court of Appeal also rejected the other factors that the District Court felt warranted suspension on the sentences. It held the defendants solely responsible for the delay (while noting that they were fully entitled to put the prosecution to its proof). It also stated, in scarcely less severe terms, that

> [w]hile the judge paid heed to the differing roles of the defendants, he does seem, with the greatest respect, to have lost sight of the fact that all of them had responsible positions in the company [. . .]. This oversight on the part of the judge may perhaps have been because he fell into the trap of comparing the relatively small quantity of infringing copies (albeit relating to fifty different titles) against the much larger

92. *Id.* (*emphasis supplied*).
93. *Id.*
94. *Id.*

> quantity of legitimate discs.[95]

Finally, it identified as a "very important point of principle in sentencing [. . .], which has to be borne in mind in cases of this nature," that courts need to avoid the disparity between immediately imprisoning small-time retail salesmen and refraining from imposing such sentences on "relatively well-to-do defendants," such as managers and bosses.[96]

In recalculating the sentences, the Court of Appeal continued to rebuke the District Court. It commented that the sentences which the District Court had imposed prior to suspension "in themselves were by any standards low, even for offences committed in 1997 [. . .]."[97] It further noted that the sentence for the company director and shareholder, who had initially received the thirty-month sentence, "in itself [. . .] was a lenient sentence for a man in [his] position who had been found guilty of these offences and, in particular, having been convicted on charge 8 [involving the possession of the equipment to make infringing copies]."[98] At the same time, it reduced the District Court's starting points by approximately one-quarter, in recognition of the fact that the defendants would now have to serve terms of imprisonment that were previously suspended.[99] This resulted in sentences for the three defendants that totaled twenty-two, thirteen, and eighteen months, respectively. To underscore its dissatisfaction with the District Court's handling of the sentencing, the Court added a final admonition that

> [t]hese sentences, for offences of this gravity, should not be regarded for the future as providing any kind of guideline. Plainly, in the light of what we have already said, sentences higher than the starting points adopted by the judge for offences of this nature would be upheld by this court.[100]

Since the Court of Appeal's decision in *Wong Dak Sung*, several reported decisions by the Court of First Instance have cited only *Choi Sai Lok* in reviewing sentences under the Copyright Ordinance.[101] *Wong Dak Sung* nonetheless has made pellucidly clear

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95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *See id.*
100. *Id.*
101. *See* HKSAR v. Cheung Yip Shing, [2001] HKCFI 792 (finding thirty-six-month

for lower courts that the Court of Appeal will not countenance any double standard in sentencing of copyright piracy offenders, and that any suspension of sentence in such cases is likely to be scrutinized with extreme care.

III. *EVALUATION*

In a recent decision involving a Copyright Ordinance sentence, the Court of First Instance declared that *Choi Sai Lok* "did not set new sentencing guidelines," but "merely grouped together principles which had been followed by courts for some time."[102] In its opinion, the relevant sentencing guidelines at the time the Magistrate had sentenced the defendant (i.e., approximately six weeks before the decision in *Choi Sai Lok*) "were in cases that preceded *Choi Sai Lok* [. . .]."[103]

Whatever their value in supporting the Court of First Instance's decision in that case,[104] these assertions are rebutted, as we have seen, by the Court of Appeal's own words in both *Li Wan Kei* and *Choi Sai Lok*. In effect, if not in literal terms, the decisions in *Choi Sai Lok* and *Wong Dak Sun* have established a group of sentencing guidelines that the Court of Appeal plainly intends lower courts to follow in copyright piracy sentencing. These guidelines may be summarized as follows:

1. In all cases, immediate imprisonment or detention should be imposed on defendants, without reference to their relative position in a particular copyright piracy operation, absent truly extraordinary circumstances. Age and general "good character" should not affect this determination.

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imprisonment sentence under section 118(1)(d) of Copyright Ordinance of person in charge of warehouse storing infringing discs to be neither excessive nor wrong in principle); HKSAR v. Wong Ho Fai, [2001] HKCFI 268 (finding six- to-nine month Detention Center sentence under sections 118(1)(e)(ii) and 119(1) of Copyright Ordinance of person who possessed more than 1,000 pirated discs to be neither manifestly excessive nor wrong in principle); HKSAR v. Wong Yiu Ming, [2001] HKCFI 238 (reducing sentence, under section 118(1)(e)(ii) of Copyright Ordinance, of retail seller of infringing discs from ten to eight months imprisonment, based on setting of initial starting point of eighteen months without reference to number of infringing discs).

102. *Wong Ho Fai*, [2001] HKCFI, at 268.

103. *Id.*

104. In that case, counsel for the defendant essentially had argued, in seeking a more lenient sentence, that *Choi Sai Lok* had changed sentencing practices that had previously applied to copyright offenses. *See id.* The Court of First Instance's view that *Choi Sai Lok* changed nothing, and merely restated sentencing principles previously in force, would certainly have served to rebut that position.

2. Defendants who occupy supervisory positions in organizations that produce pirated CDs should not, at a minimum, be treated more leniently than lower-level non-supervisory personnel in such organizations.
3. The number of pirated copies in the defendant's possession or control should be considered, without reference to the number of non-infringing copies that may also be in his possession or control.
4. Defendants who plead guilty promptly after being charged should receive a one-third discount from whatever starting point the sentencing judge selects.

The question remains how well these HKSAR guidelines, and the U.S. Sentencing Guidelines, achieve the goals of honesty, uniformity, and proportionality in sentencing. Both appear to achieve reasonable honesty in sentencing, as neither legal system allows for substantial reductions in time served after imposition of sentence. Uniformity and proportionality are more difficult to assess, as the balance between the two concepts is inevitably difficult to strike in any legal system.

The U.S. Sentencing Guidelines may have an advantage in that they clearly articulate and quantify more factors that a sentencing judge must explicitly consider beyond the base offense level. The amount of the copyright infringement (rather than just the number of infringing items); involvement in manufacture, importation, or uploading of infringing items; commission of the offense for commercial advantage or private financial gain; risk of serious bodily injury or possession of a dangerous weapon in connection with the offense; the defendant's role in the offense (whether minimal, minor, or supervisory); and the defendant's criminal history — all affect the ultimate sentencing calculations. On the other hand, age and personal circumstances ordinarily are not relevant in determining whether to go outside the applicable guideline range (although a court might cite such factors in selecting a specific sentence within a given range). Taken together, these Guidelines appear more than adequate to ensure that similarly situated piracy defendants are treated similarly, and that persons with greater authority and supervisory duties in pirate operations will be sentenced more severely than their underlings.

In contrast, the HKSAR guidelines to date address only

some of these factors with any specificity. The defendant's role in the offense and the number of infringing items (but not their "street value," or even their comparable retail value if they were non-infringing items) must now be taken into account, while age alone apparently should not. The Court of Appeal clearly is concerned that sentencing judges avoid obvious disparity in imposing terms of imprisonment. But it has yet to address whether it will consider the nature of the defendant's involvement in manufacture (as distinct from whether he plays a supervisory or non-supervisory role), or the significance of commercial advantage or private financial gain as a purpose of the defendant's actions.

Since the Court of Appeal's guidelines have only recently been issued, and courts ordinarily must wait for particular cases to come before them to consider the suitability of additional guidelines, it would be premature to draw firm conclusions about the adequacy or inadequacy of the current guidelines in achieving reasonable uniformity and proportionality. It is not too soon, however, to suggest that the Court of Appeal should consider accelerating the process of devising additional guidelines for copyright piracy cases.

Based on the decisions discussed above, it does not appear — contrary to the Court of Appeal's views in *Li Wan Kei*[105] — that the circumstances of offenders and offenses in piracy cases vary that widely. The number of ways in which criminals can and do efficiently set up and operate production lines and distribute and sell infringing items is highly limited. If, despite the vigorous enforcement efforts of HKSAR authorities, the lower courts have not amassed enough information about piracy operations for the Court of Appeal's use, it may be appropriate for the HKSAR courts or other authorities to commission a special report, drawing on law enforcement and private-sector information, that would provide a detailed description and analysis of such operations and the participants therein. The Court of Appeal could then draw on that report, in addition to the continuing stream of appeals against sentences, to devise a more comprehensive set of guidelines.

105. *See* [1997] HKCA, at 244.

CONCLUSION

One measure of the effectiveness of any sentencing regime is whether it is changing criminal behavior in a way that is both measurable and desirable. By that standard, the HKSAR's enforcement efforts against copyright piracy, including prosecution and sentencing, appears to have been highly effective at the retail level. In November 2001, one reporter observed that "pirate video stalls are sometimes left unmanned – and rely on shoppers' honesty to put money into a shoe box at the door."[106] Nonetheless, copyright piracy continues to plague both the United States and the HKSAR.[107] Authorities in both jurisdictions therefore need to maintain vigorous criminal enforcement and to seek sentences that strike an appropriate balance between uniformity and proportionality.

The U.S. copyright piracy Guidelines already appear to have articulated and incorporated enough factors to make that balance achievable. The HKSAR's guidelines, still in the fledgling state, are capable of achieving a similar balance. Whether they can do so in timely fashion depends largely on how quickly HKSAR courts respond to the problem. While other aspects of HKSAR copyright law have attracted greater attention from academia and the public,[108] further refinement of the current guidelines may be no less important in increasing the effectiveness of HKSAR copyright laws.

106. *Potter Piracy Spreads to Hong Kong*, BBC NEWS, Nov. 25, 2001, *available at* http://news.bbc.co.uk.

107. *See* Sandeep Junnarkar, *Software Piracy Dips in Some States*, CNETNEWS.COM, Oct. 31, 2002, *available at* http://www.nytimes.com (reporting overall increase in piracy rates from 2000 to 2001); Reuters, *Microsoft Says Software Piracy on the Rise in Asia*, SOUTH CHINA MORNING POST, Oct. 23, 2002 (reporting Business Software Alliance estimate that global software piracy will cost firms U.S.$11 billion per year in sales).

108. *See, e.g.*, K. H. Pun, *Reform of Copyright Law in Hong Kong: Time to Redress the Balance*, 32 H.K.L.J. 83 (2002); Bryan Bachner, *Hong Kong's Copyright Law: A Way Forward*, Hong Kong Lawyer, May 2001, *available at* http://www.hk-lawyer.com.