"It Is Right To Pirate Software"

By Wang Xiaodong, Editor, *Strategy and Management*

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What I am saying here is not at all sarcastic: I really believe that piracy is justifiable. For this reason, the use of the Chinese character "*dao*" for "pirate," carries certain derogatory connotations and is not altogether appropriate. However, to respect linguistic conventions of usage, I will nevertheless use the words associated with the Chinese concept of "*daoban*" (which literally means "pirated edition"), "to pirate," or "piracy" when referring to the phenomenon of various uses of unauthorized software. If someone wrote an article directed at software engineers claiming that piracy is justifiable, and published it in the magazine *Software Engineer*, most people would not take too kindly to this message. However, "the best medicine is bitter and sometimes the truth hurts." So, for the time being, hear me out [before passing judgment on my argument].

I. Morality and Justice: Who Owes Whom?

An article written by Xue Zhaofeng appeared in the July 16, 1999 edition of the *Southern Weekend,* entitled "How Can We Battle Microsoft?" With extremely harsh language, he refuted Wang Dingding's argument laid out in "Intellectual Property, Monopolization of Profits, and a Proposed Law against Exorbitant Profits," as well as Fang Xingdong's piece, entitled "Stand Up—Fight Back Against the Tyrannical Hegemonic Power of Microsoft." In the introduction, Xue came right out and said, "If a person wants to steal things and also wants to appear innocent, then he has no choice but to come up with a whole lot of nonsense [to rationalize his actions]." But I believe exactly the opposite. Xue's article itself is not actually rational; it is just that its irrationality is relatively well hidden.

On the surface, Xue's article seems very rational and convincing. He writes: "Is stealing reasonable and right, or not? Do we really owe other people something, or do they actually owe us? I think that honest, upright people know in their hearts the answer to this question. They know what is right." When he puts things in this way, our honest, good-natured, mild-mannered Chinese people would surely think that it is not reasonable and right [to sometimes steal]. You steal something from someone else, what are you getting all in bent out of shape about? But if you subject the matter to a closer inspection, you can see that Xue's argument is really not reasonable or right.

Everyone ought to know that we all benefit from many, many kinds of knowledge. In this pool of knowledge is a great deal for which we have paid nothing, or at the very least we have not paid for this knowledge in ways we would pay for the use of software. One example would be mathematical innovations. These sorts of things cannot be patented and protected by copyright law. Is it that the wisdom contained in a mathematical innovation is low? Lower than that of a piece of computer software? I doubt, indeed, that this is the case. On this score, I believe that software engineers themselves are also

1

perhaps quite clear.

Let me just share with you a personal experience of my own here. I graduated some time ago from a mathematics department. Among my classmates were many with mediocre to average grades. They themselves knew quite well that they would never have real career prospects in the field of mathematics, and consequently they all went to the United States to write software programs. Now they are outstanding figures in the field, even at Microsoft.

Are mathematical innovations less important to our lives than software? I'm afraid that is not the case. To put it more bluntly, where would computer software be without mathematical innovations? Can software exist without mathematics? Absolutely not. Computer software not only uses an enormous amount of existing mathematical knowledge, but also integrates as much of new mathematical innovations as possible. Examples include CAD, any of the many kinds of digital compression technologies for manipulating images and the use of encryption technologies in e-commerce (which relies to a high extent on pure mathematics).

Mathematical innovations are not only critical to our lives; there could also be a market for them. All that would be necessary for this to happen would be to allow me to apply for a patent for my mathematical innovations, and your software companies would have to shell out a whole lot of money to buy them. So, why is it then that patenting mathematical innovations is not allowed (China is still in the very beginning stages of building a rule of law, and people invariably do not even think to explore these kinds of questions)?

I'll tell you why this is the case. Mathematical formulas cannot be patented precisely because so many of the inventions made in the realm of mathematics are simply too critically important. If it were permissible to patent mathematical innovations, then the lifeblood of human society would fall into the hands of a few (in the language of the market: this is precisely because the market value is so high), and therefore human society cannot allow mathematical patents to exist. Imagine, for a moment, what would happen if someone could apply for a patent for the multiplication table. What would human society be like in such a situation? Without my authorization, your nine times nine would not be allowed to equal eighty-one (this is a joke of course). In the same vein, a number of biological inventions and a great many scientific discoveries (Chinese patent law clearly specifies that scientific discoveries are not eligible for patenting) are also not eligible for patenting, because they are too important to human life. Moreover, Chinese patent law also clearly specifies that no material deriving from nuclear conversion technologies can be awarded a patent, either. The reason for this is simple. The use of materials derived from nuclear conversion technologies has a direct relationship to the interests of national defense. The implications for national security are especially the case with those materials that have a pure application in nuclear weapons technology.

Why am I raising these examples? I do so because in the realm of things pertaining to intellectual property, it is not as simple as Xue claims—there isn't necessarily an

2

absolute "right" in terms of "who owes whom."   If we want to enter into questions of absolute right, human knowledge and wisdom are closely connected. It is very difficult to figure out clearly who actually owes whom what. But why do we want defend and protect computer software? The logic here is quite simple. We want to protect computer software because if we did not, no one will write software for us. (To a mathematician, human society is certainly not the kind to not give compensation, but it does mete out compensation in a different manner. There certainly are mathematicians who have made great contributions. Maybe the competition [between them] is not as intense as it is among software engineers, but their lives are comfortable and graceful, compared to those of software engineers. For this reason, there will definitely always be those talented ones who will choose to become mathematicians.)   Moreover, computer software will always be less important than the multiplication table. So if we give software engineers a little protection, we'll live.

For these kinds of reasons, when we answer the question of whether or not to protect software, or how much protection is appropriate, the point of departure in our thinking should not be the so-called "right" or "who owes whom." Instead, we should be asking what we can do that will be more beneficial to society. Xue's article states, "We can still choose, to be thick skinned, to continue to steal. The reason is that, for the time being, the benefits from stealing still outweigh the costs. Even though it is stealing, we ought to steal with our hearts full of gratitude and apologies." I will contend the exact opposite. If you can actually make a profit by selling authentic, copyright protected products, then you ought to do it with your heart full of gratitude and apologies. You should know that there are many people who are smarter than you are, people who make greater contributions, and we haven't given them much money (of course, it is also the case that there are many who are not as smart as you, and there are many people who have made fewer contributions and yet have taken even more money from us).   At this time, as far as we're concerned, not providing computer software protection is really not more beneficial than costly. You've just been lucky so far.

II. The Law: Three Steps and 'The Law Doesn't Punish the People'

What is "thick skin"?   What is "hearts full of gratitude and apology"? These tenets, which have been expounded excessively, are among our special Chinese characteristics. With regard to Westerners' "modern consciousness," this sort of thing just doesn't exist at all. When Westerners talk about law, they want to see whether or not the law can be effectively enforced. This point was demonstrated quite clearly during the World Cup final match of the Chinese and American women's soccer teams. When they were getting ready for the penalty kick, the American team's goalie moved forward before the Chinese team's player had moved her foot. This is against the regulations (not legal), but she had probed the referee and discovered that his attention was not focused (there is no way to effectively enforce this particular aspect of the regulation). After the match, the American goalie and the media dwelt smugly on this matter, saying it was clever of her, taking advantage of the soccer game rules the way she did. The American consciousness demonstrated by this example is: As long as it is legal—or even if it is not *really* legal but can nevertheless effectively evade legal enforcement—no matter how it might be at

3

variance with morality, don't take an attitude of "gratitude and apology;" just do it. Now, let's talk about the law again.

According to Shanghai University's Institute of Intellectual Property professor and lawyer, Shou Bu, there are three levels of software protection. First and foremost is "the first level," which specifies that the boundaries of [what constitutes] software copyright infringement do not extend to cover the activities of end-users. In other words, manufacture and retail of software without authorization is illegal, but the use of unauthorized software is still legal. (On behalf of the interests of certain software companies, the mass media has, in recent times, made a huge effort to imbue the public mind with the notion that the ordinary use of unauthorized software is illegal. This attempt, in and of itself, betrays a lack of understanding of the law.)

As a matter of fact, this is also the level of protection given to ordinary copyrights. For example, at present there are a great many pirated versions of popular novelist Jin Yong's martial arts hero stories. The printing facilities where the pirated copies of his stories are made are in violation of the law, but it is completely legal to buy a pirated copy of one of his books. The current "international standard" belongs to this "first level." If we interpret China's current laws and regulations from the perspective of legislative intent, then China is also still on this "first level." Lawyer Shou Bu describes this "first level" in terms of a "theory of normal levels."

The "second level" is comparative. When comparing the legal protections afforded to proprietary rights and copyrights for software and those afforded to more traditional products, one sees that there are indeed some differences. For this reason, some developed countries (such as Japan) extend the definition of the boundaries of what constitutes copyright infringement all the way down to a portion of the end users. This level of protection is called the "second level." In Japan, some aspects of copyright law specify that work units [businesses] that are fully aware that they are in violation of software copyright law and yet use [unauthorized/pirated software] will be viewed as violating copyright law. But it should be noted that even in Japan, under ample consideration of the special status of software, the definition of the boundaries of software copyright infringement do not differentiate between types of users, and do not probe the question of purposes in use. This lack of differentiation extends all the way down to the level of the end-user.

"The third level" takes the boundaries of what constitutes copyright infringement and extends it all the way down to the end user. Lawyer Shou Bu refers to this as "the meta-world level" because so far not one country has afforded computer software this level of protection. In China, there are a few people who have offered this kind of "meta-world level" interpretation of copyright law and attendant regulations, and are actually pushing for this level of software protection in China—a country still very much undergoing the process of development. They want to take China up to this "third level."

The people who advocate this are even more ruthless, greedy, and underhanded than Americans. Even if one looks at the matter entirely from the point of view of individual

interest and benefit, it does not follow that the more ruthless and greedy a person is, the more advantage he will gain. Rather, moderation should be the rule here. This is a question that I will continue to discuss during the next segment.

For the time being I will first focus on discussing the problem of capacity to enforce the law. A little while ago I mentioned how Xue had once engaged in an attack on the idea that "the law should not punish the people." Others who have also addressed this matter in various articles have spoken with almost one voice and argued that this idea is a "rotten and backward" manifestation of China's traditional way of thinking.

I want to say that this is, once again, a mistake. In fact, "the law does not punish the people" is a standard legal principle all across the globe. To wit, I want to give everyone an extremely famous legal example to illustrate my point. This is the example of America's prohibition of alcohol. This example is by no means a small or trivial one. Indeed, this matter was the subject of the 18th amendment to the United States Constitution. It reads as follows: "…the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." Prohibition took effect in 1920 and remained in effect until its abolition in 1933.

During this time, other than fostering the emergence of a number of alcohol dealing gangs and thugs, the benefits of prohibition were entirely dubious. The fundamental reason for this was the violation of the basic principle "the law does not punish the people." At that time, there was a joke in circulation to the effect that if one wanted to effectively enforce prohibition in New York alone, a team of 300,000 law enforcement officers would be necessary. Thereupon people would ask who would guarantee that those 300,000 law enforcement officers would not break the law. If you want to keep an eye on them, the joke went, you would still have to hire another 300,000 police officers to do that job.

When I bring up the American Constitution, I do so with the utmost respect intended. It is amazing and authoritative—if the president breaks the law, he is as guilty as a commoner. Because the Constitution of the United States is based on the principle "the law does not punish the people," it has to yield to the people [as it did in the prohibition example]. By the way, "the people" may refer to many people, but not necessarily the "majority"—otherwise, the 18th Amendment of the American Constitution could not have been ratified in the first place.

So, if the protection of software copyrights is a question of the "people," in what way is this the case? I think that each of us knows exactly how this is the case. Not long ago I gave a speech at Peking University. I discussed this very question. At the time I asked if there was anyone present who had not used pirated software. I said that if any such people were present, they should raise their hands. After waiting for quite some time, not even one person raised his hand. Finally one of the students said that if I had asked whether anyone had not used authorized, non-pirated software, everyone would have raised their hands. Even those software companies that are screaming out the loudest about copyright infringements might have used pirated software. That is how it is in China.

5

In developed countries it is a little bit better, but the proportional use of pirated software is still at a very high level (there is little mass consensus on how large this percentage actually is, and it is, in fact, very difficult to ascertain actual figures for the use of pirated software). A law or regulation, even if it only lists people breaking the law, would not be desirable or effective. In fact, computer software protection should be reduced by half a step. At present, even in the United States, there are a great many legal scholars and economic experts who are using all kinds of reasoning to appeal for taking software protection a step down. Of course, as stated above, this is not to argue that we should ignore such steps altogether, for if we did, no one would be willing to write software for others to use.

III. Interests: The Interests of Society and the Interests of Software Companies

Chinese computers use, and to a large extent, rely on pirated software. This is the reality. It is a reality that is not likely to be significantly altered in the near future. Imagine for a moment [what would happen] if all piracy was immediately stamped out of existence. What would become of China's [patterns of] computer usage? I think that even without much analysis, everyone understands quite well [what would happen]. It is absolutely not possible that everyone would go out and buy authentic, non-pirated software. Instead, what would happen is that the use of computer software in China would drastically shrink. This shrinkage would drastically impact development and progress in the field of computers in China. In light of the fact that computers have come to play an increasingly critical role in the economy, in matters pertaining to national defense, and even in the realm of everyday life, such shrinkage could spell disaster for China.

Of course, things will not *actually* turn out this badly. As stated above, "the law does not punish the people." The possibility of this happening is very small. Making a big commotion about strengthening computer software copyright protection will only hinder things at most. But first, if you create the legal regulations but still have no way to strictly enforce the law, then you might as well be practical and realistic, take a half step back, draft laws and regulations in accordance with China's actual situation—laws that can be strictly enforced (of course, I have no choice but elaborate on the ways in which the considerations of Americans are understandable) in order to uphold the seriousness and credibility of the law. Second, if the consequences were significant, it would seriously impact the development of the computer field in China, influencing the development of the entire society.

China's mass media has been sparing no effort in trying to instill the idea that the more copyright protection for computer software is strengthened, the faster it will help the entire field of computers develop. Certain Chinese software companies are always making a big commotion, saying that they have fallen behind the pack, far behind the cutting edge of the [international software industry], with no way to catch up, and this is entirely due to software piracy. Nothing could be farther from reality. We only need to think for a moment and ask ourselves why India's ineffective intellectual property protection laws have not hindered the development of India's software industry? Some people have argued that we cannot compare ourselves with India, because the Indians

6

[unlike the Chinese] understand English well. In answer to this I say: Aren't you people always talking about something like a "hero of knowledge"? One has knowledge and is a hero. But these very people can't even surmount a little obstacle like English? After so much talk, it is we ourselves who lack skills and we are always trying to find some objective [external] reason for our woes.

We can just name our Taiwanese brethren as an example. They were once the masters of piracy, and look at their computer field. It is most definitely outstanding. They pirated until they had pirated themselves out, pirated enough. And after they had made big money, Taiwan can be said to have gone on to "wash their hands [of piracy] in the golden basin."

At this present stage, there is too much protection afforded to computer software. This is not necessarily good for software companies, let alone for the interests of China in the throes of development. To put it bluntly, China's computer usage has reached the scale that it has today because [the market] has been fostered and cultivated by pirated software. As far as these software companies are concerned, if it were not for China's computer usage, to whom would they sell their software? If China's computer usage [patterns] were to shrink, I'm afraid that software companies would not be able to make a penny. Now that there is a basic established level of usage, for better or for worse, at least they can earn a bit [of money].

There are some software companies that are always calculating [their losses] in the following way. "There is such and such a number of people using my software. My software is supposed to cost such and such amount of money per unit. Multiply these numbers and you can see that [in the current copyright climate] I am losing such and such amount of money." As a matter of fact, however, this manner of calculation is fundamentally erroneous. It is only because there is piracy that such a large number of people use your software. If [people actually were to pay] the original price you set, there would not be nearly as many people using your software. To speak frankly, in today's "economy of attention," the fact that people pirate your software is a good thing. At the very least you can get people's "attention." Then, on the basis of that attention you can hype up [interest in your software], and after the hype you can use software sales or some other kind of measure to take in a heap of money. If no one even pirated your software, then you would really be pathetic.

In recent times there have been a number of writers who have filed lawsuits against certain Internet companies.   I am not as famous as these particular individuals, but my books have also been issued on the Internet without my permission or authorization on some 70 or 80 Web sites. In other words, I have also had my works pirated, and not only by Chinese people either. Americans have also pirated my work. Americans have translated my articles and published them. Some of them have contacted me and paid me for the use of my article, but others have simply used my articles without notifying me or paying me. This has happened to the point where friends of mine in the United States saw my work in the libraries there before I knew about it. (Books and computer software have some important differences, but they can be roughly equated. Books and software both

7

can be protected under copyright law, and they both use the character "*ban*"
[publish/edition]. In the broadest sense writing a book is [the same as] writing software.)

If I were to turn the tables and use American intellectual property, what attitude of
"gratitude and apology" could I possibly carry in my heart? With regards to the
distribution of my books on the Internet, I see this as a sign that people respect me. Not
only would I not sue them, I am very happy about this. What I am unhappy about is
another kind of "piracy," and that kind of "piracy" is called plagiarism. More than one or
two people have plagiarized my work, and the most detestable part about it is that some
of them are even famous individuals.

Nevertheless, I will not file a lawsuit over this either. Nor will I make a big commotion,
saying that I should receive protection. I do not have the time to go about undertaking
such meaningless action.   Of course, everyone should let me make a living. I should at
least be allowed to take home my royalties for the first printing. If it got to the point
where I cannot earn a living, I would have to go file some lawsuits too. But these big
names, famous writers who have filed lawsuits are most definitely not facing starvation of
any kind, and so I see them as being a bit on the petty side.   In the end they won their
lawsuit, because the popular slogan today is to "strengthen intellectual property rights."
I think that China's effort to lead the fray in this case is really not fully appropriate. Of
course, even though the judge has ruled in the writers' favor, there is still the matter of
enforcement and implementation. But Internet readers have their own ways of
conducting boycotts. On the Internet, some people have advocated to "seal out and kill"
several writers. And this is right. Do not make the mistake of thinking that without you,
we have no other books to read. [Your] refusal to [allow your work to] be pirated may
damage you even more.

The incomes of Chinese people are only so high. At this current stage they cannot buy
your expensive authentic, non-pirated software. Rather than demanding that they do,
which is simply impossible, why not first just "let in the water to help the fish grow." In
other words, cultivate and foster computer usage in China. Wait until the situation has
matured and users can afford to buy the "golden basin." That is the time when you can
tell them to "wash their hands" and buy your authentic, non-pirated software. It is said
that Bill Gates once made a remark to the effect that 'Chinese people like to steal, if they
are dead set on stealing, then best let them steal ours.' As I have been saying, what kind
of stealing is going on is beside the point. Chinese people and Western people, however,
are not the same.   It is nevertheless necessary to raise the question of what is just. No
matter what one says, people put a lot of energy into making these things, if someone
says a few cheap words, it is not necessary to haggle over the minute details. In any case,
Bill Gates is much more tolerant than our own software companies. Microsoft Office
2000 does not put you in a difficult position. They say that it is "one machine one
password," in order to give you a scare, but even an amateur computer user can break the
code, and so it doubly goes without saying that a professional hacker can do this with
ease. Stumping amateurs is definitely not a problem, it is obvious that what [Microsoft]
is doing is letting in the water so you can "help the fish grow."

8

Of course, China's software companies will say that they cannot be compared with Bill Gates. He is [able to act in this way because] he is self-confident owing to his great wealth. With the income from the markets of the United States and other developed countries to sustain him, [Gates] in no way relies on the little bit of money from the Chinese market, whereas Chinese software products have no other markets to provide them with a source of income and so they must rely on the Chinese market's performance to issue paychecks. Unable to sell their authentic, non-pirated software, they cannot even pay their own salaries. Under these circumstances, how can they ever be expected to "let in the water to help the fish grow"?

My answer to this is that you have only one road out [of this morass]—steel your resolve, do not be afraid to make sacrifices, attack all difficulties, move forward and strike out, like the Indians, and go earn your money from the developed countries. Of course, those who insist on trying to develop in the Chinese market must make their products more suitable, better and with prices set at a level suitable to the Chinese market. [In this way] making a living is not impossible. If you do not exert yourself, temper your skills, hone your capacities and make better code, if you just sit around and complain loudly that we need to strike down piracy, then you will be wasting time [arguing about copyright protection]: You will not be able to make money if piracy is not defeated, but if piracy is defeated, you will make even less money. This is my sincere advice to the software companies of China.