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**香港工業總會**
FHKI

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Federation of Hong Kong Industries

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Hon Mrs Sophie Leung
Chairman
Panel on Commerce and Industry
Legislative Council
8 Jackson Road
Hong Kong

Dear *Sophie*,

**Preliminary Legislative Proposals on
Various Copyright-Related Issues**

In June 2005, the Commerce, Industry and Technology Bureau submitted a paper to your panel setting out its preliminary legislative proposals on various copyright-related issues. The Federation of Hong Kong Industries would like to offer the following views on this paper for panel members' consideration.

Preamble

As a matter of principle, the FHKI fully respects the legitimate rights of intellectual property owners. We are also in keen support of the Government's efforts to continue improving the legislative regime in Hong Kong to strengthen the protection of intellectual property rights. In fact, the FHKI is the only trade association in Hong Kong with a dedicated team for intellectual property services. Earlier this year, we founded the "Hong Kong Coalition for Intellectual Property Rights" to step up our work in the protection of intellectual property rights. This Coalition pools together companies impacted by rampant counterfeiting activities and serves as a platform for collective action against IP infringements in Hong Kong and the Mainland.

While we agree that the copyright legislation needs to give the enforcement authorities the necessary "teeth" to tackle piracy and counterfeiting activities, it is imperative that extreme care must be excised to avoid overly restricting the information flow in society and organisations. In our view, criminal sanctions, being a form of punishment for serious misdeeds, must not be lightly imposed on cases involving only minor infringements not entailing substantial economic loss to the copyright owners. For such cases, civil remedies are already available, which should be sufficient for copyright owners to seek legal redress.

In drawing the legislative amendments, the Government needs to strike a sensible balance between protecting the interests of copyright owners and facilitating the fair use of copyright works by the public. Instead of over-relying on government enforcement actions to protect their rights, copyright owners should share the responsibility to safeguard their interests by incorporating advanced IP protection techniques in their products.

Specific Comments

Below are our comments on the specific proposals made by the Government.

1. Scope of business end-user possession criminal liability

The FHKI supports the Government's proposal to maintain the existing scope of business end-user possession criminal liability to cover only four categories of copyright works, namely, computer programmes, movies, television dramas and musical recordings.

2. New criminal liability for copying/distribution of copyright infringing printed works

We have strong reservation about introducing a new criminal offence for copying/distribution of copyright infringing printed works, despite the proposed inclusion of a "safe harbour" provision in the legislation.

In today's businesses, photocopying of newspaper/magazine articles or passages of a publication for internal circulation, discussion or reference is a very common practice. This is done purely to facilitate the flow of information in a timely and speedy manner without any wilful intent on the part of the business to mar the legitimate interests of the copyright owners. Given that no direct financial gain is involved in such acts, we do not see any sufficient grounds for criminalising these *bona fide* business activities.

Having said that, we do not object to imposing criminal sanctions against serious and wilful piracy of printed works to protect the copyright of newspaper, magazines, periodicals and books, provided that the infringing copies made or distributed are for sale or for other direct financial gain. In this regard, the recently enacted "copyshop possession offence" under section 119A of the Copyright Ordinance should be able to effectively deal with these infringing activities.

3. Director's and partners' criminal liability

In the paper, the Government proposes that if a body corporate or a partnership has done an act attracting the business end-user criminal liability, the director(s) of the body corporate or the partner(s) of the partnership will also be equally

liable in the same case unless there is evidence showing that the director(s)/partner(s) has not authorised the infringing act to be done. The FHKI is strongly against this proposal for the following reasons.

- (a) Putting the burden of evidence on company directors/partners is in contravention of the common law principle under which an individual is presumed innocent unless proved otherwise by the prosecution. This requirement should only apply in crimes of a very serious nature, such as drug trafficking.
- (b) Many SMEs do not have the expertise and resources to develop and implement an elaborate system to manage IP matters. It is unreasonable to ask these SMEs to adopt a corporate governance standard as high as that of large companies.
- (c) Imposing personal liability on company directors/ partners for minor offences (e.g. copyright infringement) will deter Hong Kong's entrepreneurial spirit and discourage investors from setting up businesses in Hong Kong.
- (d) It is unreasonable to expect a company director/partner to be responsible for each and every personal belonging brought to the workplace by his/her employees. To ask the directors/partners to provide evidence showing that they have not authorized the infringing act to be done will impose undue burden on them. This is especially the case if a disgruntled employee tries to frame the employer by bringing pirated copies of a copyright work to the workplace.

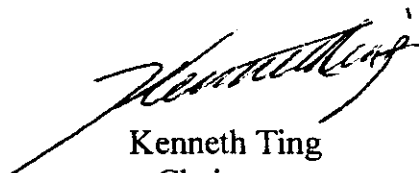
4. Parallel importation of copyright works

The FHKI disagrees with the Government's proposal to retain the existing restrictions on parallel imports of copyright works. Our recommendation is to gradually phase out these restrictions to give consumers more choices in purchasing products from overseas at more competitive prices.

The rationale behind our argument is that the primary aim of the Copyright Ordinance should be on combating copyright piracy. Copyright works that are parallel imported are genuine products, released lawfully outside Hong Kong. Those obtaining these copyright works by lawful means should have already fully requited the copyright owners. The existing 18-month ban on parallel imports, which only concerns the protection of the exclusive licensees' distribution rights, is beyond the scope of copyright protection. Since distribution rights are entirely a business strategy matter, it is inadvisable to cover its protection in the Copyright legislation.

We hope your panel will give careful consideration to our views given above and take them into full account when deliberating the Government's proposals.

Yours sincerely,



Kenneth Ting
Chairman