



Hong Kong General Chamber of Commerce
香港總商會 1861

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香港總商會
香港金鐘道統一中心廿二樓
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queenway, Hong Kong
Tel (852) 2529 9229
Fax (852) 2527 9843
Email chamber@chamber.org.hk
www.chamber.org.hk

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The Hon Sin Chung Kai
Chairman
Bills Committee on Copyright (Amendment) Bill 2006
Legislative Council Building
8 Jackson Road Central
Hong Kong

Dear Mr. Sin,

Comments by the Chamber on further amendments to the Copyright (Amendment) Bill 2006 with respect to provisions on Director's/Partner's Criminal Liability

The Hong Kong General Chamber of Commerce submitted its comments on the Copyright (Amendment) Bill 2006 when the Bill was issued for public consultation last year. Subsequently, the Chamber wrote to the Government supplementing further views on the issue of director's/partner's criminal liability. As a result of comments by the Chamber, the Bills Committee and other stakeholders, the Government has proposed further technical amendments to the Bill, and held further consultation with the Chamber. We thank the Bills Committee for taking note of the Chamber's comments. The purpose of this letter is to provide you with our views on the latest amendments as detailed in the paper of November 2006 provided by the Government to the Bills Committee (Paper CB(1)283/06-07(01)), in respect of the provisions on director's/partner's criminal liability.

The Government's latest proposal is to amend the Bill to make it easier for the defendant (the director/partner responsible for the internal administration of the company) to prove to the court that he has not authorized the infringing act. Under the new provision, the court will be satisfied if the defendant can prove that he has "set aside financial resources" or "incurred expenditure" for acquisition of sufficient copies of the infringing works in question. As we understand, this means that in practice if the director/partner can prove that he has a budget or if he can produce receipts of prior purchase of genuine products, then the burden of proof shifts back to the prosecutor.

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Insofar as this provision lessens the burden of proof on the director/partner, this is to be welcome. However, our fundamental concern, namely that of presuming the director/partner guilty until proven innocent, remains unresolved by the new amendment, which still imposes a burden of proof on the director/partner even though it is an "evidential burden" not a "legal burden". Despite the latest drafting, our view remains that the proof of guilt must lie with the prosecution.

Instead of shifting the burden of proof between defendant and prosecutor, we maintain our view that the law should be drafted in the conventional way by expressing the criminal liability explicitly, i.e. if an infringing item were found, then the person in charge (director or partner) would attract criminal offence if prosecution can prove beyond reason doubt that he has authorized it, or was aware of it but has taken no action. In the event that prosecution cannot prove beyond reasonable doubt that the person has authorized or has known, but can establish that he "should reasonably have known" of the infringement, then only civil liabilities should apply, as the offence would amount to mismanagement rather than a criminal act or an act of criminal negligence.

Yours sincerely



Alex Fong
CEO

c.c. Mr Christopher Wong, Deputy Secretary for Commerce Industry and Technology