Hong Kong Institute of
Certified Public Accountants
香港會計師公會

BY EMAIL & BY POST
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Our Ref.: C/EPLM(31), M33370 26 February 2005

Miss Eugenia Chung,
Division 3, Commerce and Industry Branch,
Commerce, Industry and Technology Bureau,
Level 29, One Pacific Place,
88 Queensway,
Hong Kong.

Dear Miss Chung,

Review of Certain Provisions of Copyright Ordinance

The comments of the Hong Kong Institute of Certified Public Accountants ("HKICPA"/ "the Institute") on the Review of Certain Provisions of Copyright Ordinance Consultation Document issued in December 2004 (the "Consultation Document") are set out below. We would also refer you to our previous submissions on the following related areas, dated 31 December 2001("2001 submission") (Appendix 1) and 28 June 2003 ("2003 submission") (Appendix 2), respectively:

- Review of Certain Provisions of Copyright Ordinance Consultation Document issued in October 2001; and
- Copyright (Amendment) Bill 2003.

1. Copyright Exemption

Under the exhaustive list approach currently adopted in the Copyright Ordinance, which is one of the options for copyright exemption contained in the Consultation Document, while the circumstances and purposes of use of a copyright restricted act may reasonably constitute fair dealing with a copyright work, the act will still attract civil, and, in some cases, criminal liability if it is not included as one of the "permitted acts" under the Ordinance. A non-exhaustive approach, on the other hand, can accommodate new circumstances and purposes of use that may emerge in future without the need to continuously update the "permitted acts" provisions in the Copyright Ordinance.

On balance, we would favour an approach that combines a non-exhaustive list of specifically-permitted acts, together with general provision on "fair dealing" that could extend to activities that fall outside of the permitted acts. As regards the elements of "fair dealing", we would have some reservations about the explicit inclusion of the possible factor referred to in paragraph 1.14 (c)(v),

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i.e., "the possibility of obtaining the copyright work within a reasonable time at an ordinary commercial price". Arguably, this begs the question because if the law does not strike a proper balance between the rights of the copyright holder and those of users of copyright works, then the "ordinary commercial price" may be a reflection of that fact and may not be regarded as being fair or reasonable by one side or the other.

2. Scope of Criminal Provisions Related to End-user Piracy

The Institute would like to reiterate its view that any legislation to criminalise copyright infringements should be targeted specifically at what are generally accepted as being significant problem areas. It should avoid introducing a heavy-handed, blanket criminalisation of other infringements that, on one hand, may have little or no material effect on copyright holders and, on the other, may impede the flow of information and adversely affect the process of learning and the quality of debate within the community.

In this regard, we would refer you to the comments made in our 2003 submission (parts I – III) and also in our 2001 submission (part B.1).

3. End-user Liability Associated with Parallel Imported Copies

In principle, the Institute considers that the civil liability and criminal sanctions against parallel importation and subsequent dealing in all types of copyright work should be removed. We would refer you to the comments made in our previous submissions, dated 28 June 2003 (part V) and 31 December 2001 (part B.5).

4. Defence for Employees against End-user Criminal Liability

We support a specific defence for employees and would refer you to the comments made in our 2003 submission (part IV) and 2001 submission (part B.1(b)).

While we agree that the defence for employers against end-user criminal liability should not be extended to executive directors or the chief executive of a body corporate, we do not believe that company secretaries should automatically be denied the defence. Company secretaries are not necessarily part of the management team. Depending upon their position within a particular company, therefore, company secretaries should be able to avail themselves of the defence.

We do not believe that the "whistle blower" protection system suggested by some copyright owners and outlined in paragraph 4.4 of the Consultation Document, which potentially involves issues of employment law, would be a practicable option.

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

The Institute is of the view that the options put forward in the Consultation Document to facilitate prosecution of end-user copyright infringement, including shifting the burden of proof to defendants, would impose an undue burden on end-users. We favour the "wait and see" approach referred to in paragraph 5.4 of the Consultation Document.

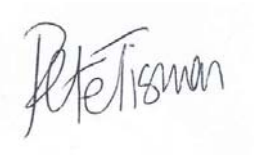
6. Circumvention of Technological Measures for Copyright Protection

We would refer you to the comments contained in our 2001 submission (part B.6), on the related issue of unauthorised reception of subscription television progammes. The Institute would not be in favour of measures that would target end-users.

The HKICPA has no particular comments to make on the other matters discussed in the Consultation Document.

I hope that you find our comments to be constructive. If you have any questions in relation to our comments, please feel free to contact me at peter@hkicpa.org.hk or at 2287 7084.

Yours sincerely,



PETER TISMAN
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