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15 February 2005

Via electronic mail  
[mary\\_chow@citb.gov.hk](mailto:mary_chow@citb.gov.hk)

Ms. Mary Chow  
Deputy Secretary  
Commerce & Industry Branch  
Commerce, Industry & Technology Bureau  
The Government of the Hong Kong SAR  
Level 29, One Pacific Place  
88 Queensway  
Admiralty, Hong Kong

**Re: Comments of the American Chamber of Commerce on  
Public Consultation Document on  
Review of Certain Provisions of Copyright Ordinance  
("Consultation Document")**

Dear Ms. Chow:

Thank you for this opportunity to comment on the Consultation Document. We commend the government on its appreciation of the importance of intellectual property (IP) protection and its positive engagement of the public on these issues.

**Introductory Remarks**

The American Chamber of Commerce in Hong Kong (the "Chamber") is a volunteer and independent business organization established in 1969 and now has a history of over 30 years. The Chamber is currently one of the most dynamic and influential international economic organizations in the Asia-Pacific region, representing more than 2,000 members from over 30 nations, including the United States, Europe and across Asia. Among them, there are large multinational corporations as well as small and medium-sized enterprises. The objectives and duties of the Chamber include representing our diverse membership on issues of common interest and serving as an advocate with governments.

The Chamber previously submitted comments on the Copyright (Amendment) Bill 2003 as part of the previous consultation process. At that time, we expressed our overarching concern that legislative proposals designed to narrow the scope of protection for copyrights in Hong Kong

were being considered at a time when piracy, product counterfeiting, and other types of IP-related offenses remain a significant concern for right holders across a wide range of industries. We reiterate that reducing the level of protection for copyrights would be inappropriate and would send the wrong signal to the public regarding the importance of respecting intellectual property rights. Furthermore, we continue to believe it is now more important than ever for Hong Kong to show leadership in this area in order to maintain our competitiveness vis-à-vis other developed economies in the Asia-Pacific region and reap the economic benefits that will flow from lower levels of piracy. Accordingly, we urge the government to refine current legislation to address the specific concerns outlined below and in our prior submission.

### **Specific Comments on Consultation Document**

In this submission, we do not comment in detail on each question raised in the Consultation Document but instead have focused on a number of the core issues raised in the paper.

#### *Proposed Introduction of General Fair Use Defense*

The Administration seeks views on the merits of introducing a general fair use defense. For a combination of reasons, we are concerned that the introduction of the fair use doctrine would be premature in Hong Kong. As an initial matter, current legislative prohibitions against certain damaging types of piracy in Hong Kong – particularly piracy by end users in the business context – have proven ineffective in application. We note that since business end user piracy was specifically criminalized in April 2001 there has not been even one successful contested case in this area that has resulted in conviction. Before adopting a fair use system, the government should first ensure that existing legal protections against piracy can be applied effectively in practice.

This is especially true given that the adoption of a fair use regime would represent a significant shift in Hong Kong's legislative framework, and thus has the potential to exacerbate the already serious piracy problem. There is a danger that a fair use system would at a minimum create unneeded ambiguity regarding the boundaries of lawful conduct or, worse, provide infringers with an opportunity to escape liability for their infringing acts based upon purported misunderstandings about the scope of the law. The concern is particularly acute given today's rampant online piracy (including P2P piracy), and in an environment such as Hong Kong where consumer awareness of and respect for intellectual property rights still lags behind that of other developed markets. Even countries such as the United States – which has the benefit of many years of jurisprudence providing greater clarity concerning what constitutes "fair use" and a strong tradition of respect for IP – are finding challenges in the application of the doctrine to scenarios that arise in the context of online piracy. In Hong Kong, fair use would be an entirely new concept and its introduction runs the risk of confusing the public on the parameters of the law or creating legal loopholes for infringers.

In addition, the consultation paper raises the previous proposals relating to free public showings of playing of broadcasts or cable programs in Appendix II. The Chamber does not agree with these proposals and does not believe that these exemptions are necessary.

#### *Scope of Criminal Provisions Related to End-user Piracy*

We remain concerned about the intention of the government to make permanent the suspension of the April 2001 amendments to the Copyright Ordinance criminalizing end user piracy of copyright works – only as those amendments apply to printed works. This suspension sends the

wrong message to the education and small business communities – communities the government should be striving to educate on the importance of intellectual property rights. For these reasons, and in light of further efforts by the publishing industry to put in place licensing mechanisms and guidelines in response to expressed concerns, we suggest that the government reinstate criminal liability for end user piracy of printed materials that takes place for the purpose of or in the course of any trade or business, including academic institutions.

#### *End-user Liability Associated with Parallel Imported Copies*

We strongly recommend the retention of the status quo and believe that no further relaxation of the existing criminal and civil liability provisions is needed. We believe that the current period during which parallel imported copies will attract criminal and civil liability represents an appropriate balance and should not be shortened.

#### *Defense for Employees against End-user Criminal Liability*

The Chamber has concerns about the proposal that the law be amended to expressly exempt certain classes of employees from liability for business end user piracy. The rate of piracy in Hong Kong among end users in the business context is considered very high for an advanced economy (as an example, the software piracy rate in 2003 was estimated at over 50%, which is substantially higher than in markets such as Taiwan, Singapore, Japan, Australia, New Zealand and others). Experience indicates that a lasting reduction of software piracy requires sustained public awareness campaigns and effective enforcement action. It is precisely for this reason that the government amended the Copyright Ordinance in 2001, in order to clarify that piracy by end users in the business context constitutes a criminal offense and should be a priority for government action. No other major jurisdiction (including the United Kingdom or the United States) has provided a specific employee defense for copyright offenses in the end user context, and doing so in Hong Kong would seem to send the wrong message to the community regarding the seriousness of IP-related crime. Moreover, the key point should be “knowledge” which is already covered in the copyright law – i.e. if the employee knew or should have known they were using pirated software, they should not be “exonerated” just because it was provided by the employer. That being said, there may be merit, however, to introducing a “whistle blower” provision along the lines in the Consultation Paper (Par. 4.4) to protect employees from retaliation by unscrupulous employers and the Chamber also views this as a means to promote corporate accountability and ethical conduct.

#### *Proof of Infringing Copies of Computer Programs in End-user Piracy Cases*

As reflected above, there is a need for further and more effective action to curb losses suffered by industry as a result of business end user piracy, including the use by businesses of pirated software. We urge the government to make the investigation and prosecution of business end user piracy cases a priority in the short term and to adopt measures to facilitate successful criminal prosecution in this area. Requiring businesses on a prospective basis to retain records of their software assets would be consistent with effective software asset management practices and responsible corporate governance. As pointed out in the Consultation Document, there are currently record-keeping obligations under the Companies Ordinance and Inland Revenue Ordinance.

We note the government suggests that, in evaluating whether and how the proof of infringing copies of computer programs in end user cases should be facilitated, consideration should be given to whether industry can address evidentiary issues through technological means. As part of

its broader efforts to reduce piracy, the copyright-based industries, including the software industry, have invested and will continue to invest considerable resources in digital rights management and other technologies designed to prevent illegal copying and distribution of copyrights and to enable the authentication of genuine products. Technology is an important component of a multi-faceted approach to piracy but is not a total solution to the problem (due to the ongoing efforts of increasingly sophisticated cyber-criminals to “hack” or “crack” security technologies, issues of consumer preference regarding product registration, etc.). Governments also have an important responsibility to create a legal infrastructure and provide the resources needed for effective enforcement.

### *Circumvention of Technological Measures for Copyright Protection*

There is a need to protect technological measures to prevent unauthorized access to or use of copyrighted material, or the illegal dissemination of protected works. It is important that the integrity of these measures be protected by prohibiting the manufacture, trade in or use of devices or software that are primarily designed to circumvent them. The WIPO Copyright Treaty includes a requirement to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures” that copyright owners use to “restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

As noted in the Consultation Document, existing Hong Kong law provides certain protections against circumvention of copy protection employed in copyright works. However, the law contains a number of areas of potential ambiguity. Relevant provisions of both the civil *and* criminal law should be clarified to confirm coverage of (1) access control technologies; (2) acts of circumvention; and (3) circumventing components.

### *Other Matters*

We note that the Consultation Document does not address a number of other important IP-related issues and concerns expressed by the Chamber previously in position papers available on the Chamber’s web site ([www.amcham.org.hk](http://www.amcham.org.hk)). These include (i) cable and satellite TV piracy which remains a significant problem in Hong Kong yet unaddressed by the criminal law; (ii) accountability of landlords in circumstances where they either know or should know that their premises are being used for trade in infringing materials; and (iii) the absence of a statutory damages system.

### **Concluding Remarks**

In sum, the essence of the Chamber’s view on the Consultation Document is that the government should not take steps that have the potential to reduce the level of IP protection in Hong Kong, especially where longstanding as well as rapidly growing forms of piracy (such as P2P piracy) remain such a serious concern. Instead, where possible the government should refine the law in a manner that would facilitate successful enforcement, thereby creating a meaningful deterrent, reducing overall piracy rates and spurring innovation and greater economic growth – objectives that are central to the vision outlined by Chief Executive Tung Chee-hwa in his most recent policy address.

Thank you again for the opportunity to offer the Chamber’s views on this important matter and we look forward to continuing to participate in the ongoing consultation and subsequent legislative process.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jon Zinke". The signature is written in a cursive, flowing style with a large initial "J" and "Z".

Jon Zinke  
Chairman  
The American Chamber of Commerce in Hong Kong