

# **CHAPTER 11**

## **Intellectual Property Department**

**Registration and promotion of intellectual property rights**

**Audit Commission  
Hong Kong  
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Report No. 47 of the Director of Audit contains 11 Chapters which are available on our website at <http://www.aud.gov.hk>.

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# REGISTRATION AND PROMOTION OF INTELLECTUAL PROPERTY RIGHTS

## Contents

|  | <b>Paragraph</b> |
|--|------------------|
| <b>PART 1: INTRODUCTION</b>  | 1.1              |
| Intellectual property rights                                       | 1.2 – 1.4        |
| Intellectual Property Department                                   | 1.5              |
| Outsourcing of non-core services                                   | 1.6              |
| Audit review   | 1.7              |
| General response from the Administration                           | 1.8 – 1.9        |
| Acknowledgement  | 1.10             |
| <br>   |                  |
| <b>PART 2: REGISTRATION OF TRADEMARKS, PATENTS AND<br/>DESIGNS</b> | 2.1              |
| Registration activities of the IPD                                 | 2.2 – 2.3        |
| Audit review   | 2.4              |
| Examination of trademark applications                              | 2.5 – 2.6        |
| <i>Audit observations and recommendation</i>                       | 2.7              |
| Response from the Administration                                   | 2.8              |
| Electronic registration services                                   | 2.9 – 2.11       |
| <i>Audit observations</i>  | 2.12 – 2.13      |
| <i>Audit recommendations</i>                                       | 2.14             |
| Response from the Administration                                   | 2.15 – 2.16      |
| Registration fees  | 2.17 – 2.20      |
| <i>Audit observations and recommendations</i>                      | 2.21 – 2.22      |
| Response from the Administration                                   | 2.23 – 2.24      |

|   | <b>Paragraph</b> |
|---|------------------|
| <b>PART 3: ADMINISTRATION OF THE OUTSOURCING CONTRACT</b>   | 3.1              |
| Outsourcing of non-core services                            | 3.2              |
| The outsourcing contract                                    | 3.3 – 3.4        |
| Audit review  | 3.5              |
| Monitoring of the contractor’s performance                  | 3.6 – 3.7        |
| <i>Audit observations</i>                                   | 3.8 – 3.12       |
| <i>Audit recommendations</i>                                | 3.13             |
| Response from the Administration                            | 3.14 – 3.15      |
| Monitoring of service modifications                         | 3.16 – 3.17      |
| <i>Audit observations</i>                                   | 3.18 – 3.23      |
| <i>Audit recommendations</i>                                | 3.24             |
| Response from the Administration                            | 3.25 – 3.26      |
| <br>  |                  |
| <b>PART 4: ADMINISTRATION OF THE NO FAKES PLEDGE SCHEME</b> | 4.1              |
| The No Fakes Pledge Scheme                                  | 4.2 – 4.5        |
| Audit review  | 4.6              |
| Monitoring of the Scheme                                    | 4.7 – 4.8        |
| <i>Audit observations</i>                                   | 4.9 – 4.10       |
| <i>Audit recommendation</i>                                 | 4.11             |
| Response from the Administration                            | 4.12             |
| Use of the “No Fakes” stickers/tent cards and logos         | 4.13             |
| <i>Audit observations</i>                                   | 4.14 – 4.16      |
| <i>Audit recommendations</i>                                | 4.17             |
| Response from the Administration                            | 4.18             |
| Evaluation of the Scheme                                    | 4.19             |
| <i>Audit observations</i>                                   | 4.20             |

|  | <b>Paragraph</b> |
|--|------------------|
| <i>Audit recommendations</i>                                       | 4.21             |
| Response from the Administration                                   | 4.22 – 4.23      |
| <b>PART 5: PROMOTION OF INTELLECTUAL PROPERTY PROTECTION</b>       | <b>5.1</b>       |
| Efforts in promoting public awareness of and respect for IP rights | 5.2              |
| Annual surveys   | 5.3 – 5.5        |
| <i>Audit observations and recommendations</i>                      | 5.6 – 5.7        |
| Response from the Administration                                   | 5.8 – 5.9        |
| <b>PART 6: PERFORMANCE MEASUREMENT</b>                             | <b>6.1</b>       |
| Performance measurement in Controlling Officer’s Reports           | 6.2              |
| Controlling Officer’s Report of the IPD                            | 6.3              |
| <i>Audit observations</i>  | 6.4 – 6.7        |
| <i>Audit recommendations</i>                                       | 6.8              |
| Response from the Administration                                   | 6.9              |
|  | <b>Page</b>      |
| <b>Appendices</b>  |                  |
| A : Registration process of trademark applications                 | 39 – 40          |
| B : Examples of registration fees of the IPD                       | 41               |
| C : Contract sum for the outsourcing contract                      | 42 – 43          |
| D : Key performance measures in the COR of the IPD for 2006-07     | 44 – 45          |
| E : Acronyms and abbreviations                                     | 46               |



## **PART 1: INTRODUCTION**

1.1 This PART describes the background to the audit and outlines its objectives and scope.

### **Intellectual property rights**

1.2 Intellectual property (IP) is the name commonly given to a group of separate intangible property rights. The most common IP rights are trademark, patent, design and copyright:

- (a) a trademark is a mark or logo used by businesses to identify the goods in which they trade or the services they provide in the course of business;
- (b) a patent gives the exclusive right to the inventor of an invention or its subsequent owner to make use or put the invention on the market;
- (c) a design is features of shape, configuration, pattern or ornament applied to an article by an industrial process, being features which in the finished article appeal to and are judged by the eye; and
- (d) a copyright is the right given to the owner of an original work.

1.3 In Hong Kong, IP rights are generally protected under the laws which provide domestic protection (i.e. a right given under Hong Kong laws only applies in Hong Kong). However, various international conventions have been applied to Hong Kong by Mainland China, requiring member countries/economies to recognise rights of persons from the other member countries.

1.4 Trademarks, patents and designs are the most common registrable IP rights. The registration of these rights gives the owners protection under the law (e.g. the owner of a registered trademark has an exclusive right to use the mark on the goods or the services for which the mark was registered). On the other hand, copyright is an automatic right. It arises when a work is created and no registration is required for getting protection under the law.

### **Intellectual Property Department**

1.5 The Intellectual Property Department (IPD) is responsible for the registration and protection of IP rights. Its services include:

- (a) operating the Trade Marks Registry, the Patents Registry and the Designs Registry for the registration of trademarks, patents and designs respectively. In 2005, about 20,000 trademarks, 7,000 patents and 5,000 designs were registered. The Director of Intellectual Property holds the offices of Registrars of Trade Marks, Patents and Designs;
- (b) promoting IP protection through public education, including the No Fakes Pledge Scheme which promotes the use and sale of genuine products;
- (c) assisting in the formulation of policies and drafting of legislation in connection with the protection of IP in Hong Kong; and
- (d) providing civil legal advice on IP related issues to government bureaux and departments.

In 2005-06, the total expenditure of the IPD was \$75 million. As at 31 March 2006, the IPD had an establishment of 84 staff.

### **Outsourcing of non-core services**

1.6 In September 2001, the IPD launched a five-year pilot scheme to outsource its non-core services. A five-year contract, expiring on 30 November 2006, was awarded to a contractor at a sum of \$87 million. The following non-core services were outsourced:

- (a) information management and processing of existing information technology (IT) systems;
- (b) development and administration of new IT systems; and
- (c) office operations (e.g. clerical support for the Trade Marks, Patents and Designs Registries).

### **Audit review**

1.7 The Audit Commission (Audit) has recently carried out a review of the services provided by the IPD. The audit focused on the following areas:

- (a) registration of trademarks, patents and designs (see PART 2);
- (b) administration of the outsourcing contract (see PART 3);
- (c) administration of the No Fakes Pledge Scheme (see PART 4);



- (d) promotion of IP protection (see PART 5); and
- (e) performance measurement (see PART 6).

Audit has found that there are areas where improvements can be made and has made a number of recommendations to address the issues.

### **General response from the Administration**

1.8 The **Secretary for Commerce, Industry and Technology** has said that:

- (a) first and foremost, the Government is committed to providing a robust IP protection system in Hong Kong. To this end, the IPD has been making vigorous efforts to maintain an efficient IP registration service for the public. It has also been making continuous efforts to educate the public on the importance of respecting IP rights;
- (b) the Commerce, Industry and Technology Bureau (CITB) notes that Audit has made a number of recommendations with a view to improving the IPD's administration including resource management. The CITB generally agrees with the audit recommendations; and
- (c) the CITB will ask the IPD to take prompt actions to follow up the audit recommendations, including introducing new targets to measure migration to electronic services, putting in place better management practices for the administration of outsourced contracts, and improving the operation of the No Fakes Pledge Scheme. In fact, the IPD is already taking action to address some of the issues raised in the audit report.

1.9 The **Director of Intellectual Property** generally agrees with the audit recommendations.

### **Acknowledgement**

1.10 Audit would like to acknowledge with gratitude the full cooperation of the staff of the IPD during the course of the audit review.

## **PART 2: REGISTRATION OF TRADEMARKS, PATENTS AND DESIGNS**

2.1 This PART examines the IPD's services for the registration of trademarks, patents and designs.

### **Registration activities of the IPD**

2.2 The IPD is responsible for operating the following three Registries for the registration of IP rights:

- (a) **Trade Marks Registry.** The Registry administers trademark registration system by undertaking substantive examination of trademark applications, maintaining the register of trademarks and making it available for public search. The substantive examination of an application for registration involves various stages, including deficiency checking, search and examination, publication for opposition and registration (see Appendix A for details). Registrability and opposition hearings will also take place, if required. The trademarks are registered for a period of ten years and renewed for further periods of ten years;
- (b) **Patents Registry.** The Registry administers the registration systems for two types of patents, namely standard and short-term patents, by undertaking formality examinations of patent applications (Note 1), maintaining the register of patents and making it available for public search. Standard patent registration is granted on the basis of patents granted by one of the designated patent offices (Note 2). Protection under standard patents is renewable annually for a maximum term of 20 years. Short-term patent registration is based on a search report from an international searching authority or one of the designated patent offices. Protection under short-term patents is renewable after four years from filing, for a maximum term of eight years; and

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**Note 1:** *The formality examinations determine whether patent applications comply with the formal requirements under the Patents Ordinance (Cap 514). Such examinations should not be construed as imposing any obligations on the Registrar as to the patentability of the inventions.*

**Note 2:** *The designated patent offices are the State Intellectual Property Office of China, the United Kingdom Patent Office and the European Patent Office in respect of a patent designating the United Kingdom.*

- (c) **Designs Registry.** The Registry administers the design registration system by performing formality examinations of design applications (Note 3), maintaining the register of designs and making it available for public search. Registered design protection is renewable for periods of five years up to a maximum of 25 years.

2.3 The IP Examiner grade officers are mainly responsible for examining applications for registration of IP rights. The staffing positions of the three Registries in June 2006 and the IP rights registered in 2005 are shown in Table 1.

**Table 1**  
**Staffing positions of the three Registries**  
**and IP rights registered**

| Registry    | Registration of IP rights<br>in 2005 | Number<br>of staff<br>(June 2006) |
|-------------|--------------------------------------|-----------------------------------|
| Trade Marks | 19,689 trademarks registered         | 33                                |
| Patents     | 6,518 standard patents granted       | } 7                               |
|             | 419 short-term patents granted       |                                   |
| Designs     | 4,989 designs registered             |                                   |

*Source: IPD records*

### Audit review

2.4 Audit has reviewed the following three areas and identified scope for improvement:

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**Note 3:** *Similar to patent, the formality examinations examine whether design applications comply with the formal requirements under the Registered Designs Ordinance (Cap 522). The formal requirements refer to the information required in the application form. Such examinations should not be construed as imposing any obligations on the Registrar as to the registrability of the designs.*

- (a) the monitoring of outstanding trademark application cases (see paras. 2.5 to 2.8);
- (b) the promotion of electronic registration services (see paras. 2.9 to 2.16); and
- (c) the review of registration fees (see paras. 2.17 to 2.24).

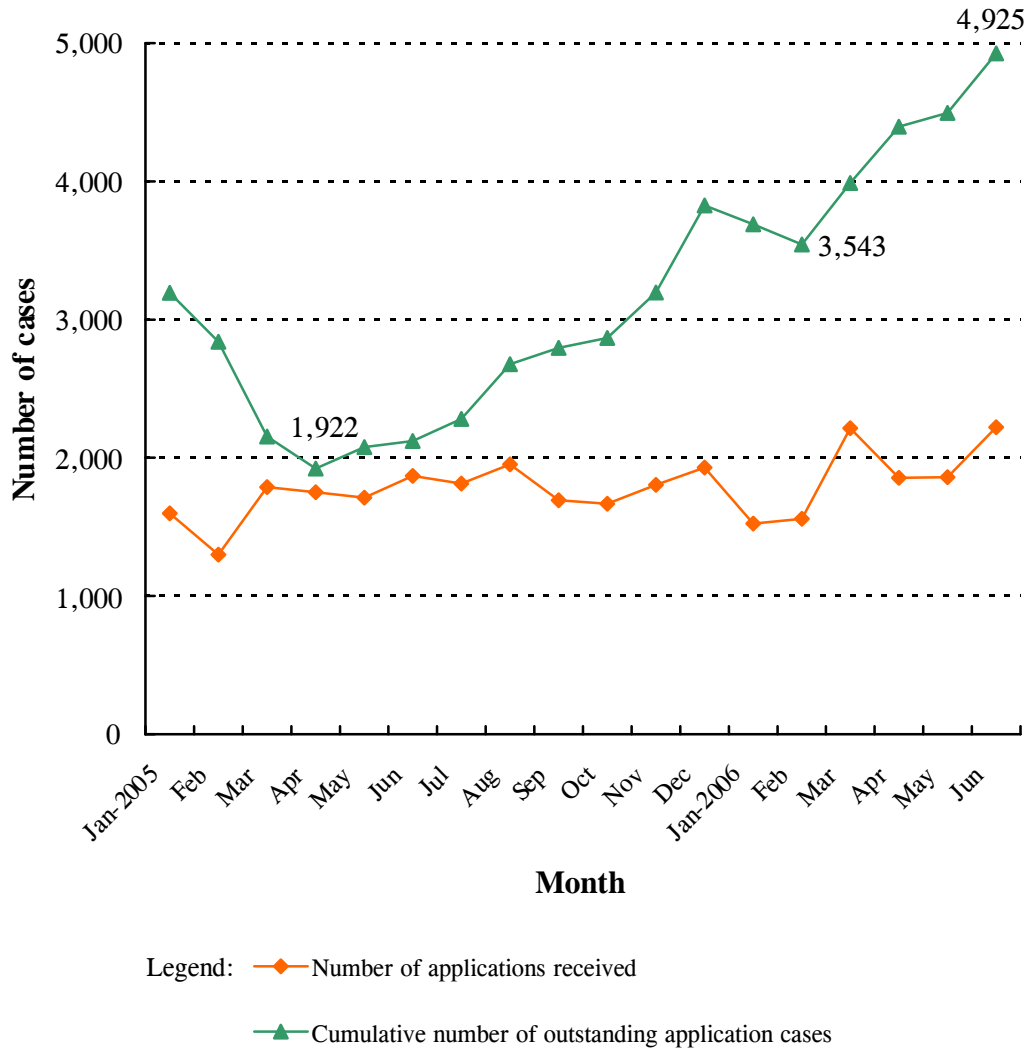
### **Examination of trademark applications**

2.5 The Trade Marks Registry accounts for most of the staff resources of the three Registries of the IPD as shown in Table 1 in paragraph 2.3. As it performs substantive examination of applications, its registration work is also more complicated than the other two Registries which perform formality examinations only (see para. 2.2). Audit therefore reviewed the work of the Trade Marks Registry.

2.6 For monitoring the progress of examination of trademark applications, the IPD compiles monthly statistics on outstanding trademark application cases. These cases refer to applications for which the IPD has not yet completed the search and examination stage (see item (c) in Appendix A). Based on the IPD's statistics, Audit analysed the number of applications received and the cumulative number of outstanding trademark application cases during the 18-month period ended 30 June 2006. The results are shown in Figure 1.

Figure 1

**Trademark applications and cumulative outstanding application cases during the 18-month period ended 30 June 2006**



Source: IPD records

**Audit observations and recommendation**

2.7 The outstanding trademark application cases had increased from about 2,000 in April 2005 to about 5,000 in June 2006, despite the fact that the number of applications received each month had largely remained at below 2,000 (see Figure 1). Audit is concerned about the rising trend of outstanding application cases, particularly the sharp increase in the first half of 2006 (from about 3,500 cases in February 2006 to nearly 5,000 cases in June 2006). **Audit considers that the IPD needs to monitor the progress of**

**examinations of trademark applications. Audit has *recommended* that the Director of Intellectual Property should take action to reduce the outstanding trademark application cases.**

### **Response from the Administration**

2.8 The **Director of Intellectual Property** agrees with the audit recommendation. He has said that the rising trend of outstanding trademark applications resulted from greater-than-anticipated staff wastage in late 2005/early 2006 and the general increase in the number of applications, from an average monthly intake of 1,700 to over 2,000 at present. The IPD has taken measures to increase the examination capacity. There is already some noticeable improvement in the situation.

### **Electronic registration services**

2.9 In January 2003, the IPD began the phased introduction of a new computer system to cater for the electronic publication and on-line search of registered trademarks, patents and designs, as well as the electronic filing (e-filing) of applications and related documents. Through e-filing, applications can be made via the Internet.

2.10 In April 2003, the computer system for on-line search and electronic publication of trademarks commenced operation. In December 2003, e-filing for trademark applications was introduced. In mid-2004, the computer system which provided electronic services (e-services) for patents and designs commenced operation. In September 2004, e-filing for patent and design applications was introduced. In addition, in November 2005, the IPD launched interactive e-services for renewal of registered trademarks and patents and extended the services to include change of applicants' particulars (e.g. address) in February 2006, and automatic approval of assignments in May 2006. The conventional method of paper filing will be maintained for as long as there remains a significant demand for this service.

2.11 The IPD encourages users to use e-filing. In its Controlling Officer's Reports, the IPD stated that it would continue to promote e-filing for applications for trademark registration in order to increase the migration rate to 30% in 2005-06 and 70% in 2006-07. According to the IPD, the 30% (for 2005-06) and 70% (for 2006-07) target migration rates refer to the highest migration rates in any one working weekday in the year. They were not based on the average migration rates for the year concerned. In 2005, the average migration rate to e-filing for trademark applications was 35%. Regarding patent and design applications, their respective average e-filing migration rates were 23% and 24% in 2005.

## Audit observations

2.12 ***No average e-filing migration rate.*** The IPD has only set target e-filing migration rate for trademark applications. Regarding patent and design applications, it has not set any target migration rates. **Audit considers that the annual average e-filing migration rate is more meaningful in assessing the IPD's performance in promoting e-filing.** At a meeting with Audit in August 2006, the IPD indicated that it would consider setting target annual average e-filing migration rates for trademark, patent and design applications.

2.13 ***Need to take measures to facilitate e-filing.*** In 2005, the migration rates to e-filing for patent applications (23%) and design applications (24%) were less than that for trademark applications (35%). For the first half of 2006, the average migration rate for trademark applications only reached 42%. Regarding patent and design applications, the average migration rates to e-filing had risen only slightly to 27% and 30% respectively during the same period. In Audit's view, the following factors may have contributed to the limited use of e-filing:

- (a) ***Lack of financial incentive for using e-filing.*** At present, the IPD charges the same fees for e-filing and conventional paper filing. However, according to the CITB, electronic channels (e-channels) often incur lower costs than conventional channels due to automation, re-engineering and streamlining of operational procedures. In line with the cost recovery principle, the fees and charges of services delivered through e-channels should reflect the lower cost where appropriate. In May 2004, the CITB suggested government bureaux/departments consider applying cost segmentation to attribute costs to different service delivery channels in conducting costing exercises. Based on the results of the costing exercises, differential pricing might be introduced to provide financial incentive to encourage customers to use the more cost-effective channels. However, the IPD had not yet conducted costing exercises for the purpose of introducing differential pricing for its e-channel and the conventional channel (see paras. 2.19 and 2.20 for details). In this connection, Audit notes that the Companies Registry has already charged a lower fee for using its e-services (e.g. the fee for on-line downloading of an image record of prospectus or accounts by unregistered users is \$23, while that for on-site users is \$35);
- (b) ***Limited electronic payment facility.*** At present, customers can only make payment through on-line deposit accounts with the IPD (Note 4). Electronic

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**Note 4:** *Users have to deposit money into a bank account of the IPD. The deposits are non-interest bearing. Users have to send the bank validated pay-in slip to the IPD. After checking with the bank statements, the IPD will credit the deposited amount to the users' on-line deposit accounts with the IPD.*

means of payment (e.g. credit card) is not yet available under the current e-filing system; and

- (c) ***Unpopular electronic certificate needed.*** A valid electronic certificate (e-cert) is required for using e-filing. However, according to the Office of the Government Chief Information Officer (OGCIO), the usage rate of e-cert of the Hong Kong Post remained unsatisfactory (Note 5). The OGCIO also considers that e-cert is more readily used for those transactions that have high security, integrity and authentication requirements. For the majority of business-to-consumer and government-to-citizen electronic transactions, there is no absolute need to use e-cert to meet the security or authentication requirements. It is understandable that the general public and the business would prefer using simpler authentication methods (e.g. one-time password).

**The IPD needs to consider taking measures to facilitate the use of e-filing. Such measures may include introducing differential pricing for e-filing and conventional paper filing, electronic means of payment and other means of customer authentication.**

### **Audit recommendations**

2.14 **Audit has recommended that the Director of Intellectual Property should:**

- (a) **consider using the annual average e-filing migration rates as targets for trademark, patent and design applications; and**
- (b) **consider taking measures to facilitate the use of e-filing. Such measures may include introducing differential pricing for e-filing and conventional paper filing, electronic means of payment and other means of customer authentication.**

### **Response from the Administration**

2.15 **The Director of Intellectual Property has said that:**

***No average e-filing migration rate***

- (a) while the IPD has put great efforts in promoting e-filing and the present published migration rates reflect the progress made, the IPD agrees to change to an annual average migration rate;

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**Note 5:** *According to a survey conducted by the Hong Kong Post in November 2004, among the citizens who obtained their e-cert embedded in smart ID cards during the period from June to August 2004, only about 10% had used the e-cert.*



- (b) the IPD will also set target migration rates for patent and design applications;

*Need to take measures to facilitate e-filing*

- (c) the average e-filing migration rate for trademark applications reached 35% in 2005 and is likely to reach 50% in 2006. For a new system that has been in operation for less than three years, the IPD considers it relatively successful;
- (d) the IPD is keen to see the greater adoption of e-filing. It has been considering a financial incentive to customers using e-filing. As the IPD has substantially reduced the fees for trademark applications in 2003 and for patent and design applications in 2004, the fees for all forms of filing are low. Further reductions may not be a strong incentive to customers. Having implemented e-filing for nearly three years, the IPD will conduct a costing exercise and then consider the benefits of differential pricing again;
- (e) regarding the provision of alternatives of electronic payment, the IPD has indicated to the OGCIO its interest in introducing credit card payment and payment by phone in 2007; and
- (f) if the IPD moves on to credit card payment, the IPD will be able to review the need to retain the use of e-certs.

2.16 The **Government Chief Information Officer** has said that:

- (a) the OGCIO supports a differential pricing structure to encourage the use of e-channels over paper filing;
- (b) electronic payment by debit cards is already available on the new One-Stop Portal, GovHK, which was launched on 6 September 2006. The payment by credit card facility is scheduled to become available around the third quarter of 2007. The IPD may wish to consider using these common facilities on the GovHK in its system enhancement; and
- (c) the OGCIO has published an E-Authentication Framework for reference of bureaux/departments in designing their e-service systems. The IPD should refer to it and consider adopting the most suitable means for its varied business requirements.

**Registration fees**

2.17 The IPD charges various registration fees (see Appendix B for examples of fees). In 2005-06, the revenue from trademark, patent and design registration fees amounted to \$76.8 million, \$14.3 million and \$7.7 million respectively. In recent years, the IPD had, in

general, reduced its registration fees. For example, the IPD reduced the trademark application fee by 76% in April 2003 and the patent and design application fees by about 80% and 73% respectively in May 2004.

2.18 ***Global costing.*** The registration fees charged by each Registry are based on the results of costing exercises for each individual Registry. The latest costing exercise for the Trade Marks Registry was conducted in 2004 and that for the Patents and Designs Registries was conducted in 2005. The costing exercises were conducted globally for each Registry but not for each individual service. In September 2005, the Financial Services and the Treasury Bureau (FSTB) informed the IPD that the adoption of global costing in setting fees might not have made reference to the specific costs of each individual service. **The FSTB suggested the IPD adopt individual activity costing, instead of global costing, for achieving full cost recovery.**

2.19 ***Differential pricing.*** As mentioned in paragraph 2.13(a), in May 2004, the CITB suggested government bureaux/departments introduce differential pricing based on the results of costing exercises to provide financial incentive to migrate customers to the more cost-effective channels. The FSTB also, under the user-pays principle, gave support to this as it could truly reflect the cost of the services provided through different channels and minimise cross-subsidisation. In September 2005, the IPD submitted proposals to the FSTB regarding the differential fees for its services delivered through e-channel and conventional channel. **However, the FSTB considered that the IPD's fee proposals did not reflect the costs for services delivered through these two channels and suggested the IPD revise the fee proposals based on the costs incurred.**

2.20 In October 2005, the IPD undertook to conduct a review of the registration fees for trademarks, patents and designs in the second quarter of 2006. Subsequently, the IPD deferred the review to the third quarter of 2006. In May 2006, the IPD suggested to the CITB and the FSTB that it adopted global costing in the current review because it had launched the interactive e-services in phases from November 2005 to May 2006 (see para. 2.10) and its work might need more time to take shape. In June 2006, the CITB informed the IPD that, subject to the FSTB's decision, it had no objection to the IPD's suggestion. The CITB also suggested the IPD review the implementation of differential pricing in the next costing exercise. In June 2006, the FSTB requested the IPD to provide justifications for adopting global costing in the current review. After noting that the IPD might need some time in ascertaining the migration rate to e-services and costs of the interactive e-services, in August 2006 the FSTB informed the IPD that, in order not to hold up the fees review and to ensure the timely implementation of the necessary revision of fees, it seemed to be a practical and understandable choice of continuing adopting global costing in the current review. The FSTB also suggested the IPD review the need of adopting individual activity costing and differential pricing as soon as the required costing and migration data were available.

## **Audit observations and recommendations**

2.21 Up to 31 August 2006, the IPD had not yet completed the review of registration fees for trademarks, patents and designs. **Audit considers that the IPD needs to ensure that the review is conducted as scheduled. In its next review of fees, the IPD also needs to conduct costing exercises to ascertain the costs for each individual service and for services delivered through e-channel and conventional channel.**

2.22 **Audit has recommended that the Director of Intellectual Property should:**

- (a) **ensure that the review of registration fees for trademarks, patents and designs is conducted as scheduled;**
- (b) **in reviewing the fees, conduct costing exercises to ascertain the costs for each individual service and for services delivered through e-channel and conventional channel; and**
- (c) **set the fees based on the results of the costing exercises.**

## **Response from the Administration**

2.23 The **Secretary for Commerce, Industry and Technology** has said that the IPD had launched different e-services in phases over the last three years. The two most recent phases were launched in February and May 2006. It is therefore understandable that the IPD has chosen to wait for a pattern of migration of various e-services to emerge before engaging in a new costing exercise covering services on an individual basis. The CITB agrees that the IPD should review the benefits of differential pricing in the next costing exercise, having regard to the migration rates for various e-services and the efficiency improvements that the services brought about.

2.24 The **Director of Intellectual Property** has said that:

- (a) the review of the registration fees will be completed by the end of September 2006 and the fees will be set with reference to its result; and
- (b) the IPD will conduct an individual activity costing exercise for the three Registries in the coming months. Upon completion of the costing exercise, the IPD will reconsider the level of fees again after consultation with the bureaux concerned.

## **PART 3: ADMINISTRATION OF THE OUTSOURCING CONTRACT**

3.1 This PART examines the IPD's administration of the outsourcing contract for its non-core services.

### **Outsourcing of non-core services**

3.2 In March 2000, the Finance Committee (FC) of the Legislative Council (LegCo) approved a commitment of \$122.6 million for the IPD to meet the expenditure for a five-year pilot scheme to outsource the following non-core services:

- (a) information management and processing of existing computer systems;
- (b) development and administration of new IT systems; and
- (c) office operations.

### **The outsourcing contract**

3.3 In November 2000, the IPD, through the Government Logistics Department (GLD), invited bids for a five-year outsourcing contract for its non-core services. The services to be provided under the contract comprised three compulsory services and one discretionary service to be acquired by the IPD as and when required, as follows:

#### ***Compulsory services***

- (a) ***New Application Development Service.*** The service included the development and administration of two new IT systems for trademark registration and design registration, and the upgrading of the existing Patents Computerisation System;
- (b) ***Ongoing Support and Maintenance Service (Ongoing Support Service).*** The service included the management, supporting and processing of the existing and new IT systems;
- (c) ***Office Operation Service.*** The service included front office service for a public counter (e.g. receipt of applications and supply of forms and printed guides) and back office service for providing clerical support to the Trade Marks, Patents and Designs Registries; and

#### ***Discretionary service***

- (d) ***Other New Service and IT Professional Service (Other New IT Service).*** The service was to cope with the existing and new business requirements of the IPD and/or the technological improvements in excess of the three compulsory

services mentioned in sub-paragraphs (a) to (c) above. The service would be acquired as and when required at the discretion of the IPD. The IPD could also employ other contractors to provide the service. Based on a manpower estimate for five years of 50 man-months to be required each year, tenderers were required to quote the daily rates of seven categories of staff (Note 6) instead of a fixed price, so that they would not quote an unreasonably high price if their services were needed after the award of the contract. The quoted staff rates would serve as the ceiling rates for the acquisition of additional service when required.

3.4 In September 2001, after obtaining the approval of the Central Tender Board, the IPD awarded a five-year contract, commencing on 1 December 2001 and expiring on 30 November 2006, to a contractor at a sum of \$87 million for the three compulsory services (see Appendix C for a breakdown of the contract sum). A contingency sum of \$29 million was also worked out for the discretionary Other New IT Service based on the staff rates quoted by the contractor (Note 7). The estimated total contract value amounted to \$116 million.

### Audit review

3.5 Audit reviewed the contractual arrangements and found two areas in which there is scope for improvement:

- (a) the monitoring of the contractor's performance (see paras. 3.6 to 3.15); and

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**Note 6:** *The qualification requirement of Category 1 staff is the lowest while that of Category 7 staff is the highest. Examples of the seven categories of staff and their qualification requirement are shown below.*

| <i>Category</i> | <i>Role</i>           | <i>Minimum post-qualification<br/>IT experience in year(s)</i> |
|-----------------|-----------------------|--|
| 1               | <i>Programmer</i>     | 1  |
| 2               | <i>Programmer</i>     | 2  |
| 3               | <i>System Analyst</i> | 4  |
| 4               | <i>System Analyst</i> | 5  |
| 5               | <i>Manager</i>        | 8  |
| 6               | <i>Manager</i>        | 10   |
| 7               | <i>Consultant</i>     | 15   |

**Note 7:** *The contingency sum was worked out based on an annual estimated requirement of 50 man-months for Programmer (a Category 2 staff — see Note 6 in para. 3.3(d)) at a daily rate of \$3,900 (i.e. \$3,900 × 30 days × 50 man-months × 5 years = \$29.25 million).*

- (b) the monitoring of service modifications (see paras. 3.16 to 3.26).

### **Monitoring of the contractor's performance**

3.6 In the FC paper of March 2000 it was stated that, as the outsourcing exercise was a pilot scheme, the performance of the service provider had to be closely monitored. A control mechanism would be set up for monitoring the contractor's performance, including the following:

- (a) a Management Committee (MC), comprising representatives of the IPD and the contractor, would be formed to assess and monitor the performance of the contractor; and
- (b) the contractor would produce performance reports to show compliance with service standards, trend analysis and charts, and service statistics on a regular basis. He would be bound by the contract terms to provide satisfactory services to the Government. Penalty and termination clauses would be included.

3.7 The outsourcing contract includes appropriate provisions on the control mechanism. Audit notes that the control mechanism has been properly put in place. For example, the MC was set up in December 2001 and was chaired by the Director of Intellectual Property. The MC held regular meetings to oversee the contractor's performance. Nonetheless, there is room for improvement in the IPD's control mechanism, as detailed in paragraphs 3.8 to 3.13.

### **Audit observations**

#### ***No checking of performance results reported by the contractor***

3.8 According to the contract, if the contractor fails to meet the service levels as specified in the contract, a deduction will be made from the monthly charges payable to the contractor based on the Service Credits mechanism (Note 8). The maximum deduction is to be capped at 25% of the monthly charges.

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**Note 8:** *The Service Credits operate as liquidated damages for performance fallen short of service levels over a period of one month. Performance incentives to the contractor for good performance are also used to offset any Service Credits to the IPD.*

3.9 The contractor submits monthly performance reports to the IPD, showing his performance results against the service levels. Based on his performance results, the contractor compiles and submits monthly Service Credits reports to the IPD, showing the calculation of the deductions, if any, from the monthly charges.

3.10 The contractor has regularly submitted his performance reports to the IPD. However, there is no evidence that the IPD has conducted checking of the performance results submitted. **To ensure that the contractor has met the service levels and that the Service Credits have been correctly computed, Audit considers that the IPD should set up procedures to check the contractor's performance results reported and the computation of the Service Credits.** Audit also notes that the IPD has not drawn up any procedural guidance to assist its staff in the administration of the outsourcing contract. **It is desirable for the IPD to draw up a guidance manual, including procedures on how to check the contractor's performance reports, to assist its staff in managing the outsourcing contract.**

*Office Operation Service not subject to the Service Credits mechanism*

3.11 Under the contract, the Service Credits mechanism only applies to two types of compulsory services, the New Application Development Service and the Ongoing Support Service (see para. 3.3(a) and (b)). The mechanism does not apply to the third type of compulsory service, the Office Operation Service (see para. 3.3(c)).

3.12 The provision of the New Application Development Service and the Ongoing Support Service (covered by the Service Credits mechanism) were estimated to cost \$14 million, whereas the provision of the Office Operation Service not covered by the mechanism was estimated to cost \$22 million. **Given that any failure in meeting the specified service levels for the Office Operation Service will affect the IPD's performance, Audit considers that the Office Operation Service should also be covered by the Service Credits mechanism in future outsourcing contracts.**

**Audit recommendations**

- 3.13 **Audit has recommended that the Director of Intellectual Property should:**
- (a) **set up procedures to check the contractor's performance reports and the computation of the Service Credits;**
  - (b) **consider drawing up a guidance manual, including procedures on how to check the contractor's performance reports, to assist IPD staff in managing the outsourcing contract; and**

- (c) **ensure that the Office Operation Service is covered by the Service Credits mechanism in future outsourcing contracts.**

### **Response from the Administration**

3.14 The **Director of Intellectual Property** agrees with the audit recommendations. He has said that:

- (a) the IPD will modify the existing procedures in the form of a more formal guidance manual; and
- (b) regarding the coverage of the Office Operation Service by the Service Credits mechanism in future outsourcing contracts, the IPD will make this change when the next opportunity arises.

3.15 The **Government Chief Information Officer** has said that the OGCIO would be pleased to advise the IPD on drawing up the procedural guidance for its staff to administer the outsourcing contract, especially the new contract.

### **Monitoring of service modifications**

3.16 Under the contract, the IPD can raise requests for service modifications (covering additional or reduced services) when necessary. When the contractor receives the IPD's written requests for service modifications, it will submit a Service Modification Note to the IPD. The contractor can also propose a service modification by submitting a Service Modification Note to the IPD. Each Service Modification Note should include the following information:

- (a) the reason for the service modification as well as the charges and full details of the service modification; and
- (b) the likely impact of the modification work on other aspects of the services, including the staff to be provided, the charges and the service levels.

3.17 At the first MC meeting held in December 2001, it was agreed that all service modifications should be approved by the MC. Up to May 2006, the MC had approved some 30 requests for service modifications, the cost implications of which amounted to \$16 million net.



## Audit observations

3.18 Audit reviewed the service modifications approved by the MC and noted one service modification costing \$8.8 million, which accounts for 55% of the total service modification costs of \$16 million. Audit findings on this service modification are detailed in paragraphs 3.19 to 3.23.

3.19 In May 2005, the IPD decided to implement a new interactive e-services for the registration of trademarks, designs and patents (Note 9). After consulting the GLD, the IPD considered that the interactive feature for submission of electronic forms was an enhancement of service requirements contemplated under the contract (Note 10). The IPD decided to apply the service modification procedures to acquire the services instead of conducting a new tendering exercise (Note 11).

3.20 In June 2005, the MC approved the service modification for implementing the new interactive e-services under the outsourcing contract at an estimated cost of \$8.8 million. A breakdown is shown in Table 2.

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**Note 9:** *By means of the interactive e-services, users could submit renewal applications and make alterations to their particulars (e.g. change of address) through the Internet. The IPD could also improve its productivity and achieve a saving of 1.3 staff.*

**Note 10:** *In May 2005, the IPD sought advice from the GLD on whether it should procure the services by conducting a new tendering exercise or following the contract variation procedures. The GLD said that if the enhancement of the service requirements was contemplated under the existing contract, contract variation could be applied. If the enhancement was not contemplated under the existing contract and the estimated value exceeded \$1.3 million, a new tendering exercise should be conducted in accordance with the Stores and Procurement Regulations.*

**Note 11:** *The IPD considered that, if the service was provided by a new contractor, it would create interfacing problems between the existing contractor and the new contractor. The new contractor would also need to go through various project stages of technical study and system work for which the existing contractor would not need to go through. The IPD estimated that the effort of servicing a new contractor by the existing contractor would be about 30% of the tender value.*

**Table 2**  
**Cost of service modification for interactive e-services**

|  | <b>Amount<br/>(\$ million)</b> |
|--|--------------------------------|
| <i>Capital cost</i>                          |                                |
| System development and implementation (Note) | 6.5                            |
| Hardware                                     | 1.0                            |
| <i>Recurrent cost</i>                        |                                |
| System support and maintenance               | 1.3                            |
| <b>Total</b>                                 | <b>8.8</b>                     |

Source: IPD records

Note: The cost was worked out based on the manpower requirement proposed by the contractor and the staff rates for Other New IT Service (adjusted for price movements as required by the contract — see Note 1 in Appendix C). The calculation was as follows:

| <i>Staff</i>           | <i>Number of<br/>man-days</i> | <i>Daily rate<br/>(\$)</i> | <i>Cost<br/>(\$ million)</i> |
|------------------------|-------------------------------|----------------------------|------------------------------|
| <i>Project Manager</i> | 186                           | 7,317                      | 1.3                          |
| <i>System Analyst</i>  | 563                           | 4,391                      | 2.5                          |
| <i>Programmer</i>      | 930                           | 2,927                      | 2.7                          |
| <b>Total</b>           | <b>1,679</b>                  |                            | <b>6.5</b>                   |

(i.e. 76 man-months)

3.21 *Inadequacies in IPD's examination of the contractor's cost proposal.* As shown in Table 2, the contractor estimated a cost of \$6.5 million for system development and implementation of the interactive e-services. The cost was worked out by multiplying a total of 76 man-months for three categories of staff by the staff rates for Other New IT Service (see para. 3.3(d)). Audit has found the following inadequacies in the IPD's examination of the contractor's cost proposal:

- (a) there was no proper assessment of the reasonableness of the manpower requirement (see para. 3.22); and
- (b) there was no vetting to ensure that the staff provided by the contractor possessed the required qualifications (see para. 3.23).

**3.22 *No proper assessment of the reasonableness of the manpower requirement.*** Audit could not find evidence to show that the IPD had properly assessed the reasonableness of the manpower requirement proposed by the contractor. According to the IPD's records, the IPD had only sought the advice of one expert (Note 12). The expert's advice was that he was unable to say in detail and that the costs looked "okay at a very superficial level". Despite this, the IPD had not sought the advice of the OGCI0 on the reasonableness of the manpower requirement, although it had once sought the OGCI0's advice on technical matters. **Audit considers that the IPD could have consulted the OGCI0 to help assess the reasonableness of the manpower requirement.**

**3.23 *No vetting of the qualifications of the team members.*** The contractor only provided the IPD with the particulars of the project team leader (i.e. Project Manager). He did not provide the IPD with the particulars of the other project team members. As a result, the IPD could not assess the competence of the team members (i.e. whether they possessed the required qualifications and working experience). **Audit considers that the IPD should in future service modifications require the contractor to provide details of the team members, including their qualifications and working experience.**

### **Audit recommendations**

- 3.24 *Audit has recommended that the Director of Intellectual Property should:***
- (a) **consult the OGCI0 in future to help assess the reasonableness of the manpower requirement; and**
  - (b) **require the contractor to provide information on the staff provided, including their qualifications and working experience, in future service modifications.**

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**Note 12:** *This expert, from the European Patent Office, had assisted the IPD in the tender evaluation before the award of the contract.*

## Response from the Administration

3.25 The **Director of Intellectual Property** has said that:

- (a) the IPD did approach the OGCIIO for assistance though it did not specifically request an assessment of the reasonableness of the manpower requirement. The IPD also consulted another consultant, an expert in the European Patent Office, who has been advising on the development of the systems in IPD. However, the IPD accepts that the request for advice was not in very specific terms as regards manpower requirements. The IPD will make improvements in the future; and
- (b) for an outcome-based project which was mainly performed off-site, the IPD had only checked the background of the team leader. The IPD takes note of Audit's concern and will require the contractor to provide more details when the opportunity arises in the future.

3.26 The **Government Chief Information Officer** has said that:

- (a) regarding the assessment of the reasonableness of the manpower requirement, the OGCIIO has published reference materials on resource estimation methodology (e.g. Function Point Analysis). The OGCIIO would be pleased to advise the IPD on the necessary provisions in the procedural guidance for contract administration; and
- (b) the OGCIIO supports the audit recommendation in paragraph 3.24(b). The OGCIIO also sees the need for the contractor to update the IPD and seek its prior agreement on any changes to the strength of the contractor's support.

## **PART 4: ADMINISTRATION OF THE NO FAKES PLEDGE SCHEME**

4.1 This PART reviews the IPD's administration of the No Fakes Pledge Scheme (the Scheme).

### **The No Fakes Pledge Scheme**

4.2 Under the programme of "Protection of Intellectual Property" (see para. 6.3(b)), the IPD has operated the Scheme which was launched in 1998. The aim of the Scheme is to encourage retailers to make a pledge of selling genuine goods and promote retailers' and consumers' awareness of IP protection, so as to enhance tourist and consumer confidence in shopping in Hong Kong.

4.3 All retail merchants participating in the Scheme must volunteer to make a pledge not to sell fakes. On doing so, they may post the "No Fakes" stickers and tent cards (see Figure 2) issued by issuing bodies in their shops, so that tourists and consumers can easily identify reliable retailers and shops with confidence. As at 30 June 2006, there were seven issuing bodies of the Scheme, all of which were trade associations. The Customs and Excise Department (C&ED) and the Consumer Council are the supporting organisations in 2006.

Figure 2

The “No Fakes” sticker and tent card



Source: IPD records

Note: A company can show a sticker and/or place a tent card in its shop.

4.4 To participate in the Scheme, a retail merchant has to be a member of one of the seven issuing bodies. These bodies each have their own set of criteria for handling membership applications. The basic criteria for the retail merchants to join the Scheme include the following:

- (a) they are willing to comply with the Scheme’s code of ethics (see para. 4.7);
- (b) they have been operating in Hong Kong continuously for more than six months; and
- (c) they have passed the no piracy record vetting within one year by the supporting organisations (i.e. no records of the IP rights offences at the C&ED and substantiated complaints at the Consumer Council).

The membership of the Scheme is valid for one year and is required to be renewed annually (i.e. membership for the 2006 Scheme is valid until 31 December 2006). As at 30 June 2006, 388 retail merchants, with 3,263 outlets, joined the Scheme.

4.5 In a LegCo Panel Paper of April 2006, the IPD advised LegCo that it played the role of the co-ordinator of the Scheme (Note 13) and its responsibilities included:

- (a) providing administrative support to the issuing bodies and supporting organisations in their processing and vetting of applications;
- (b) handling or referring public enquiries and complaints, and providing assistance to the issuing bodies in handling cases concerning the breach of the code of ethics of the Scheme by members; and
- (c) promoting the Scheme to the public and managing the Scheme's database and website (Note 14).

### **Audit review**

4.6 Audit examined the following three aspects of the Scheme:

- (a) monitoring of the Scheme (paras. 4.7 to 4.12);
- (b) use of the "No Fakes" stickers/tent cards and logos (paras. 4.13 to 4.18); and
- (c) evaluation of the Scheme (paras. 4.19 to 4.23).

### **Monitoring of the Scheme**

4.7 *Code of ethics.* Prior to 2006, the code of ethics of the Scheme required the member companies to:

- (a) refrain from selling or dealing in counterfeit and pirated goods;
- (b) impose discipline in protecting IP rights among company management and staff;

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**Note 13:** *Prior to 2006, the IPD was one of the organisers of the Scheme. It issued stickers and tent cards to the retail merchants of the Quality Tourism Services (QTS) Scheme, who could apply for joining the Scheme with a copy of the QTS certificate (see Note 16 in para. 4.19). From 2006 onwards, the IPD has changed its role to that of the co-ordinator of the Scheme and is no longer responsible for issuing stickers and tent cards.*

**Note 14:** *The IPD's website provides information about the Scheme, including a name list of the member merchants of the Scheme in 2006.*

- (c) allow the C&ED officers to visit their premises during trading hours for the purpose of monitoring compliance; and
- (d) comply with the code of ethics/agreement set out by the bodies issuing the “No Fakes” stickers and tent cards.

4.8 Following an event in September 2005 when the membership of one company in the Scheme was terminated because it was found selling counterfeit goods by the C&ED, the IPD agreed with the participating bodies to tighten up the Scheme’s code of ethics in order to regain public confidence in the Scheme. With effect from 1 January 2006, the code of ethics has been revised to allow the issuing bodies or the IPD to terminate a member company’s membership if they have reasons to believe that the company has failed to comply with the revised code or if any action has been taken against it by the C&ED (Note 15). Moreover, the member company concerned would be asked to return the “No Fakes” sticker and tent card. The issuing body concerned and the IPD also have the right to publicise any action taken against it. To uphold the integrity of the Scheme, the IPD has also set out more clearly the participating bodies’ responsibilities. The issuing bodies are responsible for the monitoring of compliance with the Scheme. The two new supporting organisations assist in providing market surveillance in this respect (see paras. 4.3 and 4.4(c)).

### **Audit observations**

4.9 Although the issuing bodies are responsible for monitoring the compliance with the Scheme, they are not required to report to the IPD the monitoring work they have performed. **Audit considers that the IPD, which oversees the Scheme, needs to take measures to ensure that the issuing bodies have put in place a robust system to prevent abuse of the Scheme.** For example, the IPD may consider requiring the issuing bodies to report to it how their systems work.

4.10 In this connection, Audit notes that, at a meeting of the LegCo Panel on Commerce and Industry held in April 2006, a few Members expressed concerns over the adequacy of the way the Scheme was monitored. At the end of the Panel meeting, Members urged the Administration to monitor the implementation of the Scheme in a more vigilant manner so as to safeguard it from abuse.

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**Note 15:** *To ensure fairness for the member company concerned, it can attend a hearing or submit written representations concerning the termination of its membership.*



### **Audit recommendation**

4.11 **Audit has recommended that the Director of Intellectual Property should take measures to ensure that the issuing bodies have put in place a robust system to prevent abuse of the Scheme.**

### **Response from the Administration**

4.12 The **Director of Intellectual Property** has said that the IPD shares Audit's concerns about possible abuse of the Scheme. The IPD will meet the issuing bodies to discuss how participants' performance can be monitored.

### **Use of the "No Fakes" stickers/tent cards and logos**

4.13 As from 2006, the rules of the Scheme have provided that:

- (a) the renewal of membership is on an annual basis and the 2006 membership of the Scheme is valid until 31 December 2006. Members are required to return all the expired and invalid "No Fakes" stickers and tent cards to the issuing bodies concerned; and
- (b) the "No Fakes" logo together with the "No Fakes" stickers and tent cards are the property of the IPD. If members intend to use the "No Fakes" logo in their advertisements or promotional materials, prior written approval should be obtained from the IPD.

For the 2005 Scheme, it was only provided that, upon the withdrawal of membership of issuing body/supporting organisation or "No Fakes Pledge" status, the member companies should immediately cease to use "No Fakes" stickers and tent cards in any manner and return these stickers and tent cards to the participating bodies concerned within 14 days.

### **Audit observations**

4.14 Although the IPD has set out more clearly the requirements for the use of the "No Fakes" stickers/tent cards and logos in 2006, Audit notes that there is room for improvement regarding the monitoring of their usage, as explained in paragraphs 4.15 and 4.16.

4.15 ***Improper use of "No Fakes" stickers and tent cards.*** Audit notes that 328 members of the Scheme of 2005 had not renewed their membership for 2006. However, the IPD did not take any measures to ensure that these non-members had ceased to use

the 2005 “No Fakes” stickers/tent cards and had returned them to the participating bodies concerned. Audit’s sample check in June 2006 found that 12 of them were still displaying the 2005 “No Fakes” stickers/tent cards in their shops. **Audit considers that the IPD needs to ensure that members of the Scheme who have not renewed their membership do not display the “No Fakes” stickers/tent cards. They should return them to the participating bodies concerned.** Audit’s sample check in June 2006 also found a case of a non-member of the Scheme in both 2005 and 2006 displaying the 2005 “No Fakes” sticker/tent card in its shop. **The IPD needs to investigate this case and take appropriate follow-up actions. It also needs to consider setting up a mechanism for tackling the improper use of stickers and tent cards of the Scheme.**

4.16 *Need to monitor the use of the “No Fakes” logo in advertisements.* Members of the Scheme are required to seek prior written approval of the IPD for using the “No Fakes” logo in their advertisements or promotional materials. Audit’s sample check of the members’ advertisements in May and June 2006 found four cases in which no prior written approval had been sought from the IPD. Audit also found that the logo was presented in various forms in members’ advertisements (e.g. some just showed the “No Fakes” logo). **Audit considers that the IPD should ensure that the requirement of seeking prior written approval is strictly followed. To standardise the use of the “No Fakes” logo, the IPD may wish to consider setting rules for the proper presentation of the logo.**

### **Audit recommendations**

- 4.17 **Audit has recommended that the Director of Intellectual Property should:**
- (a) **ensure that members of the Scheme who have not renewed their membership do not display the “No Fakes” stickers/tent cards. They should return them to the participating bodies concerned;**
  - (b) **investigate and take appropriate follow-up actions on the case of a non-member of the Scheme who displayed the 2005 “No Fakes” sticker/tent card in its shop (see para. 4.15) and consider setting up a mechanism for tackling the improper use of stickers and tent cards; and**
  - (c) **ensure that members of the Scheme seek prior written approval of the IPD for using the “No Fakes” logo in their advertisements or promotional materials, and consider setting rules for the proper presentation of the logo.**

## Response from the Administration

4.18 The **Director of Intellectual Property** has said that:

- (a) the IPD will agree with the issuing bodies a mechanism for tackling improper use of stickers and tent cards; and
- (b) the IPD has stated in the Scheme leaflet the requirement of seeking prior approval for using the Scheme's logo in advertisement. The IPD will agree with the issuing bodies ways to prevent the improper use of the logo and to standardise its presentation.

## Evaluation of the Scheme

4.19 At the meeting of LegCo Panel of April 2006 (see para. 4.10), a Member suggested that, since the objective of the Scheme was broadly similar to that of the Quality Tourism Services (QTS) Scheme (Note 16), the IPD might consider working in conjunction with the Hong Kong Tourism Board to promote both schemes to enhance consumer confidence in Hong Kong. The IPD said that it would make reference to the QTS Scheme with a view to enhancing the effectiveness of the Scheme.

## Audit observations

4.20 The Scheme has been in operation for about eight years and problems have been identified (see paras. 4.7 to 4.16). The membership of the Scheme had also dropped significantly, from 640 (4,300 retail outlets) as at 31 December 2005 to 388 (3,263 retail outlets) as at 30 June 2006. In this connection, the IPD's annual surveys (see para. 5.3) had covered the public and the business establishments' awareness of the IPD's advertising and promotional activities. The Scheme was mentioned by some respondents as one of the channels through which they became aware of the IPD's advertising or promotional activities. However, the public's understanding and expectation of the Scheme have not been assessed. The effectiveness of the Scheme in achieving the objective of enhancing confidence of tourists and consumers in shopping in Hong Kong has also not been assessed. **Audit considers that the IPD needs to consider conducting an assessment of the effectiveness of the Scheme.**

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**Note 16:** *The QTS Scheme was launched by the Hong Kong Tourism Board in 1999. It is a service certification programme whereby applicant merchants providing quality tourism services, having fulfilled a prescribed set of assessment criteria, will be certified as QTS merchants under the scheme.*

### **Audit recommendations**

4.21 **Audit has *recommended* that the Director of Intellectual Property should consider assessing the effectiveness of the Scheme, covering the following issues:**

- (a) **the public's understanding and expectation of the Scheme; and**
- (b) **enhancement of tourist and consumer confidence in shopping in Hong Kong.**

### **Response from the Administration**

4.22 The **Secretary for Commerce, Industry and Technology** has said that the CITB shares Audit's concerns about the Scheme and considers that IPD should keep the Scheme under review, taking into account Audit's comments and recommendations.

4.23 The **Director of Intellectual Property** has said that the IPD had anticipated that, with one of the issuing bodies dropping out altogether and the tightening up of the code of ethics in 2006, the number of participating retailers would drop significantly.

## **PART 5: PROMOTION OF INTELLECTUAL PROPERTY PROTECTION**

5.1 This PART examines the IPD's efforts in promoting public awareness of the protection of IP rights.

### **Efforts in promoting public awareness of and respect for IP rights**

5.2 The IPD is responsible for promoting the awareness of and respect for IP rights in the community. Over the years, the IPD has launched various publicity and educational activities to promote the public understanding of IP rights. In 2005-06, the IPD incurred expenditure of \$8.8 million on such activities. Its publicity and educational activities include:

- (a) *Seminars and exhibitions.* Through holding seminars and exhibitions, the IPD helps the business establishments understand the importance of IP and explains to them the systems to protect their IP assets in Hong Kong and Mainland China;
- (b) *School visits.* Since 1997, the IPD has run a school visit programme with the aim of promoting respect for IP rights in the younger generation. In 2005, the programme covered 74 schools and 22,281 students;
- (c) *Training programmes.* In 2005, the IPD launched a programme for training qualified teachers to teach IP concepts in secondary schools participating in the programme. It also launched a training programme to promote IP protection amongst scouts;
- (d) *Media announcements.* The IPD produced Announcements of Public Interest to promote respect for IP rights;
- (e) *Territory-wide promotion.* The IPD has launched the "I Pledge" Campaign since 1999 to encourage consumers to pledge to buy only genuine products. It has also launched the No Fakes Pledge Scheme since 1998 to promote the use and sale of genuine products, targeting visitors, tourists and retailers (see PART 4); and
- (f) *Internet dissemination.* Through its website, the IPD has disseminated information about IP protection.

### **Annual surveys**

5.3 For some years, the IPD has commissioned annual surveys to assess the effectiveness of its promotion and public educational activities and compare the community's changing patterns of awareness of and attitude towards IP rights. The annual surveys include the following:

- (a) *Surveys on public awareness of IP rights protection (public awareness surveys).* The latest survey, which was the seventh one, was conducted in late 2005. A total of 1,206 respondents aged 15 or above were successfully enumerated by telephone and the response rate was 61.4%; and
- (b) *Surveys on business attitudes towards IP rights (business attitudes surveys).* The latest survey, which was the third one, was conducted in early 2006. A total of 1,201 business establishments were successfully enumerated by means of mail survey and the response rate was 50%.

5.4 The results of the public awareness surveys in consecutive years have shown that the public are becoming more aware of the importance of protecting IP rights. Nonetheless, the latest public awareness survey has shown that:

- (a) although the majority of the general public have knowledge of IP rights, the level of public awareness of the IPD and its duties is still relatively low;
- (b) 76% of the public consider that the infringement of IP rights in Hong Kong is serious and 95.5% consider that it is necessary to protect IP rights in Hong Kong;
- (c) more respondents consider the fact that it is more difficult to buy pirated or counterfeit goods was due to the Government's increased efforts taken in 2005;
- (d) most of the respondents have positive responses on the development of creative culture and creative industries. As a result, if the Government can put more resources in developing creative culture/industries and public education in protecting IP rights, especially on television, the public awareness and attitude towards the protection of IP rights will improve in the near future; and
- (e) 28.7% of the public do not know what IP rights are.

5.5 The latest business attitudes survey has also shown that:

- (a) the majority of the business establishments are aware of IP rights and consider that IP rights are valuable assets to the establishments;
- (b) 96.7% of the business establishments consider that it is necessary to protect IP rights in the business environment of Hong Kong;
- (c) 67.6% of the business establishments still consider that the situation of IP rights infringement in the business environment of Hong Kong is serious and 42.2% consider that IP protection is adequate;

- (d) the proportion of establishments which had registered trademark, patent or design in Hong Kong has become higher. Besides, more establishments have deployed employees specifically for IP management, and have prohibited their staff in committing IP infringement, illustrating that more establishments are aware that protecting IP rights/registering IP rights is beneficial to the establishments;
- (e) for the long-term development of the IP rights, most of the establishments consider that the protection of IP rights is helpful to the development of local creative industries (89.6%), enhancing the creation of business opportunity and wealth (73.4%) and to the overall development of Hong Kong's economy (71.1%); and
- (f) 51% of the business establishments consider that IP protection in the business environment is inadequate and 18.3% of the business establishments, especially those small and medium enterprises (SMEs), have not prohibited their staff from installing/using pirated computer software.

### **Audit observations and recommendations**

5.6 Audit notes the IPD's efforts made in IP promotion. The results of the two latest surveys have also shown that both the public and business establishments are giving increasing attention to IP protection. However, the surveys have revealed that more vigorous efforts are required. For example, the surveys have shown that infringement of IP rights in Hong Kong is still serious. The popular use of the Internet facilitates the convenient uploading and downloading of files by many users, making it easy to infringe IP rights.

5.7 **In order to help build up a robust IP protection regime in Hong Kong, Audit has recommended that the Director of Intellectual Property should:**

- (a) **continue making efforts to promote IP awareness and increase respect for IP rights in the community; and**
- (b) **take into account the results of the annual surveys and input from stakeholders (including students, teachers, SMEs and different sectors in the community) in the allocation of the IPD's resources on IP promotion.**

## Response from the Administration

5.8 The **Director of Intellectual Property** has said that:

- (a) the IPD agrees completely that its promotional efforts should be continued and strengthened. It pledges to pursue this; and
- (b) the IPD agrees to allocate resources after taking into account the results of the annual surveys and input from stakeholders. It has been doing so in a rigorous manner since 1997.

5.9 The **Secretary for Commerce, Industry and Technology** agrees that it is important to continue with the effort in IP promotion and public education activities in order to cultivate a culture of respect for IP rights in the community.



## **PART 6: PERFORMANCE MEASUREMENT**

6.1 This PART examines the IPD's performance measurement in its Controlling Officer's Report (COR).

### **Performance measurement in Controlling Officer's Reports**

6.2 *Guidelines on performance measures.* In the Guidelines issued by the Secretary for Financial Services and the Treasury in October 2005, the following provisions on performance measures (targets and indicators) to be included in the CORs are stated:

- (a) when developing performance measures, Controlling Officers should focus on "Targets" measured preferably in terms of outcome (versus output or input) and should apply the most relevant performance indicators that measure economy, efficiency and cost-effectiveness of the resources deployed; and
- (b) the targets should indicate the extent to which the department's operational objectives are being achieved. They should highlight changes in the cost-effectiveness with which results are being achieved. In this respect, unit cost or productivity indicators should be provided.

### **Controlling Officer's Report of the IPD**

6.3 In its COR for 2006-07, the IPD has set out the following aims and performance measures against two programmes:

- (a) *Programme (1): Statutory Functions.* The aim and key performance measures under this Programme involving an estimated expenditure of \$71 million in 2006-07 are as follows:
  - (i) *Aim.* The aim is to provide cost-effective and efficient systems for the registration and administration of trademarks, patents, designs and copyright licensing bodies (Note 17) in Hong Kong; and

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**Note 17:** *Copyright licensing bodies are authorised by copyright owners to grant, on their behalf, licences to users of copyright work. The Copyright Ordinance (Cap. 528) provides for a voluntary registration scheme for copyright licensing bodies. The scheme aims to enhance the transparency of these bodies by requiring registered licensing bodies to make available to the public essential information such as scales of royalty charges for different uses.*

- (ii) **Key performance measures.** The IPD has set 6 targets, all of which relate to the percentage of cases that meet the specified time for processing the registration of IP rights. In addition, the IPD has set 14 indicators, all of which relate to the number of applications received, the number of trademarks and designs registered and the number of patents granted. Details of the targets and indicators are shown at Appendix D; and
  
- (b) **Programme (2): Protection of Intellectual Property.** The aim and key performance measures under this Programme involving an estimated expenditure of \$15.5 million in 2006-07 are as follows:
  - (i) **Aim.** The aim is to promote awareness of IP rights, enhance the reputation of Hong Kong in the protection of IP rights in order to attract investment, and protect existing and new types of IP rights in line with international trends and standards; and
  
  - (ii) **Key performance measures.** The IPD has not set any targets in the COR. It has only set 4 indicators, all of which relate to the number of publicity and educational activities held (e.g. school visits, seminars and conferences). Details of the indicators are shown at Appendix D.

In the COR for 2006-07, the IPD reported its performance results against the targets set. It also reported that it had met all its performance pledges in 2005.

## **Audit observations**

### ***Need to revise the presentation in the COR***

6.4 In its website the IPD has posted five performance pledges for 2006. A comparison of the targets set in the COR against the actual results for 2005, and against the performance pledges in the IPD website, is shown in Table 3.

Table 3

**Targets set in the IPD COR measured against the 2005 result and the 2006 performance pledges posted on its website**

| Time taken to process the following matters:                       | Performance measures in the COR for 2006-07 |               |             | Performance pledge in the IPD website |
|--|---|---------------|-------------|---------------------------------------|
|  | Target                                      | 2005 (Actual) | 2006 (Plan) |                                       |
| (a) First response for trademark applications within two months    | 70%   | 96%           | 95%         | 95%                                   |
| (b) Second response for trademark applications within three months | 70%   | 82%           | 75%         | 75%                                   |
| (c) Standard patent applications within ten days                   | 70%   | 79%           | 75%         | 75%                                   |
| (d) Short-term patent applications within ten days                 | 70%   | 80%           | 75%         | 75%                                   |
| (e) Design applications within ten days                            | 70%   | 99%           | 99%         | 99%                                   |

Source: IPD records

6.5 Table 3 shows that the targets in the COR for 2006-07 were not challenging enough, as the IPD had already achieved better performance in 2005, and the IPD has posted more challenging performance pledges for 2006 in its website. In response to Audit's enquiry, the IPD advised that the "Target" in the COR referred to last year's target (i.e. 2005) and the current year's target (i.e. 2006), which was identical to the performance pledges in its website, was shown under the "2006 (Plan)". **Audit considers that it is the general practice of government bureaux/departments to state their current year targets under the "Target" and their planned results under the "2006 (Plan)" in CORs. To be in line with the general practice, the IPD needs to revise the presentation of its targets and planned results in the COR.**

***Need to provide complete and accurate performance information***

6.6 Under the Programme "Statutory Functions" in its COR for 2006-07, the IPD stated that migration to e-filing had reached 62% for applications for trademark registration

in August 2005. Audit has however found that according to the IPD's records, the average migration rate in 2005 was only 35% (i.e. 7,295 of 20,877 trademark applications in 2005 used e-filing). The 62% refers to the migration rate of one working weekday in August 2005 which was the highest daily rate for working weekdays in 2005. **Audit considers that the IPD needs to provide complete and accurate performance information in the COR to help users assess its performance.**

6.7 Under the Programme "Statutory Functions", the IPD has set 6 targets and 14 performance indicators (see para. 6.3(a)). All of these 20 performance measures related to workloads and service qualities. **To help measure cost-effectiveness with which the results are being achieved, Audit considers that the IPD should consider providing unit cost or productivity indicators as far as possible (see para. 6.2(b)).**

### **Audit recommendations**

- 6.8 **Audit has recommended that the Director of Intellectual Property should:**
- (a) **revise the presentation of the targets and planned results in the COR;**
  - (b) **provide complete and accurate performance information in the COR to help users assess the IPD's performance; and**
  - (c) **consider providing unit cost or productivity indicators as far as possible to measure the IPD's cost-effectiveness in the registration and administration of trademarks, patents, designs and copyright licensing bodies in Hong Kong.**

### **Response from the Administration**

- 6.9 The **Director of Intellectual Property** has said that:
- (a) the IPD's performance pledges have been promulgated through its website. The IPD will consult the CITB and the FSTB in relation to the presentation of its targets and planned results in the COR;
  - (b) while the IPD has put great efforts in promoting e-filing and the present published migration rates reflect the progress made, the IPD agrees to change to an annual average migration rate; and
  - (c) the IPD will consider the audit recommendation of developing some unit cost or productivity indicators.

### **Registration process of trademark applications**

The registration process of trademarks involves the following stages:

- (a) **Application.** Upon receipt of the application form, the IPD issues a receipt notifying the applicant of the allotted application number;
- (b) **Deficiency checking.** Before examination of the application, the IPD carries out a thorough check of the application forms and any attachments. This is to see if all the necessary parts of the forms have been filled in, if they are correct and if any required information is missing. If any required information is missing, the IPD will ask the applicant to provide the information to remedy the deficiencies;
- (c) **Search and examination.** After the deficiency checking, the IPD conducts a search of the trademarks records to see if the same or similar trademark has already been registered or been applied for by another trader in respect of the same or similar class of goods and services. The IPD will also see if the trademark satisfies the registration requirements laid down in the Trade Marks Ordinance. The IPD will then issue an opinion in writing which will either lay out the grounds for objection to the mark or confirm the mark is acceptable for registration;
- (d) **Objection.** If the requirements of registration are not met, the IPD will object to the mark. The applicant has six months to meet the requirements. A further three months extension may be granted. The IPD will indicate in the opinion why the mark does not meet the requirements for registration and may suggest ways of overcoming the objection if the IPD considers it possible to do so. Even if the applicant has tried to overcome the objections made in the initial opinion, the IPD may still find that the requirements for registration have not been met and will issue a further opinion indicating these findings. At this stage, if the applicant still wishes to pursue the trademark application, the applicant has three months from the date of the further opinion to satisfy the registration requirements or call for a hearing;

- (e) **Hearing.** If the applicant calls for a hearing, all the evidence for and against the trademark will be considered at the hearing, and a decision will be issued by a hearing officer;
- (f) **Publication of trademark.** Once the applicant's trademark has been accepted for registration, it is published in the Hong Kong Intellectual Property Journal at the IPD's website;
- (g) **Opposition to the trademark by a third party.** Anyone can view the trademark in the Hong Kong Intellectual Property Journal and lodge an opposition to it. The applicant may withdraw application or respond to the opposition by filing a counter-statement. When all the evidence has been received, a hearing will take place before a hearing officer who then makes a decision; and
- (h) **Registration.** Once the trademark has been accepted for registration, the Registrar of Trade Marks will enter the details of the trademark into the trademarks register and the applicant will be issued with a certificate of registration. Notice of the registration will be published in the Hong Kong Intellectual Property Journal.

*Source: IPD records*

**Examples of registration fees of the IPD**

| Fee item   | Trademark<br>(\$) | Standard<br>patent<br>(\$) | Short-term<br>patent<br>(\$) | Design<br>(\$)       |
|--|-------------------|----------------------------|------------------------------|----------------------|
| Application (Note 1)                                 | 1,300             | 896                        | 823                          | 940                  |
| Renewal (Note 2)                                     | 3,000             | 540                        | 1,080                        | 1,230<br>to<br>4,170 |
| Notice of opposition/objection/<br>counter-statement | 800               | 325                        | 325                          | 590                  |
| Notice of attendance at hearing                      | 1,700             | —                          | —                            | —                    |
| Request for statement of reasons                     | 1,500             | —                          | —                            | —                    |
| Request for copy (per page)                          | 6                 | 6                          | 6                            | 6                    |

Source: IPD records

Note 1: The application fee for the registration of trademark is a lump sum fee while that for the registration of the other three IP rights comprise the following two fee items:

|  | <i>Standard<br/>patent<br/>(\$)</i> | <i>Short-term<br/>patent<br/>(\$)</i> | <i>Design<br/>(\$)</i> |
|--|-------------------------------------|---------------------------------------|------------------------|
| <i>Filing fee</i>                            | 760                                 | 755                                   | 785                    |
| <i>Advertisement fee in Official Journal</i> | 136                                 | 68                                    | 155                    |
| <b>Total</b>                                 | <u><u>896</u></u>                   | <u><u>823</u></u>                     | <u><u>940</u></u>      |

Note 2: Trademarks are registered for a period of ten years and renewed for further periods of ten years. Protection under standard patents is renewable annually for a maximum term of 20 years. Protection under short-term patents is renewable after four years from filing, for a maximum term of eight years. Registered design protection is renewable for periods of five years up to a maximum of 25 years. The renewal fees for the first, second, third and fourth 5-year extension are \$1,230, \$1,860, \$2,740 and \$4,170 respectively.

Remarks: Details of the registration fees are available at the IPD's website.

**Contract sum for the outsourcing contract**

|   | <b>Amount</b><br>(Note 1) |  |
|---|---------------------------|--|
|   |                           | <b>(\$ million)</b>  |
| <b>New Application Development Service</b>          |                           |  |
| Implementation service (Note 2)                     | 48.70                     |  |
| Hardware (Note 3)                                   | 2.85                      | } <b>\$5.92 million</b><br>(subject to<br>Service Credits<br>mechanism —<br>see para. 3.8) |
| Software (Note 3)                                   | 3.07                      |  |
|   | <hr/>                     |  |
| <b>Sub-total</b>                                    | <b>54.62</b>              |  |
| <b>Ongoing Support Service</b>                      |                           |  |
| Transition period charges (Note 4)                  | 2.00                      |  |
| Acceptance period charges (Note 5)                  | 1.20                      | } <b>\$8.29 million</b><br>(subject to<br>Service Credits<br>mechanism —<br>see para. 3.8) |
| Ongoing service after<br>acceptance period (Note 5) | 7.09                      |  |
|   | <hr/>                     |  |
| <b>Sub-total</b>                                    | <b>10.29</b>              |  |
| <b>Office Operation Service</b>                     |                           |  |
| Transition period charges (Note 4)                  | 1.30                      |  |
| Acceptance period charges (Note 5)                  | 2.45                      |  |
| Ongoing service after<br>acceptance period (Note 5) | 18.00                     |  |
|   | <hr/>                     |  |
| <b>Sub-total</b>                                    | <b>21.75</b>              |  |
|   | <hr/>                     |  |
| <b>Total</b>  | <b>86.66</b>              |  |
|   | <hr/> <hr/>               |  |

Source: IPD records

Note 1: Under the contract, after the first year, the fees, service charges and charge rates as set out in the contract may, at the IPD's discretion, be adjusted either upward or downward not more frequently than once in every 12 months. The adjustment should be in line with and at a rate not exceeding the movement in the latest available Government Consumer Price Index B in a period of 12 months preceding the date on which the adjustment is to take effect.

Note 2: Milestone payments would be made based on the completion of different stages of system implementation.



**Appendix C**  
(Cont'd)  
(para. 3.4 refers)

*Note 3: The charges would be payable in the form of monthly service charge within the period from the live-run dates of the systems to the last date of the term of the contract.*

*Note 4: There was a one-month transition period beginning on 1 December 2001 and thereafter an acceptance period of eight months. The one-time transition period charges were payable after the end of the transition period.*

*Note 5: The charges were payable monthly based on the manpower resource provided by the contractor during the acceptance period and thereafter until the last date of the term of the contract.*

**Key performance measures in the COR of the IPD for 2006-07**

|   | <b>Target</b> | <b>2004<br/>(Actual)</b> | <b>2005<br/>(Actual)</b> | <b>2006<br/>(Plan)</b> |
|---|---------------|--------------------------|--------------------------|------------------------|
| <b>Programme (1): Statutory Functions</b>                                 |               |                          |                          |                        |
| <i>Targets</i>  |               |                          |                          |                        |
| Time taken to process the following matters:                              |               |                          |                          |                        |
| <i>Trademarks</i>   |               |                          |                          |                        |
| • First response for trademark applications within two months (Note 1)    | 70 %          | 85 %                     | 96 %                     | 95 %                   |
| • Second response for trademark applications within three months (Note 1) | 70 %          | N.A.                     | 82 %                     | 75 %                   |
| • Hearing decisions on trademarks within six months                       | 80 %          | 80 %                     | 80 %                     | 80 %                   |
| <i>Patents</i>  |               |                          |                          |                        |
| • Standard patent applications within ten days                            | 70 %          | 70 %                     | 79 %                     | 75 %                   |
| • Short-term patent applications within ten days                          | 70 %          | 70 %                     | 80 %                     | 75 %                   |
| <i>Designs</i>  |               |                          |                          |                        |
| • Design applications within ten days                                     | 70 %          | 70 %                     | 99 %                     | 99 %                   |
| <i>Indicators</i>   |               |                          |                          |                        |
| <i>Trademarks</i>   |               |                          |                          |                        |
| • Applications received   |               | 19,940                   | 20,877                   | 20,800                 |
| • Applications successfully registered (Note 2)                           |               | 26,640                   | 19,689                   | 19,600                 |
| • First response issued for trademark applications (Note 1)               |               | N.A.                     | N.A.                     | 20,800                 |
| • Second response issued for trademark applications (Note 1)              |               | N.A.                     | N.A.                     | 2,470                  |
| • Hearing decisions issued  |               | 29                       | 98                       | 100                    |

**Appendix D**  
(Cont'd)  
(para. 6.3 refers)

|   | <b>Target</b> | <b>2004<br/>(Actual)</b> | <b>2005<br/>(Actual)</b> | <b>2006<br/>(Plan)</b> |
|---|---------------|--------------------------|--------------------------|------------------------|
| <i>Patents</i>  |               |                          |                          |                        |
| • Applications for standard patents received              |               | 10,005                   | 11,763                   | 11,700                 |
| • Applications for short-term patents received            |               | 416                      | 463                      | 460                    |
| • Standard patents granted                                |               | 4,242                    | 6,518                    | 6,500                  |
| • Short-term patents granted                              |               | 392                      | 419                      | 410                    |
| <i>Designs</i>  |               |                          |                          |                        |
| • Applications received                                   |               | 3,026                    | 3,176                    | 3,100                  |
| • Designs registered                                      |               | 4,213                    | 4,989                    | 4,900                  |
| <i>Copyright licensing bodies</i>                         |               |                          |                          |                        |
| • Applications received                                   |               | 0                        | 1                        | 0                      |
| • Applications successfully registered                    |               | 0                        | 1                        | 0                      |
| • Applications for renewal of registration                |               | 3                        | 2                        | 3                      |
| <b>Programme (2): Protection of Intellectual Property</b> |               |                          |                          |                        |
| <i>Indicators</i>   |               |                          |                          |                        |
| • Visits, seminars, conferences and workshops             |               | 164                      | 178                      | 180                    |
| • Speeches and presentations                              |               | 48                       | 59                       | 60                     |
| • Media interviews, briefings and press conferences       |               | 10                       | 18                       | 15                     |
| • School visits   |               | 48                       | 74                       | 50                     |

Source: COR of IPD for 2006-07

Note 1: These are new targets in the COR for 2006-07. To correspond with the new targets, new indicators were also set.

Note 2: The Trade Marks Ordinance (Cap. 559) commenced on 4 April 2003. The Trade Marks Ordinance (Cap. 43) was repealed on the same day. The high volume of trademark applications registered in 2004 was due to the time taken by IP Examiners in learning the concept and practices of the Trade Marks Ordinance (Cap. 559) as well as the new automated trademark registration system implemented in April 2003. As a result, most of the applications were processed and registered in 2004 when the IP Examiners were better equipped with the necessary skills and knowledge.

**Acronyms and abbreviations**

|           |  |
|-----------|--|
| Audit     | Audit Commission                                   |
| C&ED      | Customs and Excise Department                      |
| CITB      | Commerce, Industry and Technology Bureau           |
| COR       | Controlling Officer's Report                       |
| e-cert    | Electronic certificate                             |
| e-channel | Electronic channel                                 |
| e-filing  | Electronic filing                                  |
| e-service | Electronic service                                 |
| FC        | Finance Committee                                  |
| FSTB      | Financial Services and the Treasury Bureau         |
| GLD       | Government Logistics Department                    |
| IP        | Intellectual property                              |
| IPD       | Intellectual Property Department                   |
| IT        | Information technology                             |
| LegCo     | Legislative Council                                |
| MC        | Management Committee                               |
| OGCIO     | Office of the Government Chief Information Officer |
| QTS       | Quality Tourism Services                           |
| SMEs      | Small and medium enterprises                       |