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Secretary for Commerce and Industry
(Attention: Mr. Philip CHAN,
Principal Assistant Secretary (5))
Commerce and Industry Bureau
Level 29 One Pacific Place
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Hong Kong

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BY FAX

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Dear Mr. Chan,

Draft Copyright (Suspension of Amendments) Bill 2001

I understand that the Subcommittee formed by the House Committee on 20 April 2001 to study the Administration's legislative proposal to suspend the operation of some of the provisions of the Copyright Ordinance will meet on 25 April 2001. The following are some of my comments on the draft Bill which was presented to the Commerce and Industry Panel on 19 April 2001. If any of my comments turns out to be not relevant because of changes you may have made to the draft Bill, please ignore them.

I. General observations

2. Despite the title of the draft Bill which refers to "suspension", there is no mechanism provided in it for the cessation of the suspension. This may give rise to a possible interpretation by the court that the Bill, if enacted, is legislation for the repeal of the amendments in question. It may, therefore, trigger off the operation of section 24 of the Interpretation and General Clauses Ordinance (Cap. 1) that the relevant sections may not be revived resulting in leaving "truncated" provisions in the Copyright Ordinance.

3. In the Legislative Provisions (Suspension of Operation) Ordinance 1997, there were time limits for the suspension of the relevant Ordinances matched by provisions empowering the Legislative Council to extend the suspension period by resolution. It would seem necessary to put in place a similar mechanism to cease the suspension, for example, to provide an end date which may be varied by the Legislative Council.

4. The present draft Bill is much more complicated than the Legislative Provisions (Suspension of Operation) Ordinance 1997. The complication lies with the intention to except certain types of copyright works from the proposed suspension and that the descriptions used for identifying the seven types of copyright works which are to be suspended and those excepted works are not found in the Copyright Ordinance. This complication is compounded by the fact that the legal effect resulted from the suspension could not be understood by crossing out any of the existing text in the Copyright Ordinance. A reader of the Copyright Ordinance will need to have the suspension legislation placed next to it in order to be able to ascertain the resultant legal effect of the suspension.

5. There is no transitional provision in the draft Bill. I wonder if the Administration had considered whether there is any need for transitional provisions to cover any enforcement or investigative actions in respect of copyright works which would be covered by the proposed suspension.

6. Section 31 provides for the circumstances under which a person may infringe the copyright in a work. It appears that the provision forms an integral part of section 118(1)(d) because an element of the section 118(1)(d) offence is "with a view to committing any act infringing the copyright". Would it not be necessary to amend section 31 consequential upon the 'partial and temporary amendment' proposed by Clause 2(1) of the draft Bill or to provide in the draft Bill how section 31 should operate during the period of suspension?

7. Investigative powers under section 122 are directed at things described as "infringement copy of copyright work". Should these provisions be suspended or amended as well in order that the policy of suspension would be consistently applied to the scope of these powers?

8. It was the Administration's belief that the expression "for the purpose of

trade or business” was unclear that necessitated the enactment of the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 to substitute that expression by “for the purpose of, in the course of or in connection with any trade or business”. When the Administration met with the Bills Committee to study the Intellectual Property (Miscellaneous amendments) Bill 2000, it informed the Committee that no enforcement action had been taken under section 118 because of the ambiguity of the provision. Assuming that the proposed suspension would have the effect of bringing the legislation back to its pre-amended form, would the Administration advise whether the same investigation and prosecution attitude as before would be adopted. If not, it would seem that an act of infringing the copyright of printed newspaper although would not be an offence under the Copyright Ordinance as amended by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 would still be liable to prosecution under the pre-amended law during the period of suspension if the act was committed for the purpose of trade or business.

9. The draft Bill proposes to exclude from the proposed suspension various copyright works. This would result in differential treatment in legislation. Would the Administration please explain on what basis such difference could be justified in accordance with Article 22 of the Hong Kong Bill of Rights which guarantees equality before and equal protection of the law?

II. The Draft Bill

Long title

10. The long title refers to the suspension of the operation of certain amendments to the Copyright Ordinance. There have been a number of amendments to the Ordinance since its enactment in 1997. Should reference of “certain amendments” be made clear to confine to "amendments effected by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000" ?

Clause 2 - Suspension of amendments

11. Of the seven kinds of copyright works, the terms such as "printed book", "printed newspaper, magazine or periodical", "a copyright work included in a television broadcast, sound broadcast or cable program", "a printed version of a computer program" etc. are not defined in the Ordinance. It would assist the Subcommittee if the intended meaning of these terms with examples could be provided by the Administration.

12. Clause 2(1)(e) refers to "a cable program of a subscription television network that is licensed, or deemed to be licensed, under the Telecommunications Ordinance (Cap. 106)". Under the Telecommunications Ordinance, there is no reference to a "subscription television network". After the enactment of the Broadcasting Ordinance (No. 48 of 2000), a cable program is provided by a domestic pay television program service licensee who may or may not have a network licence. Is it appropriate to use such reference to identify the cable program?

III. On Chinese version of the draft Bill

13. In Clause 2(1)(g), why is there a need to repeat "的服務" after "互聯網服務"?

14. In Clause 2(2), "in any form" has not been reflected in the Chinese version.

I would be grateful if you could let me have your response in both English and Chinese versions at your earliest convenience.

Yours sincerely,

Anita HO
Assistant Legal Adviser

cc: Department of Justice (Attention: Mr. Jeffrey GUNTER, SALD and
Mr. Michael LAM, GC)

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