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22 March 2012

Ms Yue Tin-po
Clerk to the Bills Committee on
Copyright (Amendment) Bill 2011
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Ms Yue,

**Copyright (Amendment) Bill 2011
Outstanding Matters**

At the Bills Committee meeting held on 15 March 2012,
Members invited the Administration to consider the following matters –

- (a) amending new section 88C(4) in Clause 45 of the Copyright (Amendment) Bill 2011 (“the Bill”) to clarify its legal effect in respect of a notice of alleged infringement that did not comply with section 88C(2) or (3), particularly in the light of section 88B(2)(a)(ii) and (iii);
- (b) amending new section 88D(6) in Clause 45 of the Bill in view of the deletion of section 88D(3)(b) in the proposed Committee Stage Amendments (“CSAs”); and

- (c) providing information on the legal definition and the usage in existing legislation of Hong Kong of the term “trivial” in the context of the new subsection 118(2AA) and 118(8C) in Clause 51 of the Bill, as compared with the term “minimal”.

2. The Administration’s response is set out below.

New Section 88C(4)

3. As explained at the meeting, the new section 88B(2)(a) provides the following scenarios under which an online service provider (“OSP”) may elect to take reasonable steps to limit or stop an infringement on its service platform as soon as practicable should it wish to seek protection under the safe harbour provisions –

- (a) receipt of a valid notice of alleged infringement (i.e. a notice which complies with the statutory requirement prescribed by the new sections 88C(2) and (3)) by an OSP; or
- (b) acquisition of either actual knowledge (re. the new section 88B(2)(a)(ii)) or constructive knowledge (re. the new section 88B(2)(a)(iii)) by an OSP of the occurrence of an infringing material/activity on its service platform.

4. In this connection, the new section 88C(4) is intended to clarify the following –

- (a) an OSP is not obliged to process a defective notice of alleged infringement, i.e. a notice that fails to meet the statutory requirements prescribed by the new section 88C(2) or (3); and
- (b) a defective notice received by an OSP shall not be taken into account in determining whether an OSP has acquired any actual or constructive knowledge of an infringement under the new section 88B(2)(a)(ii) or (iii).

5. To make our legislative intent clearer, we propose revising the new section 88C(4) to read as follows –

88C. Notice of alleged infringement

(4) If a notice of alleged infringement given to a service provider does not comply with subsection (2) or (3) –

(a) the notice is of no effect for the purposes of section 88B(2)(a)(i); and

(b) in determining whether the service provider was aware of any of the matters mentioned in section 88B(2)(a)(ii) or (iii), no account is to be taken of the notice.

New Section 88D(6)

6. In the light of a question raised at the meeting on 15 March 2012, we propose revising the new section 88D(6) to read as follows –

88D. Counter notice

(6) A counter notice that does not comply with subsection (4) or (5) is of no effect for the purposes of subsection (1)(b).

7. The Administration will soon provide the proposed CSAs and an updated marked-up version of the Bill for Members' easy reference.

New Sections 118(2AA) and (8C)

8. Our research into local legislation reveals that the term “minimal” is used in four provisions, and “trivial” in 19 provisions.

9. According to our findings, the term “trivial” is sometimes used in statutory provisions in connection with criminal offences, such as section 16 of the Defamation Ordinance (Cap. 21); section 107 of the Criminal Procedure Ordinance (Cap. 221); section 36 of the Magistrates Ordinance (Cap. 227); and rule 36 of the Immigration (Vietnamese Boat People) (Shek Kwu Chau Detention Centre) Rules (Cap. 115P). For instance, under section 16 of the Defamation Ordinance (Cap. 21), if a libel is of a “trivial” character, the presiding magistrate may, under the prescribed condition, summarily convict a defendant and adjudge him to

pay a fine of \$250. The term “輕微” has been adopted as the Chinese equivalent of the term “trivial” in these provisions.

10. On the other hand, the term “minimal” is generally used in regulatory contexts, such as Schedule 1 to the Factories and Industrial Undertakings (Work in Compressed Air) Regulations (Cap. 59M); regulation 3 of the Residential Care Homes (Persons with Disabilities) Regulation (Cap. 613A); and regulation 25 of the Merchant Shipping (Prevention of Air Pollution) Regulation (Cap. 413M). The terms “低量”, “最小” and “低度” are used as the Chinese equivalents of the term “minimal” in different provisions.

11. Further, as mentioned at the meeting on 15 March 2012, the concept of “trivial” (rendered as “輕微” in the Chinese version) is also reflected in the Statement of Prosecution Policy and Practice which states that a prosecution may not be required by the public interest if an offence is trivial or otherwise of a technical nature only.

12. While we consider that there is no material difference between the respective magnitude designated by the terms “minimal” and “trivial”, we remain of the view that adoption of the term “trivial” is preferable to “minimal” in the context of both the prejudicial distribution and communication offences, having regard to the practice as reflected in paragraphs 8 to 10 above.

Remaining issues

13. The Administration will provide the Bills Committee with the latest version of the Code of Practice before the end of March 2012.

14. Separately, at the meeting held on 22 November 2011, the Administration was requested to conduct a public consultation on a copyright exception for parody after the passage of the Bill. The Administration had hitherto indicated that it would follow up this issue accordingly after the enactment of the Bill. The Secretary for Commerce and Economic Development will reiterate this commitment in his reply to be delivered during resumption of the Second Reading debate on the Bill.

15. We hope the above has cleared the way for early resumption of the Second Reading of the Bill.

16. I should be grateful if you could bring this letter to the attention of Members of the Bills Committee.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Patricia So', with a stylized, flowing script.

(Patricia So)

for Secretary for Commerce and Economic Development

c.c.

Secretary for Justice (Attn: Mr Michael Lam and Mr Henry Chan)
Director of Intellectual Property (Attn: Mr Thomas Tsang)