By fax (2877 8024) and by hand

11 January 2002

Ms Connie Szeto
Clerk to LegCo Panel on Commerce and Industry
Legislative Council Secretariat
3/F Citibank Tower, 3 Garden Road
Hong Kong

Dear Ms Szeto,

Supplementary information regarding LegCo Panel queries of 10 January 2002

I write further to the queries posed to CASH at yesterday's LegCo Panel and would appreciate if you could circulate this letter to all the relevant LegCo Members, including those on the Panel as well as those who are not on the Panel but have attended the meeting.

A. WTO rulings on US copyright exemptions

In response to Mr Tommy YY Cheung's query regarding the "homestyle" exemption in the 1976 US Copyright Act, I have consulted our internal legal opinion and would like to provide a clear reply in this letter.

The simple and straightforward answer is that the US "homestyle" exemption is not concerned with ordinary musical works and lyrics. It is ruled by WTO that it covers works other than ordinary musical works and lyrics. It thus covers, for example, dramatic rendition of music written for an opera. Examples of these works are *Madame Butterfly, La Traviata* and *La Boheme*.

That is to say, even though the US "homestyle" exemption is ruled by WTO to be consistent with the Berne Convention and the TRIPs Agreement, it is irrelevant as far as ordinary musical works and lyrics are concerned.

On the other hand, the US exemption regarding communication by an establishment of a transmission embodying a performance of ordinary musical works and lyrics intended to be received by the general public, originated by a radio or television broadcast station (referred as "business" exemption) is ruled by WTO to be inconsistent with the Berne Convention and the TRIPs Agreement.

The US Government is obliged to remove this "business" exemption and to bring its copyright law into conformity with its obligations under the TRIPs Agreement.

I have extracted the most relevant sections of the WTO Report on this case and the due-to-be amended copyright exemptions provided in the US Copyright Act for your ease of reference. Please see Appendices 1 and 2.

As a matter of fact, we have already tackled this issue in Section 9.1 of our submission. For convenience sake, I have extracted that Section and enclosed it in Appendix 3 of this letter.

B. CASH distribution details

Our royalty distribution is strictly governed by our Distribution Rules approved by our Council of Directors (please refer to Appendix 4 for our current Directors). As the royalties are concerned with public performance and broadcasting of music, the higher the performance/broadcast frequency and duration, the more royalties are distributed to a work.

Mr CC Hui and Mr Tommy YY Cheung have enquired about the details of our distribution. While we cannot disclose the actual amount distributed to each of our members due to privacy reason, we would like to refer you to Appendix 5 for an analysis of our year 2000 distribution result (extracted from our Annual Report 2000).

As for royalties distributed to overseas composers, the distribution goes through our sister societies. Details of royalties distributed to each overseas work are provided to these societies who are to pass on the royalties to the relevant copyright owners (whose membership is directly with our sister societies and not CASH). In our royalty distribution 2000, 33% of our distributable royalties is for overseas composers (see Appendix 6). And the top beneficiaries include composers from US, UK, Japan, Taiwan, France, Canada, Germany, Australia and China.

While it is a matter of internal policy whether our sister societies deduct any cost before forwarding the royalties, I should quote it is the practice of CASH not to deduct any cost from royalties received from abroad before passing onto our CASH members.

I sincerely hope the above provides satisfactory answers to the queries posed to us at yesterday's Panel meeting. It would be my pleasure to supply further details if there is any points unclear.

With kind regards,

Elton Yeung
Chief Executive Officer

copy :

Commerce and Industry Bureau
Attention : Mr Mr Kenneth Mak, Mr Philip Chan and Ms Laura Tsoi

Intellectual Property Department
Attention : Mr Stephen Selby, Mr Peter Cheung and Ms Pancy Fung

Appendix 1

Extracts of the WTO Report of the Panel of 5 May 2000 on United States – Section 110(5) of the US Copyright Act

"2.1 The dispute concerns Section 110(5) of the **US Copyright Act of 1976, as amended by the Fairness in Music Licensing Act of 1998** ("the 1998 Amendment"), which entered into force on 26 January 1999. The provisions of Section 110(5) place limitations on the exclusive rights provided to owners of copyright in Section 106 of the Copyright Act in respect of certain performances and displays.

2.4 Subparagraph (A) of Section 110(5) essentially reproduces the text of the original "homestyle" exemption contained in Section 110(5) of the Copyright Act of 1976. When Section 110(5) was amended in 1998, **the homestyle exemption was moved to a new subparagraph (A) and the words "except as provided in subparagraph (B)" were added** to the beginning of the text.

2.7 …… the homestyle exemption was originally intended to apply to performances of all types of works. However, given that the present subparagraph (B) applies to "a performance or display of a nondramatic musical work", the parties agree, by way of an *a contrario* interpretation, that the effect of the introductory phrase "except as provided in subparagraph (B)", that was added to the text in subparagraph (A), is that **it narrows down the application of subparagraph (A) to works other than "nondramatic musical works"**.

[Added by CASH] : "nondramatic musical work" refers to ordinary musical works and lyrics such as pop music, serious music and advertisement jingles.

2.8 ……Consequently, the operation of **subparagraph (A) is limited to** such musical works as are not covered by subparagraph (B), **for example** a communication of a broadcast of a **dramatic rendition of the music written for an opera**.

[Added by CASH] : Examples of "dramatic rendition of the music written for an opera" are *Madame Butterfly, La Traviata and La Boheme.*

2.9 The 1998 Amendment has added a new **subparagraph (B) to Section 110(5)**, to which we, for the sake of brevity, hereinafter refer to as a "business" exemption. It **exempts, under certain conditions, communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station**……

7.1 In the light of the findings … above, the Panel concludes that:

(a) Subparagraph (A) of Section 110(5) of the US Copyright Act meets the requirements of Article 13 of the TRIPS Agreement and is thus consistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.

(b) Subparagraph (B) of Section 110(5) of the US Copyright Act does not meet the requirements of Article 13 of the TRIPS Agreement and is thus inconsistent with Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.

7.2 The Panel recommends that the Dispute Settlement Body request the United States to bring subparagraph (B) of Section 110(5) into conformity with its obligations under the TRIPS Agreement.**"**

Appendix 2

The relevant parts of the current text of Section 110(5) read as follows:

"§ 110. Limitations on exclusive rights : Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

…

(5)(A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless –

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public;

(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(iii) no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed; and

…"

Appendix 3

Extract of CASH submission on Chapter 4 of Consultation Document

"9. The Panel's Decisions

From the Panel's different decisions[1] on the two exemptions (the "homestyle exemption" and the "business exemption"), we may draw a reference, albeit not absolute, on the degree or the extent of prejudice that it is of an unreasonable level.

9.1 Decision on "Homestyle Exemption"

9.1.1 In making the decision, the facts considered by the Panel included:

(a) The Panel had not been given any evidence suggesting that the right holders would have licensed, or attempted to license, the public communication[2] of broadcasts of performances embodying dramatic renditions of "dramatic" musical works either before the enactment of the original homestyle exemption or after the 1998 Amendment;

(b) The playing of music by the small establishments covered by the "homestyle exemption" has never been a significant source of revenue collection for collective management organizations ("CMOs")3; and

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[1] The Panel concluded that:

(a) Subparagraph (A) of Section 110(5) of the US Copyright Act meets the requirements of Article 13 of the TRIPS Agreement and is thus *consistent* with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.

(b) Subparagraph (B) of Section 110(5) of the US Copyright Act does not meet the requirements of Article 13 of the TRIPS Agreement and is thus *inconsistent* with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement."

[2] Within the meaning of Article 11(1)(ii) or 11*bis*(1)(iii) of the Berne Convention (1971).

[3] In this case, the US submitted that the economic effect of the original homestyle exemption of Section 110(5) of 1976 was minimal. Its intent was to exempt from liability small shop and restaurant owners whose establishments would not have justified a commercial licence. Given that such establishments are not a significant licensing market, they could not be significant sources of revenue for right holders. Even in the absence of an exception, no licences would be justified to be sought or issued. Therefore,

(c) As regards the exemption as amended in 1998 to exclude nondramatic musical works from its scope, the EC had not explicitly claimed that the exemption would cause any prejudice to right holders.

9.1.2 The Panel therefore concluded that the "homestyle exemption" contained in subparagraph (A) did not cause unreasonable prejudice to the legitimate interests of the right holders within the meaning of the third condition of Article 13.

9.1.3 In the US, the reason why the "homestyle exemption" caused *no significant* economic effect to the right holder was that it was not feasible, practical, nor cost-effective for the CMOs in the US to collect royalties from the small establishments in their country. The CMOs could not or would not even attempt to collect such kind of royalties in reality, irrespective of the nature of the legislation in place.

9.1.4 However, it is an entirely different situation in Hong Kong. In Hong Kong, it is an accepted fact that most of the establishments are small ones and it is a compact place connected by an efficient transportation network. It is never infeasible, impractical or cost-ineffective for CASH (Section 9.1.3 above refers) to exercise our performing right. Most importantly, unlike the CMOs in the US, CASH has been and is exerting its best efforts to collect royalties from users who perform music in public by means of turning on radio or TV programmes. The economic effect of introducing the Extension will thus be exceedingly significant. An estimation of the financial impact on CASH is detailed in Section 9.2.3 below. In the circumstances, any "homestyle exemption" in the context of Hong Kong will be ruled prejudicial to the legitimate right of authors."

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there was literally no economic detriment to the right holder from an explicit exception. Given their size and that the playing of music is often incidental to their services, these establishments are among those most likely simply to turn off the radio if pressed to pay licensing fees. Furthermore, the 1998 Amendment has only decreased the economic relevance of the exemption by reducing its scope to "dramatic" musical works.

Appendix 4

COUNCIL OF DIRECTORS 理事會

Writer Directors 作家理事

Prof. Chan Wing Wah, JP	(Chairman)	陳永華教授(主席)
Mr. Jolland Chan	(Vice Chairman)	陳劍和先生(副主席)
Mr. Gene Lau		劉卓輝先生
Dr. Richard Tsang		曾葉發博士

PUBLISHER DIRECTORS 出版人理事

Mr. Clarence Hui - Stardust Music (Hong Kong) Ltd.	許愿先生
Mr. Alvin Leong - Passport Publishing	梁榮駿先生
Ms. Susanna Ng - EMI Music Publishing (S.E. Asia) Ltd.	吳加愛小姐
Ms. Flora Yip - Sony/ATV Music Publishing (Hong Kong)	葉麗玲小姐

Appendix 5

Performing Royalties Distributed To CASH Members					
Performance Year		2000			1999
Income Range	No. of Members			No. of Members	
$500 (UPA only)	427	26.1%		355	22.7%
< = $500	21	1.3%		19	1.2%
$501 - $5,000	749	45.7%		750	48.0%
$5,001 - $10,000	98	6.0%		98	6.3%
$10,001 - $50,000	200	12.2%		204	13.0%
$50,001 - $100,000	67	4.1%		54	3.5%
$100,001 - $200,000	38	2.3%		39	2.5%
> $200,000	38	2.3%		44	2.8%
Total	**1,638**	100.0%		**1,563**	100.0%

Appendix 6

	HK$
AMOUNTS ALLOCATED TO	
Local members	57,682,013
Affiliated societies	29,836,987
Contribution to CASH Music Fund	2,211,776
	89,730,776