香 港 特 別 行 政 區 政 府

商 務 及 經 濟 發 展 局
工 商 及 旅 遊 科

香港添馬添美道二號
政府總部西翼二十三樓

COMMERCE, INDUSTRY AND TOURISM BRANCH
COMMERCE AND ECONOMIC DEVELOPMENT BUREAU
GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

23/F, WEST WING
CENTRAL GOVERNMENT OFFICES
2 TIM MEI AVENUE
TAMAR, HONG KONG

Our ref. : CITB 07/09/17

Tel. no. : 2810 2862
Fax no. : 2147 3065

22 December 2014

Miss Carrie Wong
Assistant Legal Adviser
Legislative Council Secretariat
Legal Service Division
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Miss Wong,

Copyright (Amendment) Bill 2014

Thank you for your letter dated 7 November 2014. Please find below the first batch of our replies to your questions on the above Bill. Further replies will follow.

Question 1- Clause 1

The Ordinance will come into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette. Following good practices, the Government may launch educational and promotional activities about the amendments to the copyright law before bringing the Ordinance into operation. The commencement notice is treated as a piece of subsidiary legislation subject to negative vetting by the Legislative Council.

Questions 2 and 3- Clauses 6 and 8

We will consider amending the English text of the existing sections 17(5) and 19(6) of the Copyright Ordinance (Cap. 528) so that the expression "making available to the public" in those provisions will appear as a defined term and together with its Chinese equivalent "(向公眾提供)".

Question 4- Clauses 9 and 13

The existing section 22(1) provides that the acts described in section 22(1)(a), (b), (c), (d), (e), (f) and (g) are collectively referred to as the "acts restricted by the copyright", without including the words "in a work" or "in the work" in that reference. However, the inclusion of those words in the expression "acts restricted by the copyright in a work" in the proposed section 22(2A) and the expression "an act restricted by the copyright in the work" in the proposed section 28A(1) is appropriate when the contexts require them. Examples of such inclusion can be found in the existing section 22(3), 25(1), 154(g), 161(g), 168(2), etc.

Question 5- Clause 13

We will consider changing the expression "信息" in the Chinese text of the proposed section 28A(6)(b) to "訊息".

Question 11- Clause 18

The expression "裁定" is usually used to connote a decision by a body exercising judicial or similar functions. In the Copyright Ordinance (Cap. 528), it is generally used in relation to the Court or the Copyright Tribunal.

While the determination of whether a work has been released or communicated to the public referred to in the proposed section 39(5) may ultimately involve a determination by the Court, it seems that it is not necessarily limited to such a determination. In the absence of a direct reference to the Court or the Copyright Tribunal in the proposed section 39(5), "斷定" may be more appropriate.

Question 14- Clause 26

The condition "knew or ought to have been aware of" is not newly introduced by the new section 44(2). The existing "to-be-repealed" sections 44(2) and 45(2) of the Copyright Ordinance governing the respective permitted acts of the recording or copying of broadcasts and cable programmes, and reprographic copying made by educational establishments or pupils of passages from published works, also contain the same condition.

The mental status of the person who “ought to have been aware of” has to be judged objectively by the “reasonable man” test in the light of all the circumstances of a case. This in essence requires an objective consideration and assessment of the underlying circumstances. For instance, if there is a licensing scheme readily available to educational establishments for the relevant acts of recording, copying or communication, and information about such licensing scheme is widely publicised to members of the educational sector, e.g. through newsletters, a person from the educational sector would reasonably be expected to be aware of that licensing scheme based on an objective assessment of the underlying circumstance.

We consider that there is no material difference in substance between the terms “ought to have known” and “ought to have been aware of”. We prefer keeping the use of “ought to have been aware of” in the relevant provisions as the expression is now used throughout the Copyright Ordinance in similar contexts.

Yours sincerely,

(Patricia So)
for Secretary for Commerce and Economic Development

c.c. Legal Adviser
Chief Council Secretary (4)3