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

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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

Further to our reply of 22 December 2014, please find below our responses to your remaining questions on the above.

Questions 6 and 8 – Clause 15

The term "dealing with" in the heading of section 31 refers to the various acts specified in section 31(1)(a) to (d). The term is also used in other sections of the Copyright Ordinance, such as in sections 40B to 40D, 41A, 41, 44, 45, 54A and 72. Under these sections, where a copy of a work is made pursuant to a permitted act is subsequently (a) possessed, exhibited or distributed, for the purpose of or in the course of trade or business by any person or organization who is not permitted to make and/or use the copy pursuant to the relevant provisions; or (b) sold or let for hire, or offered or exposed for sale or hire, the copy would be considered to have been "dealt with" ("被用以進行交易") and is treated as an infringing copy. It therefore refers to subsequent dealings in the general context of trade or business otherwise than for the purposes or uses permitted by the relevant provisions.

As to the term "dealing in" ("經營") which appears in sections 31(2), 32(3), 95(1A), 96(6A), 109(1A) and 120(2A) of the existing Copyright Ordinance, it is defined under section 198(2) to include "buying, selling, letting for hire, importing, exporting and distributing".

The concept of "fair dealing" ("公平處理") should be distinguished from the concepts of "dealing with" and "dealing in" which have defined meanings as explained above. For the "fair dealing" provisions, the word "dealing" is used in its ordinary meaning referring to the "use" of a work. Whether any use of a work amounts to "fair dealing" is to be considered according to all the circumstances of the case through a fairness assessment.

Given that the terms "dealt with", "dealing in" and "fair dealing" are used in different sections with different specific meanings, their equivalent Chinese terms are therefore rendered differently.

Question 7 – Clause 15

Under the proposed section 31(3)(e), the word "potential" refers to both the "market" and "value" of the work. The concept of "the effect of the distribution on the potential market for or value of the work" can be found from the non-exhaustive list of factors for determining "fairness" under the existing fair dealing provisions in sections 38(3)(d), 41A(2)(d), 54A, 242A and 246A as well as the proposed new fair dealing provisions in sections 39 and 39A. Such a formulation has taken reference from the fair use provision under section 107 of the U.S. Copyright Act and case law. According to the case law[1], it has been held that the potential value as well as the potential market of the copyright work should be taken into account when considering the effect of the dealing. The relevant existing and proposed provisions in the Copyright Ordinance are sufficiently clear and amendment is not necessary.

Question 8 – Clause 15

As explained above, the term "dealing with" is used in the heading of section 31 because it refers to the acts specified in section

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[1] *Princeton University Press, MacMillan Inc., and St. Martin's Press, Inc. v. Michigan Document Services, Inc., and James M. Smith* (United States Court of Appeals for the Sixth Circuit 99 F.1381.Decided: Nov 8 1996).

31(1)(a) to (d). Those acts are essentially dealings in the context of trade or business or of similar effect. As such, it is appropriate to refer to "dealing with" in the heading.

Since "dealing"/"dealt with" has also been used in other proposed sections (e.g. sections 40B(6), 40C(8), 40D(8), 41A(8), 41(6), 44(4), 45(4), 54A(4) and 72(3)) to cover the meaning of possession, we propose to simplify all the headings by deleting the reference to "possessing or".

Question 9 – Clause 18

The proposed exception for the purpose of quotation under the proposed section 39(2) is modelled on section 30(1ZA) of the UK's Copyright, Designs and Patents Act 1988 (CDPA). The scopes of the exceptions in the UK and Hong Kong provisions are essentially the same.

Notably, both the UK and Hong Kong quotation exceptions require that the work must be one that has already been made known to the public. The minor differences in drafting are only technical.

The UK quotation exception applies to a work which "has been made available to the public". The CDPA further provides that "a work has been made available to the public if it has been made available by any means including the issue of copies to the public; making a work available by means of an electronic retrieval system, the rental or lending of copies of the work to the public; the performance, exhibition, playing or showing of the work in public; the communication to the public of the work".

On the other hand, the quotation exception in our proposed section 39(2) applies to a work which "has been released or communicated to the public", with the meaning of that expression further explained in the proposed section 39(5).

We do not follow the exact wording of the expression "has been made available to the public" as provided in the UK provision. The CDPA does not have a separate provision in relation to the exclusive right of "making available to the public" whereas our Copyright Ordinance has provided an exclusive right of "making available to the public" under section 26, which will be moved to and subsumed under the proposed communication right in section 28A(2). As such, to avoid

confusion, we adopt a different expression ("has been released or communicated to the public") to bring out a similar idea.

Question 10 – Clause 18

We will consider changing the expression "the performance, exhibition, playing or showing of the work to the public" to "the performance, exhibition, playing or showing of the work in public".

Question 12 - Clause 19

The proposed section 39A introduces a fair dealing exception for parody, satire, caricature and pastiche. In the UK, the CDPA provides for a similar exception for parody, caricature and pastiche in line with the wording of the EU Copyright Directive, whereas in Australia and Canada, a fair dealing exception for parody and satire is provided. No statutory definition for the terms "parody", "satire", "caricature" and "pastiche" has been provided in the copyright legislation of these countries and our Bill. The terms are to be interpreted according to their ordinary and general meanings[2] and there may be some overlapping of the meanings of those terms. In any case, by applying all these overseas precedents and including all four terms in our Bill, we will ensure a wide scope of the proposed exception that will adequately accommodate many commonly seen activities on the Internet, thereby enhancing freedom of expression.

Question 13 – Clause 19

The existing Copyright Ordinance has more than 60 provisions which provide for various permitted acts for users to make use of copyright works under prescribed conditions without infringing copyright in the works. Whether or not a private contractual term that excludes or limits the exercise of such statutory permitted acts by a contractual party is subject to the operation of laws outside the Copyright

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[2] For ease of reference, the Concise Oxford English Dictionary (12th Edition, 2012) defines the terms as follows –

Parody: **1** an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect. **2** a travesty.

Satire: **1** the use of humour, irony, exaggeration, or ridicule to expose and criticise people's stupidity or vices. **2** a play, novel, etc. using satire.→(in Latin literature) a literary miscellany, especially a poem ridiculing prevalent vices or follies.

Caricature: a depiction of a person in which distinguishing characteristics are exaggerated for comic or grotesque effect.

Pastiche: an artistic work in a style that imitates that of another work, artist or period.

Ordinance (which contains no express provision limiting such private contractual terms). For example, a contractual term that is contrary to public policy may be unenforceable under the law of contract. The Unconscionable Contract Ordinance (Cap. 458) prevents "unconscionable" contractual terms from being enforceable in appropriate circumstances. Each case has to be examined according to its specific circumstances. In any case, such contract override, if enforceable, is enforceable only between parties privy to the contract. In practice, we do not observe any problem of users in exercising the permitted acts.

We note that in the UK, the new fair dealing exception for parody, caricature and pastiche has included a provision restricting contractual terms from overriding or limiting the exception. The introduction of such a categorical provision is highly controversial and has attracted much debate during the legislative process. The UK Government has been criticized for underestimating the adverse economic impact on the content industry and has been urged to monitor closely the impact of the legislation from the point of implementation.

On prudence grounds, in proposing our fair dealing exception for parody, satire, caricature and pastiche, we have not included in the current Bill an express provision restricting contract override as the UK does. The UK appears to be the only jurisdiction that have done so. The operation of the existing provisions on permitted acts in Hong Kong or elsewhere does not appear to be hampered in the absence of such an express provision. We will closely monitor future operations of our new fair dealing exceptions when passed and implemented as well as overseas developments in relation to statutory limitation on contract override.

Yours sincerely,

(Patricia So)
for Secretary for Commerce and Economic Development

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