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By Fax (2147 3065)
7 November 2014

Ms Patricia SO
Principal Assistant Secretary for Commerce
and Economic Development (Commerce and Industry)
Commerce and Economic Development Bureau
22-23/F, West Wing, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Ms SO,

Copyright (Amendment) Bill 2014

To assist our scrutiny of the Copyright (Amendment) Bill 2014, we should be grateful for your clarifications on the legal and drafting issues set out at the **Annex**. Please send us your reply in both English and Chinese as soon as possible.

Yours sincerely,

(Miss Carrie WONG)
Assistant Legal Adviser

Encl.

**Comments on legal and drafting issues on
Copyright (Amendment) Bill 2014**

Clause 1 (Short title and commencement)

1. Please advise the anticipated commencement date of the Bill to be enacted.

Clauses 6 and 8 - proposed sections 17(5) and 19(6)

2. Under the proposed section 17(5)

For the purposes subsection (3), "making available to the public" includes...

為施行第(3)款，"向公眾提供" (making available to the public)...包括...

Should the Chinese rendition of "making available to the public" be added to the corresponding English text?

3. Under the proposed section 19(6)

For the purposes of subsection (4) "making available to the public" includes ...

為施行第(4)款，"向公眾提供" (making available to the public)包括...

Should the Chinese rendition of "making available to the public" be added to the corresponding English text?

Clauses 9 and 13 - proposed sections 22(2A) and 28A(1)

4. References are made to "acts restricted by the copyright in a work" and "an act restricted by the copyright in the work" in the proposed section 22(2A) and the proposed section 28A(1) respectively. It is noted that the expression "acts restricted by the copyright" is already defined in section 22(1), and its meaning includes the meaning of "copyright in a work". Please consider whether any of the abovementioned expressions need amendments.

Clause 13 - proposed section 28A(6)

5. "Transmission" is rendered as "信息" in the proposed section 28A(6)(b) and as "訊息" in section 153Q(3) of the Crimes Ordinance (Cap. 200). Please clarify.

Clause 15 - proposed section 31

6. It is noted that –
 - (a) under the heading of the proposed section 31 and throughout the Bill,

"dealing with infringing copy" is rendered as "進行...交易";
and
 - (b) under the existing section 31(2),

"dealing in infringing copy of copyright work" is rendered as "經營版權作品的侵犯版權複製品".

A "deal" or "dealing in" may mean "經營" or "交易", but "dealing with" seems to mean "handling" (處理), rather than a "deal" "交易",. Also, "dealing with" is used extensively in the Bill in the context of "fair dealing" (公平處理). Please clarify the use of those expressions.

7. Under the proposed section 31(3)(e), does the word "potential" modify "market" only, or does it modify "market" for, as well as "value" of, the work? If the latter, please make suitable amendments to that section and to other similar sections where "potential" is used in a similar context.
8. It is noted that the phrase "dealing with" is used in the heading of the proposed section 31, but its meaning is not reflected in the body of that section. It is also noted that "possessing or" is deleted from the heading of that section, despite the meaning of possession still remains. Please clarify.

Clause 18 - proposed section 39 (Criticism, review, quotation, and reporting and commenting on current events)

9. The proposed section 39(2) on quotation exception is modeled on the United Kingdom's (UK) copyright legislation. Please clarify how, and why, the proposed quotation exception differs from that of the UK's copyright legislation.
10. Under the proposed section 39(5)(a)(iii), a work has been released to the public if it has been provided to the public by any means (other than by communication to the public), including "the performance, exhibition, playing or showing of the work to the public". The corresponding U.K. provision provides for "the performance, exhibition, playing or showing of the work in public" in a similar context. Please clarify whether there is any difference in meaning between the performance of the work "to the public" and the performance of the work "in public" in this context?
11. In "determining" whether a work has been released or communicated to the public, is it "the court" that must not take into account of "any unauthorized act" under the proposed section 39(5)(b)? If so, should amendments be made to the Chinese rendition of "determining" from "斷定" to "裁定" in that section, as in subsection (4) where "裁定" is used in a similar context?

Clause 19 - proposed section 39A (Parody, satire, caricature, and pastiche)

12. It is noted that the proposed section 39A proposes a fair dealing exception for parody, satire, caricature and pastiche. Australia and Canada only have a fair dealing copyright exception for parody and satire. UK's fair dealing exception is only for the purposes of caricature, parody or pastiche. Please clarify how the proposed section 39A compares with the corresponding provisions in the overseas jurisdictions.
13. It is noted from The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (UK), which has come into force on 1 October 2014, that there are provisions in the UK legislation that make a contractual term unenforceable to the extent that such term purports to prevent or restrict the doing of an act,

which by virtue of the quotation or parody exception, would not infringe copyright. As there are no similar provisions in the Copyright (Amendment) Bill 2014, it seems that based on the Bill as drafted, a copyright owner can negotiate the contractual terms to the effect that the statutory protection afforded by those exceptions under the Bill to be enacted would be cancelled out. Please clarify.

Clause 26 - proposed section 44(2)

14. It is noted that "knew or ought to have been aware" used in the proposed section 44(2) has only been used in the Copyright Ordinance (Cap. 528) in the entire Laws of Hong Kong. Is there any difference between "knew or ought to have known" that is commonly used in Hong Kong legislation and "knew or ought to have been aware" that is used in Cap. 528? Both "knew" and "aware" are rendered as "知道" in the Chinese text. By using two different words in the English text, please clarify whether there is any difference in the meaning of those words? If yes, should two different Chinese words be used in the Chinese text to achieve consistency with the English text? If no, should the more commonly-used expression "knew or ought to have known" (rendered as "知道或應該知道") be used in that section and other sections where the same expression is used? If the expression "knew or ought to have been aware" has been judicially considered, please clarify the meaning of that expression in the light of the court cases.