

立法會
Legislative Council

LC Paper No. CB(1)1966/05-06
(These minutes have been seen
by the Administration)

Ref : CB1/BC/1/05/1

Bills Committee on Copyright (Amendment) Bill 2006

**Minutes of the sixth meeting
held on Thursday, 8 June 2006, at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, JP (Chairman)
Hon NG Margaret
Hon Mrs CHOW LIANG Suk-ye, Selina, GBS, JP
Hon CHAN Kam-lam, SBS, JP
Hon LI Kwok-ying, MH, JP
Hon LAM Kin-fung, Jeffrey, SBS, JP
Hon LEUNG Kwan-yuen, Andrew, SBS, JP
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
- Members absent** : Hon Bernard CHAN, GBS, JP
Dr Hon WONG Yu-hong, Philip, GBS
Dr Hon YEUNG Sum
Hon Timothy FOK Tsun-ting, GBS, JP
Hon EU Yuet-mee, Audrey, SC, JP
Hon FANG Kang, Vincent, JP
Hon CHIM Pui-chung
Hon LAU Sau-shing, Patrick, SBS, JP
Hon Albert Jinghan CHENG
- Public officers attending** : Miss Mary CHOW
Deputy Secretary for Commerce, Industry and
Technology (Commerce and Industry)

Ms Priscilla TO
Principal Assistant Secretary for
Commerce, Industry and Technology
(Commerce and Industry)

Miss Eugenia CHUNG
Assistant Secretary for
Commerce, Industry and Technology
(Commerce and Industry)

Ms Ada LEUNG
Assistant Director of Intellectual Property
Intellectual Property Department

Ms Maria NG
Senior Solicitor
Intellectual Property Department

Mr Y K TAM
Senior Superintendent
Intellectual Property Investigation Bureau
Customs and Excise Department

Mr Michael LAM
Senior Government Counsel
Department of Justice

Ms Rayne CHAI
Government Counsel
Department of Justice

Clerk in attendance : Miss Polly YEUNG
Chief Council Secretary (1)3

Staff in attendance : Miss Anita HO
Assistant Legal Adviser 2

Paul WOO
Senior Council Secretary (1)3

Ms YUE Tin-po
Senior Council Secretary (1)5

I Confirmation of minutes and matters arising

LC Paper No. CB(1)1639/05-06 -- Minutes of meeting held on 8 May 2006

LC Paper No. CB(1)1646/05-06(01) -- Administration's paper on "Extension of the validity of the Copyright (Suspension of Amendments) Ordinance 2001"

The Bills Committee deliberated (Index of proceedings attached at **Appendix**)

2. The minutes of the meeting held on 8 May 2006 were confirmed.

Proposed resolution

3. Members noted that the Administration had proposed to move a resolution to extend the validity period of the Copyright (Suspension of Amendments) Ordinance 2001 at the Council meeting on 21 June 2006 for a further period of 12 months ending 31 July 2007. The proposed resolution would be considered by the House Committee (HC) on 9 June 2006. The Chairman said that the Bills Committee supported the Administration's proposal.

(Post-meeting note: The Legal Service Division's report was issued to HC's members on 8 June 2006 (LC Paper No. LS80/05-06)

Follow-up action

4. The Chairman informed members that to facilitate the tracking of outstanding issues, the Secretariat would prepare a list of issues which required follow up action or consideration by the Administration after each meeting. He asked the Administration to revert to the Bills Committee and/or provide written responses as appropriate.

II Papers issued since last meeting

LC Paper No. CB(1)1704/05-06(01) -- Submission dated 5 June 2006 from the International Federation of the Phonographic Industry (Hong Kong Group) Limited (English version only)

LC Paper No. CB(1)1704/05-06(02) -- Submission dated 5 June 2006 from American Chamber of Commerce in Hong Kong (English version only)

LC Paper No. CB(1)1590/05-06(01) -- Submission dated 24 May 2006 from Hon WONG Ting-kwong (Chinese version only)

5. Members noted that the above papers had been issued for the Bills Committee's information.

III Meeting with the Administration

LC Paper No. CB(1)1635/05-06(01) -- The Administration's response to issues raised at the meeting on 12 May 2006 on "Directors'/Partners' liability" (*issued on 30.5.2006*)

LC Paper No. CB(1)1437/05-06(04) -- Administration's response to deputations' views raised at the meeting on 8 May 2006 : (I) Criminal liability against making or dealing in infringing articles etc. (II) Business end-user liability

Other relevant papers as listed in the Appendix of the agenda.

6. Mr Andrew LEUNG declared that he was a member of the Federation of Hong Kong Industries.

7. Mr WONG Ting-kwong declared that he was a member of the Small and Medium Enterprises Committee (SMEC).

Directors' and partners' criminal liability

8. On overseas practice, the Administration advised that there were provisions in the intellectual property related legislation in the United Kingdom (UK) and Singapore imposing liability on partners for offences committed by the partnership. The relevant legislation included the Trade Marks Act 1994 of UK, and the Copyright Act, Trade Marks Act and Patents Act of Singapore. If a partnership was guilty of an offence under the provisions of the relevant legislation, every partner, other than a partner who was proved to have been ignorant of or to have attempted to prevent the commission of the offence, was also guilty of the offence

and liable to be proceeded against and punished accordingly. A member observed that the proposed provisions on directors'/partners' liability would cover more than what were provided in the aforesaid overseas legislation since no similar liability was imposed on the directors of body corporate under the aforesaid legislation. In this connection, Mr Ronny TONG pointed out that unlike a partnership, a body corporate was a legal person already capable of being sued or performing other legal action. He had reservation on whether it was justified to extend criminal liability to the company directors as individual persons.

9. Mr Andrew LEUNG, Mr Jeffrey LAM, Mr WONG Ting-kwong Mr CHAN Kam-lam, and Mrs Selina CHOW reiterated the serious concern of the business community, particularly the small and medium enterprises (SMEs), about the possible shift of burden of proof to the directors/partners under the proposed criminal offence. They considered that the proposed evidential burden on the directors/partners was tantamount to a reversal of burden of proof and was inconsistent with the principle for the prosecution to prove the commission of an offence beyond reasonable doubt.

10. In response, the Administration explained that an evidential burden was different from a legal burden. The former only required the defendant to adduce sufficient evidence to raise an issue before it had to be determined as one of the facts of the case while the latter required the defendant to prove, on the balance of probabilities, a matter which was essential to determine his guilt or innocence. The Administration reiterated that under the case law, imposition of evidential burden was not inconsistent with the right to presumption of innocence and the right to remain silent. Provisions imposing an evidential burden on the defendant in criminal cases could be found in other pieces of local legislation. The Administration assured members that it would maintain communication with SMEs and conduct publicity programmes after the enactment of the proposal, with a view to explaining the legal requirements to allay their concerns.

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11. Some members considered that as existing section 125 of the Copyright Ordinance (Cap 528) (CO) already dealt with liability of persons (including directors and partners) other than the principal offender, the introduction of criminal offence provisions on directors'/partners' liability in addition to section 125 might not be called for. This might also give the impression that the Administration was taking an expedient approach to secure conviction merely because there was difficulty in substantiating an offence under section 125 of CO.

12. Referring to clause 22 (4) of the Bill (i.e. proposed section 118 (2H) (a), (b) and (c)), a member commented that the proposed provision lacked certainty as to what would constitute sufficient evidence to absolve the directors/partners from liability, given that the measures listed therein were not exhaustive and subject to determination by the court. She suggested the Administration to consider revising the proposal to provide more definitive and exhaustive guidelines for corporate/business management to follow. The Administration

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was requested to consider members' views and revert to the Bills Committee.

Arrangements for the next meeting

13. Members agreed that the sixth meeting would be held on Monday, 19 June 2006 at 10:45 am. The Bills Committee would proceed to discuss "copyright exemption" at the meeting. The Administration's response to deputations' views on "copyright exemption" raised at the meeting on 8 May 2006 had been issued to members (LC Paper No. CB(1)1633/05-06(01)).

III Any other business

14. There being no other business, the meeting ended at 10:12 am.

Council Business Division 1
Legislative Council Secretariat
10 July 2006

**Proceedings of the sixth meeting of the
Bills Committee on Copyright (Amendment) Bill 2006
on Thursday, 8 June 2006, at 8:30 am
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000631	Chairman Administration	<p>(a) Confirmation of the minutes of the third meeting on 8 May 2006 (LC Paper No. CB(1)1639/05-06)</p> <p>(b) Briefing by the Administration on its proposal to move a resolution to extend the validity period of the Copyright (Suspension of Amendments) Ordinance 2001 at the Council meeting on 21 June 2006 for a further period of 12 months ending 31 July 2007</p> <p>(c) The Bills Committee supported the Administration's proposal</p> <p>(d) Outstanding items of the list of follow-up actions to be taken by the Administration for each meeting</p>	<p>The Legal Service Division would finalize a report on the proposed resolution for the consideration of HC on 9 June 2006</p> <p>The Administration to note the Chairman's advice as per paragraph 4 of the minutes</p>
000632 – 001959	Chairman Administration	The Administration's response to members' questions on directors'/partners' liability raised at the meeting on 12 May 2006 (LC Paper No. CB(1) 1635/05-06(01))	

Time Marker	Speaker	Subject(s)	Action Required
002000 – 003150	Chairman Mr Andrew LEUNG Administration	<p>(a) Overseas practices on directors' and partners' criminal liability</p> <p>(b) Mr Andrew LEUNG's view that</p> <p>(i) SMEs, which accounted for the majority of the business establishments in Hong Kong, agreed with the need to protect intellectual property rights. However, they were against the proposed directors'/partners' liability as they might not have the necessary resources and IT knowledge to safeguard against the unlawful act of their employees in relation to copyright infringements;</p> <p>(ii) SMEs were concerned about the possible shift of burden of proof to the defendant and the difficulties for the directors/partners to rebut the presumption. The proposed provision might have contravened the presumption of innocence under the common law</p>	

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		<p>principle and was inconsistent with the defendant's right to remain silent;</p> <p>(iii) the Administration should continue to strengthen enforcement actions against business end-user piracy and increase the level of penalty, instead of proposing to impose a criminal liability on directors/partners; and</p> <p>(iv) even in the overseas intellectual property related legislation referred to by the Administration, the criminal liability was only imposed on the partners of a partnership, not on the directors of a body corporate.</p> <p>(c) The Administration's reference to decided cases and its advice that</p> <p>(i) whilst the imposition of a legal burden on the accused would raise an issue of presumption of innocence, the imposition of an evidential burden would not have a similar effect. A</p>	

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		<p>legal burden of proof required the defendant to prove, on the balance of probabilities, a matter which was essential to determine his guilt or innocence. An evidential burden, on the other hand, only required the defendant to adduce sufficient evidence to raise an issue before it had to be determined as one of the facts of the case. The prosecution did not need to lead any evidence about it. But if it was put in issue, the burden remained with the prosecution to prove the offence beyond reasonable doubt;</p> <p>(ii) the proposed liability did not in any way compel the defendant to answer questions of the enforcement agency during investigation, nor did it compel the defendant to appear in the witness box and be cross-examined by the prosecution during the trial. Even with the proposed evidential burden on the defendant, the defendant himself could still refuse to</p>	

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		<p>give evidence personally. The evidential burden on the defendant might be discharged in many other ways e.g. the defendant might rely on documentary evidence, evidence by other witness or other circumstantial evidence in the prosecution's case in order to raise doubt; and</p> <p>(iii) the Administration would maintain communication with SMEs and conduct publicity programmes after the enactment of the proposal, with a view to clarifying the legal requirements to allay their concerns.</p>	
003151 – 004303	Mr Jeffrey LAM Administration Chairman	<p>(a) The Administration's advice that</p> <p>(i) reference had been made to the Broadcasting Ordinance (Cap. 562) which contained similar provisions on the liability of directors and partners for the use of unauthorized decoders in business;</p> <p>(ii) the Administration had conducted briefing sessions for various</p>	

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		<p>sectors, trades and industries including SMEs so as to enhance their understanding of the proposals and facilitate their giving of views. No strong views had been raised by SMEs during the briefing session on the proposal on directors'/partners' criminal liability; and</p> <p>(iii) the Administration had taken steps to revise the proposal in light of comments received, first by narrowing down the scope to directors/partners carrying out chief executive function after consulting the Panel on Commerce and Industry in June 2005. In view of Members' comments at the Panel meeting in November 2005, the Administration further amended the proposal to apply the offence to directors/ partners responsible for internal management and added a provision to clarify the types of evidence that a defendant might adduce.</p> <p>(b) Mr Jeffrey LAM's view that SMEs might not have</p>	

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		<p>been too conversant with the Administration's proposal when initially consulted. However, after further consideration, SMEs in general considered the proposed evidential burden too harsh on directors and partners.</p> <p>(c) Mr Jeffrey LAM's worry that the element of the existing criminal justice system might have been fundamentally changed.</p> <p>(d) The Administration's advice that the burden of proof on the defendant was only an evidential burden. The defendant could absolve his liability if he could adduce sufficient evidence to raise an issue that he did not authorize the infringing act in question. To clarify the type of evidence that the defendant might adduce, the Administration had already included under proposed sections 118(2H) in clause 22(4) and 119B(8) in clause 24 of the Bill a list of mitigating measures for the court to consider. The list was not exhaustive as the court might also give due regard to other factors or mitigating measures.</p>	
004304 – 005538	Mr Ronny TONG Administration Chairman	(a) Mr Ronny TONG's view that he had reservation on the proposed offence.	

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	ALA 2	<p>Under the principles of company law, individual directors acting on behalf of a body corporate, which was a legal person, should not be held personally liable for the misconduct of his corporation. He doubted if it was reasonable to impose a liability on the directors for the infringing acts committed by the corporation.</p> <p>(b) The Administration's advice that liability provisions on directors and other officers having managerial function were found in certain Commonwealth, State and Territory legislation in Australia concerning environmental protection, occupational health and safety, hazardous goods and fair trading.</p> <p>(c) The Administration's advice that the fines imposed on convicted cases of business end-user privacy ranged from \$1,000 to \$230,000, and the average fine was about \$10,000.</p> <p>(d) Local legislation such as Banking Ordinance (Cap.155) imposing an evidential burden on defendant</p>	

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		(e) The Administration's information that there were only few business end-user piracy cases in which directors were found liable for the possession of infringing copies of copyright works for use in business. Most cases ended up in having only the companies being charged and fined.	
005539 – 010228	Mr WONG Ting-kwong Administration	<p>(a) Mr WONG Ting-kwong's view that</p> <ul style="list-style-type: none"> (i) directors/partners of SMEs might not be able to afford the time and costs for discharging the evidential burden of proof in court proceedings; and (ii) the proposed provision was in contravention with the presumption of innocence under the common law principle. The Administration should re-consider the views of SMEs and revise its proposal. <p>(b) The Administration's reiteration that the current proposal aimed to promote corporate accountability and responsible governance to prevent business end-user piracy. Under the current proposal, the defendant would have</p>	

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		<p>discharged the evidential burden if he could adduce sufficient evidence to raise an issue that he did not authorize the infringing act in question. If the court was satisfied that the defendant had adduced sufficient evidence to raise an issue with respect to that fact, it would still be necessary for the prosecution to prove beyond reasonable doubt that the defendant had authorized the infringing act in question for an alleged offence to be substantiated. If the prosecution failed to do so, the defendant would absolve his liability.</p>	
010229 – 012047	Mrs Selina CHOW Administration Mr Jeffrey LAM Chairman	<p>(a) The Administration's advice that to provide certain guidance to business concerns, especially SMEs, a list of non-exhaustive factors had been included under proposed section 118(2H) in clause 22(4) of the Bill to clarify the types of evidence a defendant might adduce to discharge the evidential burden.</p> <p>(b) Mrs Selina CHOW's view that as the existing section 125 of CO already dealt with the liability of persons (including directors and partners) other than the principal offender, the introduction of criminal</p>	The Administration was requested to consider members' views and revert to the Bills Committee.

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		<p>offence provisions on directors'/partners' liability in addition to section 125 might not be called for. She commented that notwithstanding the non-exhaustive list in proposed section 118(2H) under clause 22 (4) of the Bill, SMEs might still be uncertain as to what appropriate measures should be taken which would constitute sufficient evidence to absolve the liability of directors/partners, given that the measures listed therein were not exhaustive and subject to determination by the court. She suggested the Administration to consider revising its proposal to provide more definitive and exhaustive guidelines for corporate/business management to follow.</p> <p>(c) Discussion on whether factors such as proof of purchase and the valid licence, if applicable, should also be considered as sufficient evidence for the purpose of discharging the evidential burden on defendants.</p>	
012048 – 012705	Mr CHAN Kam-lam Administration	(a) Mr CHAN Kam-lam's view that the proposal might give the impression that the Administration was taking an expedient	

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		<p>approach to secure conviction merely because it was difficult to prove that the business end-user piracy offence was committed with the consent or connivance of, or attributable to any act on the part of, the director or the partner concerned under existing section 125 of CO.</p>	
012550 – 013629	<p>Mrs Selina CHOW Chairman Administration Mr Andrew LEUNG</p>	<p>Some members' views that the Administration should consider revising the proposal to provide more definitive and exhaustive guidelines for corporate/business management to follow.</p>	
013630 – 013859	<p>Administration Chairman</p>	<p>(a) Briefing by the Administration on the major revisions in the paper :</p> <p>(i) Hong Kong General Chamber of Commerce had no objection to the proposed directors'/partners' liability on the condition that it was the prosecution's duty to prove the offence. It also highlighted the importance of public education and provision of clear guidelines for SMEs before enforcing the provision.</p> <p>(ii) The Movie Producers and Distributors Association of Hong Kong Limited (MPDA) had no views on</p>	

Time Marker	Speaker	Subject(s)	Action Required
		the proposed directors/partners' liability and employees' defence. The Administration had therefore deleted MPDA from the list of organizations which gave agreement to the proposal.	
013900 - 014013	Chairman	Arrangements for the next meeting	

Council Business Division 1
Legislative Council Secretariat
10 July 2006