

立法會
Legislative Council

LC Paper No. CB(1)1984/05-06
(These minutes have been seen
by the Administration)

Ref : CB1/BC/1/05/1

Bills Committee on Copyright (Amendment) Bill 2006

**Minutes of the seventh meeting
held on Monday, 19 June 2006, at 10:45 am
in the Chamber 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 Bernard CHAN, JP
Hon CHAN Kam-lam, SBS, 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 LI Kwok-ying, MH
Hon LAM Kin-fung, Jeffrey, SBS, JP
Hon LEUNG Kwan-yuen, Andrew, SBS, JP
Hon WONG Ting-kwong, BBS
Hon LAU Sau-shing, Patrick, SBS, JP
Hon Albert Jinghan CHENG
- Members absent** : Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
- 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 Albert HO
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

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

I Confirmation of minutes and matters arising

LC Paper No. CB(1)1759/05-06 -- Minutes of meeting held on
12 May 2006

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

2. The minutes of the meeting held on 12 May 2006 were confirmed.
3. Arising from the discussion at the Bills Committee meeting on 12 May 2006, members noted that the Administration had sought clarification with the Hong Kong Professional Teachers' Union (HKPTU) regarding the latter's suggestion to also exempt certain private educational establishments, such as some kindergartens not subvented by the Government, from the proposed business end-user copying/distribution offence. The Administration's response had been issued to members on 16 June 2006 (LC Paper No. CB(1)1782/05-06).

II Papers issued since last meeting

LC Paper No. CB(1)1765/05-06(01) -- Submission dated 6 June 2006
from Hong Kong Video
Development Foundation Ltd
(English version only)

LC Paper No. CB(1)1765/05-06(02) -- Submission dated 13 June 2006
from International Federation of
the Phonographic Industry
(English version only)

4. 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)1633/05-06(01) -- Administration's response to
deputations' views raised at the
meeting on 8 May 2006 :
Copyright exemption

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

5. Dr YEUNG Sum declared that he was a lecturer of the University of Hong Kong.

Copyright exemption

Overseas practice

6. On overseas practice, the Administration advised that copyright laws in the United States (US) and Singapore contained general provisions on “fair use/fair dealing” in which the exemption was not confined to specific purposes of use of copyright works. The four factors stipulated in proposed sections , 41A(2), 54A(2), 242A(2) and 246A(2) of the Bill and the amended section 38(3), which should be taken into account by the court in determining whether a particular act amounted to “fair dealing”, were modelled on the “fair use” provision in the US copyright law in which the factors were also not meant to be exhaustive. Under the non-exhaustive approach as proposed under the Bill, the court could take into account other relevant factors in determining whether any dealing with a work constituted “fair dealing”.

“Fair dealing” for purposes of giving or receiving instruction

7. On proposed section 41A of the Bill, members noted that pursuant to the proposed non-exhaustive regime, it was not the Administration’s intention to specify the acts which would fall within the scope of the “fair dealing” provision for educational purposes. Whether the act in question would constitute “fair dealing” would need to be determined in the light of the circumstances of the case. A member pointed out that if the proposed provisions were enacted, Hong Kong might be the first jurisdiction in the world to introduce copyright exemption for “fair dealing” for specific purposes. Concern was raised on possible uncertainties and litigation arising from the non-exhaustive approach and the lack of precedent cases. On the four factors stipulated in proposed section 41A(2)(a) to (d) of the Bill, a member highlighted that ordinary copyright work users might not be in a position to understand some of these factors, notably “the effect of the dealing on the potential market for or value of the work”. Some members raised concern on whether a proper balance between the copyright work owners and users had been struck and whether this had been reflected in the Bill clearly. Members also requested the Administration to provide the following information in writing:

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- (a) some specific examples of what would amount to acts of “fair dealing”, having regard to the four factors stipulated in proposed section 41A(2)(a) to (d);
- (b) guidelines and decided cases, if any, of overseas jurisdictions (such as US) which adopted non-exhaustive provisions on what constituted “fair dealing” or “fair use”; and

- (c) analysis and clarification on the relationship and the operation of the proposed “fair dealing” provisions with existing section 37(3); and to advise which section was to prevail.

(Post-meeting note: The information provided by the Administration was circulated to the Bills Committee on 4 July 2006 (LC Paper No. CB(1)1913/05-06(01)).)

Removal of the licensing restriction at sections 45(2) of the Bill

8. Members noted that the permitted acts of reprographic copying of passages from published works made by educational establishments under existing section 45 of CO would not be permitted if there were relevant licensing schemes granting authorizations for the copying concerned. The proposed deletion of existing section 45(2) aimed to address the concern of copyright work users that the aforesaid condition would disallow copying of a reasonable part of a work for educational purposes, which should be a permitted act. According to the Administration’s research, a similar condition existed in the copyright law in the United Kingdom. However, the copyright laws in other jurisdictions such as Singapore and Australia did not contain similar provisions but instead allowed a limited amount of copying subject to certain prescribed conditions. The amended section 45 (with subsection (2) deleted) should still be subject to the primary consideration as stipulated in section 37(3) of CO, namely, the act should not conflict with a normal exploitation of the work by the copyright owner and should not unreasonably prejudice the legitimate interests of the copyright owner. For copying beyond a “reasonable extent”, schools were required to acquire licences from the relevant copyright owners.

“Fair dealing” for purposes of public administration

9. Members noted that the Administration had proposed to introduce a new provision (proposed section 54A in clause 16) to the effect that “fair dealing” with a work by the Government, the Executive Council (ExCo), the Legislative Council (LegCo), the Judiciary or any District Councils (DCs) for the purpose of efficient administration of urgent business would not infringe copyright. In response to the submission from the Hong Kong Institute of Trade Mark Practitioners (HKITMP), the Administration explained that in coming up with the proposed “fair dealing” provisions for education and public administration; reference had been made to the existing CO which already provided permitted acts for educational and public administration purposes. Hence, the Administration disagreed with HKITMP’s comments that it was unfair to have the “fair dealing” provision applicable to public administration only while the business sector was left out. The restriction in the scope of the “fair dealing” provision was mainly to address copyright owners’ concerns.

Admin 10. On whether it was necessary to provide a definition on “urgent business”, members noted from the Administration that the plain and ordinary meaning of “urgent” (i.e., need to be dealt with immediately) would be adopted. Nevertheless, the Administration undertook to maintain dialogue with the copyright work owners regarding their concerns about the meaning of “urgent business” and to consider whether it was necessary to add a definition of “urgent business” in proposed section 54A.

Admin 11. The Chairman referred to existing section 54(1) of CO which provided that copyright was not infringed by anything done for the purposes of the proceedings of LegCo or judicial proceedings. He questioned the need to include LegCo and the Judiciary under the proposed section 54A which also sought to provide copyright exemption under certain circumstances to the Government, ExCo and DCs. The Administration advised that the proposed “fair dealing” provision for public administration sought to provide flexibility to the existing exemption regime to meet the community’s increased expectation for timely response by the public administration in urgent matters. In the case of LegCo under the proposed section 54A, copyright exemption might also apply to administration work of the LegCo Secretariat and complaints handling under LegCo’s Redress System, where these might not relate to the purposes of LegCo proceedings. Whether there was a need for something to be dealt with immediately depended largely on the circumstances at the material time. Nevertheless, the Administration stressed that the proposed section 54A would still be subject to the primary consideration as stipulated in section 37(3) of CO. In this connection, members requested the Administration to provide further information on the operation of proposed section 54A, including whether the copyright work users concerned would need to seek covering permission from the copyright work owners afterwards.

(Post-meeting note: The information provided by the Administration was circulated to the Bills Committee on 4 July 2006 (LC Paper No. CB(1)1913/05-06(01)).)

Submissions tabled at the meeting (subsequently issued vide LC Paper No. CB(1)1794/05-06 on 20 June 2006)

Admin 12. The Administration undertook to provide a written response to the submissions by updating the written responses previously provided to the Bills Committee.

(Post-meeting note: The Administration’s written response was circulated to the Bills Committee on 3 July 2006 (LC Paper No. CB(1)1633/05-06(01)).)

Arrangements for the next meeting

13. Members agreed that the 8th meeting of the Bills Committee would be held on Thursday, 6 July 2006 at 8:30 am.

IV Any other business

14. There being no other business, the meeting ended at 12:45 am.

Council Business Division 1
Legislative Council Secretariat
20 July 2006

**Proceedings of the seventh meeting of the
Bills Committee on Copyright (Amendment) Bill 2006
on Monday, 19 June 2006, at 10:45 am
in the Chamber of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000259	Chairman	(a) Confirmation of the minutes of the fourth meeting on 12 May 2006 (LC Paper No. CB(1) 1759/05-06) (b) Submissions tabled at the meeting (subsequently issued vide LC Paper No. CB(1)1794/05-06 on 20 June 2006)	The Administration to provide a written response as required under paragraph 12 of the minutes
000737 - 001349	Chairman Administration	The Administration's response to deputations' views on copyright exemption raised at the meeting on 8 May 2006 (LC Paper No. CB(1)1633/05-06(01))	
001350 – 001739	Dr YEUNG Sum Administration	(a) Dr YEUNG Sum's concern about the grey areas as to what would amount to acts of "fair dealing" in proposed section 41A of the Bill (b) The Administration's view is as follows: (i) more flexibility should be introduced into the copyright exemption regime and it was not the Administration's intention to specify the acts which would	

Time Marker	Speaker	Subject(s)	Action Required
		<p>fall within the scope of the “fair dealing” provision; and</p> <p>(ii) whether an act in question would constitute “fair dealing” would need to be determined in the light of the circumstances of the case having regard to the four factors stipulated in proposed section 41A(2) of the Bill and other relevant factors as determined by the court.</p>	
001740 – 004339	Ms Audrey YU Administration ALA2 Chairman	<p>(a) Ms Audrey YU’s enquiry whether the proposed provisions on “fair dealing” in the Bill had adequately balanced the divergent interests of the copyright work owners and users</p> <p>(b) The Administration’s explanation is as follows:</p> <p>(i) copyright work owners were opposed to the introduction of a general “fair dealing” provision whilst views from users were divided. Having considered the interests of parties concerned and the fact that the existing permitted acts already</p>	The Administration to provide the information as required under paragraph 7 of the minutes

Time Marker	Speaker	Subject(s)	Action Required
		<p>covered certain education and public administration uses, the Administration had proposed to restrict the scope of the new “fair dealing” provision to the above two purposes only;</p> <p>(ii) the Administration had taken into account publishers’ views and proposed to restrict the application of the “fair dealing” provision under proposed section 41A to “a specified course of study”;</p> <p>(iii) Copyright work owners and users were most divided on the question of copyright exemption in the digital environment. The former had proposed to require educational establishments to implement digital rights management measures as a pre-requisite for the application of the “fair dealing” provision in the digital environment, but the educational sector was against the proposal; and</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(iv) the Administration had strong reservation on the proposal as the required measures were complicated, not readily available in the market and very expensive. The Administration would maintain dialogue with both sides to see if some arrangements could be worked out.</p> <p>(c) overseas practices on copyright exemptions</p> <p>(d) existing practice to manage educational uses of copyright works by encouraging licensing agreements between right owners and schools</p> <p>(e) The Administration's advice that educational bodies were aware that certain acts could not constitute "fair dealing", such as:</p> <p>(i) copying exercises verbatim from workbooks for distribution to students;</p> <p>(ii) compiling a course pack made up of extracts from different copyright works (e.g. textbooks) and distributing copies</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>thereof to replace the need to purchase any textbook/materials for a course; and</p> <p>(iii) uploading a substantial part of a movie (which is currently shown in cinema) onto the school Intranet system.</p>	
004340 – 010033	Mrs Selina CHOW Administration	<p>(a) Mrs Selina CHOW observed that the copyright owners were concerned about the “fair dealing” provisions for fear of abuse and no consensus had been reached by the copyright work owners and users in this respect</p> <p>(b) The Administration responded that copyright owners did not consider the “fair dealing” provisions totally unacceptable. Their concerns lied in the application of “fair dealing” provision in the digital environment and the meaning of “urgent matters”.</p>	
010034 – 011633	Dr YEUNG Sum Administration Chairman Ms Audrey YU	(a) Members’ concern about possible uncertainties and litigation arising from the non-exhaustive approach and the lack of precedent cases. Ordinary copyright work users	

Time Marker	Speaker	Subject(s)	Action Required
		<p>might not be in a position to understand the four factors stipulated in proposed section 41A(2)(a) to (d) of the Bill, notably “the effect of the dealing on the potential market for or value of the work”.</p> <p>(b) Members’ concern whether a proper balance between the copyright work owners and users had been struck and whether this had been reflected in the Bill clearly</p> <p>(c) The Administration’s advice that it might not be desirable or appropriate to include in the Bill guidelines on what would amount to acts of “fair dealing” in terms of the volume of copying that would be permitted.</p>	
012404 – 020014	Ms Audrey YU Administration Chairman Mrs Selina CHOW Ms Audrey YU	<p>(a) Members’ queries about the scope of public administration and the definition of “urgent business” relating to “fair dealing” for purposes of public administration</p> <p>(b) The Chairman questioned the need to include LegCo and the Judiciary under the proposed section 54A</p> <p>(c) Hong Kong Institute of Trade Mark Practitioners’ suggestion to delete the</p>	The Administration to follow up as stated in paragraph 10 of the minutes and to provide the information as required under paragraph 11 of the minutes

Time Marker	Speaker	Subject(s)	Action Required
		<p>“fair dealing” provision for public administration unless the exemption applied to all users</p> <p>(d) The Administration’s advice that</p> <p>(i) the plain and ordinary meaning of “urgent” (i.e., need to be dealt with immediately) would be adopted;</p> <p>(ii) the proposed section 54A would still be subject to the primary consideration as stipulated in section 37(3) of CO. Section 37(5) stipulated that provisions of permitted acts were to be construed independently of each other, so that the fact that an act did not fall within one provision did not mean that it was not covered by another provision;</p> <p>(iii) The proposed “fair dealing” provision for public administration sought to provide flexibility to the existing exemption regime to meet the community’s increased expectations for timely response by the public administration in</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>urgent matters. The “fair dealing” provision under proposed section 54A would be subject to the primary consideration as stipulated in section 37(3) of CO and would only apply if the “urgent business” criteria were met; and</p> <p>(iv) in the case of LegCo under the proposed section 54A, copyright exemption might also apply to administration work of the LegCo Secretariat and complaints handling under LegCo’s Redress System where these might not relate to the purposes of LegCo proceedings; and</p> <p>(v) it would maintain dialogue with the copyright work owners regarding their concerns about the meaning of “urgent business” and consider whether it was necessary to add a definition of “urgent business” in the proposed section.</p>	
020015 – 020036	Chairman	Arrangements for the next meeting	

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20 July 2006