

立法會
Legislative Council

LC Paper No. CB(1)2063/05-06
(These minutes have been seen
by the Administration)

Ref : CB1/BC/1/05/1

Bills Committee on Copyright (Amendment) Bill 2006

**Minutes of the eighth meeting
held on Thursday, 6 July 2006, at 8:30 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, GBS, JP
Hon CHAN Kam-lam, SBS, JP
Dr Hon YEUNG Sum
Hon EU Yuet-mee, Audrey, SC, JP
Hon FANG Kang, Vincent, 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
Hon LAU Sau-shing, Patrick, SBS, JP
- Members absent** : Dr Hon WONG Yu-hong, Philip, GBS
Hon Albert Jinghan CHENG
Hon Timothy FOK Tsun-ting, GBS, JP
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 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 Kitty CHENG
Assistant Legal Adviser 5

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

I Confirmation of minutes and matters arising

LC Paper No. CB(1)1816/05-06 -- Minutes of meeting held on
23 May 2006

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

2. The minutes of the meeting held on 23 May 2006 were confirmed.

II Papers issued since last meeting

(LC Paper No. CB(1)1934/05-06(01) -- Submission dated 4 July 2006
from Hong Kong Video
Development Foundation Ltd
(English version only)

LC Paper No. CB(1)1904/05-06(01) -- Submission dated 29 June 2006
from International Federation of
the Phonographic Industry (Hong
Kong Group) Limited (English
version only)

LC Paper No. CB(1)1840/05-06(01) -- Submission dated 21 June 2006
from Hong Kong Video
Development Foundation Ltd
(English version only)

LC Paper No. CB(1)1794/05-06(01) -- Submission dated 16 June 2006
from Hong Kong and International
Publishers' Alliance (English
version only)

LC Paper No. CB(1)1794/05-06(02) -- Submission dated 16 June 2006
from Hong Kong Reprographic
Rights Licensing Society (English
version only)

LC Paper No. CB(1)1794/05-06(03) -- Joint submission dated 15 June 2006 from International Federation of the Phonographic Industry (Hong Kong Group) Limited, Hong Kong Video Development Foundation Ltd, Intercontinental Group Holding Limited, Hong Kong Comics & Animation Federation Limited, Hong Kong and International Publishers' Alliance, Hong Kong Reprographic Rights Licensing Society, Association of American Publishers (USA), Hong Kong Publishing Federation Limited, The Anglo-Chinese Textbook Publishers Organization, Hong Kong Educational Publishers Association, Federation of Hong Kong Filmmakers and Film Industry Response Group)

3. 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)1913/05-06(01) -- Administration's response to issues raised at the meeting on 19 June 2006 : Fair dealing provision for education and public 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

LC Paper No. CB(1)1916/05-06(01) -- Letter dated 29 June 2006 from the Assistant Legal Adviser (ALA) to the Administration

LC Paper No. CB(1)1916/05-06(02) -- Reply dated 22 June 2006 from the Administration to ALA's letter of 10 May 2006

LC Paper No. CB(1)1916/05-06(03) -- Letter dated 10 May 2006 from the ALA to the Administration)

Copyright exemption

“Fair dealing” for purposes of public administration

4. Members noted that the existing section 54(1) of the Copyright Ordinance (CO) provided that “Copyright is not infringed by anything done for the purposes of the proceedings of the Legislative Council or judicial proceedings” while the proposed section 54A(1) of the Bill stated that “Fair dealing with a work by the Government, the Executive Council, the Legislative Council, the Judiciary or any District Council for the purposes of efficient administration of urgent business does not infringe the copyright in the work, or in the case of a published edition, in the typographical arrangement.” Members were concerned whether the new section 54A(1) , if enacted, would have the effect of prejudicing the copyright exemption currently available to the Legislative Council and the Judiciary under existing section 54(1) of CO.

5. The Administration advised that section 37(5) of CO stipulated that the provisions of permitted acts in Division III, Part II of CO were to be construed independently of each other. As such, the fact that an act did not fall within one provision did not mean that it was not covered by another provision. Hence, the proposed section 54A(1) on “fair dealing” for public administration should not prejudice the operation of the existing section 54(1) of CO. In reply to members, the Administration indicated that there were already permitted act provisions for the Judiciary, Legislative Council and the Government under the existing CO. The new section 54A sought to provide more flexibility to the existing copyright exemption regime for public administration purposes by introducing a new “fair dealing” provision and should not affect the existing exemption available. Hence, the Administration had not consulted the relevant bodies specifically on this new section. The proposal to extend the copyright exemption regime for public administration purposes to cover District Councils was made in response to the views received during past consultation. The Administration also highlighted that “fair dealing” was not a novel concept under the existing copyright protection regime as the existing sections 38 and 39 of CO already stipulated that “fair dealing” with a work for research, private study, criticism, review or news reporting would not be regarded as infringement.

6. The Chairman questioned the need to include the Legislative Council and the Judiciary under proposed section 54A given that “Legislative Council and judicial

proceedings” were already covered by the “permitted act” provision in existing section 54 of CO. After discussion, members requested the Administration and the Legal Service Division of the Secretariat to provide further analysis and information on the following issues before considering whether it was necessary for the Administration to consult the Legislative Council Commission and the Judiciary on the new section 54A:

- (a) the scope of “the proceedings of the Legislative Council” and the scope of “judicial proceedings” under the existing section 54(1) of CO; and
- (b) the scope of the “business” of the Legislative Council and the Judiciary which might not fall within the scope of existing section 54(1) of CO and were sought to be covered by proposed section 54A(1) of the Bill.

(Post-meeting note: The information provided by the Administration and the Legal Service Division of the Secretariat was circulated to the Bills Committee on 18 July 2006 (LC Paper No. LS95/05-06, CB(1)2009/05-06(01) and CB(1)2009/05-06(02)).)

“Fair dealing” for purposes of giving or receiving instruction

7. Dr YEUNG Sum noted that the Hong Kong Professional Teachers’ Union (HKPTU) had suggested that an exhaustive rather than a non-exhaustive list of factors should be included in the relevant sections (namely, proposed sections 41A(2), 54A(2), 242A(2) and 246A(2) of the Bill) and the amended section 38(3) to provide certainty to the educational sector as to whether certain dealing with a copyright work would constitute “fair dealing”. He also noted the Administration’s response that the four factors were modelled on the fair use provision in the US Copyright Act in which the factors were also not meant to be exhaustive. Nevertheless, Dr YEUNG Sum urged the Administration to continue dialogue with HKPTU direct with a view to allaying their concern. The Administration took note of Dr YEUNG’s suggestion and assured members that communication with stakeholders would continue.

8. Dr YEUNG Sum noted that the International Federation of the Phonographic Industry (Hong Kong Group) Limited (IFPI (HK)) had suggested the Administration to withdraw the proposed amendments which sought to expand the composition of audience under section 43 of CO. It further suggested excluding parents of pupils from the audience in order to comply with the Berne Convention and other treaties. According to the Administration’s response, the proposal was to address the concern that the scope of existing section 43 was too restrictive and hence, might not accommodate the practical needs of educational establishments. In addition, the Dispute Settlement Body of the World Trade Organization had confirmed in a decision (WT/DS/160R) that, inter alia, Article 11 of the Berne

Convention (public performance rights) comprised the possibility of providing minor exceptions to the exclusive rights in question. These minor exceptions, as in the case of all other exceptions, were subject to the three-step test in Article 13 of the Trade-Related Aspects of Intellectual Property Rights Agreement. The Administration was satisfied that the proposed amendments to section 43 would comply with the three-step test. Nevertheless, Dr YEUNG Sum urged the Administration to maintain communication with IFPI (HK) to explain its stance direct. The Administration took note of Dr YEUNG's suggestion.

Arrangements for the next meeting

9. Members agreed that the 9th meeting of the Bills Committee would be held on Wednesday, 19 July 2006 at 2:30 pm. The Bills Committee would proceed to discuss "Circumvention and Rights Management Information"

IV Any other business

10. There being no other business, the meeting ended at 10:05 am.

Council Business Division 1
Legislative Council Secretariat
27 July 2006

**Proceedings of the eighth meeting of the
Bills Committee on Copyright (Amendment) Bill 2006
on Thursday, 6 July 2006, at 8:30 am
in the Chamber of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000849	Chairman	(a) Confirmation of the minutes of the fifth meeting on 23 May 2006 (LC Paper No. CB(1) 1816/05-06) (b) Submission from Television Broadcasts Limited (TVB) tabled at the meeting (subsequently issued vide LC Paper No. CB(1)1942/05-06 on 6 July 2006)	
000850 – 003726	Chairman Administration Ms Audrey EU ALA 5 Ms Margaret NG Mrs Selina CHOW Dr YEUNG Sum	(a) Discussion on (i) the need to include the Legislative Council and the Judiciary under proposed section 54A given that “Legislative Council and judicial proceedings” were already covered by the “permitted act” provision in existing section 54 of CO; and (ii) whether the proposed section 54A(1) would have the effect of prejudicing the copyright exemption currently available to the Legislative Council and the	The Administration and Legal Service Division to provide further analysis and information as required under paragraph 6 of the minutes

Time Marker	Speaker	Subject(s)	Action Required
		<p>Judiciary under existing section 54(1) of CO.</p> <p>(b) The Administration’s explanation on the operation of section 37(5) of CO</p> <p>(c) The Administration’s advice that it had not consulted the Legislative Council and the Judiciary specifically on new section 54A as the proposed provision was regarded as an improvement over the existing copyright exemption regime</p> <p>(d) Discussion on the scope of “the proceedings of the Legislative Council” and “judicial proceedings” under the existing section 54(1) of CO, and the scope of the business of the Legislative Council and the Judiciary which might fall under the purview of proposed section 54A(1)</p> <p>(e) The Administration’s advice that</p> <p>(i) with the exception of complaints-handling under the Legislative Council’s Redress System, the scope of “the proceedings of the Legislative</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>Council” probably covered the proceedings of the Legislative Council meetings, standing committees, bills committees, panels and subcommittees; and</p> <p>(ii) existing section 198 of CO provided a definition on “judicial proceedings”.</p>	
003727 – 005200	Chairman Administration	The Administration's response to issues raised at the meeting on 19 June 2006: Fair dealing provision for education and public administration (LC Paper No. CB(1)1913/05-06(01))	
005201 – 05743	Dr YEUNG Sum Chairman Administration	<p>(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</p> <p>(b) Hong Kong Professional Teachers’ Union (HKPTU)’s view, as conveyed by Dr YEUNG Sum, that an exhaustive rather than a non-exhaustive list of factors should be included to provide certainty to the educational sector as to whether certain dealing with a copyright work would constitute “fair dealing”</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(c) The Administration's advice that</p> <ul style="list-style-type: none"> (i) the objective of introducing "fair dealing" provisions for education and public administration was to provide flexibility to the existing copyright exemption regime so that acts which did not fall under the provisions of the existing copyright permitted act might still be exempted from copyright restriction if they constituted "fair dealing"; (ii) as teaching methods changed over time, it would not be practicable or desirable to stipulate an exhaustive list of permitted acts in the law; (iii) 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 	

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		<p>and other relevant factors as determined by the court;</p> <p>(iv) relevant factors to be taken into account in determining whether the dealing in question was fair or otherwise were found in decided cases of the UK courts, which incorporated a number of considerations similar to the statutory criteria under the US fair use provision;</p> <p>(v) the four factors stipulated in proposed section 41A(2) of the Bill were modelled on the fair use provision in the US Copyright Act in which the factors were also not meant to be exhaustive; and</p> <p>(vi) to safeguard against liability arising from reprographic copying of copyright works for educational purposes, schools were encouraged to acquire licences from copyright owners.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		(d) Dr YEUNG Sum's request that the Administration should continue dialogue with HKPTU.	
005744 – 011407	Ms Audrey EU Administration Chairman	<p>(a) Ms Audrey YU's query on the rationale for including "urgent business" in the "fair dealing" provision for purposes of public administration under proposed section 54A(1)</p> <p>(b) The Administration's advice that</p> <p>(i) in view of the copyright owners' concern about possible abuse of the "fair dealing" provisions, the Administration had restricted the scope of "fair dealing" under section 54A(1) to acts "for the purposes of efficient administration of urgent business";</p> <p>(ii) the formulation under proposed section 54A(2) was much more restrictive than the US fair use provision;</p> <p>(iii) the Administration considered it not appropriate to generally apply the proposed "fair dealing" provision to</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>all subvented organizations having regard to the concerns and objection of copyright owners; and</p> <p>(iv) regarding copyright owners' concerns about the meaning of "urgent business", the Administration would consider whether it was necessary or appropriate to add a definition of "urgent business" in proposed section 54A of the Bill.</p> <p>(c) Ms Audrey YU's question about overseas experience in the operation of "fair dealing" provisions in the digital environment</p> <p>(d) The Administration's advice that</p> <p>(i) in the copyright laws of Singapore and US, there were no fair use provisions which specifically catered for the digital environment; and</p> <p>(ii) the US Technology Education and Copyright Harmonization Act did not provide for a</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>pre-requisite for the application of the “fair use” provision in the digital environment. Instead, it provided specific exemption to facilitate distance learning in the digital environment involving the Internet.</p> <p>(e) The Administration’s clarification that</p> <ul style="list-style-type: none"> (i) the publishing industry had suggested that clear guidelines regarding the volume and the kind of copying which would be permitted should be specified in law if existing section 45(2) of existing CO was to be repealed; (ii) with the removal of existing section 45(2) of CO, the portion permitted for reprographic copying for the purposes of giving and receiving instruction would still need to be of a “reasonable extent”; (iii) it was difficult for the publishing industry and the educational sector to reach a 	

Time Marker	Speaker	Subject(s)	Action Required
		<p>consensus as to what constituted a “reasonable extent”, in particular in the digital environment;</p> <p>(iv) the Administration would welcome copyright owners to set up licensing schemes for copyright works and would encourage schools to reflect their needs for such use so that mutually acceptable licensing schemes could be worked out; and</p> <p>(v) in the copyright law in Australia and Singapore, there were permitted act provisions which allowed multiple copying (1% and 5% of a reference book in Australia and Singapore respectively), subject to certain prescribed conditions and there was no licensing restriction in these provisions.</p>	
011408 – 012119	Chairman Administration	(a) TVB’s concern that the removal of sections 44(2) and 45(2) of CO in the digital environment would enable school teachers and students to download, distribute and	

Time Marker	Speaker	Subject(s)	Action Required
		<p>communicate all types of copyright works freely on the Internet and other new media.</p> <p>(b) The Administration’s advice that such abusive use envisaged by copyright owners could not be exempted given that any permitted act should be subject to the primary consideration that the act did not conflict with a normal exploitation of the work by the copyright owner and did not unreasonably prejudice the legitimate interests of the copyright owner as stated in existing section 37(3) of CO.</p> <p>(c) The Administration would discuss with copyright owners and the education sector the feasibility of introducing collective licences to deal with the use of copyright works in the digital environment</p> <p>(d) The Administration undertook to explain to the education sector the coverage and implications of the removal of sections 44(2) and 45(2) of CO and the “fair dealing” provisions upon the enactment of the Bill</p>	

Time Marker	Speaker	Subject(s)	Action Required
012120 – 013304	Chairman Administration Dr YEUNG Sum	<p>(a) The Administration's response to deputations' views raised at the meeting on 8 May 2006: Copyright exemption (LC Paper No. CB(1)1633/05-06(01))</p> <p>(b) Dr YEUNG Sum's concern about uncertainties arising from the non-exhaustive approach for copyright exemption</p> <p>(c) IFPI (HK)'s suggestion that the Administration to withdraw the proposed amendments which sought to expand the composition of audience under section 43 of CO. It further suggested excluding parents of pupils from the audience in order to comply with the Berne Convention and other treaties.</p> <p>(d) Dr YEUNG Sum's view that the Administration should maintain communication with IFPI (HK)</p>	
013305 – 013407	Chairman Administration	Letter dated 29 June 2006 from ALA to the Administration/ Reply dated 22 June 2006 from the Administration to ALA's letter of 10 May 2006/ Letter dated 10 May 2006 from ALA to the Administration (LC Paper No. CB(1)1916/05-06(01) to (03))	ALA to continue to follow up with the Administration on outstanding issues on the legal and drafting aspects of the Bill

Time Marker	Speaker	Subject(s)	Action Required
013408 – 013544	Chairman Administration Ms Audrey EU Secretariat	Arrangements for the next meeting	

Council Business Division 1
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27 July 2006