

立法會
Legislative Council

LC Paper No. CB(1)673/06-07
(These minutes have been seen
by the Administration)

Ref : CB1/BC/1/05/1

Bills Committee on Copyright (Amendment) Bill 2006

**Minutes of the fifteen meeting
held on Friday, 15 December 2006, at 10:45 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, JP (Chairman)
Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
Hon CHAN Kam-lam, SBS, JP
Dr Hon YEUNG Sum
Hon Audrey EU Yuet-mee, SC, JP
Hon LI Kwok-ying, MH, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon WONG Ting-kwong, BBS
Hon Patrick LAU Sau-shing, SBS, JP
Hon Albert Jinghan CHENG
- Members absent** : Hon Margaret NG
Hon Bernard CHAN, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Timothy FOK Tsun-ting, GBS, JP
Hon Vincent FANG Kang, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
- Public officers attending** : Mr Christopher K B WONG
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 Michael LAM
Senior Government Counsel
Department of Justice

Ms Rayne CHAI
Senior Government Counsel
Department of Justice

Mr Ben HO
Senior Superintendent
Intellectual Property Investigation Bureau
Customs and Excise Department

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)464/06-07 -- Minutes of meeting held on 20 November 2006

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

2. The minutes of the meeting held on 20 November 2006 were confirmed.

II Papers issued since last meeting

LC Paper No. CB(1)420/06-07(01) -- Submission dated 1 December 2006 from Hong Kong and International Publishers' Alliance (English version only)

LC Paper No. CB(1)450/06-07(01) -- Further submission dated 6 December 2006 from Hong Kong and International Publishers' Alliance (English version only)

Admin 3. Members noted that the above papers had been issued for the Bills Committee's information. The Chairman requested the Administration to provide in due course its response to the submissions from Hong Kong and International Publishers' Alliance to the Bills Committee.

III Meeting with the Administration

Clause-by-clause examination of the Bill

LC Paper No. CB(1)510/06-07(01) -- Marked-up version of the Administration's proposed Committee Stage Amendments (up to clause 24)

LC Paper No. CB(3)433/05-06 -- The Bill

LC Paper No. CB(1)1323/05-06(02) -- Marked-up copy of the Bill prepared by the Legal Service Division

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| LC Paper No. LS50/05-06 | -- The Legal Service Division Report on the Bill |
| CIB CR 07/09/16 | -- The Legislative Council Brief issued by the Commerce, industry and Technology Bureau |
| LC Paper No. CB(1)1250/05-06 | -- Background brief on Review of certain provisions of Copyright Ordinance prepared by the Secretariat |

(A list of other relevant papers previously issued is available on the Legislative Council website at http://www.legco.gov.hk/yr05-06/english/bc/bc01/papers/bc01_ppr.htm)

4. The Chairman advised that the Administration had provided a marked-up version of its proposed Committee Stage Amendments (CSAs) (up to clause 24) to the Bill to facilitate members' discussion. He suggested that the Bills Committee would focus discussion on the English version first. The Administration could then finalize the Chinese version in the light of the English version as agreed by members. He also requested the Legal Service Division of the Secretariat to vet the finalized Chinese version and sort out legal and drafting problems with the Administration; and to revert to the Bills Committee in case of difficulty. Members agreed to the approach proposed by the Chairman.

LSD
and
Admin

Clause 2 - Commencement

5. Regarding the commencement date of the proposed sections included in clause 2(2)(a) to (u), the Administration advised that different sections might have different commencement dates which would be appointed by the Secretary for Commerce, Industry and Technology. While certain provisions (notably those relating to copyright exemptions) would take effect upon enactment of the Bill, provisions imposing new civil/criminal liabilities (such as those relating to rental rights and directors'/partners' liability) would not commence operation until such time as a reasonable period had been allowed for the affected parties to acquire the necessary licences or for rental licensing schemes /rental versions of copyright works to become available. Before the new liabilities came into effect, the Administration would arrange suitable publicity and public education programmes to enhance public awareness of the new requirements. The Chairman cautioned against appointing too many different commencement dates. Where practicable, the enacted sections should commence operation by batches in one or two stages to avoid causing confusion to the public. The Administration noted the Chairman's view.

Admin

6. Clause 7(2) relating to the proposed amendment to section 35(4)(b) was then discussed. In view of the concerns expressed by copyright owners and the Bills Committee about the proposed criminal sanction period for parallel importation, the Administration advised that it was prepared to consider a criminal sanction period ranging from 12 to 15 months as opposed to reducing it to 9 months.

Admin 7. As the criminal sanction period was referred to in various proposed sections of the Bill, the Chairman reminded the Administration to pay attention to the need or otherwise of any consequential amendments should the Administration's proposal be voted down or amended by members. The Administration took note of the Chairman's remarks.

Clause 8 – Section added immediately after section 35A (35B - Imported copy not an "infringing copy" for the purposes of section 35(3))

8. The Administration advised that the proposed section 35B(1) provided for situations under which a copy of a copyright work was not, in relation to the person who imported it into Hong Kong or acquired it after it was imported into Hong Kong, an infringing copy for the purposes of section 35(3) if it (a) was lawfully made in the country, territory or area where it was made; and (b) was not imported or acquired with a view to its being dealt in by any person for the purpose of or in the course of any trade or business. Section 35B(1) would not apply if the copy of work was a musical sound recording, a musical visual recording, a television drama or a movie; and was intended to be played or shown in public except if the playing or showing was done by an educational establishment for the educational purposes of the establishment or by a specified library for use of the library. In other words, for a parallel imported copy of a musical sound recording, a musical visual recording, a television drama or a movie which was lawfully made in the country, territory or area where it was made, it would not be regarded as an infringing copy by virtue of section 35(3) in relation to an educational establishment or a specified library even if the copy was intended to be played or shown in public for the educational purposes of the establishment or for the use of the library. On whether the public showing must be done at the school's/library's premises, the Administration clarified that section 35B(3) would apply as long as it was for the aforesaid purposes irrespective of where the parallel-imported copy of copyright work was played or shown.

9. On the application of the proposed section 35B(3), the Administration advised that the public showing of a copy of copyright work referred to in the proposed section 35B(2)(a) by a student union for any purpose (e.g. with a fee being charged for the admission) other than for the educational purposes of the educational establishment concerned might not fall under proposed section 35B(3). If the copy was a parallel-imported copy, it would be regarded as an infringing copy by virtue of section 35(3). However, whether the student union would incur any liability would depend on whether it had done any restricted or prohibited acts in relation to the parallel imported copy.

10. Dr YEUNG Sum enquired about the meaning of "public performance". The Administration explained that the expression was not defined in the Copyright Ordinance (CO). However, the scope of the restricted act was analyzed in previous court cases with reference to the facts of each case. It was held, for example, that the playing of background music in an office-setting constituted public performance. It was likely that the showing of an audio-visual work by a student union would constitute a public performance. The Administration further explained that there were certain permitted acts in CO in relation to the public performance of a work. One such permitted act was provided in section 76 of CO that the public showing of a non-infringing copy of any copyright work (including audio-visual works) by a club or a society without any charge for admission was not an infringement of the copyright in a work if the club or society was not established or conducted for profit and its main objects were charitable.

11. On the drafting of proposed section 35B, Ms Audrey EU noted the Administration had sought to delineate the circumstances under which an imported copy was not an "infringing copy" for the purposes of section 35(3). She considered this way of drafting slightly cumbersome and said that it might be more preferable if reference was made to the use of the parallel-imported copy of copyright work in determining whether civil or criminal liability was incurred. Ms EU also queried whether the wording "acquired" was clear enough to mean "come to possess physically". Mrs Selina CHOW shared Ms EU's concern and pointed out that as currently drafted, the proposed section 35B(1) would require a higher standard of proof as it was necessary to prove the original intention of the person who had "imported" or "acquired" the copy of copyright work. The Administration assured members that it had considered other drafting approaches and, on balance, the current drafting approach was preferred. The Administration's thinking was that by delineating the conditions under which an imported copy was not an "infringing copy", a greater degree of certainty could be provided to the end-user of the parallel-imported copy. Nevertheless, at the Chairman's request, the Administration would consider the views of Ms EU and Mrs CHOW and the draft provisions in question.

Admin

12. In response to Ms EU, the Administration advised that the Law Society of Hong Kong (the Law Society) had not raised any comment on the drafting of the proposed section 35B. The Administration would consult the Law Society as to whether they had any concern about the drafting of the provision, as well as the need or otherwise of amending the definition of "lawfully made" as raised by the Law Society.

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Meeting Arrangements

13. Members agreed that the 16th meeting would be held on Thursday, 4 January 2007 at 10:45 am. The Chairman advised that the meeting dates from January to May 2007 had been finalized on the basis of members' returns in response to LC

Paper No CB(1)427/06-07 issued on 5 December 2006. A circular would be issued to inform members of the updated schedule of meetings (including additional/re-scheduled meetings).

(Post-meeting note: The revised schedule of meetings was issued to members on 15 December 2006 vide LC Paper No CB(1)523/06-07).

IV Any other business

14. There being no other business, the meeting ended at 12:42 pm.

Council Business Division 1
Legislative Council Secretariat
10 January 2007

**Proceedings of the fifteen meeting of the
Bills Committee on Copyright (Amendment) Bill 2006
on Friday, 15 December 2006, at 10:45 am
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 001410	Chairman Administration	<p>(a) Confirmation of the minutes of the 13th meeting on 20 November 2006 (LC Paper No. CB(1) 464/06-07)</p> <p>(b) Members noted two submissions from Hong Kong and International Publishers' Alliance issued on 4 and 7 December 2006 (LC Paper Nos. CB(1)420/06-07(01) and CB(1)450/06-07(01)) and the Chairman's request for the Administration's written response</p> <p>(c) Chinese version of the marked-up version of the Administration's proposed CSAs (up to clause 24) to the Bill tabled at the meeting (subsequently issued vide LC Paper No. CB(1)536/06-07 on 18 December 2006)</p>	The Administration to follow up as stated in paragraph 3 of the minutes
001411 – 004119	Administration Chairman	<p>Clause-by-clause examination</p> <p>The Bills Committee's agreement to first examine the English version of the Bill and proposed CSAs. The Administration would finalize the Chinese version in the light of the Bills Committee's discussion in due course.</p> <p><u>Clause 1 – Short title</u></p> <p>Members raised no query</p> <p><u>Clause 2 – Commencement</u></p> <p>(a) The Administration's advice that different sections might have different commencement dates to be appointed by the Secretary for Commerce, Industry and Technology</p>	The Legal Service Division and the Administration to follow up as stated in paragraph 4 of the minutes

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) The Chairman's view that the enacted sections should, where practical, commence operation by batches in one or two stages to avoid causing confusion to the public.</p> <p><u>Clause 2A – Duration of copyright in literary, dramatic, musical or artistic works</u> Members raised no query</p> <p><u>Clause 3 – The acts restricted by copyright in a work</u> Members raised no query</p> <p><u>Clause 4 – Infringement by rental of work to the public</u> Members raised no query</p> <p><u>Clause 5 – Secondary infringement: possessing or dealing with infringing copy</u> Members raised no query</p> <p><u>Clause 6 – Secondary infringement: providing means for making infringing copies</u> Members raised no query</p> <p><u>Clause 7 – Meaning of "infringing copy"</u></p> <p>(a) The Administration's advice that, in view of the concerns expressed by copyright owners and the Bills Committee, it was prepared to consider a criminal sanction period ranging from 12 to 15 months as opposed to reducing it to 9 months.</p> <p>(b) The Administration's advice that it would discuss with the stakeholders concerned in refining the drafting of clause 7(2A).</p>	
004120 – 013839	Chairman Dr YEUNG Sum	<u>Clause 8 – Section added immediately after section 35A (i.e. proposed section 35B)</u>	The Administration to follow up as

Time Marker	Speaker	Subject(s)	Action Required
	<p>Mrs Selina CHOW Ms Audrey EU Administration Prof Patrick LAU</p>	<p>(a) Discussion of possible scenarios in which proposed section 35B might or might not apply</p> <p>(b) Members' views on the drafting of proposed section 35B are as follows:</p> <p>(i) it might be more preferable if reference was made to the use of the parallel-imported copy of copyright work in determining whether civil or criminal liability was incurred;</p> <p>(ii) the proposed section 35B(1) as currently drafted would require a higher standard of proof as it was necessary to prove the intention of the person who had "imported" or "acquired" the copy of copyright work, as opposed to the act undertaken in relation to the copy; and</p> <p>(iii) the meaning of "acquired" might not be clear enough to mean "come to possess (irrespective of how the copy had come into physical possession)"</p> <p>(c) The Administration's advice that:</p> <p>(i) it had considered other drafting approaches and, on balance, the current drafting approach was preferred; and</p> <p>(ii) by delineating the conditions under which an imported copy was not an "infringing copy", a greater degree of certainty could be provided to the end-user of the parallel-imported copy.</p> <p>(d) Prof Patrick LAU's enquiry about the use of a parallel-imported copy of a copyright</p>	<p>stated in paragraph 12 of the minutes</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>work by a business end-user for commercial dealing purposes if he did not know that the copy in question was an infringing copy.</p> <p>(e) The Administration's advice that a defence might apply in the light of the circumstances of the case if the business end-user could prove that he was not aware of or had no reason to believe that the copy in question was an infringing copy.</p> <p><u>Clause 9 – Defences of the purposes of sections 30 and 31</u></p> <p>Members raised no query</p> <p><u>Clause 10 – Research and private study</u></p> <p>(a) Dr YEUNG Sum's enquiry about the definition of "the amount and substantiality of the portion dealt with in relation to the work as a whole" as specified in clause 10(2) provided for fair dealing for research and private study</p> <p>(b) The Administration's advice that:</p> <p>(i) whether the use of a certain amount or substantial portion of a copyright work would constitute fair dealing would need to be determined by the court in the light of the circumstances of the case, including how large was the portion of the copyright work that had been used and its quality.</p> <p>(ii) the proposed provision in clause 10(2) was modelled on comparable provision in overseas jurisdictions.</p>	
013840 – 015429	Administration Chairman Prof Patrick	<u>Clause 11 – Sections added immediately after section 40 (i.e. 40A, 40B, 40C, 40D, 40E and 40F) for persons with a print disability</u>	

Time Marker	Speaker	Subject(s)	Action Required
	LAU Dr YEUNG Sum Mr CHAN Kam-lam	The Administration's advice that: <ul style="list-style-type: none"> <li data-bbox="571 360 1241 595">(a) relevant stakeholder organizations including the Hong Kong Society for the Blind and the Hong Kong Blind Union supported the introduction of the new permitted act for persons with a print disability; <li data-bbox="571 640 1241 869">(b) elderly persons who would not be able to hold or manipulate a book because of physical disability would be considered as persons with a print disability under the proposed section 40A(c) in the light of the circumstances of the case concerned; and <li data-bbox="571 913 1241 1704">(c) under the proposed section 40E, the specified body must possess a master copy of the whole or part of a commercial publication of a literary, dramatic, musical or artistic work which was not accessible to persons with a print disability. The permitted act to make copies would not apply unless the specified body had made reasonable enquiries and was satisfied that accessible copies of the copyright work concerned could not be obtained at a reasonable commercial price. The specified body making the copies (including the whole or part of the copyright work) needed to (a) notify the copyright owners within a reasonable time before or after making or supplying the accessible copies; and (b) to keep records of the making and supplying of accessible copies, for inspection by copyright owners. 	
015430 – 015559	Chairman	Meeting arrangements	