

立法會
Legislative Council

LC Paper No. CB(1)1016/07-08
(These minutes have been seen
by the Administration)

Ref : CB1/PL/CI/1

Panel on Commerce and Industry

Minutes of meeting
held on Tuesday, 19 February 2008, at 2:30 pm
in Conference Room A of the Legislative Council Building

- Members present** : Hon Vincent FANG Kang, JP (Chairman)
Hon WONG Ting-kwong, BBS (Deputy Chairman)
Hon CHAN Kam-lam, SBS, JP
Hon SIN Chung-kai, SBS, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon CHIM Pui-chung
- Members attending** : Hon Emily LAU Wai-hing, JP
- Members absent** : Dr Hon LUI Ming-wah, SBS, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Ronny TONG Ka-wah, SC
- Public officers attending** : Agenda Item IV
Commerce and Economic Development Bureau

Mr Christopher K B WONG, JP
Deputy Secretary for Commerce and Economic
Development (Commerce and Industry)

Ms Bonnie YAU
Principal Assistant Secretary for Commerce and
Economic Development (Commerce and Industry)

Intellectual Property Department

Ms Ada LEUNG
Assistant Director of Intellectual Property

Clerk in attendance : Ms YUE Tin-po
Chief Council Secretary (1)3

Staff in attendance : Ms Guy YIP
Senior Council Secretary (1)5

Ms May LEUNG
Legislative Assistant (1)6

Action

I. Confirmation of minutes of meeting

(LC Paper No. CB(1)780/07-08 -- Minutes of meeting held on
18 December 2007)

The minutes of the meeting held on 18 December 2007 were confirmed.

II. Information paper issued since last meeting

2. Members noted that no paper had been issued since the last meeting held on 15 January 2008.

III. Date of next meeting and items for discussion

(LC Paper No. CB(1)803/07-08(01) -- List of outstanding items for
discussion

LC Paper No. CB(1)803/07-08(02) -- List of follow-up actions)

3. Members agreed to discuss the item "Progress in relation to the development of the convention and exhibition industry" at the next Panel meeting scheduled for 18 March 2008.

4. Members agreed to the Administration's proposal to defer the discussion of the item "Copyright protection in the digital environment", originally scheduled for the March meeting, to the April meeting.

IV. Follow-up to the Copyright (Amendment) Ordinance 2007

(LC Paper No. CB(1)803/07-08(03) -- Paper provided by the Administration

LC Paper No. CB(1)803/07-08(04) -- Submission from 電影租賃業
(Chinese version only) 大聯盟

LC Paper No. CB(1)803/07-08(05) -- Administration's response to
issues raised by 電影租賃業大
聯盟

LC Paper No. CB(1)820/07-08(01) -- Submission from Hong Kong
(Chinese version only) Video Development Foundation
Ltd.

LC Paper No. CB(1)820/07-08(02) -- Submission from a group of
(Chinese version only) copyright owners in the movie
industry

LC Paper No. CB(1)820/07-08(03) -- Submission referred by the
(Chinese version only) Complaints Division on views
from "電影租賃業大聯盟")

Briefing by the Administration

5. At the invitation of the Chairman, the Deputy Secretary for Commerce and Economic Development (Commerce and Industry) (DSCED(CI)) briefed members on the publicity and public education activities conducted by the Administration following the enactment of the Copyright (Amendment) Ordinance 2007 (Amendment Ordinance), proposed "Safe Harbour" Regulation in relation to the new business end-user copying and distribution offence, the First List of Exceptions on Act of Circumvention, the commencement timetable for provisions that were yet to come into operation, and its response to views expressed by the industry on rental rights for films. He highlighted the salient points as follows:

(a) Publicity and public education activities conducted by the Administration following the Amendment Ordinance

A series of publicity and public education activities had been organized since July 2007 to enhance public awareness and understanding of the new provisions under the Amendment Ordinance. These included Announcement of Public Interests,

advertisements, posters, leaflets, web-based information packs, direct mailing/emailing, tele-marketing as well as seminars and other presentations.

(b) Proposed "Safe Harbour" Regulation

After discussion with stakeholders, the following numeric limits within which the copying and distribution offence did not apply (known as the "Safe Harbour ") would be adopted:

- for newspapers, magazines and periodicals (excluding academic journals), a maximum of 500 A4 pages infringing copies for any 14-day period; and
- for books (including academic journals), a maximum total retail value of \$6,000 within any 180-day period, where the retail value of books would be counted towards the total value when the user made for distribution or distributed more than 15% of the number of pages of a book on each occasion or for use on one occasion; or more than 40% of the number of pages of the book cumulatively; or complete article(s) in academic journals on one occasion or for use on one occasion.

The Administration aimed to table the "Safe Harbour" Regulation before the Legislative Council (LegCo) in April 2008, in time for it to be vetted and passed by the current legislature. The Regulation would be reviewed periodically to ensure that a reasonable balance was maintained between protecting the interests of copyright owners and minimizing hardship of copyright users, having regard to changes in circumstances.

(c) First List of Exceptions on Act of Circumvention

The Amendment Ordinance would introduce, inter alia, a new civil liability under Section 273A for the act of circumvention against a technological measure applied to a copyright work or performance. In December 2007, the Administration had consulted the public and stakeholders on the need for additional exemptions on circumvention of technological measures, the outcome of which showed that there was no concrete evidence that justified the grant of any additional exemption at the present stage. Nevertheless, the need for any new exceptions and the list of exceptions (when available) would be reviewed at regular intervals in future to ensure that the list met the prevailing needs. A guidance note would be posted onto the websites of the Commerce and Economic Development Bureau and Intellectual Property Department to facilitate users in putting up proposals for additional exemption.

(d) Commencement timetable for provisions that were yet to come into operation

It was proposed that the following provisions should commence operation:

- on 25 April 2008 – moral and related rights for performers of aural performances and for underlying works in sound recordings; provisions that introduced new criminal and civil liability in relation to the making of and dealing in circumvention devices; rental rights of films; and the provision on rights management information;
- on 4 July 2008 – directors/partners' liability in relation to the business end-user "possession offence" regarding computer programs, movies, television dramas and musical recordings (sound or visual); provisions that introduced civil remedies in relation to the act of circumvention; and rental rights for comics (subject to the progress made in putting the relevant licensing scheme into place); and
- in the Fourth Quarter of 2008 – business end-user "copying/distribution offence" regarding printed works and the related directors/partners' liability (subject to the timely enactment of the "Safe Harbour" Regulation).

(e) The Administration's response to views expressed by relevant industry players on rental rights for films

Independent academic research conducted by overseas countries showed that the introduction of a rental licensing scheme was conducive to the sustained healthy development of the creative industry, as well as the interests of relevant stakeholders including the investors, distributors and consumers, etc. In order to minimize the possible adverse impact on the rental shop operators in Hong Kong, mitigation measures had been adopted, namely putting on hold the commencement of the relevant provisions to allow time for copyright owners and rental shops to work out a rental licensing scheme for films (licensing scheme) and introducing a saving provision to relieve possible hardship caused to the rental shops that had acquired stocks of films for commercial rental purposes prior to the commencement of the amended provision. The Amendment Ordinance also empowered the Copyright Tribunal to deal with and arbitrate in disputes and matters pertaining to the licensing scheme.

The Administration had been facilitating positive dialogue between copyright owners and the rental shop operators to narrow their differences. Progress had been made regarding several issues

surrounding the licensing scheme. The two sides were still negotiating on the price ceiling for the rental version of video discs and other related matters, including the deposit level. The two sides differed primarily in their assessments about how the market would react, including in particular how many consumers might be driven away if the rental fees were raised to a certain level. Nevertheless, the Administration had arranged a further meeting involving the two sides as well as the Consumer Council with a view to ironing out the differences. Subject to Members' views, the relevant commencement notice would be gazetted on 29 February 2008. Meanwhile, the Administration would make continued efforts to facilitate constructive discussions between the two sides for a mutually acceptable licensing scheme.

Discussion

Proposed "Safe Harbour" Regulation

6. Mr CHAN Kam-lam supported the proposal to introduce the "Safe Harbour" Regulation and remarked that the provisions should be written in a clear and concise manner.

7. Mr Timothy FOK said that the copyright owners of printed works had accepted the reduced threshold, as opposed to the original proposals made in November 2005, within which the copying and distribution offence would not apply with a view to speeding up the passage of the "Safe Harbour" Regulation. Nevertheless, to enhance copyright protection, he urged that the propriety of the thresholds should be reviewed vigorously from time to time. He considered the enactment of the Regulation would also be conducive to the development of the creative industry in Hong Kong and called on members to give their support to the Administration's legislative proposal.

8. Acknowledging copyright owners' views, DSCED(CI) assured members that the Administration would review the thresholds from time to time having regard to enforcement experience.

9. Noting the threshold of 'a maximum of 500 A4 pages' would be adopted, Mr WONG Ting-kwong raised that it was possible to magnify or reduce the size of the copies with the technologies provided by a photocopying machine. He sought clarification on the method to be used to count the number of pages. In reply, DSCED(CI) advised that the industry had been consulted on this. It was the accepted view that whenever there was a reduction in size, the size of the original article would be used in considering whether the threshold had been met. The legislative intent would be reflected in the "Safe Harbour" Regulation.

Circumvention of technological measures used for copyright protection

10. Pointing out that some mobile phones purchased from overseas were installed with devices to limit their geographical usage, Mr SIN Chung-kai asked whether the use of these phones in Hong Kong would be regarded as an act of circumvention against a technological measure applied to a copyright work or performance if no infringement of copyright was involved.

11. In response, the Assistant Director of Intellectual Property (ADIP) advised that an act of circumvention was determined on whether a technological measure was used to protect copyright and an act was done to circumvent such measure. On whether the use of mobile phones installed with devices to restrict certain usage would constitute an act of circumvention, she considered that it should be examined on a case-by-case basis. In general, if the technological measure was installed merely for preventing users from using parallel imported products, circumvention of such measures might be covered by an exemption provided for under the Amendment Ordinance.

12. As mobile phones installed with devices to restrict certain usage would be brought into Hong Kong by the public from time to time, Mr SIN Chung-kai remarked that a clear policy in this regard should be drawn up for compliance and enforcement.

Rental rights for films

13. Mr Andrew LEUNG said that he was one of the members who attended a Duty Roster Member (DRM) interview to receive views from the Alliance of the Film Rental Industry (the Alliance). While appreciating that the licensing scheme would enhance copyright protection and contribute positively to the healthy development of the relevant industries, he noted with concern that in addition to buying the rental version of video discs at a price higher than that of the retail version, video shop operators were also required to pay for deposits. He therefore sought justification for the proposed arrangement. In addition, noting that only two-thirds of the video distribution companies had joined the Hong Kong Video Development Foundation (HKVDF), the organization which took lead in working out the details and terms of the licensing scheme with rental shop operators, Mr LEUNG also enquired about whether the licensing scheme would cover the remaining video distributors eventually.

14. DSCED(CI) replied that, HKVDF represented 11 video distributors. On the deposit arrangement, the Administration was given to understand that a sum ranging from \$0 to \$1,500 per rental shop would be charged by each of the 11 video distributors, making a maximum of \$9,100 per rental shop. As he understood it, the deposits were charged mainly for the sake of accomplishing contractual commitments. For example, some distributors were permitted to distribute rental version of video discs for a prescribed period and therefore had to recover, on a refundable basis, the video discs from the rental shops upon expiry of the permitted period. Nevertheless, some distributors had indicated that they

would keep in view the implementation of the deposit arrangement and consider abolishing the arrangement in the near future and refunding the deposits in full to the rental shops in due course.

15. Noting the Administration's explanation, Mr Andrew LEUNG pointed out that there would be wear and tear of the video discs due to customers' negligence or theft. As such, the rental shop operators might not be able to return the rental version of video discs to the distributors and hence be deprived of their eligibility to claim refund of their deposits. He urged the Administration to strive to facilitate a mutually acceptable licensing scheme between the two sides so as to pave way for the successful commencement of the provisions relating to rental rights of films.

16. Ms Emily LAU informed the Panel that the Alliance had approached her member's office for help in respect of the licensing scheme. She was also one of the members who attended the DRM interview referred to by Mr Andrew LEUNG. She noted that although a meeting among the Alliance, HKVDF, the Consumer Council and the Administration had been held on 31 January 2008, some issues remained unsolved. In this connection, she urged that another urgent meeting should be arranged among the four parties for an early consensus on the licensing scheme. She also remarked that views of distributors and rental shop operators should be equally considered during the process of negotiating the terms and details of the licensing scheme.

17. In response, DSCED(CI) advised that another meeting would be conducted among the four parties on 25 February 2008. Assuming that a consensus could be reached by the distributors and rental shop operators at the meeting, the relevant commencement notice would be gazetted, as scheduled, on 29 February 2008. Meanwhile, the Administration would maintain close liaison with the two sides to help narrow their differences. On the mechanism to ensure fairness, he re-iterated that the Copyright Tribunal would be empowered to deal with and arbitrate in disputes and matters pertaining to the rental licensing scheme for films. Its rulings would be binding on all relevant parties of the arbitration. Apart from the legal framework, he stressed that the Administration would stand ready to facilitate constructive exchanges between the two sides.

18. Ms Emily LAU opined that legal proceedings to settle disputes between copyright owners and users should be avoided as far as possible. She also raised that as the price for rental version of video discs was proposed to be increased in a progressive manner, in the forthcoming meeting, the Administration should play an active role in facilitating an agreement on a mechanism for the two sides to negotiate the terms and details of the licensing scheme fairly in future. The Chairman echoed Ms LAU's views and remarked that a fair mechanism should be devised to ensure an equal participation of both sides in future negotiations. The Administration took note of members' remark.

19. Appreciating the efforts made by the industry in bringing into play the rental rights of films, Mr CHAN Kam-lam urged all relevant parties to forge ahead

a consensus for its early implementation. In this connection, he noted with concern that divergent views had been expressed by the film industry and video rental industry on the licensing scheme. While the provisions relating to rental rights for films were proposed to commence on 25 April 2008, he urged that the Administration should play an active role in facilitating an early consensus between the two sides. He also asked whether the Administration had assessed the implications to be brought about by the licensing scheme, including the sustainability of the video rental industry and protection of consumer interests, etc.

20. Ms Emily LAU expressed similar concern. She considered that the introduction of the licensing scheme would inevitably result in higher rental fees which might jeopardize the sustainability of small rental shops. For those providing rental services mainly to the low-income groups, e.g. rental shops operating in the public housing estates, the introduction of the licensing scheme might lead to closure of business due to hardship. Consumer interests would eventually be impaired.

21. In reply, DSCED(CI) explained that divergent views had been expressed by the two sides on the implications that the introduction of the licensing scheme might bring, in terms of impact on the business of rental shops. While one side considered that a certain increase in rental fees would only draw mild reaction, the other side forecast a much more significant loss in business. The Administration was striving to find common grounds between the two sides in this regard but did not manage to make much headway thus far.

22. Ms Emily LAU did not subscribe fully to the Administration's explanation. She considered that while the two sides had expressed very divergent views, it would be desirable if the Administration would conduct its own study with a view to forming its own view on the implications of the licensing scheme on the market players and consumers. In this connection, she suggested that assistance from the Central Policy Unit might be solicited.

23. DSCED(CI) replied that the Administration was assessing the implications of the licensing scheme and would provide relevant figures to members for reference in due course. As regards the suggestion to conduct some independent research, he noted that, given the host of factors that might affect the balance sheet of a rental shop and the different business environment that the existing rental shops were operating in, the resources that might be required to produce study findings that could stand up to scrutiny would probably be better spent elsewhere. In the circumstances, the Administration considered it more appropriate to focus on facilitating positive dialogue between the two sides.

24. Mr Timothy FOK said the industry was supportive of the proposal to legislate on the legitimate rental of video discs. He shared Members' view that the Administration should play an active role in fostering common views of the two sides and pave way for the commencement of the provisions relating to rental rights of films on 25 April 2008.

25. Pointing out that the increased operation cost of small and medium sized enterprises (SMEs) due to upsurge of rent and salaries in recent years, the Chairman opined that the terms of the licensing scheme should be set at a reasonable level without jeopardizing the sustainability of the rental shops. As the price for the rental version of video discs would be increased progressively, he called on copyright owners to consider setting the price at a lower level in the initial stage. He also reminded the Administration to spare no efforts in engaging copyright owners and rental shop operators for a fruitful exchange on 25 February 2008.

26. Mr SIN Chung-kai declared that he was an honorable consultant of the Federation of Hong Kong Filmmakers, one of the organizations that had provided a joint submission to the Panel (LC Paper No. CB(1)820/07-08(02)) expressing support to the early commencement of the provisions relating to rental rights of films. While noting with concern that divergent views had been expressed by copyright owners and rental shop operators over the licensing scheme, he cautioned that one should not rule out the possibility that a subcommittee might be formed by the LegCo to study the issue after the gazettal of the relevant commencement notice. To avoid affecting the commencement of the other three groups of provisions which had been scheduled to be gazetted on the same day, he suggested that separate instruments should be used for gazetting the rental rights of films and the three other copyright related issues in order not to affect the legislative timetable of the latter. Ms Emily LAU supported Mr SIN's proposal.

27. DSCED(CI) replied that the Administration would take forward members' opinion that the commencement notice relating to rental rights for films should be gazetted by a single instrument while that for the other three groups of provisions by another instrument on 29 February 2008, for commencement on 25 April 2008.

Directors/partners' liability in relation to the business end-user "possession offence" and "copying/distribution offence"

28. The Chairman sought information on the liabilities of directors and partners under the current legislative proposal. DSCED(CI) replied that although the Copyright Ordinance (Cap. 528) had prescribed the liability of directors and partners for non-compliance, it was not easy to prove that the offence was committed with the consent or connivance of the director or partner. The Amendment Ordinance introduced a new criminal offence, which was yet to come into operation, against directors and partners who were responsible for the internal management of a body corporate or partnership for any act attracting the business end-user criminal liability. To raise public awareness and understanding of the new provisions, in particular to avoid inadvertent breaches, publicity and public education activities, such as the distribution and uploading onto the Internet a Guidance Note on Prevention of End-User Piracy in Business to SMEs and holding of seminars, etc., were conducted since the enactment of the Amendment Ordinance. Under the current proposal, the Administration proposed to gazette the provisions providing for directors/partners' liability in relation to the business end-user "possession offence" regarding four categories of work, i.e. computer

programs, movies, television dramas and musical recordings, on 2 May 2008 for commencement on 4 July 2008. Subject to the passage of the "Safe Harbour" Regulation, another round of publicity programmes and public education would be launched before bringing the provisions providing for directors/partners' liability in relation to the business end-user "copying/distribution offence" regarding printed works into effect, tentatively in the Fourth Quarter of 2008.

The way forward

29. Mr SIN Chung-kai remarked that given the diametrical nature of interests, it was inevitable that copyright protection and liberalization would remain controversial in the community. Nevertheless, as Chairman of the Bills Committee on Copyright (Amendment) Bill 2006, he supported the commencement of the provisions introduced under the Amendment Ordinance which were yet to come into operation within this LegCo term, if possible. Ms Emily LAU shared his view that copyright involved complex issues, a consensus of which might take a long time to build up. She urged the Administration to strive to speed up the process.

Admin

30. The Chairman concluded that the Panel was in principle supportive of the Administration's proposed commencement timetable for the provisions under the Amendment Ordinance that were yet to come into operation and the proposal in relation to the introduction of the "Safe Harbour" Regulation. He also requested the Administration to follow up closely on the licensing scheme and to report the progress made in respect of the negotiation of the details and terms of the licensing scheme between the copyright owners and rental shop operators to the Panel in due course.

(Post-meeting note: The information paper provided by the Administration has been circulated to all Members vide LC Paper No. CB(1)985/07-08(01) on 5 March 2008.)

V. Any other business

31. There being no other business, the meeting ended at 3:50 pm.