

立法會
Legislative Council

LC Paper No. CB(1)2384/08-09
(These minutes have been seen
by the Administration)

Ref : CB1/BC/4/08

Bills Committee on Copyright (Amendment) Bill 2009

**Minutes of the fourth meeting on
Tuesday, 7 July 2009, at 10:45 am
in Conference Room B of the Legislative Council Building**

- Members present** : Dr Hon Samson TAM Wai-ho, JP (Chairman)
Dr Hon Margaret NG
Hon CHAN Kam-lam, SBS, JP
Hon LEUNG Yiu-chung
Hon Miriam LAU Kin-yee, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Hon Paul TSE Wai-chun
- Members absent** : Hon Albert HO Chun-yan
Hon Timothy FOK Tsun-ting, GBS, JP
- Public officers attending** : Commerce and Economic Development Bureau

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

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

Mr Bill LI
Assistant Secretary for Commerce and Economic
Development (Commerce and Industry)

Intellectual Property Department

Ms Ada LEUNG
Assistant Director of Intellectual Property

Mr Thomas TSANG
Senior Solicitor

Department of Justice

Mr Michael LAM
Senior Assistant Law Draftsman

Ms Rayne CHAI
Senior Government Counsel

Customs and Excise Department

Mr Ben HO
Head of Intellectual Property Investigation Bureau

Mr Thomas S Y LIN
Group Head (Intellectual Property Investigation (Operations))

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

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser 2

Ms Annette LAM
Senior Council Secretary (1)3

Action

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- I. Confirmation of minutes of meeting**
(LC Paper No. CB(1)2081/08-09 -- Minutes of meeting held on 9 June
2009)

The minutes of the meeting held on 9 June 2009 were confirmed.

II. Papers issued since last meeting

- (LC Paper No. CB(1)2021/08-09(01) -- Submission from the Hong Kong Bar Association (English version only)
- LC Paper No. CB(1)2184/08-09(01) -- Submission from the Law Society of Hong Kong (English version only))

2. Members noted that the above submissions had been issued for the Bills Committee's information.

III. Meeting with the Administration

- (LC Paper No. CB(1)2156/08-09(01) -- Administration's paper on elements of the copying and distribution offence and other related matters

Other relevant papers

- LC Paper No. CB(3)525/08-09 -- The Bill
- LC Paper No. CB(1)1638/08-09(01) -- Marked-up copy of the Bill prepared by the Legal Service Division
- Ref: CITB 07/09/22 -- Legislative Council Brief on Copyright (Amendment) Bill 2009 issued by the Commerce and Economic Development Bureau
- LC Paper No. LS59/08-09 -- Legal Service Division Report)

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

Admin 4. The Administration was requested to:

- (a) clarify, with reference to the provisions under section 119B of the Copyright Ordinance, whether the defendant's knowledge of the extent of his making or distribution of infringing copies at the material time in excess of the prescribed numeric limits was an element of the copying and distribution offence;

- (b) provide examples of the penalty level for white-collar offences (such as default in payment of Mandatory Provident Fund contribution) in the relevant legislation, as compared with the penalty level for the copying and distribution offence under section 119B(17) of the Copyright Ordinance; and
- (c) provide information on the penalty level for similar offence in the copyright law of other jurisdictions such as the United States.

IV. Any other business

Dates of next meeting

- 5. Members agreed that the fifth meeting would be held on Monday, 28 September 2009 at 2:30 pm to meet with the Administration.
- 6. There being no other business, the meeting ended at 12:20 pm.

Council Business Division 1
Legislative Council Secretariat
30 July 2009

**Proceedings of the fourth meeting of
Bills Committee on Copyright (Amendment) Bill 2009
on Tuesday, 7 July 2009, at 10:45 am
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000000-000400	Chairman Administration	Opening remarks by the Chairman Confirmation of minutes of meeting held on 9 June 2009 Submission from the Hong Kong Bar Association (LC Paper No. CB(1)2021/08-09(01)) Submission from the Law Society of Hong Kong (LC Paper No. CB(1)2184/08-09(01))	
000401-001321	Chairman Administration	Briefing by the Administration (LC Paper No. CB(1)2156/08-09(01))	
001322-012843	Chairman Administration Assistant Legal Adviser (ALA) Dr Margaret NG Mr CHAN Kam-lam Mr Andrew LEUNG Mr WONG Ting-kwong Mr Ronny TONG Ms Cyd HO Sau-lan Mr Paul TSE	<p>Discussion on elements of the copying and distribution offence.</p> <p>Dr Margaret NG noted that section 119B of the Copyright Ordinance (the Ordinance) stipulated that a person committed the offence if he made for distribution or distributed an infringing copy of a copyright work in a printed form that was contained in a book, a magazine, a periodical or a newspaper without the licence of the copyright owner of the copyright work on a regular or frequent basis for the purpose of or in the course of any trade or business, resulting in a financial loss to the copyright owner. She considered that the relevant provisions in the Bill was unclear on the mental state of the defendant in relation to the numeric limits (i.e. the defendant's knowledge of the extent of his making or distribution of infringing copies at the material time in excess of the relevant numeric limit).</p> <p>Discussion on directors'/partners' criminal liability for copyright infringing acts of their employees.</p> <p>In response to Mr Andrew LEUNG's concern about the criminal liability of directors/partners of enterprises for copyright infringing acts of their employees, the Administration advised that-</p> <p>(a) the copying and distribution offence was limited to regular or frequent infringements only. Occasional copying and distribution would not constitute an offence under section 119B of the Ordinance;</p> <p>(b) the offence was proposed to be qualified by a set of numeric limits within which the offence would not apply;</p>	The Administration to follow up as stated in paragraph 4(a) of the minutes.

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		<p>(c) where substantial copying or distribution of copies of copyright works in printed form on a regular or frequent basis was required in the course of business, business end-users were encouraged to (i) obtain authorization from copyright owners under the relevant licensing scheme in advance, or (ii) otherwise take measures to ascertain whether the relevant numeric limits would be exceeded before the making or distribution of copies of copyright works for the avoidance of criminal liability under section 119B;</p> <p>(d) section 119B(12) provided that a director or partner charged with the offence under section 119B(1) by virtue of section 119B(11) could adduce evidence to raise the issue that he did not authorize the relevant act of copying or distribution to be done, and section 119B(13) provided that the defendant would be taken to have adduced sufficient evidence if he could satisfy the court that he, for instance, had set aside financial resources and directed the use of the resources for the acquisition of appropriate licences, etc.</p> <p>(e) similar to the situation of the "possession offence", directors/partners would not be held criminally liable for the infringing acts of their staff if those acts were not authorized; and</p> <p>(f) the onus of proof was on the prosecution to prove beyond reasonable doubt all elements of the offence. The benefit of doubt would be given to the defendant.</p> <p>In response to the Chairman's enquiry about precedent cases on prosecution of directors/partners in relation to the "possession offence", the Administration advised that the relevant provision had just commenced operation in 2008, and most of the cases on hand were still under investigation. The investigation would collect all relevant evidence concerning the criminal liability of the company directors/partners. The Department of Justice would be consulted on these cases on the sufficiency of evidence before initiating criminal prosecution.</p> <p>Discussion on the definition of "qualifying copy" in relation to a specified journal.</p> <p>Discussion on the liability of persons providing reprographic copying services under the offence.</p> <p>Ms Cyd HO sought clarification on whether the criminal offence under section 119B of the Ordinance would apply in cases where the source of copying (source book) might be an infringing copy</p>	

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		<p>(e.g. a reprographic copy of a genuine book) which might not have a retail price, and hence the user had no knowledge whether the numeric limits (both in terms of monetary value or the number of printed pages) had been exceeded or not.</p> <p>The Administration advised that whether the offence would apply depended on the circumstantial evidence available as to whether the defendant had knowingly made/distributed infringing copies on a regular or frequent basis for the purpose of or in the course of any trade or business in excess of the relevant numeric limit. Section 119B would not apply to non-profit making educational establishments/students making copies for self-use.</p> <p>Discussion on penalty level under section 119B(17) of the Ordinance.</p> <p>Mr Ronny TONG noted that a person who committed a copying and distribution offence under section 119B(1) of the Ordinance was liable on conviction on indictment to a fine at level 5 (\$50,000) in respect of each infringing copy and to imprisonment for 4 years. While he appreciated that the penalty level provided for under section 119B(17) was the maximum, and was in line with that of the majority of offences under the Ordinance, he raised concern whether the penalty level might be too high for inadvertent breaches by members of the public, particularly where the numeric limits were relatively complicated and not easy to be understood. Ms Cyd HO and the Chairman shared the same concern.</p> <p>Discussion on the meaning of "on a regular or frequent basis".</p> <p>Mr Paul TSE sought clarification on the meaning of "on a regular or frequent basis" and whether there was any precedent ruling by the court. As infringement would attract criminal liability, he was of the view that the legislation should be sufficiently clear to provide greater certainty for the protection of the public. He was of the view that uncertainty and grey areas would lead to subsequent legal disputes and waste of resources in terms of enforcement and prosecution.</p> <p>The Administration advised that whether infringing activities formed a pattern of behaviour that fell within the meaning of "regular or frequent" would have to be considered on a case by case basis depending on individual circumstances, and would eventually be ruled by the court in legal proceedings. Any attempt to define the words "regular" or "frequent" would make the bill unduly complicated and was liable to create more room for loopholes. The Administration reiterated that the objective of the new criminal offence was to deter business end-users from</p>	<p>The Administration to follow up as stated in paragraph 4(b) and (c) of the minutes.</p>

Time marker	Speaker	Subject(s)	Action required
		<p>making infringing copies of copyright works for distribution or distributing infringing copies in excess of the numeric limits on a regular or frequent basis, and to impose criminal liability against blatant infringing acts committed by business end-users.</p> <p>Mr Paul TSE said that while he appreciated the importance of copyright and intellectual property (IP) protection, he personally had reservation over the copying and distribution offence. Ms Cyd HO and Mr Andrew LEUNG shared a similar view and expressed concern that the new criminal business end-user copying and distribution offence, once came into operation, would apply to all business end-users irrespective of the size of the businesses.</p> <p>Mr CHAN Kam-lam's view that there was a need to maintain a reasonable balance between the interests of copyright owners and copyright users. In line with the international trend, it was important to protect IP rights which were conducive to the development of creative industries in Hong Kong. The offence, as contained in the Copyright (Amendment) Ordinance 2007, was qualified by a set of numeric limits drawn up after extensive discussion with the relevant stakeholders over the past two years having regard to the need to maintain a reasonable balance between the interests of copyright owners and users. He supported the business end-user copying and distribution offence which he considered as both deterring and enforceable.</p> <p>The Chairman's view that IP protection was conducive to Hong Kong's development into a knowledge-based creative economy and an information technology hub. He supported putting in place a proper legislative framework providing criminal sanctions for copyright infringing acts.</p> <p>Discussion on publicity and public education programme.</p> <p>In response to Ms Miriam LAU's enquiry, the Administration advised that the Administration would allow a reasonable period of time (about six months) to roll out suitable publicity and public education programmes before bringing the business end-user copying and distribution offence into operation.</p>	
012844-013333	Chairman Administration	Meeting arrangement	