

立法會
Legislative Council

LC Paper No. CB(4)635/14-15
(These minutes have been seen
by the Administration)

Ref : CB4/BC/6/13

Bills Committee on Copyright (Amendment) Bill 2014

Minutes of the ninth meeting
held on Tuesday, 20 January 2015, at 10:45 am
in Conference Room 1 of the Legislative Council Complex

- Members present** : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, GBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon WONG Ting-kwong, SBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan, JP
Hon Paul TSE Wai-chun, JP
Hon WONG Yuk-man
Hon Claudia MO
Hon YIU Si-wing
Hon MA Fung-kwok, SBS, JP
Hon Charles Peter MOK, JP
Hon CHAN Chi-chuen
Hon CHAN Yuen-han, SBS, JP
Hon Alice MAK Mei-kuen, JP
Hon Dennis KWOK
Hon SIN Chung-kai, SBS, JP
Hon Martin LIAO Cheung-kong, SBS, JP
- Members absent** : Hon Vincent FANG Kang, SBS, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon Gary FAN Kwok-wai
Dr Hon Elizabeth QUAT, JP
Hon CHUNG Kwok-pan
Hon Christopher CHUNG Shu-kun, BBS, MH, JP

**Public officers
attending**

: Agenda item II

Commerce and Economic Development Bureau

Mr David WONG, JP
Deputy Secretary for Commerce and Economic
Development
(Commerce and Industry)2

Miss Patricia SO
Principal Assistant Secretary for Commerce and
Economic Development
(Commerce and Industry)3

Intellectual Property Department

Ms Michelle CHONG
Assistant Director of Intellectual Property
(Copyright)

Ms Jasmine KUN
Senior Solicitor (Copyright) 3

Department of Justice

Mr Michael LAM
Senior Assistant Law Draftsman (I) 1

Mr Henry CHAN
Senior Government Counsel (Acting)

Clerk in attendance : Ms YUE Tin-po
Chief Council Secretary (4)3

Staff in attendance : Miss Carrie WONG
Assistant Legal Adviser 4

Mr Joey LO
Senior Council Secretary (4)3

Action

I. Confirmation of minutes of meeting

(LC Paper No. CB(4)351/14-15 -- Minutes of meeting held on 16 December 2014)

The minutes of the meeting held on 16 December 2014 were confirmed.

II. Meeting with the Administration

Follow-up to issues arising from previous meetings

(LC Paper No. CB(4)364/14-15(01) -- Administration's paper on legal liability of uploading copyrighted Cantonese films made in Hong Kong in the mid-20th century

LC Paper No. CB(4)364/14-15(02) -- Administration's response dated 15 January 2015 to the Assistant Legal Adviser

LC Paper No. CB(4)292/14-15(01) -- Administration's response to Assistant Legal Adviser's letter dated 7 November 2014

LC Paper No. CB(4)153/14-15(01) -- Assistant Legal Adviser's letter dated 7 November 2014 to the Administration

LC Paper No. CB(4)375/14-15(01) -- List of follow-up actions arising from the discussion at the meeting on 8 December 2014

LC Paper No. CB(4)375/14-15(02) -- List of follow-up actions arising from the discussion at the meeting on 6 January 2015)

Clause-by-clause examination of the Bill

Starting from Clause 19

- (LC Paper No. CB(3)719/13-14 -- The Bill
- LC Paper No. CB(4)871/13-14(01) -- Marked-up copy of the Bill prepared by the Legal Service Division (Restricted to members))

Other relevant papers

- (File Ref.: CITB 07/09/17 -- Legislative Council Brief issued by the Commerce and Economic Development Bureau on 11 June 2014
- LC Paper No. LS63/13-14 -- Legal Service Division Report
- LC Paper No. CB(4)977/13-14(01) -- Paper on Copyright (Amendment) Bill 2014 prepared by the Legislative Council Secretariat (Background brief)
- LC Paper No. CB(4)11/14-15(01) -- Administration's paper on criminal cases in copyright infringement
- LC Paper No. CB(4)11/14-15(02) -- Administration's paper on copyright cases illustrating fairness assessment
- LC Paper No. CB(4)100/14-15(01) -- Administration's paper on user-generated content
- LC Paper No. CB(4)153/14-15(02) -- Administration's paper on application of fair dealing provisions)

Discussion

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

Follow-up actions to be taken by the Administration

3. The Administration was requested to provide:

- (a) information on precedent cases involving the court's judgement on what constituted a "substantial part" of the underlying work in determining whether a certain act infringes copyright in the work;
- (b) information on the reasons for not including in the Bill an express provision restricting contract override as in the case of UK, and the arguments for and against such a provision raised during the UK House of Lord's deliberation on its new fair dealing exception for parody, caricature and pastiche, as well as the reasons for not including such a provision in other overseas jurisdictions such as Australia and the US; and

4. The Administration was also requested to provide information, with reference to precedent cases where appropriate, to illustrate the general application of the Unconscionable Contracts Ordinance (Cap. 458) in preventing private contractual terms from being enforceable that excluded or limited the exercise of statutory permitted acts by a contractual party, and whether the proposed fair dealing exceptions for the purpose of parody, satire, caricature or pastiche would become unenforceable if there was no express provision in the Copyright Ordinance (Cap. 528) limiting such private contractual terms.

Date of next meeting

5. The Chairman reminded members that the 10th meeting would be held on 3 February 2015 at 4:30 pm to continue clause-by-clause examination of the Bill.

III. Any other business

6. There being no other business, the meeting ended at 12:50 pm.

Council Business Division 4
Legislative Council Secretariat
13 March 2015

**Proceedings of the ninth meeting of
Bills Committee on Copyright (Amendment) Bill 2014
on Tuesday, 20 January 2015, at 10:45 am
in Conference Room 1 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
Agenda item I – Confirmation of minutes			
000301 – 000400	Chairman	Confirmation of minutes of meeting on 16 December 2014 (LC Paper No. CB(4)351/14-15).	
Agenda item II – Meeting with the Administration			
000401 – 002109	Chairman Ms Claudia MO Mr CHAN Chi-chuen Administration	<p>Briefing by the Administration on its response to the issues raised at the meeting on 8 December 2014 (LC Paper No. CB(4)364/14-15(01)).</p> <p>Ms Claudia MO's enquiry and the Administration's response on what constituted a "substantial part" of the underlying work in determining whether a certain act infringed copyright in the work.</p>	The Administration to follow up as per paragraph 3(a) of the minutes.
002110 – 002719	Chairman Mr Charles Peter MOK Administration	<p>Mr Charles Peter MOK's enquiry and the Administration's response on legal liability of uploading on video sharing websites copyrighted films made in the mid-20th century which were not Cantonese films and/or not produced in Hong Kong.</p> <p>The Administration advised that a copyrighted work was subject to different durations of copyright in different countries. The use of a copyright work in Hong Kong created by a person abroad would be protected under Hong Kong's copyright laws.</p>	
002720 – 003437	Chairman Ms Claudia MO Mr CHAN Chi-chuen Administration	<p>Mr CHAN Chi-chuen's enquiry and the Administration's response on the date of publishing an original dramatic work for the purpose of determining the duration of copyright.</p> <p>Ms Claudia MO's enquiry and the Administration's response on the definition of author of a film.</p> <p>The Administration advised that under section 11 of the existing Copyright Ordinance (Cap. 528), author, in relation to a work, meant the person who created it. In the case of a film, author was the producer and the principal director.</p>	

<p>003438 – 004740</p>	<p>Chairman Mr Charles Peter MOK Administration</p>	<p>Mr Charles Peter MOK's enquiry and the Administration's response on whether copyright was infringed by a user who recorded a television broadcast of a film made in the mid-20th century and uploaded the clip on a video sharing website.</p> <p>The Administration advised that although the copyright of the underlying work might have expired, the user might still infringe the copyright in the broadcast (which was protectable as a copyright work) held by the television station concerned.</p>	
<p>004741 – 010013</p>	<p>Chairman Mr Paul TSE Administration</p>	<p>Mr Paul TSE's enquiry and the Administration's response on application of the concept of domicile under the 1911 Copyright Act and 1956 Copyright Act of the United Kingdom ("UK") under Hong Kong's copyright regime.</p>	
<p>010014 – 013930</p>	<p>Chairman Mr Dennis KWOK Mr CHAN Chi-chuen Mr Charles Peter MOK Administration</p>	<p>Discussion on the Administration's response to the remaining issues raised in ALA's letter dated 7 November 2014 (LC Paper No. CB(4)364/14-15(02)).</p> <p>Mr Dennis KWOK opined that there was a need to include in the Bill an express provision limiting private contractual terms which purported to exclude or limit statutory permitted acts by a contractual party as in the case of the UK. He said that the UK Government had explained at the House of Lords that the contract override provisions would give users, consumers and businesses certainty and clarity that the new fair dealing exceptions for parody, caricature, pastiche and quotation would apply in all circumstances regardless of the terms of a contract. Without such clauses, restrictive contract terms could prevent the uses permitted by the exceptions, thus preventing benefits from being realized. The contract override provisions would ensure that, where the law provided for an exception to copyright, people would be able to rely on that law without having to work out whether there existed a contractual term to the contrary creating a whole patchwork of different legal situations.</p> <p>Mr Charles Peter MOK shared Mr Dennis KWOK's view and supported the inclusion of the proposed express provision in the Bill.</p> <p>The Administration advised that contract override, if applicable, was enforceable only between the parties privy to the contract. In practice, the</p>	

		<p>Administration did not observe any problem of users in exercising the permitted acts. Nevertheless, the Administration would closely monitor future operations of the new fair dealing exceptions when the Bill was passed and implemented as well as overseas developments in relation to statutory limitation on contract override.</p> <p>Mr CHAN Chi-chuen's enquiry and the Administration's response on the UK Government's public policy intent of including an express provision limiting private contractual terms from excluding or limiting statutory permitted acts by a contractual party.</p> <p>The Administration noted the purported policy intent of the UK to give users, consumers and businesses certainty and clarity that the exceptions applied in all circumstances regardless of the terms of a contract, but was also keenly aware of the controversies brought out doubts about the magnetic effect and the UK government's commitment to review after implementation. The Administration reiterated a few basic principles to be observed when fair dealing exceptions were to be introduced in Hong Kong. Firstly, creators and producers of creative works should receive meaningful protection, recognition and compensation to incentivise their contributions to economic and cultural development. Secondly, copyright law should reflect an appropriate balance between the rights of creators and copyright owners and the interests of consumers and other users of works, and fair dealing exceptions should be given with good public policy reasons. Thirdly, the Government should be mindful of the need to uphold the principles of freedom of contract which played a vital role in Hong Kong's free-market economy .</p>	
<p>013931 – 015839</p>	<p>Chairman Mr Paul TSE Ms Cyd HO Mr Dennis KWOK Mr MA Fung-kwok Mr CHAN Chi-chuen Administration</p>	<p>Discussion on the reasons for not including in the Bill an express provision restricting contract override as in the case of the UK, and the arguments for and against such a provision raised during the UK House of Lord's deliberation on its new fair dealing exception for parody, caricature and pastiche, as well as the reasons for not including such a provision restricting contract override in other overseas jurisdictions such as Australia and the US.</p> <p>Mr MA Fung-kwok said that he did not support the inclusion of the proposed express provision restricting contract override in the Bill as it would</p>	<p>The Administration to follow up as per paragraph 3(b) of the minutes.</p>

		<p>interfere with freedom of contract and legitimate business dealings.</p> <p>Ms Cyd HO's enquiry and the Administration's response on the application of the Unconscionable Contracts Ordinance (Cap. 458) in respect of the enforceability of private contractual terms and the effect of the proposed fair dealing exceptions for the purpose of parody, satire, caricature or pastiche in the absence of an express provision in the Copyright Ordinance limiting contract override.</p>	<p>The Administration to follow up as per paragraph 4 of the minutes.</p>
015840 – 020425	<p>Chairman Mr WONG Yuk-man Ms CHAN Yuen-han Administration</p>	<p>Mr WONG Yuk-man said that he would propose Committee Stage amendments to the proposed sections 39(2)(c) and 39(3) if his suggestions at the meeting on 6 January 2015 on the drafting of these proposed sections were not adopted by the Administration.</p> <p>Ms CHAN Yuen-han's enquiry and the Administration's response on the lack of statutory definitions for the terms "parody", "satire", "caricature" and "pastiche" in the Bill.</p> <p>The Administration advised that the terms were to be interpreted according to their ordinary and general meanings to allow flexibility for the court in adjudication. This approach followed the practice of overseas jurisdictions and reflected the consensus reached by various stakeholders during the public consultation exercise on parody conducted in 2013.</p>	
020426 – 020718	<p>Chairman Mr CHAN Chi-chuen Administration</p>	<p>Date of next meeting</p> <p>Additional meetings from March to July 2015</p>	