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Report of the Subcommittee on Copyright Tribunal Rules

Purpose

This paper reports on the deliberations of the Subcommittee on Copyright Tribunal Rules ("the Subcommittee").

Background

2. The Copyright Tribunal ("the Tribunal"), established under section 169(1) of the Copyright Ordinance (Cap. 528) ("the Ordinance"), has jurisdiction to hear and determine proceedings as specified under sections 173 and 233 of the Ordinance.¹ Section 174(1) of the Ordinance stipulates that the Chief Justice ("CJ") may make rules for regulating proceedings before the Tribunal, as to the fees chargeable in respect of such proceedings, and as to the enforcement of orders made by the Tribunal. Pursuant to paragraph 41 of Schedule 2 to the Ordinance, the Copyright Tribunal Rules (App. I, p. BF1) in force immediately before 27 June 1997 (i.e. the date on which the Ordinance (except certain provisions) came into force), so far as they are not inconsistent with the Ordinance, apply to regulate the Tribunal, subject to such necessary adaptations and modifications as may be necessary for their having effect under the Ordinance, pending rules to be made by CJ under section 174 of the

¹ Sections 173 and 233 of the Copyright Ordinance (Cap. 528) ("the Ordinance") set out the types of cases that the Copyright Tribunal has power to hear and determine, including –

- (a) disputes relating to a licensing scheme in operation or a licensing scheme proposed to be operated by a licensing body, or the refusal of grant of a licence in connection with a licensing scheme (sections 155 to 160);
- (b) disputes relating to a licence proposed to be granted by a licensing body or a licence due to expire (sections 162 to 166);
- (c) determining the award to employees for using his/her work outside reasonable contemplation (section 14);
- (d) giving consent on behalf of owners of right of reproduction of a performance or on behalf of owners of the performers' rental right (sections 213 and 213A); and
- (e) other applications.

Ordinance. Those Copyright Tribunal Rules (App. I, p. BF1), which have subsequently been amended, are contained in Cap. 528C.

Copyright Tribunal Rules

3. As the existing rules under Cap. 528C are outdated in some aspects, the Administration is committed to providing a new set of concise and user-friendly rules to modernize the practice and procedures of the Tribunal. A two-month public consultation on a new set of rules was launched in December 2014. Having considered the views received, the Administration refined the draft new set of rules and engaged relevant stakeholders for further consultation. Subsequently, in exercise of the power conferred upon him, CJ made the new Copyright Tribunal Rules ("the Rules"). The Rules were gazetted on 24 February 2017 and tabled at the Legislative Council meeting of 1 March 2017 for negative vetting. The Rules come into operation on 1 May 2017.

4. The Rules comprise 12 Parts and four Schedules, the key features of which are outlined as follows –

- (a) Part 1 contains the definitions used in the Rules and sets out the underlying objectives of the Rules. It also contains the rules requiring the Tribunal to give effect to the underlying objectives and requiring parties and their representatives to assist the Tribunal to further the underlying objectives.
- (b) Part 2 sets out the procedures for making an application to the Tribunal, the Tribunal's power to reject an application and the originator's power to amend or withdraw an application.
- (c) Part 3 sets out the procedures for responding to an application.
- (d) Part 4 sets out the requirements for publication of an application and procedure for intervening in the proceedings before the Tribunal.
- (e) Part 5 sets out the Tribunal's powers relating to case management.
- (f) Part 6 deals with the procedures for mediation.
- (g) Part 7 contains the rules relating to evidence.
- (h) Part 8 contains the rules relating to a hearing.

- (i) Part 9 contains the rules relating to the delivery of decisions, costs orders, publication of decisions, the effective date of an order and the Tribunal's powers to make corrections and clarifications.
- (j) Part 10 contains the rules relating to an appeal and a suspension of the operation of the decision appealed against.
- (k) Part 11 contains supplementary provisions, including rules on enforcement of the Tribunal's decisions, representation and rights of audience, address for service, service of documents and fees.
- (l) Part 12 repeals the existing rules (Cap. 528C) and contains a transitional provision.
- (m) Schedules 1, 2 and 3 set out the forms required under the Rules.
- (n) Schedule 4 specifies the fees chargeable in respect of the proceedings before the Tribunal.

The Subcommittee

5. At the House Committee meeting on 17 March 2017, Members agreed to form a subcommittee to study the Rules. The membership list of the Subcommittee is in **Appendix**.

6. As the deadline for amending the Rules would be the Council meeting of 29 March 2017 unless extended by a resolution of the Council, a motion, which was moved by the Chairman of the House Committee, was passed at the Council meeting of 22 March 2017 to extend the scrutiny period to the Council meeting of 26 April 2017.

7. Under the chairmanship of Hon WONG Ting-kwong, the Subcommittee held one meeting on 24 March 2017 with the Administration and completed the scrutiny of the Rules at the meeting.

Deliberations of the Subcommittee

8. Members of the Subcommittee are supportive of the Rules which seek to modernize the practice and procedures of the Tribunal. The Subcommittee's deliberations are summarized in the ensuing paragraphs.

Benefits of the Copyright Tribunal Rules

9. The Subcommittee has enquired about the benefits of having the Rules when compared to the existing rules under Cap. 528C, especially in terms of expediting the conduct of proceedings before the Tribunal.

10. The Administration has advised that it is difficult to directly compare the levels of efficiency in conducting proceedings under the Rules and the existing rules (Cap. 528C), particularly as a number of applications to the Tribunal were discontinued by the parties subsequently. Nonetheless, the Rules seek to maintain the fairness of the proceedings before the Tribunal on the one hand, and make the proceedings as flexible, convenient and cost-effective as possible in accordance with contemporary dispute resolution practices on the other. It is envisaged that the Rules will render an effective and efficient mechanism to facilitate the settlement of disputes. Compared to the existing rules under Cap. 528C, the Administration considers that the Rules are more user-friendly as a set of self-contained rules with all links and cross-references to the Arbitration Ordinance (Cap. 609) delinked, and are available in both English and Chinese, which will facilitate easier comprehension of the Rules by the public.

Advocating the use of mediation

11. Noting that one of the objectives of the Rules is to advocate the use of mediation as an alternative mode of dispute resolution to expedite dispute resolution, the Subcommittee has requested the Administration to explain the circumstances under which mediation will be promoted, at which stage of the proceedings the parties can engage in mediation, as well as the procedures for mediation.

12. The Administration has explained that the procedures for mediation are set out in rule 29 of the Rules. There are no provisions under the Rules requiring the parties to first attempt to engage in mediation before making an application to the Tribunal. The parties may engage in mediation at any stage of the proceedings by mutual consent. Given that the Tribunal is empowered to issue practice directions as appropriate under the Rules, the Tribunal may consider issuing a practice direction to provide non-binding guidance to the parties, for instance, on the stage of proceedings at which the parties may attempt mediation, after the Rules have come into operation.

13. Reiterating that many copyright users are hesitant about commencing proceedings before the Tribunal because of the high legal costs involved, Hon MA Fung-kwok is of the view that the promotion of mediation as an alternative dispute resolution should be a means of facilitating quick and cost-effective settlement in dispute resolution. The Administration has pointed out that it adopted a number of principles in formulating the Rules, particularly the exercise of active case management, promotion of the use of alternative dispute resolution and

empowerment of a single member of the Tribunal to exercise certain adjudication powers, all of which would make the proceedings as flexible, convenient and cost-effective as possible.

Use of language in the proceedings of the Copyright Tribunal

14. In relation to the use of language in the Tribunal as stipulated under rule 52 of the Rules, some members including the Chairman are concerned whether a request by a party to use an official language in any proceedings, which is different from that decided to be used by the Tribunal, will be acceded to by the Tribunal. Noting that while a party to, or a witness or any other person allowed by the Tribunal to appear on behalf of a party in, any proceedings may use either or both of the official languages (rule 52(3)(a)), the decision of the Tribunal on the official language to be used by the Tribunal is final (rule 52(1) and (2)), the Chairman has further enquired whether the practice is in conformity with Article 9 of the Basic Law, which stipulates that, in addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region.

15. The Administration has assured members that the Rules are in conformity with the Basic Law, and reference has been made to other existing legislation such as the District Court Civil Procedure (General) (Use of Language) Rules (Cap. 5A) when formulating rule 52 of the Rules. As regards the use of language by the Tribunal, the Administration has advised that, under rule 52, the Tribunal has the discretion to use either or both of the official languages in its proceedings as it considers appropriate. In deciding on the choice of official language, the paramount consideration for the Tribunal is the just, expeditious and economical conduct of the proceedings having regard to all the circumstances of the case including, for instance, any request by the parties of the proceedings. The Administration has further confirmed that, regardless of the official language chosen to be used by the Tribunal in its proceedings, it does not mean that a party or witness is restricted only to use that language in the proceedings. In accordance with rule 52(3), a party or witness may (a) use either or both of the official languages, and (b) address the Tribunal or testify in any language.² The Administration has reiterated that the Tribunal will not dismiss a party's view on the official language to be used by the Tribunal, unless with justified reasons.

Fees

16. Some members have sought elaboration on whether the fees chargeable for the types of service or matter listed in Part 2 of Schedule 4 to the Rules were comparable to those currently charged for the similar types of service or matter in

² This would include any language which is not one of the official languages.

Hong Kong's courts. The Administration has advised that the fees payable to the Tribunal have been reviewed and updated regularly in accordance with the "user-pay" principle to recover the full costs of providing the relevant services and reflect the up-to-date cost level at 2017 to 2018 price level.

Issues relating to proceedings and case management

17. Noting that under rule 10(1)(b) of the Rules, the Tribunal may reject an application if it is satisfied that the reference under section 155(1) or 162(1) of the Ordinance is premature, Hon MA Fung-kwok has enquired about the circumstances under which a reference will be considered premature. Hon WU Chi-wai has further enquired that where a reference is ruled premature and rejected by the Tribunal, whether an appeal mechanism is in place to allow a party to appeal against the Tribunal's decision.

18. The Administration has explained that rule 10 of the Rules seeks to enable the Tribunal to dispose of certain applications as appropriate (for instance, where an application discloses no reasonable ground for bringing the application or is frivolous or vexatious). Under sections 155(1) and 162(1) of the Ordinance, the terms of the licensing scheme proposed to be operated by a licensing body, and the terms on which a licensing body proposes to grant a licence may be referred to the Tribunal. Sections 155(2) and 162(2) of the Ordinance further provide that the Tribunal may decline to entertain the reference on the ground that the reference is premature. This may apply, for instance, where discussions on the terms in relation to a proposed licence or proposed licensing scheme have not reached a mature stage. Meanwhile, a party may appeal on any point of law arising from a decision of the Tribunal to the Court of First Instance under section 176(1) of the Ordinance.

19. In response to an enquiry by the Subcommittee's legal adviser as to whether there will be sanctions imposed for a person who fails to attend as a witness at a hearing of the Tribunal at the time and place specified in the summons or to answer any question or produce any document in the person's possession or custody or power that relates to any issue in the proceedings as ordered pursuant to rule 32(1) of the Rules, the Administration has advised that under the Rules, witnesses are expected to attend a hearing to give evidence or produce documents in the proceedings before the Tribunal on a voluntary basis. For instance, neutral non-parties may be asked to give evidence before the Tribunal, particularly on industry practices and customs. In light of this, the Administration considers that it is not necessary to provide under the Rules any sanctions in the event of such failure.

20. As rule 39 of the Rules provides that the Secretary of the Tribunal must arrange for a decision of the Tribunal which is delivered or recorded in writing to be published in a manner that the Tribunal directs, the Subcommittee's legal adviser has enquired as to whether written reasons for the decision will also be published as

public information and if not, the reasons for not requiring so. The Administration has explained that since written decisions of the Tribunal and the reasons for the decision (if any) will be provided to the parties concerned, publication of the reasons for a decision of the Tribunal is therefore not necessary.

21. The Administration has also clarified that while rule 41(4) of the Rules stipulates that a request for correction or clarification of the Tribunal's decision or any document produced by it must be made within seven days after the date on which the decision or document is made or produced, a party who needs more time to make such a request may apply to the Tribunal for time extension under the Rules.

22. In view of the complexity of copyright disputes, Hon WU Chi-wai has enquired about the legal qualifications and relevant experience that members of the Tribunal should possess in order to be able to deal with such disputes. The Administration has advised that the Tribunal currently consists of a Chairman, a Deputy Chairman and seven ordinary members. In accordance with section 169(2)(a) of the Ordinance, the Chairman and Deputy Chairman must be qualified for appointment as a District Judge under the District Court Ordinance (Cap. 336). The remaining seven members are currently from various sectors ranging from education, accounting, and design, etc., to ensure that the needs of different sectors may also be taken into account in a hearing before the Tribunal as appropriate.

Recommendation

23. The Subcommittee has no objection to the Rules and will not propose any amendment. The Subcommittee also notes that the Administration will not move any amendment to the Rules.

Advice sought

24. Members are invited to note the deliberations of the Subcommittee.

Subcommittee on Copyright Tribunal Rules

Membership List

Chairman	Hon WONG Ting-kwong, SBS, JP
Members	Hon WU Chi-wai, MH
	Hon MA Fung-kwok, SBS, JP
	Hon Charles Peter MOK, JP
	Hon Dennis KWOK Wing-hang
	(Total : 5 members)
Clerk	Mr Desmond LAM
Legal Adviser	Ms Wendy KAN