

立法會
Legislative Council

LC Paper No. CB(1)894/06-07
(These minutes have been seen
by the Administration)

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Bills Committee on Copyright (Amendment) Bill 2006

**Minutes of the eighteen meeting
held on Thursday, 18 January 2007, at 2:30 pm
in the Chamber of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, JP (Chairman)
Hon Margaret NG
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 Vincent FANG Kang, JP
Hon LI Kwok-ying, MH, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
Hon Patrick LAU Sau-shing, SBS, JP
- Members absent** : Hon Bernard CHAN, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Timothy FOK Tsun-ting, GBS, JP
Hon CHIM Pui-chung
Hon Albert Jinghan CHENG
- 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 Maria NG
Acting Assistant Director of Intellectual Property
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

Action

I Matters arising

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

2. The Chairman recapped that at the meeting held on 4 January 2007, the Administration was requested to provide a copy of the relevant proposed CSAs to the Legislative Council Commission on its proposal to extend the copyright exemption under the Copyright Ordinance (CO) to cover any acts done by the Legislative Council for the purposes of exercising its powers and functions pursuant to Article 73 of the Basic Law. He informed members that the Administration had issued a letter together with the proposed CSAs to the Commission on 12 January 2007 for its consideration.

II Papers issued since last meeting

- LC Paper No. CB(1)704/06-07(01) -- Submission dated 10 January 2007 from Hong Kong Educational Publishers Association (English version only)
- LC Paper No. CB(1)704/06-07(02) -- Submission dated 10 January 2007 from Oxford University Press (China) Ltd (English version only)
- LC Paper No. CB(1)727/06-07(01) -- Submission dated 12 January 2007 from Sino United Publishing (Holdings) Limited (English version only)
- LC Paper No. CB(1)727/06-07(02) -- Submission dated 12 January 2007 from International Federation of the Phonographic Industry (Hong Kong Group) Limited (English version only)
- LC Paper No. CB(1)750/06-07(01) -- Submission dated 15 January 2007 from Hong Kong Educational Publishing Co (English version only)

3. Members noted that the above submissions had been issued for the Bills Committee's information. The Chairman recapped his earlier request and reminded the Administration to provide in due course a detailed response to all submissions received for members' consideration. Meanwhile, the Bills Committee would continue clause-by-clause examination of the Bill.

III Meeting with the Administration

LC Paper No. CB(1)630/06-07(01) -- **Revised** marked-up version of the Administration's proposed Committee Stage Amendments (from clause 12 to 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

(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)

Clause 22 – Criminal liability for making or dealing with infringing articles, etc.

4. At the previous meeting, Mr Ronny TONG asked whether the drafting of proposed section 118(2E)(a) would have the effect of exempting from the criminal offence provision under proposed section 118(2A) those lawyers who were not permitted by the Legal Practitioners Ordinance (Cap. 159) to give legal advice in Hong Kong. The Administration advised that the policy intent of proposed section 118(2E) was that legal professionals who were admitted to practice law in Hong Kong and overseas lawyers who were qualified to practice overseas law, should be exempted from business end-user criminal liability for possession of infringing copies of copyright works for the purpose of providing legal advice pertaining to the copies. The proposed provision would apply to government lawyers and those in private practice, and in-house lawyers. The Administration would further revise the currently proposed CSAs to give effect to its policy intent. The Administration would also propose an additional provision to provide the relevant exemption to pupils who assisted their masters being barristers in handling cases. The Administration would seek the views of the Hong Kong Bar Association and the Law Society of Hong Kong (the Law Society) on the drafting of the proposed amendments and revert to the Bills Committee.

Admin

Clause 24 – Section added (i.e. 119B on offence of making for distribution or distributing infringing copies of copyright works in printed from contained in books, etc)

"Safe Harbour"

5. Members noted that under proposed section 119B(14), the Secretary for Commerce, Industry and Technology (SCIT) would be empowered to prescribe, by

way of regulation, numeric limits (known as "a safe harbour") within which criminalization would not occur. The regulation would be subsidiary legislation subject to negative vetting by the Legislative Council.

6. According to the Administration, the proposed "safe harbour" was to address the community's concern that information dissemination should not be adversely affected by the proposal to criminalize copying and/or distribution of infringing copies for business end-use. The proposed provision helped ensure that the proposed offence would only catch infringement activities which were significant in scale. Under the "safe harbour" formulation for newspapers, magazines and periodicals proposed by the Administration, the proposed offence would not apply if the aggregate number of infringing copies made from all copyright works concerned for distribution or distributed did not exceed 1,000 copies within any 14-day period. Newspaper publishers had counter-proposed that the aggregate number concerned should not exceed 300 copies. As for copyright works in books (including academic journals), the Administration proposed that such an offence would not apply if the total retail value of the infringing copies made for distribution or distributed within a 180-day period did not exceed \$8,000, whereas book publishers had demanded that the amount should not exceed \$3,000. The Administration had not formulated any new position but would continue to consider the views of copyright owners and users before drafting the subsidiary legislation. Pending the enactment of the subsidiary legislation to prescribe the relevant numeric perimeters, the proposed criminal offence provisions would not commerce operation. The Administration highlighted the merits of passing the primary legislation early, so that the bulk of the provisions which helped enhance copyright protection and make the copyright exemption regime more flexible could take effect upon enactment of the Bill.

7. The Chairman and Dr YEUNG Sum urged the Administration to maintain discussion with the stakeholders with a view to narrowing down their differences and working out a more acceptable "safe harbour" formulation as soon as practicable. They also urged the Administration to commence drafting of the regulations concerned in parallel. The Administration took note of members' concern.

Admin

Proposed sections 119B(3) and (14)

8. Noting that proposed section 119B(3) was an empowering provision to empower SCIT to specify the circumstances under which subsection (1) would not apply, Ms Margaret NG considered that the scope of such empowering provision should be clearly defined. This was to ensure that the subsidiary legislation to be made would be within scope and not ultra vires of the primary legislation. Dr YEUNG Sum shared her concern. In this connection, the Chairman requested the Administration to re-consider the drafting of the proposed empowering provisions in the light of members' views.

Admin

Clause 27 – Affidavit evidence

9. On the Law Society's concern that proposed sections 121(2A), (2B), (2C) and (2D), which required the affidavit to be made by or on behalf of the copyright owner, might not cover the case where a sub-licence was granted, the Administration proposed to use the formulation of "the person named in the affidavit has not been granted with a licence of the owner" in lieu of "the owner has not granted a person named in the affidavit a licence" to avoid potential legal arguments that "licence" was narrowly interpreted to mean the authorization granted directly by the copyright owner. The Administration further advised that the proposed formulation mirrored the wording used under proposed section 118(1).

Admin

10. Ms Audrey EU considered that the use of "passive voice" as currently drafted still lacked certainty and asked whether consideration could be given to re-drafting along the lines of "a licence includes a sub-licence". The Chairman suggested adding "the authorized representative" on top of the copyright owner in the provisions concerned. He requested the Administration to consider whether the drafting of the proposed provisions should be revised and to revert to the Bills Committee at the next meeting.

Arrangements for the next meeting

11. Members agreed that the 19th meeting would be held on Thursday, 25 January 2006 at 2:30 pm.

IV Any other business

12. There being no other business, the meeting ended at 4:30 pm.

Council Business Division 1
Legislative Council Secretariat
6 February 2007

**Proceedings of the eighteen meeting of the
Bills Committee on Copyright (Amendment) Bill 2006
on Thursday, 18 January 2007, at 2:30 pm
in the Chamber of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000450	Chairman	<p>(a) The Chairman informed members that the Administration had issued a letter together with the proposed CSAs to clause 16 to the Legislative Council Commission on 12 January 2007 for its consideration</p> <p>(b) Members noted the 5 submissions issued</p>	
000451 – 003404	Chairman Administration Mr Ronny TONG	<p><u>Clause 22 – Criminal liability for making or dealing with infringing articles, etc.</u></p> <p>(a) The Administration's advice that:</p> <p>(i) the policy intent of proposed section 118(2E) was that legal professionals who were admitted to practice law in Hong Kong and overseas lawyers who were qualified to practice overseas law, should be exempted from business end-user criminal liability for possession of infringing copies of copyright works for the purpose of providing legal advice pertaining to the copies. The proposed provision would apply to government lawyers and those in private practice, and in-house lawyers;</p> <p>(ii) it would further revise the currently proposed CSAs to give effect to its policy intent; and</p> <p>(iii) it would also propose an additional provision to provide the relevant exemption to pupils who assisted their masters being barristers in</p>	The Administration to follow up as stated in paragraph 4 of the minutes

Time Marker	Speaker	Subject(s)	Action Required
		<p>handling cases.</p> <p>(b) Ms Audrey EU's question as to whether the expression "sufficient evidence was adduced to raise an issue " in new section 118(2G)(a) could be replaced by "there is evidence showing "as used in the new section 118(2F) for the sake of consistency</p> <p>(c) The Administration's advice that</p> <p>(i) the expression "there is evidence showing" in the new section 118(2F) was to put beyond doubt that an evidential burden, instead of a legal burden, was placed on the defendant.; and</p> <p>(ii) the provisions "(a) sufficient evidence is adduced to raise an issue that he did not authorize the act to be done; and (b) the contrary is not proved by the prosecution beyond reasonable doubt" as proposed in new section 118(2G) were adopted in other ordinances and there were court decisions which confirmed that the above wording imposed an evidential burden on the defendant</p> <p>(d) The Administration's advice that</p> <p>(i) whether the defendant could adduce sufficient evidence to discharge his/her evidential burden would need to be determined by the court in the light of the circumstances of the case concerned, having regard to the factors stated in proposed section 118(2H) or section 119B(8) (whichever was appropriate in the case), and other relevant factors as determined by the court; and</p>	

Time Marker	Speaker	Subject(s)	Action Required
		(ii) it might not be practicable to specify in law what constituted a "sufficient number of genuine copies" or "appropriate licences" as this would depend on the needs and operation of individual enterprises.	
003405 – 003440	Chairman Administration	<p><u>Clause 23 – Penalties for offences under section 118</u></p> <p>Members raised no query</p>	
003441 – 011938	<p>Chairman Administration</p> <p>Mr YEUNG Sum</p> <p>Ms Audrey EU</p> <p>Ms Margaret NG</p> <p>ALA5</p>	<p><u>Clause 24 – Section added (i.e. 119B on offence of making for distribution or distributing infringing copies of copyright works in printed from contained in books, etc)</u></p> <p>(a) The Administration's advice that:</p> <p>(i) it had not formulated any new position on proposed "safe harbour" but would continue to consider the views of copyright owners and users before drafting the subsidiary legislation; and</p> <p>(ii) pending the enactment of the subsidiary legislation to prescribe the relevant numeric perimeters, the proposed criminal offence provisions would not commerce operation.</p> <p>(b) The Administration's advice that new section 119B(1) aimed to combat the infringing acts of copying and distribution of infringing copies of copyright works in certain printed works which were undertaken by business end-users on a regular or frequent basis resulting in financial loss to the copyright owners concerned. The literal meaning of "financial loss" should be adopted in construing the term. The concept of "significant infringement" was reflected in</p>	<p>The Administration took note of members' concern as stated in paragraph 7 of the minutes and to follow up as stated in paragraph 8 of the minutes</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>the proposed “safe harbour” perimeters within which the relevant infringing acts would not be criminalized. .</p> <p>(c) Ms Margaret NG's view that the scope of the empowering provision (proposed section 119B(3)) in the principal ordinance should be clearly defined so as to ensure that the subsidiary legislation to be made would be within scope and not ultra vires of the primary legislation</p> <p>(d) The Administration's advice that kindergartens, which were non-profit making could be exempted from the proposed business end-user copying-distribution offence under proposed section 119B(4)(b) or (c) if they were exempted from tax under section 88 of the Inland Revenue Ordinance (Cap. 112) or if they received any direct recurrent subvention from the Government. However, in line with other profit-making educational establishments, profit-making kindergartens should not be given special treatment.</p>	
011939 – 012012	Chairman Administration	<p><u>Clause 25 – Making infringing copies outside Hong Kong, etc.</u></p> <p>Members raised no query</p>	
012013 – 012134	Chairman Administration	<p><u>Clause 26 – Time limit for prosecutions</u></p> <p>Members raised no query</p>	
012135 – 015838	Chairman Administration Ms Audrey EU Mr YEUNG Sum Ms Selina CHOW	<p><u>Clause 27 – Affidavit evidence</u></p> <p>(a) The Administration's advice that:</p> <p>(i) it had proposed to use the formulation of "the person named in the affidavit has not been granted with a licence of the owner" in lieu</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>of "the owner has not granted a person named in the affidavit a licence" to avoid potential legal arguments that "licence" was narrowly interpreted to mean the authorization granted directly by the copyright owner and</p> <p>(ii) the proposed formulation mirrored the wording used under proposed section 118(1).</p> <p>(b) Ms Audrey EU's view that the use of "passive voice" as currently drafted still lacked certainty and asked whether consideration could be given to re-drafting along the lines of "a licence includes a sub-licence"</p> <p>(c) The Chairman's suggestion to add "the authorized representative" on top of the copyright owner in the provisions concerned</p>	
015839 – 015904	Chairman	Arrangements for the next meeting	