

立法會
Legislative Council

LC Paper No. CB(1)1334/06-07
(These minutes have been seen
by the Administration)

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Bills Committee on Copyright (Amendment) Bill 2006

**Minutes of the 22nd meeting
held on Thursday, 15 March 2007, at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, JP (Chairman)
Hon Margaret NG
Hon Bernard CHAN, 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 CHIM Pui-chung
Prof Hon Patrick LAU Sau-shing, SBS, JP
- Members absent** : Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Timothy FOK Tsun-ting, GBS, JP
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 Ada LEUNG
Assistant Director of Intellectual Property
Intellectual Property Department

Ms Maria NG
Senior Solicitor
Intellectual Property Department

Mr Michael LAM
Senior Assistant Law Draftsman
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

I Confirmation of minutes and matters arising

LC Paper No. CB(1)1126/06-07 -- Minutes of meeting held on 12 February 2007

The minutes of the meeting held on 12 February 2007 were confirmed.

II Papers issued since last meeting

LC Paper No. CB(1)1107/06-07(01) -- Joint submission dated 21 November 2006 from Hong Kong Cable Television Limited, International Federation of the Phonographic Industry (Hong Kong Group) Limited and Television Broadcasts Limited (English version only)

LC Paper No. CB(1)1107/06-07(02) -- Submission dated 14 December 2006 from Johnson Stokes & Master on behalf of the Hong Kong Comics & Animation Federation (English version only)

LC Paper No. CB(1)1107/06-07(03) -- Submission dated 30 January 2007 from Hong Kong Retail Management Association (English version only)

LC Paper No. CB(1)1107/06-07(04) -- Submission dated 9 February 2007 from Hong Kong Institute of Certified Public Accountants (English version only)

LC Paper No. CB(1)1107/06-07(05) -- Submission dated 14 February 2007 from Hong Kong General Chamber of Commerce (English version only)

LC Paper No. CB(1)1141/06-07(01) Submission dated 13 March 2007 from Hong Kong Video Development foundation Ltd (Hong Kong Group) Limited (English version only)

LC Paper No. CB(1)1146/06-07(01) Submission dated 14 March 2007 from International Federation of the Phonographic Industry (English version only)

LC Paper No. CB(1)1154/06-07(01) Submission dated 8 March 2007 from Hong Kong Record Merchants Association Ltd (Chinese 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)1125/06-07(01) -- Information paper on "Term of Copyright Protection" provided by the Administration

LC Paper No. CB(1)1142/06-07(01) Administration's response to deputations' submissions on the Copyright (Amendment) Bill 2006 after the Administration's introduction of the proposed Committee Stage Amendments

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

Business end-user copying/distribution offence

4. Members asked if the business end-user copying/distribution offence would apply only if the acts of copying for distribution or the acts of distribution were done in relation to the same copyright work. In response, the Administration said that new section 119B(1) of the Copyright Ordinance ("CO") sought to combat the infringing acts of making for distribution or 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. For the purpose of determining whether the infringing acts done by a business end-user were regular or frequent, the infringements done to any copyright work would be taken into account. To address the community's concern that the offence might unduly prejudice dissemination of information, no criminal liability would arise where the extent of copying or distribution did not exceed the proposed "safe harbour" perimeters. Under the proposed "safe harbour" formula, it was only when the extent of copying exceeded a given percentage of the same

book in question would the financial loss (in terms of retail revenue forgone) be counted.

Views on "Safe harbour" for copyright works in books

5. In response to members' enquiry on the proposed "safe harbour" perimeters for copyright works in books, the Administration advised that the proposed business end-user copying/distribution 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. Infringing copies made or distributed on a single occasion not exceeding 15% of the number of pages of a book, or cumulatively not exceeding 50% of a book within a 180-day period would not be counted for the calculation of the retail value. The Administration had taken great care to address the concern in the community about the impact that the offence might have on dissemination of information. Nevertheless, book publishers still considered the Administration's proposed "safe harbour" too lax. They had counter-proposed that the amount of retail value should not exceed \$3,000, and infringing copies made or distributed on a single occasion not exceeding 15% of the number of pages of a book, or cumulatively not exceeding 30% of a book within a 180-day period would not be counted for the calculation of the retail value. Mr Jeffrey LAM commented that the proposed "safe harbour" might not be easy to understand.

6. Ms Margaret NG said that copying and distribution of law books for sharing of information and internal circulation within a law firm or a set of barristers' chambers on a regular or frequent basis did not involve the willful intent to prejudice the legitimate interests of the copyright owners or other dishonest motive. However, where such act was done on a regular or frequent basis and the extent of copying/distribution exceeded the proposed "safe harbour" perimeters without authorization from copyright owners, the business end-users of the legal profession might be caught under proposed section 119B(1). She was concerned that the numerical threshold of the "safe harbour" provision might not meet the operational needs of barristers' chambers. Mr Ronny TONG shared her concern.

7. In response, the Administration stressed that the numerical threshold of the "safe harbour" provision sought to reflect the intention that only significant infringement was to be criminalized. The Administration said that the proposed offence aimed at combating the infringing acts of making for distribution and distributing infringing copies of copyright works. Hence, a person's mere act of making infringing copies for his own reference in business would not be covered under the proposed offence. The Administration further advised that existing section 54 of the CO provided copyright exemption for acts done for the purposes of judicial proceedings. However, if a business end-user needed to make a large number of copies of copyright works for distribution on a frequent or regular basis, he should acquire appropriate licences from the concerned copyright owners. Under existing CO, the Copyright Tribunal was established and empowered to hear and determine proceedings in case of disputes involving licensing schemes. To

avoid any adverse impact on business operations, the Administration had also proposed to provide statutory defence under a number of scenarios as stated in proposed section 119B(9) of the Bill.

8. On the suggestion that the acts of copying for distribution and distributing infringing copies of copyright works for purposes of internal discussion in the course of business should be exempted from the proposed offence provision, the Administration maintained its stance that such infringing activities should not be exempted from the offence if they constituted significant infringements.

9. Dr YEUNG Sum urged the Administration to maintain discussion with stakeholders with a view to narrowing down the differences between users groups and copyright owners on the proposed offence and the "safe harbour" formulation.

"Safe harbour" for distribution over Intranets or private networks

10. The Administration pointed out that distribution of copies under the new offence also covered distribution of digital copies by email or uploading the scanned copies onto the company's Intranet for access by its staff. A separate formulation for the "safe harbour" for distribution over Intranets would be considered as such electronic distribution was very different from distribution of physical copies or distribution by emails. The Administration also considered that appropriate licensing schemes to enable users to upload copies of printed works onto private networks including Intranets must be made available before the proposed offence could take effect in relation to such means of distribution. As these issues were yet to be resolved, the application of the proposed offence to private networks would be deferred and the exclusion would be specified in the regulations to be made by the Secretary for Commerce, Industry and Technology (SCIT) under new section 119B(14). Dr YEUNG SUM considered the proposed approach acceptable.

11. The Administration was yet to formulate its position on the proposed "safe harbour" for distribution over Intranets. It would consider proposals put forward by copyright owners and consult the stakeholders before determining the way forward. Since logs showing the actual number of access to an infringing copy on an Intranet might not be readily available in all cases, the local newspaper industry had suggested that a presumption should be introduced to the effect that the number of copies made for distribution or distributed would be presumed to be 10% of the number of persons who could potentially access the infringing copy uploaded on the network. If an accused charged could produce a network log showing the actual number of persons who had actually accessed the infringing copy, he could rebut the presumption. The book publishing industry, however, advised that it was not yet ready to consider the "safe harbour" for uploading infringing copies over Intranets.

12. Mr Andrew LEUNG was of the view that the presumption proposal floated by the newspaper industry should be examined with caution because criminal liability was involved. Noting that Hong Kong was making substantial progress in migrating to electronic communication and paperless transactions, Mr LEUNG considered that the proposed formulation should not be too rigid as to impede such developments.

Directors'/partners' liability

13. Mr Andrew LEUNG noted that under the Bill, the directors of the body corporate or the partners of the partnership responsible for internal management would be liable if the body corporate or partnership in question had committed an infringing act of using infringing copies in the course of business or making infringing copies for distribution/ distributing infringing copies for use in business. He reiterated his concern that the directors and partners might have substantive difficulties in guarding against the unlawful act of their employees in relation to copyright infringements. Mr Jeffrey LAM shared his concern.

14. In response, the Administration said that it had taken note of the concerns raised by small and medium enterprises. In addition to proposed section 119B(8)(b), the Administration had proposed CSAs to specify clearly that if the court was satisfied that the defendant had set aside financial resources or incurred expenditure for acquisition of a sufficient number of genuine copies of the copyright work concerned or appropriate licences to make or distribute copies of the copyright work concerned, the defendant should be regarded as having discharged the evidential burden.

IV Any other business

Arrangements for the next meeting

Admin

15. Members agreed that the 23rd meeting would be held on Tuesday, 3 April 2007 at 10:45 am. To facilitate discussion, the Chairman advised that the Administration should provide (a) a full set of revised CSAs to the Bill and (b) the response to outstanding items as stated in the list of "Issues requiring follow-up action/consideration by the Administration" prepared by the Secretariat.

16. There being no other business, the meeting ended at 10:31 am.

Council Business Division 1
Legislative Council Secretariat
11 April 2007

**Proceedings of the 22nd meeting of the
Bills Committee on Copyright (Amendment) Bill 2006
on Thursday, 15 March 2007, at 8:30 am
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000215	Chairman	(a) Confirmation of the minutes of the 20 th meeting on 12 February 2007 (LC Paper No. CB(1)1126/06-07). (b) Members noted the eight submissions issued.	
000231 – 000951	Administration Chairman	The Administration's briefing on the overseas practices and developments regarding the term of copyright protection (LC Paper No. CB(1)1125/06-07(01)). - members raised no query	
000952 – 012721	Administration Chairman Ms Audrey EU Dr YEUNG Sum Mr Andrew LEUNG Mr Jeffrey LAM Mr Ronny TONG Ms Margaret NG	(a) The Administration's response to deputations' submissions on the Copyright (Amendment) Bill 2006 after the Administration's introduction of the proposed Committee Stage Amendments (LC Paper No. CB(1)1142/06-07(01)). I Business end-user liability <u>"Safe harbour" for copyright works in books</u> (b) Ms Margaret NG's view that copying and distribution of law books for sharing of information and internal circulation within a law firm or a set of barristers' chambers on a regular or frequent basis did not involve the willful intent to prejudice the legitimate interests of the copyright owners or other dishonest motive. However, where such act was done on a regular or frequent basis and exceeded the proposed "safe harbour" perimeters and without authorization from copyright owners, business end-users of the legal profession might be caught under proposed section 119B(1). She was	

Time Marker	Speaker	Subject(s)	Action Required
		<p>concerned that the numerical threshold of the "safe harbour" provision might not meet the operational needs of barristers' chambers.</p> <p>(c) Dr YEUNG Sum urged the Administration to maintain discussion with stakeholders on the proposed offence and the "safe harbour" formulation.</p> <p>(d) The Administration's advice that the numerical threshold of the "safe harbour" provision sought to reflect the intention that only significant infringement was to be criminalized. Business end-users should acquire appropriate licences from the concerned copyright owners if they needed to make copies of copyright works for their business use.</p> <p>(e) The Administration's advice that copyright was not infringed by anything done for the purposes of judicial proceedings under existing section 54 of CO.</p> <p>(f) The Administration's clarification that exemption from business end-user possession offence would apply to a person who possessed an infringing copy of a computer program, a movie, a television drama, a musical sound recording, or a musical visual recording) for the purpose of giving legal advice in relation to the infringing copy as a lawyer as provided in proposed section 118(2E)(a).</p> <p>(g) Mr Andrew LEUNG's view that:</p> <p>(i) limited copying of a genuine copy of a book already acquired by the company (i.e. business end-user) for purposes of easy reference should not attract criminal liability; and</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(ii) the existing legislation had already provided adequate channels for copyright owners of printed works to issue civil proceedings for financial loss due to copyright infringement.</p> <p>(h) The Administration's clarification that new section 119B(1) would only apply to infringing acts of copying for distribution or distribution of infringing copies of copyright works in certain printed works undertaken by business end-users on a regular or frequent basis and resulted in financial loss to the copyright owners concerned.</p> <p><u>"Safe harbour" for distribution over Intranets</u></p> <p>(i) The Administration's advice that</p> <ul style="list-style-type: none"> (i) distribution of copies under the new offence would also cover distribution of digital copies by email or uploading the scanned copies onto the company's Intranet for access by its staff; (ii) it would be necessary to formulate a separate "safe harbour" for distribution over Intranets. Besides, appropriate licensing schemes to enable users to upload copies of printed works onto private networks including Intranets must be made available before the proposed offence could take effect in relation to such means of distribution; and (iii) the Administration would specify the deferred application arrangement, which would apply to all business end-users, in the regulations to be made by the Secretary for Commerce, Industry and Technology (SCIT) under new section 119B(14). 	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(j) Dr YEUNG SUM urged the Administration to maintain dialogue with stakeholders.</p> <p>(k) The Administration's advice that it had not taken a position on the proposed "safe harbour" applicable to distribution over Intranet and further consultation would be required on this subject, as well as the setting up of appropriate licensing schemes.</p> <p>(l) Members noted the suggestion of the local newspaper industry to adopt a presumption approach on the extent of distribution over the Intranet; and that the book publishing industry was not yet ready to consider the "safe harbour" for uploading infringing copies over Intranets.</p> <p>(m) Mr Andrew LEUNG's view that</p> <ul style="list-style-type: none">(i) the newspaper industry's proposal on the basis of presumption should be examined in a cautious manner;(ii) the Administration should continue discussion with the industries concerned; and(iii) the proposed formulation should not be too rigid so as to facilitate paperless transactions in Hong Kong. <p><u>Directors'/partners' liability</u></p> <p>(n) Mr Andrew LEUNG's concern that the directors and partners might not have the knowledge to safeguard against the unlawful act of their employees in relation to copyright infringements.</p> <p>(o) Discussion of possible scenarios in which a director/partner might be criminally liable for the offence of copying for distribution or distribution of infringing copies of copyright</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>works of certain printed work</p> <p>(p) Mr Jeffrey LAM's concern that directors and partners might fall into the criminal net inadvertently since the proposed "safe harbour" might not be easy to understand.</p> <p>(q) Mr Jeffrey LAM's suggestion that copying and distribution of books for purposes of internal reference in the course of business should be exempted from the proposed offence provision.</p> <p>(r) The Administration's advice that it had proposed CSAs to specify clearly that if the court was satisfied that the defendant had set aside financial resources or incurred expenditure for acquisition of a sufficient number of genuine copies of the copyright work concerned or appropriate licences to make or distribute copies of the copyright work concerned, the defendant should be regarded as having discharged the evidential burden.</p>	
012853 – 012931	Administration Chairman	<p>II Rental rights for film and comic books</p> <p>Members raised no query</p>	
012932 – 014709	Administration Chairman	<p>III Copyright Exemption</p> <p><u>Fair dealing for education</u></p> <p>Members raised no query</p> <p><u>Retention of section 45(2) and related amendments to section 41A</u></p> <p>Members raised no query</p> <p><u>Fair dealing for public administration</u></p> <p>Members raised no query</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p><u>Proposal to expand the composition of audience under Section 43</u></p> <p>Members raised no query</p> <p><u>Fair dealing provisions</u></p> <p>Members raised no query</p> <p><u>Permitted act for persons with a print disability</u></p> <p>Members raised no query</p>	
014710 – 015449	Administration Chairman	<p>IV Anti-circumvention provisions</p> <p><u>Defence provision under section 273A</u></p> <p>Members raised no query</p> <p><u>Rights of the creators of technological protection measures</u></p> <p>Members raised no query</p> <p><u>Exception to section 273C for time-shifting purpose</u></p> <p>Members raised no query</p>	
015450 – 015814	Administration Chairman	<p>V Parallel Importation</p> <p>Members raised no query</p>	
015815 – 020029	Administration Chairman	<p>VI Others</p> <p><u>Incorporation of requirements of the World Intellectual Property Organization (WIPO) Internet Treaties</u></p> <p>Members raised no query</p> <p><u>Time limit for prosecutions</u></p> <p>Members raised no query</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<u>Proof of absence of licence from copyright owner</u> Members raised no query	
020030 – 020145	Chairman	Arrangements for the next meeting	The Administration to follow up as stated in paragraph 14 of the minutes

Council Business Division 1
Legislative Council Secretariat
11 April 2007