

**立法會**  
**Legislative Council**

LC Paper No. CB(1)1759 /05-06  
(These minutes have been seen  
by the Administration)

Ref : CB1/BC/1/05/1

**Bills Committee on Copyright (Amendment) Bill 2006**

**Minute of the fourth meeting  
held on Friday, 12 May 2006, at 3:00 pm  
in Conference Room A of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, JP (Chairman)  
Hon NG Margaret  
Hon Mrs CHOW LIANG Suk-ye, Selina, GBS, JP  
Hon CHAN Kam-lam, SBS, JP  
Dr Hon WONG Yu-hong, Philip, GBS  
Hon Timothy FOK Tsun-ting, GBS, JP  
Hon EU Yuet-mee, Audrey, SC, JP  
Hon FANG Kang, Vincent, JP  
Hon LAM Kin-fung, Jeffrey, SBS, JP  
Hon LEUNG Kwan-yuen, Andrew, SBS, JP  
Hon WONG Ting-kwong, BBS  
Hon Ronny TONG Ka-wah, SC  
Hon LAU Sau-shing, Patrick, SBS, JP  
Hon Albert Jinghan CHENG
- Members absent** : Hon Bernard CHAN, JP  
Dr Hon YEUNG Sum  
Hon LI Kwok-ying, MH  
Hon CHIM Pui-chung
- Public officers attending** : Miss Mary CHOW  
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 Government Counsel  
Department of Justice

Ms Rayne CHAI  
Government Counsel  
Department of Justice

Mr Y K TAM  
Acting Assistant Commissioner  
(Intelligence and Investigation)  
Customs and Excise Department

**Clerk in attendance :** Miss Polly YEUNG  
Chief Council Secretary (1)3

**Staff in attendance :** Miss Anita HO  
Assistant Legal Adviser 2

Paul WOO  
Senior Council Secretary (1)3

Ms YUE Tin-po  
Senior Council Secretary (1)5

---

## I Scrutiny of the Bill

LC Paper No. CB(1)1437/05-06(01) -- Schedule of meetings for April, May and June 2006

LC Paper No. CB(1)1437/05-06(02) -- Major proposals under the Copyright (Amendment) Bill 2006

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

### Proposed meeting schedule to study the Bill

2. The Chairman invited members to consider the proposed meeting schedule to study the Bill (LC Paper No. CB(1)1437/05-06 issued on 9 May 2006) aimed at completing scrutiny and enactment of the Bill before the end of the current legislative session. In response to the Chairman, the Deputy Secretary for Commerce, Industry and Technology (Commerce and Industry) confirmed that the Administration hoped that the Bill could be enacted as early as possible, hopefully within the 2005-06 session. Apart from obviating the need for another extension of the validity of the suspension arrangement which was due to expire in end July 2006, early enactment of the Bill would also enable copyright owners and the community to benefit as soon as possible from a stronger copyright protection and a more flexible copyright exemption regime. She further said that the Bill was the result of more than two years of extensive consultation and discussion with interested parties and the major proposals therein sought to strike a balance between the interests of various stakeholders. In this connection, members recalled that the Bill was introduced into the Council on 29 March 2006 and noted that in accordance with the schedule of two meetings per week from April to June 2006 (LC Paper No. CB(1)1437/05-06(01)), the last meeting was scheduled to be held on 19 June 2006. If the Bill was to resume the Second Reading debate on 12 July 2006 (i.e. the last Council meeting for 2005-06), then, the Bills Committee would need to report to the House Committee on 23 June 2006.

3. Ms Margaret NG, Mr Ronny TONG, Mr Andrew LEUNG, Dr YEUNG Sum and Mr Patrick LAU were not in favour of committing the Bills Committee to a hectic meeting schedule in order to complete scrutiny and enactment of the Bill, which was complex and controversial, within a tight timeframe of less than two months. They stressed the need for thorough deliberation and prudent study of the policy and legal aspects of the Bill. Summing up, the Chairman said that it was the consensus of the Bills Committee that scrutiny of the Bill should proceed at the normal pace. He suggested and members agreed that meetings should be scheduled at regular intervals of about two to three weeks. As it would be most unlikely that scrutiny of the Bill could be completed before the end of the current legislative session, the Chairman asked the Administration to consider preparing the necessary resolution to extend the validity period of the

Copyright (Suspension of Amendments) Ordinance 2001 for a further period of 12 months.

- Clerk 4. The Chairman requested the Clerk to revise the overall meeting schedule of the Bills Committee having regard to members' views stated in paragraph 3 and the grouping of major proposals listed in LC Paper No. CB(1)1437/05-06(02).

*(Post-meeting note: The revised schedule of meetings together with the major proposals under the Copyright (Amendment) Bill 2006 were circulated to members vide LC Paper No. CB(1)1513/05-06(01) and (02) on 18 May 2006)*

## **II Meeting with the Administration**

- LC Paper No. CB(1)1437/05-06(03) -- The Administration's response to issues raised at the meeting on 25 April 2006 : "Reading out newspaper articles in radio broadcast programmes"
- LC Paper No. CB(1)1437/05-06(04) -- Administration's response to deputations' views raised at the meeting on 8 May 2006 : (I) Criminal liability against making or dealing in infringing articles etc. (II) Business end-user liability
- LC Paper No. CB(1)1437/05-06(05) -- Administration's response to deputations' views raised at the meeting on 8 May 2006 : (I) Rental rights for films and comic books (II) Issues relating to the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty
- LC Paper No. CB(1)1437/05-06(06) -- Administration's response to deputations' views raised at the meeting on 8 May 2006 : Parallel importation

Other relevant papers as listed in the Appendix of the agenda.

Reading out newspaper articles in radio broadcast programmes

5. Members noted the Administration's advice that the reading out or "citation" of newspaper articles in radio programmes might lead to copyright infringement. However, depending on the facts of the case, the act might be permitted if it amounted to (a) fair dealing for the purpose of criticism or review, (b) fair dealing for the purpose of reporting current events, or (c) public reading of a reasonable extract (i.e. permitted acts under sections 39 and 68 of the Copyright Ordinance). Some members considered that it would be in the interest of the public that such an act be permitted, and suggested that it should be stated clearly in the law that the act did not amount to copyright infringement so as to remove uncertainty. Members noted that the Bill did not seek to amend the sections in question but still requested the Administration to consider the suggestion in due course

Admin

Business end-user liability

*Business end-user copying/distributing offence*

6. On the Hong Kong Professional Teachers' Union (HKPTU)'s suggestion to also exempt certain private kindergartens which were not subvented by the Government from the proposed business end-user copying/distributing offence, the Administration had advised that kindergartens which were exempted from tax under section 88 of the Inland Revenue Ordinance (IRO) would be exempted from the offence even if they did not receive any direct subvention from the Government. The Chairman, however, doubted if some non-profit making private kindergartens might not be exempted from tax under section 88 of IRO, and hence, not exempted from the proposed copying/distributing offence. The Administration was requested to provide a response after seeking HKPTU's clarification.

Admin

*"Safe harbour"*

7. Members noted that the new criminal offence against making or distributing infringing copies of four kinds of printed works (including books, magazines, periodicals and newspapers) would not apply if the extent of infringement did not exceed a limit (also known as "safe harbour") to be prescribed under the regulations to be made by the Secretary for Commerce, Industry and Technology.

8. The Chairman and Dr YEUNG Sum urged the Administration to continue discussion with the industries concerned (mainly the publishing industry) on the proposed numerical perimeters for the proposed business end-user/distributing offence for printed works with a view to working out an acceptable "safe harbour" formulation. This would facilitate the introduction of the subsidiary legislation and scrutiny of the proposed sections of the Bill at a later stage. The Administration undertook to maintain dialogue with the industries on its proposal. The Chairman also considered it useful if the Administration could make

Admin

available a draft of the subsidiary legislation for the Bills Committee's information.

*Directors' and partners' criminal liability*

9. Members noted that under the Bill, the directors of the body corporate or the partners of the partnership responsible for internal management would also be liable if the body corporate or partnership in question had committed an infringing act of using infringing copies of copyright works in the course of business, unless there was evidence showing that the directors/partners had not authorized the infringing act.

10. Mr Andrew LEUNG said that small and medium enterprises (SMEs) respected intellectual property rights. However, they might not have the necessary resources and knowledge to safeguard against the unlawful act of their employees in relation to copyright infringements. He recapped the concerns of SMEs about the possible shift of burden of proof to the defendant and the difficulty for the directors/partners to rebut the presumption. Mr LEUNG was also concerned that the proposed provision had in fact contravened the presumption of innocence under the common law principle.

11. Dr YEUNG Sum noted with concern that according to the submission of the Consumer Council (CC), it had grave reservation over the reversed burden of proof. CC considered that the provisions were not only too harsh on directors and partners, but had also fundamentally changed the element of the criminal justice system.

12. Mr WONG Ting-kwong pointed out that directors/ partners of SMEs might not be well-versed in information technology; nor were they always capable of distinguishing whether the work in question was an infringing copy or a genuine version. In addition, the persons responsible for internal management might not be in a position to exercise control over all the acts of their staff in the course of business. Mr WONG considered that it might be possible for infringing copies of software to be installed in computers at the workplace without the knowledge of the management.

13. Mr Andrew LEUNG and Mr WONG Ting-kwong considered that to be fair to business concerns, especially SMEs, and to safeguard the interests of copyright owners, the Administration should continue to strengthen enforcement actions against business end-user piracy and raise the penalty level, instead of proposing to impose a criminal liability on directors/partners.

14. In response, the Administration explained that the current proposal aimed to promote corporate accountability and responsible governance to prevent business end-user piracy. Past enforcement experience had revealed that it was not easy for the prosecution to prove that the offence had been committed with the consent or connivance of, or to be attributable to any act on the part of, the director or the

partner concerned under existing section 125 of the Copyright Ordinance. Members were assured that under the current proposal, the burden of proof on the defendant was only an evidential burden. The defendant would have discharged the evidential burden if he could adduce sufficient evidence to raise an issue that he did not authorize the infringing act in question. If the court was satisfied that the defendant had adduced sufficient evidence to raise an issue with respect to that fact, it would still be necessary for the prosecution to prove beyond reasonable doubt that the defendant had authorized the infringing act in question for an alleged offence to be substantiated. If the prosecution failed to do so, the defendant would absolve his liability.

15. At members' request, the Administration would provide the following information:

- (a) overseas legislative provisions on directors'/partners' liability for the misconduct of their corporate/partnership;
- (b) similar provisions imposing an evidential burden on the defendant found in existing local Ordinances, together with the levels of penalty prescribed under these Ordinances;
- (c) the justifications for introducing the proposed directors'/partners' liability and the evidential burden of proof for copyright-related offences ; and
- (d) comments on CC's views that the reversed burden of proof was not only too harsh on directors and partners but amounted to a fundamental change of the element of the criminal justice system.

The Chairman also asked ALA2 to provide further advice if necessary.

*(Post-meeting note: The Administration's response was circulated to the Bills Committee on 30 May 2006 (LC Paper No. 1635/05-06(01).)*

#### Arrangements for the next meeting

16. Members agreed that the 5<sup>th</sup> meeting of the Bills Committee would be held on Tuesday, 23 May 2006 at 10:45 am. The two meetings previously scheduled on 16 and 18 May 2006 at 8:30 am would be cancelled.

### **III Any other business**

17. There being no other business, the meeting ended at 5:33 pm.

Council Business Division 1  
Legislative Council Secretariat  
14 June 2006



**Proceedings of the forth meeting of the  
Bills Committee on Copyright (Amendment) Bill 2006  
on Friday, 12 May 2006, at 3:00 pm  
in Conference Room A of the Legislative Council Building**

| <b>Time<br/>Marker</b> | <b>Speaker</b>  | <b>Subject(s)</b>   | <b>Action<br/>Required</b>   |
|------------------------|---|---|--|
| 000000 – 002359        | Chairman<br>Administration<br>Ms Margaret NG<br>Mr Ronny TONG<br>Mr Andrew LEUNG<br>Dr YEUNG Sum<br>Mr Partrick LAU | (a) Discussion of the proposed schedule to study the Bill (CB(1)1437/05-06)<br><br>(b) The consensus of the Bills committee that scrutiny of the Bill should proceed at the normal pace and meetings would be scheduled at regular intervals of about two to three weeks  | The Administration to follow up members' request as stated in paragraph 3 of the minutes<br><br>The Clerk to revise the overall meeting schedule of the Bills Committee as stated in paragraph 4 of the minutes. |
| 002400 – 004149        | Chairman<br>Administration<br>Dr YEUNG Sum<br>Mr CHAN Kam-lam<br>Ms Margaret NG<br>Mr Ronny TONG                    | (a) The Administration's advice that the reading out or "citation" of newspaper articles in radio programmes might lead to copyright infringement<br><br>(b) Members' views that it would be in the interest of the public that such an act be permitted<br><br>(c) Members' suggestion to state clearly in the law that the act did not amount to copyright infringement so as to remove uncertainty | The Administration to note members' suggestion for consideration in future.  |

| Time Marker     | Speaker                                   | Subject(s)  | Action Required  |
|-----------------|---|---|--|
| 004150 – 010445 | Chairman<br>Adminstration<br>Dr YEUNG Sum | <p>(a) The Administration's response to deputations' views raised at the meeting on 8 May 2006</p> <p>(b) New criminal offence against making for distribution or distributing infringing copies of printed works including books, magazines, periodicals and newspapers</p> <p>(c) The Administration's advice that:</p> <p>(i) because of the nature of printed works, criminalizing the possession of a photocopy of any printed works in the course of business (which already attracted civil liability under the existing law) was impracticable; and</p> <p>(ii) the introduction of the proposed new criminal offence against making for distribution or distributing infringing copies of four kinds of printed works by business end-users would strike a balance between user groups and copyright owners.</p> | The Administration undertook to maintain dialogue with the industries concerned on the proposal as stated in paragraph 8 of the minutes. |

| Time Marker     | Speaker  | Subject(s)  | Action Required  |
|-----------------|--|---|--|
|                 |  | (d) Members' views that the Administration should continue discussion with the industries concerned (mainly the publishing industry) on the proposed numerical perimeters for the proposed business end-user/distributing offence for printed works with a view to working out an acceptable "safe harbour" formulation |  |
| 010446 – 011616 | Chairman Administration<br>Dr YEUNG Sum  | (a) The Hong Kong Professional Teachers' Union (HKPTU)'s concern that certain private kindergartens, although not subvented by the Government, should also be exempted from the proposed business end-user copying/distributing offence   | The Administration to provide a response after seeking HKPTU's clarification                 |
| 011617 – 012034 | Chairman Administration<br>Dr YEUNG Sum  | (a) Acts restricted by copyright in a work as provided in section 22 of the Copyright Ordinance<br><br>(b) Reprographic copying made by educational establishments of passages from published works   |  |
| 012035 – 015104 | Chairman Administration<br>Mr Andrew LEUNG<br>Dr YEUNG Sum<br>Mr WONG Ting-kwong | Directors' and partners' criminal liability and the onus of proof   | The Administration to provide the information as required under paragraph 15 of the minutes. |

| <b>Time Marker</b> | <b>Speaker</b>   | <b>Subject(s)</b>  | <b>Action Required</b> |
|--------------------|--|--|------------------------|
| 015105 – 015300    | Chairman   | Arrangements for the next meeting  |                        |
| 015301 – 015729    | Chairman<br>Administration<br>Mr WONG<br>Ting-kwong          | Defence for employees and exemptions for certain professionals in respect of business end-user criminal liability  |                        |
| 015730 – 020423    | Chairman<br>Administration<br>Dr YEUNG Sum<br>Mr Timothy FOK | (a) Period of criminal liability for parallel importation<br><br>(b) Objection raised by the film and music industry to the proposed shortening of the period of criminal liability for parallel importation from 18 months to 9 months<br><br>(c) Importance of fostering the development of creative industries in Hong Kong |                        |