

立法會
Legislative Council

LC Paper No. CB(1)1975/08-09
(These minutes have been seen
by the Administration)

Ref : CB1/BC/4/08

Bills Committee on Copyright (Amendment) Bill 2009

**Minutes of the first meeting on
Thursday, 21 May 2009, at 2:30 pm
in Conference Room B of the Legislative Council Building**

- Members present** : Dr Hon Samson TAM Wai-ho, JP (Chairman)
Hon Albert HO Chun-yan
Dr Hon Margaret NG
Hon CHAN Kam-lam, SBS, JP
Hon LEUNG Yiu-chung
Hon Miriam LAU Kin-yee, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Hon Paul TSE Wai-chun
- Member absent** : Hon Timothy FOK Tsun-ting, GBS, JP
- Public officers attending** : Commerce and Economic Development Bureau

Mr Christopher K B WONG
Deputy Secretary for Commerce and Economic Development
(Commerce and Industry)

Ms Bonnie YAU
Principal Assistant Secretary for Commerce and Economic
Development (Commerce and Industry)

Mr Bill LI
Assistant Secretary for Commerce and Economic
Development (Commerce and Industry)

Intellectual Property Department

Ms Ada LEUNG
Assistant Director of Intellectual Property

Mr Thomas TSANG
Senior Solicitor

Department of Justice

Mr Michael LAM
Senior Assistant Law Draftsman

Ms Rayne CHAI
Senior Government Counsel

Customs and Excise Department

Mr Edmond CHENG
Head of Intellectual Property Investigation Bureau

Clerk in attendance : Ms YUE Tin-po
Chief Council Secretary (1)3

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser 2

Ms Annette LAM
Senior Council Secretary (1)3

Action

I. Election of Chairman

Dr Hon Samson TAM Wai-ho was elected Chairman of the Bills Committee.

II. Meeting with the Administration

LC Paper No. CB(3)525/08-09 -- The Bill

LC Paper No. CB(1)1638/08-09(01) -- Marked-up copy of the Bill prepared by the Legal Service Division

- Ref: CITB 07/09/22 -- Legislative Council Brief on "Copyright (Amendment) Bill 2009" issued by the Commerce and Economic Development Bureau
- LC Paper No. LS59/08-09 -- Legal Service Division Report
- LC Paper No. CB(1)1639/08-09(01) -- Background brief prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1639/08-09(02) -- Letter from Assistant Legal Adviser to the Administration dated 11 May 2009
- LC Paper No. CB(1)1639/08-09(03) -- Administration's paper dated 18 May 2009 in response to letter from Assistant Legal Adviser as set out in LC Paper No. CB(1)1639/08-09(02)

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

III. Any other business

Public consultation

3. Members agreed to invite the Hong Kong Copyright Licensing Association representing major newspaper and magazine publishers, and the Hong Kong Reprographic Rights Licensing Society representing major book and journal publishers as well as other stakeholders to give views to the Bills Committee at the next meeting. The Chairman requested members to notify the Clerk if they wished to invite any organizations to the meeting. It was also agreed that a general notice would be posted on the website of the Legislative Council to invite submissions. In accordance with the general practice, invitation would be extended to the 18 District Councils.

Date of next meeting

4. The Chairman instructed the Secretariat to consult members on the meeting date and notify members of the meeting arrangements in due course.

(Post-meeting note: With the concurrence of the Chairman, the next meeting was scheduled for Tuesday, 9 June 2009 at 2:30 pm to meet with deputations and the Administration.)

5. There being no other business, the meeting ended at 4:05 pm.

Council Business Division 1
Legislative Council Secretariat
19 June 2009

**Proceedings of the first meeting of
Bills Committee on Copyright (Amendment) Bill 2009
on Thursday, 21 May 2009, at 2:30 pm
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000000 - 004010	Mr Albert HO Ms Miriam LAU Dr Samson TAM Mr Andrew LEUNG	Election of Chairman	
004011 - 013259	Chairman Administration Assistant Legal Adviser (ALA) Mr Albert HO Dr Margaret NG Mr CHAN Kam-lam Mr LEUNG Yiu-chung Ms Miriam LAU Ms Audrey EU Mr Andrew LEUNG Mr WONG Ting-kwong Mr Ronny TONG Ms Cyd HO Sau-lan Mr Paul TSE	<p>Briefing by the Administration</p> <p>(a) <u>Enforceability of the copying and distribution offence</u></p> <p>Members' concern about the following-</p> <p>(i) possible loopholes and grey areas creating enforcement difficulties and problems (such as copying but not distributing, and separate copying by a number of "persons" each not exceeding the prescribed numeric limits); and</p> <p>(ii) the difficulty in proving different elements of the copying and distribution offence given the high standard of proof (beyond reasonable doubt) required under criminal law; and</p> <p>(iii) whether the criminalization of business-end user copying and distribution offence was necessary, or alternatively, the infringing acts could be dealt with through civil proceedings in the form of a fine. Mr Albert HO's suggestion that while the copying and distribution of infringing copies of copyright works as core business (for the purpose of business) would attract criminal liability, infringing acts or activities incidental to or marginally related to business could be dealt with through civil proceedings.</p> <p>The Administration's response as follows:</p> <p>(i) the Copyright Ordinance was amended in 2000 making possession of an infringing copy of any type of copyright works for use in business a criminal offence. There emerged widespread community concern that the new criminal provision were too wide and might</p>	

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		<p>hamper dissemination of information. In view of that, the Copyright (Suspension of Amendments) Ordinance 2001 was enacted in June 2001 to suspend the offence except where it applied to computer programs, movies, television dramas and musical recordings;</p> <p>(ii) during subsequent consultations in 2003 and 2005, the publishing industry requested that business end-user criminal liability should be reinstated for printed works to better safeguard the interests of copyright owners;</p> <p>(iii) after extensive consultation with relevant stakeholders, the Administration proposed in 2006 that a new business end-user copying/distribution offence, which was limited to infringing acts committed on a regular or frequent basis in respect of printed works, should be introduced. The offence was proposed to be qualified by a set of numeric limits within which the offence would not apply;</p> <p>(iv) copying a copyright work or distributing its infringing copies to users without the authorization of the owner and without any lawful excuse could amount to an infringement of copyright that would entail civil liability. Business end-users were encouraged to refrain from such activity or conduct, regardless of whether there may also be potential criminal liability;</p> <p>(v) business end-users were encouraged to respect intellectual property rights and to obtain authorization from copyright holders under the licensing scheme; and</p> <p>(vi) while enforcement of the offence would not be free from difficulties, there was a fair chance of successful prosecution depending on the evidence available in the circumstances.</p> <p>Ms Miriam LAU's concern whether an individual, in the conduct of his/her daily life, would fall within the scope of the new copying/distribution</p>	

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		<p>criminal provisions.</p> <p>The Administration's response that the new criminal provision was intended for business-end users only. Moreover, the offence would not apply if the making or distribution of the infringing copies was not done on a regular or frequent basis or did not exceed the prescribed numeric limits. Enforcement action would be targeted mainly at significant infringement committed by business-end users on a regular and frequent basis.</p> <p>(b) <u>Numeric limits</u></p> <p>The Administration advised that the numeric limits would be prescribed in a Schedule to the principal legislation. The limits were drawn up after extensive discussion with the relevant stakeholders over the past two years having regard to the need to maintain a reasonable balance between the interests of copyright owners and business end-users.</p> <p><u>Newspapers, magazines and periodicals (other than specified journals)</u></p> <p>In response to members' enquiry about the revised numeric limits from 1 000 copies to 500 A4 size pages, and the method used to convert the number of infringing pages which contain an enlarged/a reduced image of the original copyright work, the Administration explained that a counting method based on a readily quantifiable unit (i.e. A4 size pages) rather than "copyright work" was proposed to provide greater certainty. As the industry advised that on average one A4 size page would normally contain two articles, it was proposed that the numeric limit should accordingly be pitched at 500 A4 size pages. In the case of infringing pages with an enlarged/a reduced image of the original copyright work, the original size of the copyright work would be used as the basis for adjusting/calculating the number of infringing pages.</p> <p><u>Books and specified journals</u></p> <p>In response to members' enquiry about the reason for lowering the maximum total retail value from</p>	

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		<p>\$8,000 to \$6,000, the Administration explained that the initial amount of \$8,000 was proposed having regard to the threshold of US\$1,000 adopted in the US for a similar criminal offence. However, the publishing industry advised that the average book price in Hong Kong was about 30% of that in the US, and counter-proposed to set the numeric limit at \$3,000. After extensive discussion, a compromise was reached to set the numeric limit at \$6,000.</p> <p>On members' enquiry about the method for determining the retail value of qualifying copies made from books and specified journals given that books/specified journals of different editions and binding (e.g. in soft/hard cover) would have different prices, the Administration advised that the total retail value would be calculated based on the retail price as printed by the publisher in or on a copy of the book/specified journal which was comparable to that used as the source for making copies for distribution.</p> <p>Members' and ALA's concern that there was no provision in the Amendment Bill or the Ordinance for determining the exchange rate of a foreign currency that would be used in calculating the total value in Hong Kong-dollar equivalent of qualifying copies of a book/specified journal denominated in foreign currencies. In view of currency fluctuation, members' view was that the method for determining the exchange rate of a foreign currency should be specified in the Bill to provide greater certainty.</p> <p>The Administration explained that as the copying and distribution offence would most likely take place over a period of time, it was anticipated that the enforcement agency, in most cases, would only be able to determine by circumstantial evidence the period of time in which the offence was committed rather than identifying the exact day and timing during which a particular book or specified journal was copied, or an infringing copy was distributed. As such, any standardized method (which would likely refer to a prescribed and time-specific exchange rate), if prescribed at all, might not be able to accommodate the circumstances of individual cases.</p>	

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		<p>As some books/specified journals (such as professional book/academic journal) might be more expensive, Mr Ronny TONG considered that to ensure fairness, a proportion of the price of the book/specified journal in question, rather than a fixed monetary value, should be set as the threshold.</p> <p>(c) <u>Exemption</u></p> <p>Mr LEUNG Yiu-chung and Ms Cyd HO sought clarification on whether institutions running re-training for re-employment programmes, non-profit making social service organizations and non-governmental organizations (NGOs) were covered by the exemption provisions. Members' view was that these set-ups should be exempted.</p> <p>The Administration's advice that the business end-user copying and distribution offence would not apply to a set-up that satisfied any of the descriptions under section 119B(4) (namely, an educational establishment specified in section 1 of Schedule 1, exempt from tax under section 88 of the Inland Revenue Ordinance, or receiving direct recurrent subvention from the Government). The Administration reiterated that the making and, where appropriate, distribution of infringing copies of copyright works without the authorization of the copyright owners and any lawful excuse was of itself an infringement of copyright that would entail civil liability. Business end-users were encouraged to obtain authorization from the copyright-holders under the licensing scheme.</p> <p>(d) <u>Works in electronic forms and distribution by electronic means</u></p> <p>On members' enquiry whether the new criminal provision would apply to the electronic version of printed works (for example, an E-book), the Administration clarified that the offence would apply to printed copyright works only. As regards the enquiry on distribution by electronic means, the Administration confirmed that the offence covered distribution by email, e-fax etc. On the other hand, section 119B(5) excluded distribution through a wire or wireless network of</p>	

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		<p>an infringing copy to which access was not restricted by procedures of authentication or identification. Moreover, to allow more time for relevant copyright owners to roll out suitable licensing arrangements covering Intranet distribution, the copying and distribution offence would not apply to Intranet distribution in the meantime.</p> <p>(e) <u>Defence provisions</u></p> <p>In response to members' enquiry about defence provisions for business end-users (such as directors/partners and employees), the Administration advised that statutory defence was provided under section 119B(14). It would be a defence if the person charged with the offence could prove that he (a) had taken adequate and reasonable steps to obtain a licence, but failed to receive a timely response; (b) could not, after making reasonable efforts, obtain commercially available copies and could not obtain a licence on reasonable commercial terms; (c) did not know and had no reason to believe that the copies he made or distributed had infringed copyright; or (d) could not, after making reasonable enquiries, ascertain the identity and contact details of the copyright owners. Statutory defence was available under section 119B(15) to an employee to prove that he did the act in the course of his employment, and in accordance with the instruction given to him by or on behalf of his employer in the course of his employment.</p>	
013300 - 013817	Chairman Administration	Public consultation Meeting arrangement	