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BY EMAIL (co_ctr@ipd.gov.hk)
AND BY POST

Dear Ms. ~~Leung,~~

Consultation Paper on Draft Copyright Tribunal Rules

After studying the Consultation Paper on the Draft Copyright Tribunal Rules, the Intellectual Property Committee of the Law Society has some preliminary observations and questions. We believe that it would be more effective and constructive if the Intellectual Property Department could arrange for us to meet with the responsible draftsmen to discuss the issues.

Our preliminary observations on the Draft Copyright Tribunal Rules are set out as follows:-

1. We are pleased to note that certain features we suggested in 2009 were adopted:-
 - (a) The parties can explore alternative dispute resolution although we note that mediation is not compulsory and will not constitute a 'special circumstance' for an award of costs.
 - (b) The Tribunal may regulate its own procedures and issue guidelines (R29) and we note that there is no policy intent to make the use of practice directions mandatory under the Rules.
 - (c) The Tribunal can determine a matter without an oral hearing under certain circumstances (R35(4)).

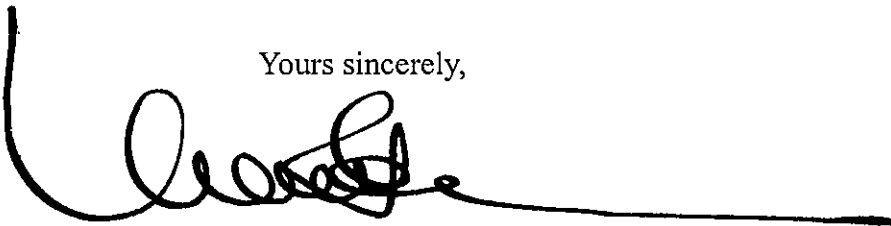
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- (d) Matters not involving the final determination of an application may be heard and determined by the Chairman, the Deputy Chairman or a suitably qualified member. We note that these individuals have to be qualified for appointment as a District Court Judge (R36 and ss 169(2)(a) and 172(1A) Copyright Ord).
 - (e) The Rules are self-contained and no longer include references to the Arbitration Ordinance.
2. After considering the definition of “representative” and R46(5), it appears to us that an agent for a party does not automatically have a right of audience before the Tribunal. We would like to know if our interpretation is correct and the rationale behind this. And what are the criteria for a person get to be “allowed by the Tribunal to appear” under that rule?
 3. Whilst applications can be withdrawn (R12), there seems to be no rules to allow Responses or Interventions to be withdrawn.
 4. What is the effect of a proceeding being “uncontested” by the respondent under R13(3)? Can the applicant proceed to request the Tribunal to make a decision in its favour, like seeking a judgment by default in a litigation before the courts?
 5. We would like to know the channel by which an application to the Tribunal will be published (R18). This should be made clear so that parties who may be interested to intervene can watch out the relevant publication and put in their request within the 28 days time limit.
 6. We note that the Tribunal’s power under R26(4)(h) is wide and the Tribunal can specify the scope and nature of evidence. We suppose that where expert evidence is required, the Tribunal may impose upon the parties to try to jointly engage an expert unless this is impractical or prejudicial to a party. However, in order to better manage the parties’ expectations, it may be better to expressly include in the Rules the possibility for the appointment of a joint expert whose duties are owed to the Tribunal instead of the respective parties.

7. Likewise, the Tribunal's powers under R26(1)(b) is wide and the Tribunal can give any order or direction that it thinks fit to secure the just, expeditious and economical conduct of the proceedings. We suggest it may still be appropriate to expressly refer to the Tribunal's powers to administer interrogatories and to allow the parties to do so too.
8. It is not clear to us whether under R28, after a party is debarred from taking further part in the proceeding without the leave of the Tribunal and the Tribunal may give any consequential orders or directions it thinks necessary, the Tribunal can proceed to deliver a decision?
9. Please explain the reason why the Tribunal's appointment of a mediator shall not be appealable (R30(4))?
10. R31 says that the Tribunal is not bound by rules of evidence in any proceedings. R33(3) goes on to say that a person may not refuse to give any evidence or produce any document on the ground only that the evidence or document would not be admissible in a court of law. Does that mean that the Tribunal can ask a party to produce privileged documents or incriminating evidence?
11. R35(2) stipulates that the Tribunal should give at least 14 days' notice of an oral hearing. While we appreciate the Tribunal's desire to expedite the process, 14 days seems far too short for proper preparation especially if a party is overseas and if legal representation is required by any party.
12. We understand and agree that the system is so designed that costs will only be awarded under special circumstances (R39). The 'special' circumstances are indeed 'special' save and except (R39c) when a party has contravened a requirement of the Rules or an order or a direction given by the Tribunal. Given the active case management contemplated, it seems that most of the objectives (R3) - cost-effectiveness, expedition, fairness and fair distribution of Tribunal resources are achieved through cost-sanctions. We therefore wonder if this is indeed in line with the original intention that costs should not be a deterrent to parties hoping to use the Tribunal system.

13. Currently, it is much easier to bring in non-UK counsel to have a right of audience before the Tribunal (R46). As we previously suggested, the restrictions under the Legal Practitioners Ordinance should be relaxed and this should be specifically allowed under these Rules.
14. Given that there are likely more potential applicants than respondents, we believe it may be helpful for prospective applicants to learn and understand more about past references in order to minimize repeated futile arguments or redundant points being raised. We therefore suggest that in addition to allowing the public to search and see only the application to the Tribunal and the written decision (R52), this should be extended to include Responses, Interventions and their amended versions.
15. In addition to the original version, we suggest that the amended Application, Response and Intervention should also be verified by a Statement of Truth.

Yours sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'Ivy Chow', with a long horizontal line extending to the right.

MP. Ivy Chow
Secretary to the Intellectual Property Committee
The Law Society of Hong Kong