

CONSULTATION PAPER ON COPYRIGHT TRIBUNAL RULES

OBJECTIVE

1. This paper seeks your views on the *drafting approach and direction for the new Copyright Tribunal Rules to be made pursuant to section 174(1) of the Copyright Ordinance (Cap 528)*.

BACKGROUND

2. The Copyright Tribunal is an independent, quasi-judicial body established under the *Copyright Ordinance* (hereinafter referred to as "the Ordinance") to hear and resolve certain types of disputes relating to use/licensing of copyright works¹. The previous *Copyright Tribunal Rules* (Cap 528C) immediately in force preceding the commencement of the Ordinance have been saved by one of the transitional provisions of the current Ordinance. Insofar as these rules are not inconsistent with the Ordinance, they continue to apply, subject to such necessary modification and adaptations, to regulate proceedings before the Tribunal, until a new set of rules is made by the Chief Justice pursuant to section 174(1) of the Ordinance.
3. The Government has committed to providing a new set of concise and user-friendly rules to modernize the practice and procedure of the Tribunal with a view to not only maintaining the fairness of the proceedings but also making the proceedings as flexible, convenient and cost-effective as possible in accordance with contemporary dispute resolution practice. These new rules need to correlate with the updated statutory provisions governing the Tribunal's jurisdiction as expanded by the *Copyright (Amendment) Ordinance 2007*. The proposed new rules will be prepared by the Government for consideration by the Chief Justice.

PROPOSALS FOR CONSULTATION

4. Apart from taking into account the local development of dispute resolution, the Government has reviewed the latest overseas practice and development in the UK, Singapore and Australia. We propose adopting the

¹ More information about the Tribunal is available at <http://www.ct.gov.hk/>.

following drafting approach for the new rules –

(a) Applying the relevant principles of the Civil Justice Reform² as the fundamental value of dispute resolution before the Tribunal

The Tribunal provides a forum for just resolution of disputes under an adversarial system akin to the courts in our judicial system. We find strong merits in having the recognized value and rationale of dispute resolution built in the Tribunal's revised practice and procedure. We consider that the underlying objectives of the Civil Justice Reform, as effective from 2 April 2009, should also be made applicable to proceedings before the Tribunal. Thus we propose that the new Copyright Tribunal Rules should expressly set out the following as the underlying objectives that the Tribunal should give effect and further in adjudication: -

- i. to maximize the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Tribunal;
- ii. to ensure that each case is dealt with as expeditiously as is reasonably practicable;
- iii. to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
- iv. to ensure fairness between the parties;
- v. to facilitate the settlement of disputes; and
- vi. to ensure that the resources of the Tribunal are distributed fairly.

(b) One standard procedure and form for all types of applications/references before the Tribunal

The Tribunal has jurisdiction to entertain various types of applications/references. Instead of having different procedures and application forms for individual applications/references, it is preferable for the new rules to set down one standardized procedure and form fit for all types of applications/references. This approach seeks to minimize the complexity of the procedure thereby making the Tribunal more accessible to users – particularly unrepresented litigants.

(c) Exercising active case management

² More information about the Civil Justice Reform is available at <http://www.civiljustice.gov.hk/>.

While we are aware that the powers given to the Tribunal may not be as extensive as those to the Courts due to the former's confined jurisdiction, we consider the active case management approach adopted by the Civil Justice Reform is equally applicable to proceedings before the Tribunal. Thus we propose adopting the following measures of active case management by reference to the Civil Justice Reform so as to attain the Tribunal's underlying objectives in adjudication: -

- i. requiring use of Statements of Truth to verify the facts pleaded and evidence adduced by the parties;
- ii. empowering the Tribunal to convene case management conferences and pre-hearing reviews to give necessary/appropriate directions on conduct of proceedings;
- iii. empowering the Tribunal to remedy or sanction against non-compliance with rules or the Tribunal's orders/directions, including direction to rectify defective documents, rejection of an application in whole or in part and making cost-sanction.

(d) Promotion of Alternative Dispute Resolution (ADR)

The Civil Justice Reform advocates use of mediation (being a voluntary process of appointing a trained and neutral third party for assisting the parties to procure and reach an amicable settlement) as a mode of ADR to expedite dispute resolution. While we recognize that mediation may not be appropriate for resolving all disputes before the Tribunal, and hence should not be made compulsory in all cases, we cannot rule out mediation as a potential means of facilitating quick and cost-effective settlement in appropriate cases. In line with the modern practice in civil proceedings, we propose empowering the Tribunal when exercising its active case management power to encourage and facilitate use of mediation in appropriate cases. For instance, the Tribunal may appoint a mediator for the parties upon their request by consent and stay the proceedings pending the outcome of mediation.

(e) Empowering a single member of the Tribunal to exercise certain adjudication powers

The new section 172(1A) – added to the Ordinance by the Copyright

(Amendment) Ordinance 2007 – enables a single member of the Tribunal to hear and determine specified proceedings. The intent is to dispense with the need to empanel a fully constituted Tribunal of at least three members under Section 172(1), thereby allowing more flexible and efficient disposal of certain proceedings. To achieve this objective, we propose to provide a rule that all interlocutory applications may generally be heard singly under section 172(1A), and the presiding single member is also empowered to exercise active case management as stated in point (c) above.

(f) Use of Practice Directions to regulate proceedings, if appropriate

We propose the Tribunal be given power to issue Practice Directions from time to time to regulate its administrative matters. This approach gives the Tribunal flexibility in devising and revising certain administrative guidelines for the parties to follow, having regard to its experience in adjudicating cases.

(g) Prescribing a set of self-contained rules – de-linking all direct links/cross-references to the Arbitration Ordinance (Cap 341)

The Copyright Tribunal Rules as currently in force refer to and apply certain provisions of the *Arbitration Ordinance* to regulate proceedings before the Tribunal, because certain powers and procedures exercisable by the arbitral tribunal and the Court in arbitration cases are pertinent to cases before the Tribunal. Section 174(2) of the *Copyright Ordinance* echoes this approach. However, this approach has a major drawback: users need to cross-refer to another piece of legislation, which may be amended from time to time in future. In fact it is intended that subject to passing in the Legislative Council, the Arbitration Ordinance will soon be repealed by the *Arbitration Bill 2009*. Instead, we propose a set of self-contained rules, which will be easier to read and refer to thus more user-friendly. Accordingly, we propose that all direct links/cross-references to the *Arbitration Ordinance* (that is intended to be repealed soon) be removed from the Copyright Tribunal Rules. Having said that, we shall review the arbitration laws, particularly the provisions in the *Arbitration Bill 2009*, in formulating the new rules. Where appropriate, the new rules will contain tailor-made provisions to reflect any practices and procedures of arbitration applicable to proceedings before the Tribunal.

SUMMARY OF VIEWS SOUGHT

5. You are cordially invited to send your views on the Government's proposals as set out in paragraph 4 above **on or before 30 September 2009** for the attention of the **Director of the Intellectual Property of the Intellectual Property Department** by e-mail, fax or post at the following addresses and no: -

E-mail: co_ctr@ipd.gov.hk

Fax: 2574 9102

Address: 25/F, Wu Chung House, 213 Queen's Road East, Wanchai, Hong Kong

6. Unless you specify a reservation, we shall assume that you have licensed us to reproduce and publish your views in whole or in part in any form and to use, adapt or develop any proposals put forward without the need for permission from or subsequent acknowledgment of the party making the views/proposals.

Intellectual Property Department

31 August 2009