

立法會
Legislative Council

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by the Administration)

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**Bills Committee on
Copyright (Suspension of Amendments) Bill 2001**

**Minutes of meeting
held on Monday, 28 May 2001, at 4:30 pm
in the Chamber of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai (Chairman)
Hon Kenneth TING Woo-shou, JP
Hon Cyd HO Sau-lan
Hon Margaret NG
Hon HUI Cheung-ching
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon SZETO Wah
Hon Timothy FOK Tsun-ting, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon Eric LI Ka-cheung, JP
Dr Hon LUI Ming-wah, JP
Prof Hon NG Ching-fai
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon CHAN Kam-lam
Hon YEUNG Yiu-chung
Hon LAW Chi-kwong, JP
- Public officers attending** : Mr Kenneth MAK
Deputy Secretary for Commerce and Industry
- Mr Philip CHAN
Principal Assistant Secretary for Commerce and Industry

Mr Peter CHEUNG
Deputy Director of Intellectual Property

Ms Pancy FUNG
Assistant Director of Intellectual Property

Mr Jeffrey GUNTER
Senior Assistant Law Draftsman

Mr Michael LAM
Senior Government Counsel

Mr Vincent POON
Assistant Commissioner of Customs and Excise

Clerk in attendance : Mrs Florence LAM
Chief Assistant Secretary (1)4

Staff in attendance : Miss Anita HO
Assistant Legal Adviser 2

Mr S C TSANG
Senior Assistant Secretary (1)7

Meeting with the Administration

(LC Paper Nos. CB(1) 1359/00-01(01) to (03))

Comparison with the copyright laws in other jurisdictions

The Chairman invited the Administration to brief members on the information paper on "Criminal provisions in seven jurisdictions on copyright protection for computer programs" (LC Paper No. CB(1) 1359/00-01(03)).

2. The Deputy Secretary for Commerce and Industry (DS/CI) said that a comparison of the criminal provisions of Hong Kong on copyright protection for computer programs with those of seven other jurisdictions had been done in response to members' request at the Bills Committee meeting held on 22 May 2001. Broadly speaking, the level of protection for computer programs in these jurisdictions, including Taiwan, Korea, Singapore, India, Japan, Germany and the United States, was comparable to that in Hong Kong. All these economies provided criminal sanction against the unauthorized reproduction of a computer program. In Taiwan, Korea, India and Japan, there was criminal sanction against the use of an infringing copy of a computer program for business purposes (in India for private use as well).

The copyright protection legislation in Singapore was relatively less stringent in that a person committed an offence if he possessed an infringing copy of a computer program for the purpose of selling or distributing it, or made such an infringing copy for sale or hire.

3. Miss Margaret NG referred to the copyright legislation of the United States as set out in the Annex to the information paper and opined that the criminal provisions under the Copyright Ordinance in Hong Kong had a more extensive scope than those in the United States. In the United States, a person committed an offence if he willfully infringed a copyright for the purpose of commercial advantage or private financial gain or if he reproduced or distributed one or more copies of copyright works with a total retail value of more than US\$1,000. Thus the criminal liability was confined to circumstances where commercial gain or dealings were involved. However, with the enactment of the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (Amending Ordinance), the expression "in connection with any trade or business" had extended the scope of application to such an unacceptable extent that the possession of an infringing copy of a copyright work by non-commercial organizations would be a criminal offence.

4. Dr YEUNG Sum shared Miss Ng's view on the extensive scope of application of the criminal provisions brought about by the expression "in connection with any trade or business". He had reservations about the need for going beyond the requirement of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to criminalize the possession of infringing copies. Ms Audrey EU added that a comparison of the criminal provisions against copyright piracy between jurisdictions would not be meaningful if the relevant defence provisions were not taken into account.

5. DS/CI explained that the term "reproduction" in the Copyright Law in the United States would include the reproduction of a pirated software program through installation in a user's personal computer. The criminal liability under this provision was even more stringent than that of the Amending Ordinance as it would cover the situation where a financial motive for copyright infringement was not apparent. He added that the copyright legislation in some jurisdictions, such as India and Korea, were found to be more stringent in terms of the criminal liability of copyright infringement. The information paper, however, only provided a brief analysis of the copyright laws in overseas jurisdictions because of time constraint. The Administration planned to conduct an in-depth comparison on the relevant legislation in other jurisdictions during the suspension period so that the merits of different copyright laws could be considered in the light of the circumstances in Hong Kong.

6. Mr HUI Cheung-ching asked whether any comparison had been made between different jurisdictions of the criminal provisions in relation to the infringement of copyright works in newspapers. In response, DS/CI said that the analysis made in the information paper did not cover the infringement of copyright works in newspapers as this was already included in the scope of suspension.

Except for Korea which had more stringent provisions in respect of computer software piracy, there was no distinction on the level of protection given to different types of copyright works in the copyright legislation of the jurisdictions studied. He assured members that the Administration would study further the copyright laws in other jurisdictions in the formulation of a long-term solution to the problem.

Scope of suspension

7. Mr Kenneth TING welcomed the Administration's proposed Committee Stage amendment (CSA) in relation to the suspension of criminal provisions concerning the use of parallel-imported computer programs in business. At the same time, he sought clarification on the feasibility of relaxing the legal requirements on the sale and importation of these products through making amendments to the Copyright (Suspension of Amendments) Bill 2001 (the Bill).

8. DS/CI explained that as the Bill aimed to revert, with respect to all copyright works but subject to some exceptions, the key criminal provisions in the Copyright Ordinance to the position before the commencement of the Amending Ordinance, it would not be feasible technically to effect changes to the criminal provisions in the Copyright Ordinance which were outside the scope of the Amending Ordinance.

9. Ms Audrey EU pointed out that the views expressed by copyright owners organizations were diverse in relation to the categories of copyright works to be excluded from the scope of suspension. In addition, taking into account the complexity and the technical difficulties in drafting the provisions to exempt users of parallel-imported software in business from criminal liability, she cautioned that it would be unsafe to enact the Bill with the proposed exceptions. The expert advice of the legal profession was that a full suspension applicable to all types of copyright works would be preferable as a partial suspension would involve risks of inconsistencies in the application of the provisions.

10. Miss Margaret NG shared Ms EU's view on the extension of the scope of suspension to all types of copyright works. She drew members' attention to the submission from the Intellectual Property Committee of the Law Society of Hong Kong (LC Paper No. CB(1) 1378/00-01(03)) and pointed out that even the legal professionals had found that with the enactment of the Amending Ordinance and the proposal of the Bill, the criminal liability in respect of the possession of infringing copies was confusing and difficult to understand. In view of the inadequate understanding of copyright issues among the Hong Kong public, the implementation of the provisions in the Amending Ordinance was untimely. Hence, a full suspension would allow more time for the Administration to sort out the long-term solutions to the related problems. Moreover, she requested the Administration to review the scope of application of the expression "in connection with any trade or business". She invited members to refer to the submission from the Hong Kong Reprographic Rights Licensing Society (LC Paper No. CB(1) 1378/00-01(04)), which set out its objection to the Bill and its suggestion of narrowing the scope of criminal

provisions by suspending the expression "in connection with any trade or business" in relevant provisions of the Amending Ordinance.

11. Ms Cyd HO supported the proposal of suspending the application of the Amending Ordinance to the key criminal provisions in the Copyright Ordinance in respect of all types of copyright works. She opined that the complexity involved in effecting the exception might result in more confusion in the interpretation of the Copyright Ordinance and this would be against the original intent of the Bill, which was to alleviate public concern on the criminal liability in the use of copyright works. She urged the Administration to put more emphasis on the social and educational aspects in strengthening the protection of copyright in the territory.

12. DS/CI said that different views had been put forward by the deputations in respect of the scope of copyright works to be excluded from the suspension. In general, copyright users supported the suspension while some copyright owners, such as those in the publication industry and the television broadcasting industry, preferred to restrict the scope of suspension for better protection of their rights. He explained that the Amending Ordinance was aimed at strengthening the criminal provisions against copyright piracy in the course of business for all categories of copyright works. Nevertheless, in response to the wide public concern over the criminal liability of ad hoc copying for information dissemination or educational purposes, the Bill was proposed as an interim measure, to suspend the application of the Amending Ordinance to the key criminal provisions in the Copyright Ordinance subject to certain exceptions. The copyright works excluded from the suspension generally had substantial commercial value and normally were not "information" disseminated in enterprises or schools. Moreover, the piracy of these works in Hong Kong and elsewhere was rampant. He disagreed with Miss Margaret NG that the Law Society of Hong Kong was opposed to the exception of some copyright works from the suspension. Instead, it proposed that the relevant provisions under clause 2(2) of the Bill should be simplified, so that the drafting would be clearer.

13. As to the suggestion of suspending the expression "in connection with any trade or business", DS/CI explained that the Administration was of the view that the deletion of this expression would give rise to some other new problems. For example, the Government had publicized over the past six months that the cases which fell within the ambit of the Amending Ordinance would involve criminal liability. Deletion of the expression might create confusion among the public.

14. The Chairman drew members' attention to the table which summarized the deputation's views and the Administration's responses at LC Paper No. CB(1) 1359/00-01(02).

15. Miss Margaret NG had reservations about the Administration's view that the majority of the deputations were in support of the Bill. She pointed out that although the deputations had stated their position and expressed their concerns, most of them had not made any detailed suggestions or comments on the content or the drafting of

the Bill. She opined that a full suspension of application of the Amending Ordinance to all types of copyright works would not be against the majority views as there had not been any consensus on the categories of works to be excepted.

16. DS/CI said that some organizations, such as the Hong Kong General Chamber of Commerce and the Business Software Alliance, had clearly indicated their support to the Bill as well as the categories of copyright works to be excluded from the suspension. As for the television broadcasting industry, it was in fact seeking to narrow the scope of the suspension so that all television programmes would be excluded from the suspension. Therefore, the full suspension of all copyright works would be contradictory to the views of these deputations.

Other concerns on the drafting of CSA

17. In response to Ms Audrey EU's enquiry on the propriety of some new terms used in the Bill, such as "predominant", the Assistant Legal Advisor (ALA) said that there were inconsistencies in the terms used in the Bill and the Amending Ordinance. She urged the Administration to provide detailed examples of the cases which would fall within the scope of suspension so that the public could fully understand the criminal liability under the Amending Ordinance after the suspension.

18. DS/CI replied that the Administration had tried to adopt the terms used in the Copyright Ordinance in the drafting of the Bill except in cases where new concepts were introduced. He assured members that detailed consideration had been given to the drafting of the Bill to address the technical issues involved. He agreed that more publicity and public education on the legislation relating to the protection of intellectual property rights had to be done. The Administration would arrange for the distribution of information sheets on "frequently asked questions" to explain to the public the legal impact of the suspension.

19. The Deputy Director of Intellectual Property supplemented that the provisions in the Copyright Ordinance were in line with the international requirements on copyright protection. The drafting of the Copyright Ordinance was done with reference to the terms and expressions commonly used internationally in the context of intellectual property protection. As to the term "predominant" proposed for clause 2 (2)(c) in CSA, he pointed out that this term was not new and had been used in section 35 of the Copyright Ordinance.

Clause-by-clause examination of the Bill

Clauses 1 and 2(1)

20. Members noted the content of the clauses.

Clause 2(2)

21. Miss Margaret NG objected to the provisions under clause 2(2) as she was opposed to the arrangements of excluding some copyright works from the scope of suspension.

Subclause (2)(a)

22. Members noted the content of the subclause.

Subclause (2)(b)

23. Mr Timothy FOK referred to the joint submission from the television broadcasting industry (LC Paper No. CB(1) 1378/00-01(02)). He urged the Administration to consider the request of the industry to include all television programmes in the scope of the exception. He had doubts as to the need for classifying these programmes into "drama" and "non-drama" programmes, as this would result in uncertainty, confusion and unfairness in the copyright protection for the television broadcasting industry.

24. Ms Audrey EU also pointed out that the classification between "drama" and "non-drama" television programmes was an inappropriate attempt to assess the commercial value of different types of programmes. She felt that there was no urgent need for excluding television dramas from the suspension as the reproduction of these programmes other than for personal and domestic entertainment was already a criminal offence before the enactment of the Amending Ordinance.

25. DS/CI responded that the Administration had considered the views of the television broadcasting industry. However, it was of the view that television dramas should be excluded from the scope of suspension because of the rampant piracy of these products and that these were not normally used for information dissemination or teaching purposes. The Administration had no intention to undermine the commercial value of "non-drama" programmes. The reproduction of these programmes for sale was already a criminal offence under the Copyright Ordinance even before the Amending Ordinance came into effect.

Subclause (2)(c)

26. Members noted the content of the subclause.

Subclause (2)(d)

27. The Principal Assistant Secretary for Commerce and Industry invited members to note the proposed CSA to subclause (2)(d), replacing the original subclause in the Bill by three new clauses i.e. 2A, 2B and 2C to exempt the use of legitimate copies of parallel-imported computer programs in business from criminal

liability. A new clause i.e. 2D was also proposed to provide for the suspension of criminal liability for the possession of an infringing copy of a computer program in a printed form and copies of associated computer program technically required for viewing or listening of a copyright work by a member of the public to whom the copy of the work was made available.

28. In response to Ms Audrey EU's question on the circumstances under which the provision under clause 2C(b) would be applied, DS/CI said that the clause adopted the substance of section 35(9) of the Copyright Ordinance. In countries or territories where there was no or very low level of copyright protection (for example, extremely short duration of copyright), copies of a computer program lawfully made there might not have any real difference from pirated goods in view of the limited extent of copyright protection. In this connection, the Amending Ordinance would continue to apply.

29. Mr Kenneth TING sought information on the defence provided to those copyright users who had no knowledge of the level of copyright protection in the country or territory where the copy of a computer programme was made. DS/CI said that defence provisions were given under the Copyright Ordinance. The defendant could defend himself by proving that he did not know or have reason to believe that the copy was an infringing copy.

30. Ms Audrey EU appreciated the difficulties involved in drafting the technical provisions in clause 2D(b), taking into account the time constraint. However, she had doubts as to whether the clause could achieve the intended legal effect as the drafting was too complicated. DS/CI admitted that the drafting of the clause was technical and rather complicated in structure. To ensure consistency and to facilitate understanding of the provisions, the Administration had adopted the concepts and the terms currently used in section 65 of the Copyright Ordinance in drafting the clause.

Clause 2(3)

31. Members noted the proposed CSA to the clause, which was a technical amendment in relation to clause 2D.

Clause 3

32. Members noted the content of the clause.

Explanatory Memorandum

33. Members noted the content of the explanatory memorandum.

Date of next meeting

34. Members agreed that the fifth meeting of the Bills Committee be scheduled for Wednesday, 6 June 2001 at 8:30 am in the Chamber of the Legislative Council Building. Members invited ALA to prepare draft CSAs to propose extending the scope of suspension to all types of copyright works and suspending the expression "in connection with any trade or business" for members' consideration at the next meeting. Upon members' request, the Administration undertook to provide an information paper on the effects of the Bill after incorporating the latest proposed CSA.

(Post-meeting notes: the draft CSAs prepared by ALA and the information paper provided by the Administration were circulated to members vide LC Paper Nos. CB(1) 1427/00-01(02) and (03) on 5 June 2001.)

35. There being no other business, the meeting ended at 6:25 pm.

Legislative Council Secretariat
30 October 2001