

立法會
Legislative Council

LC Paper No. CB(1) 2213/00-01
(These minutes have been seen
by the Administration)

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

**Minutes of meeting
held on Wednesday, 6 June 2001, at 8:30 am
in the Chamber of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai (Chairman)
Hon Kenneth TING Woo-shou, JP
Hon Margaret NG
Hon HUI Cheung-ching
Hon CHAN Kam-lam
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 Cyd HO Sau-lan
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 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

Miss Pancy FUNG
Assistant Director of Intellectual Property

Ms Maria NG
Senior Solicitor

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

I Committee Stage Amendments (CSAs)
(LC Paper Nos. CB(1) 1427/00-01(01) to (03))

CSAs proposed by the Administration

Suspension of the application of the expression "in connection with any trade or business"

The Deputy Secretary for Commerce and Industry (DS/CI) drew members' attention to the latest version of the CSAs to the Copyright (Suspension of Amendments) Bill 2001 (the Bill), which was set out in LC Paper No. CB(1) 1427/00-01(01). A new clause 2(2E) was proposed to suspend the application of the expression "in connection with any trade or business" in response to members' concern and request. Subclause 2E would commence retroactively on 1 April 2001 to ensure that the provisions of the Bill would apply to cases currently under investigation. He sought members' support to the CSAs and the Bill.

2. Miss Margaret NG expressed appreciation towards the Administration in taking on board members' concern about the extensive application of the expression "in connection with any trade or business" and in proposing a CSA in this regard. Nevertheless, she said that despite the proposed suspension of the application of the

expression, public concern about the criminal liability of the use of copyright works could not be addressed fully in view of the exclusion of four categories of copyright works from the suspension. She opined that a full suspension of the application of the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (Amending Ordinance) to the key criminal provisions in the Copyright Ordinance would be necessary to alleviate public concern. As she had pointed out at earlier meetings, a partial suspension was considered undesirable by legal professionals, such as the Hong Kong Bar Association, because of the possible confusion in interpretation of the law.

3. Ms Audrey EU shared the views of Miss NG on the merits of a full suspension of the application of the Amending Ordinance. She noted the Administration's concern about the need for strengthening the protection for intellectual property rights in Hong Kong. However, a partial suspension should only be considered if a widely acceptable proposal on the categories of copyright works to be excluded from the suspension could be worked out. In a situation where there were diverse views on the copyright works to be excluded, a full suspension would be preferable.

4. Dr YEUNG Sum said that members of the Democratic Party had reservations about the proposal of a full suspension. He pointed out that with the introduction of the Bill and the CSA to suspend the application of the expression "in connection with any trade or business", public concern about the extensive application of the criminal provisions effected by the Amending Ordinance could be alleviated. To protect the international image of Hong Kong in combating copyright piracy, members of the Democratic Party supported the Administration's proposal on the suspension of the application of the Amending Ordinance with exceptions to the four categories of copyright works.

5. While expressing support for the suspension of the application of the expression "in connection with any trade or business", Ms Audrey EU had doubts about the complicated structure adopted for the CSA. She asked whether it would be simpler just to delete the expression from the provisions.

6. DS/CI explained that since the expression "for the purpose of, in the course of, or in connection with, any trade or business" bore slight differences in terms of wording used in various subsections of the Copyright Ordinance, the amendments to the relevant subsections of the Ordinance were set out in (a) to (c) under subclause 2E. The Administration's intention was to make it clear to readers that the conditions of "for the purpose of, or in the course of, any trade or business" would still apply after the enactment of the Bill. The Senior Government Counsel supplemented that the drafting of the CSA was limited by the long title of the Bill, which was to provide for the suspension of the operation of certain amendments to the Copyright Ordinance effected by the Amending Ordinance. He said that the simpler way of drafting by deleting the expression "in connection with any trade or business" could only be used if amendments were made directly to the Copyright Ordinance.

7. Miss Margaret NG pointed out that the expression "shall be read as a reference to" used in subclause 2E(a), (b) and (c) was rarely used in legislation according to the expert advice of legal professionals. She suggested that the Administration should consider replacing the expression by "shall have the meaning of". DS/CI agreed to consider.

Relaxation of parallel importation

8. Mr Kenneth TING expressed support for the suspension of the application of the expression "in connection with any trade or business". He opined that a full suspension of the application of the Amending Ordinance on all types of copyright works would be undesirable. However, he pointed out that the legal requirements on parallel importation of computer software should be relaxed through the Bill. In this connection, he had drafted a CSA to clause 2 for members' reference. Mr HUI Cheung-ching also expressed support for the suspension of the application of the expression "in connection with any trade or business".

9. Mr CHAN Kam-lam said that members of the Democratic Alliance for the Betterment of Hong Kong welcomed the Administration's proposed CSA. To provide enterprises with more choices of computer software at cheaper prices, there was an urgent need for the relaxation of the legal requirements on parallel importation of computer software. He urged the Administration to speed up the process of drafting legislation in this regard.

10. Noting from paragraph 6 of LC Paper No. CB (1) 1427/00-01(02) that the Government had, in principle, agreed to relax the legal requirements on parallel importation of computer software and was consulting various interested parties, Dr YEUNG Sum sought information on the progress of the consultation. DS/CI replied that letters had been sent to interested parties, including software providers and users to invite written submissions to the Administration by mid-June 2001. The Administration would consider the views received and consult the Panel on Commerce and Industry before preparing a draft bill on the relaxation. He assured members that the Administration would accord priority to the proposal. Dr YEUNG, the Chairman and Mr Howard YOUNG urged the Administration to speed up the drafting of the bill, so that users could benefit from a more open and competitive software market.

Proof on the legitimacy of computer software

11. Miss Margaret NG said that in examining the computer software in her office, she found that it was rather difficult for users to prove the legitimacy of the software in use, especially those purchased a few years ago. She sought clarification from the Administration on the proof required of users in this regard. She asked whether users would be subject to the criminal liabilities effected by the Amending Ordinance if they failed to produce the original explanatory notes or discs of the software in use.

Ms Audrey EU also expressed concern about the proof required by the Customs and Excise Department (C&ED) in the investigation of a complaint on software piracy. She sought information on the existence of any mechanism for users to prove the legitimacy of the software in question other than producing the original explanatory notes or discs. Mr Howard YOUNG pointed out that there were cases in the tourist industry where software providers offered "upgrade version" to users to legitimize their use of pirated software purchased before the enactment of the Amending Ordinance.

12. DS/CI said that C&ED would only conduct investigation on piracy when a complaint was received. The proof provided by users of the legitimacy of the copy in question would be considered and examined by C&ED, taking into account the circumstances of individual cases. It would not be practical for the enforcement authorities to give general proof requirements applicable to all cases of piracy complaints. As regards the mechanism, he said that this could be explored with software providers. He pointed out that users had to give reasonable explanation for the failure to produce adequate proof of the legitimacy of the software during the investigation. This would be considered by the enforcement authorities in the light of the circumstances of each case. The Assistant Commissioner of Customs and Excise added that the proof provided by users would be examined in the context of individual cases under investigation. The user under investigation could defend himself by proving that he had tried his best to ensure the legitimacy of the software copy when it was purchased and that he had no reason to believe that the copy in question was an infringing copy.

13. Miss Margaret NG said that in the absence of clear guidelines on the acceptable proof of legitimacy of a software copy, users might have to resort to paying additional fees to software providers for the "upgrade version" or re-issue of licence so as to protect themselves against the possible criminal liabilities involved. This would be greatly unsatisfactory and unfair to those users who had been using legitimate copies but had simply failed to keep the explanatory notes or original discs of the software. The requirement for users to produce proof in defence against the criminal liability of using an infringing copy was also inconsistent with the normal practice under which the burden of proof was on the prosecution instead of the defendant.

14. In response, DS/CI said that from the policy point of view, it would be unnecessary for users using legitimate copies of software to purchase any additional licence from software providers in order to prove the legitimacy of the software. Nevertheless, from the prosecution point of view, it would be undesirable to set out the proof requirements in absolute terms, as this might be subject to abuse by users using pirated copies.

CSAs proposed by members

15. Mr Timothy FOK proposed a CSA to clause 2(2)(b) of the Bill to include "non-drama" television programmes as one of the copyright works exempted from the suspension. He explained that the television broadcasting industry was concerned about the confusion in the classification between "drama" and "non-drama" programmes as well as the inadequate protection for the copyright of "non-drama" programmes which also had high commercial value.

16. Mr Kenneth TING would propose a CSA to suspend all criminal provisions in relation to the importation of parallel-imported copies of computer software other than for private and domestic use.

17. The Assistant Legal Adviser advised that as the Bill was aimed at suspending the application of the key criminal provisions effected under the Amending Ordinance, it might not be feasible technically to suspend the legal requirements on importation and sale of parallel-imported copies of software, which was not covered in the Amending Ordinance. DS/CI shared her view and added that the Administration was conducting a consultation exercise on the proposed relaxation for preparing a separate bill.

18. Miss Margaret NG would move a CSA to suspend the operation of the amendments to sections 118 and 120 of the Copyright Ordinance effected by the Amending Ordinance on all copyright works with effect on and from 1 April 2001.

II Legislative timetable

19. DS/CI sought members' support for the early resumption of the Second Reading debate so that the Bill could be enacted at the earliest possible date to alleviate public concern about the criminal liability of the possession of infringing copies in business.

20. Mr Howard YOUNG said that with the Administration's proposal of the retrospective application of the suspension from 1 April 2001, the public concern over criminal liability could be alleviated to a certain extent. However, he said that members of the Liberal Party had to consider further the CSA proposed by Mr Timothy FOK. He suggested that the Second Reading debate of the Bill be resumed on 27 June 2001.

21. Miss Margaret NG and Dr YEUNG Sum supported the early enactment of the Bill and proposed that the Second Reading debate be resumed on 20 June 2001, which was the earliest possible date.

22. After discussion, members agreed to the following dates for the resumption of the Second Reading debate:

<u>Council meeting</u>	<u>Report to House Committee</u>	<u>Deadline for giving notice of CSA</u>
20 June 2001	8 June 2001 (oral report) 15 June 2001 (written report)	11 June 2001

23. There being no other business, the meeting ended at 10:00 am.

Legislative Council Secretariat
30 October 2001