

立法會
Legislative Council

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(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 Friday, 11 May 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 Cyd HO Sau-lan
Hon Eric LI Ka-cheung, JP
Hon Margaret NG
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon HUI Cheung-ching
Hon CHAN Kam-lam
Dr Hon YEUNG Sum
Hon YEUNG Yiu-chung
Hon SZETO Wah
Hon Timothy FOK Tsun-ting, SBS, JP
Hon LAW Chi-kwong, JP
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Dr Hon LUI Ming-wah, JP
Prof Hon NG Ching-fai
Hon Howard YOUNG, 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 Maria NG
Senior Solicitor

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

I Election of Chairman

Mr SIN Chung-kai was elected Chairman of the Bills Committee.

II Meeting with the Administration

2. The Deputy Secretary for Commerce and Industry (DS/CI) drew members' attention to LC Paper No. CB(1) 1196/00-01(04), in particular to the Administration's response on the issue of parallel importation of computer software. While the Administration had always supported the relaxation of legal requirements regarding parallel-imported products, further study of the complicated technical issues involved would be required. For example, given the trend of convergence of computer software and multi-media products (including films and music), the definition of computer software applicable under the legal requirements on parallel importation had to be considered

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carefully when making any amendments to the law. The Administration would consult the industry before amending the Copyright Ordinance. Given that the purpose of the Copyright (Suspension of Amendments) Bill 2001 (the Bill) was to suspend certain amendments made to the Copyright Ordinance by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (Amending Ordinance), the relaxation of legal requirements on parallel importation could not be pursued under this Bill. However, the Administration would give priority to further consideration of this suggestion.

Discussion with members

Parallel importation of computer software

3. Mrs Selina CHOW opined that business enterprises were facing a very difficult situation because the price of legitimate computer software was high and the choice of products available in the market was very limited. The relaxation of parallel importation of computer software would be an important and practical means to alleviate the problem. Even though parallel importation fell outside the ambit of the Bill, she urged the Administration to make appropriate transitional arrangements to assist these enterprises before the introduction of a separate amendment bill for the relaxation of parallel importation.

4. Mr Kenneth TING and Miss Margaret NG shared Mrs CHOW's view on the urgent need for relaxing parallel importation of computer software. Miss Margaret NG further suggested that if the relaxation of parallel importation of computer software could not be pursued under the Bill or through a separate bill to be introduced at the same time, Committee Stage Amendments should be made to the Bill to the effect that the use of parallel-imported computer software in business would not constitute a criminal offence. Ms Cyd HO shared Miss NG's view.

5. Mr LAW Chi-kwong expressed support for the relaxation of parallel importation of computer software. While appreciating the technical difficulties involved, he opined that the Administration should take into consideration the views of the industry. This was because the business software market was a relatively professional and small one and outsiders might not have sufficient knowledge and information on its operations to fully appreciate the difficulties faced by the parties concerned.

6. Mr CHAN Kam-lam opined that there was an urgent need for the relaxation of parallel importation of computer software so as to increase competition and reduce prices in the market. He requested the Administration to make amendments to the Bill so that the proposed relaxation could be effected within the current legislative session. If it was not feasible to do so under this Bill, the Administration should present to the Bills Committee the

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legislative timetable for the introduction of a separate amendment bill to the Copyright Ordinance.

7. In response, DS/CI said that parallel-imported computer software was not common in Hong Kong as there was only a small price difference between legitimate computer software on sale in Hong Kong and other countries. As explained at the beginning of the meeting, the proposed relaxation had to be pursued under a separate amendment bill to the Copyright Ordinance instead of being incorporated in this suspension bill. The Administration would accord priority to the examination of this suggestion. However, the legislative timetable for the said bill would depend on the consultation with the industry and deliberations in the Legislative Council. Nevertheless, he undertook to explore the feasibility of Miss Margaret NG's proposal of making amendments to the Bill so that the use of legitimate copies of parallel-imported computer software in business would not constitute a criminal offence. Regarding Mrs Selina CHOW's concern about the transitional arrangements for relieving the financial pressure of enterprises before the relaxation of parallel importation, DS/CI undertook to liaise with the Business Software Alliance (BSA) to ask its members not to lodge any criminal complaints to the Customs and Excise Department (CED) during the suspension period.

8. Miss Audrey EU sought clarification on the technical problems encountered by the Administration in the definition of computer software because of the converging trend of the computer software and multi-media products. DS/CI explained that certain software products might contain different types of copyright works, for example, educational software might contain music and cartoons, such products might be excluded from the liberalization if the definition of computer software was not made broad enough to cover products with multiple copyright works.

9. Mrs Selina CHOW sought clarification on the Administration's position on the issue of relaxing the legal requirements on parallel-imported computer software. She also invited the Administration and the Assistant Legal Adviser (ALA) to explain the technical feasibility of bringing about the proposed relaxation through the Bill.

10. DS/CI reiterated that the Administration welcomed members' suggestion on the relaxation of parallel importation of computer software. However, the Administration had to follow the necessary procedures in the preparation of a draft bill and time would be required for completing these procedures. On the technical feasibility of effecting the proposed relaxation through the Bill, he explained that while the feasibility of suspending the criminal provisions in relation to the use of legitimate copies of parallel-imported computer software could be further explored, the exemption in relation to the importation and sale of these products could not be effected by amending the Bill.

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11. ALA advised members 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.

12. The Chairman summarized the discussion on relaxation of parallel-imported computer software by requesting the Administration to take members' views into consideration and to explore the means for resolving the technical problems in effecting the proposals in the Bill.

Concerns of the educational sector

13. Dr YEUNG Sum conveyed the concern of the educational sector that teachers might incur criminal liability inadvertently as it was a common practice among teachers to make copies of copyright works contained in newspapers, magazines or books, as well as works downloaded from the Internet and recordings of radio or television broadcast for teaching purposes. Despite the exemptions for educational copying provided under the Copyright Ordinance, teachers remained worried as the statutory exemptions were subject to the condition that copying must be done within a "reasonable extent", which was not clearly defined in the Copyright Ordinance. He sought information from the Administration on proposed measures to alleviate the worries of the educational sector. He also asked whether there was any legal definition of "reasonable extent" in the laws of other jurisdictions, such as the United Kingdom (UK) and the United States of America (USA).

14. In response, DS/CI said that the passage of the Bill would suspend the criminal sanctions against possession in the course of business (including teaching activities in educational establishments) of unauthorized copies of copyright works commonly used for the purpose of dissemination of information, such as newspaper cuttings, recording of a television news programme, etc. On the definition of "reasonable extent", he advised that this term was commonly used in other common law jurisdictions such as UK. It was a common practice in other jurisdictions for guidelines on the interpretation of "reasonable extent" to be worked out mutually between copyright owners and users, instead of adopting a legal definition for the term. DS/CI further informed members that the Administration had liaised with the educational sector and the media and publishing industries with a view to working out guidelines on the acceptable circumstances and conditions for copying copyright works for teaching purposes. Amendments to the Copyright Ordinance would not be necessary if such guidelines could be worked out between the relevant parties.

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15. Mr SZETO Wah cautioned that from his experience as a freelance writer for the press, there were considerable variations in the terms and conditions concerning the copyright ownership of articles in the agreements between individual writers and the newspapers concerned. He urged the Administration to draw the attention of the press and publication sectors to these variations when drafting the guidelines with the educational sector.

16. DS/CI said that the Administration was aiming at the development of a collective mechanism under which copyright users could approach one single body for the authorization of using the copyright works of similar nature, for example, newspapers and magazines.

Competition in the business software market

17. Mr HUI Cheung-ching pointed out that with the enactment of the Amending Ordinance on 1 April 2001, business enterprises had to purchase legitimate copies of computer software at high prices. However, the choice of products was limited, as the market had long been dominated by the mainstream software. In order to introduce more competition in the business software market and to provide users with more choices at lower prices, he urged the Administration to provide incentives to the software industry for the development of new software.

18. DS/CI replied that the Innovation and Technology Fund supported projects that contributed to innovation and technology development in the local industry. Regarding the high prices and limited choices of software products, he reiterated that it would not be appropriate for the Government to interfere with the commercial decision of software providers in setting prices for computer software. The newly amended Copyright Ordinance played a positive role in encouraging the use of legitimate software in enterprises. This would increase demand in the market and encourage more software developers to devote resources to product development to provide users with more choices at cheaper prices.

19. In response to Ms Cyd HO's request for the development of a proper discussion channel and charging mechanism between the copyright owners and users, DS/CI undertook to consider this further.

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Other concerns on the drafting of the Bill

20. Miss Margaret NG considered that the "downgrade" arrangement provided by BSA members was unfavorable to the user enterprises which were unable to purchase legitimate copies of the out-dated software still in use, as these were no longer on sale in the market. At the same time, they could not use the updated version due to the limitations of the hardware. She suggested that the Administration should make "grandfathering" arrangements

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under the legislation to exempt the criminal liability of enterprises using out-dated versions of pirated software which were installed before the enactment of the Amending Ordinance.

21. DS/CI explained that in view of the difficulties in ascertaining the time at which the "out-dated" software was installed, the proposed exemption would create enforcement problems. The "downgrade" arrangement provided by BSA members allowed flexibility in the continued use of previously installed pirated software by business enterprises even though such software was out-dated and no longer sold by the software vendor concerned. As the main objective of the Amending Ordinance was to strengthen the criminal sanctions against copyright piracy in the course of business to combat the rampant piracy problem, any arrangement for the convenience of business enterprises should not be made at the expense of proper protection of copyright.

22. Miss Margaret NG doubted the propriety of using the expression "in connection with" in Sections 31(a) and 118(1)(d) of the Copyright Ordinance. Referring to the examples given by the Administration in LC Paper No. CB(1) 1196/00-01(05), she expressed concern over the interpretation of the expression and the ambiguity involved in deciding whether an infringing act fell within the ambit of this expression. To remove such ambiguity in the legislation, she proposed that the expression "in connection with" should be suspended throughout the Bill. Ms Cyd HO and Ms Audrey EU supported Miss NG's proposal. Ms Audrey EU was concerned that the expression "in connection with" would unnecessarily create ambiguity in the application of the law against infringing acts, bearing in mind the importance of having exact and clear definitions in criminal provisions.

23. DS/CI explained that the Amending Ordinance amended the Copyright Ordinance by , inter alia, deleting the expression "for the purpose of trade or business" and replacing it by "for the purpose of, in the course of, or in connection with, any trade or business". The purpose of the amendment was to combat corporate copyright piracy activities, which had gained wide public support during the 1999 public consultation on additional legislative measures to combat piracy. The inclusion of the expression "in connection with" was considered useful in the enforcement actions against piracy, as illustrated in the examples outlined in paragraphs 12 to 14 of LC Paper No. CB(1) 1196/00-01(05).

24. The Chairman suggested that the CED could follow overseas practices of placing their enforcement and prosecution guidelines on the Internet to facilitate compliance of the law by the public. This would improve the transparency of CED's work. Moreover, CED could review the necessity of having the expression "in connection with" in the course of drafting the guidelines.

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25. Mrs Selina CHOW drew members' attention to the submission from the Television Broadcasts Limited (TVB) (LC Paper No. CB(1) 1196/00-01(08)) concerning its request for all films, broadcasts or cable programmes be included in the scope of Clause 2(2)(b) of the Bill. In this connection, she expressed concern over the legal definition of "movie" and "television drama" under Clause 2(2)(a) and (b) of the Bill, which were to be excepted from the scope of the suspension. As it would be difficult to give a clear definition of television drama, the exception would create ambiguity and difficulties for the entertainment industry in classifying the wide variety of television programmes into drama and non-drama. She requested the Administration to consult the television production professionals before finalizing the type of copyright works to be excepted and the terms used for the exception in the Bill.

26. Ms Audrey EU shared Mrs CHOW's views regarding the definitions for "movie" and "drama". She also considered that the expression "is intended to be published" used in Clause 2(2)(a) and (b) was too ambiguous. She urged the Administration to reconsider the drafting of Clause 2(2)(a) and (b) in this connection.

27. DS/CI said that TVB's request for excluding all television and broadcast programmes from the exception would go against the original intent of the Bill. The Bill sought to address the worries of enterprises and educational establishments about the possibility of incurring criminal liabilities when making timely copies of copyright works including television programmes for information dissemination and educational purposes. The Administration wished to facilitate the dissemination of information and to ensure protection of intellectual property rights at the same time. Therefore, exception of four categories of copyright works, of which there was rampant piracy, was provided in the Bill. He further explained that the Administration would consult various sectors of the community and parties concerned with a view to coming up with an acceptable solution which would strike a balance between the two important principles of protecting intellectual property rights and free-flow of information. It planned to work out the long term solution before the suspension period ended on 31 July 2002.

28. The Deputy Director of Intellectual Property supplemented that Section 7 of the Copyright Ordinance provided a broad definition for the word "film", which might include a recording of any moving image. Clause 2(2)(a) of the Bill adopted the word "movie" which meant a cinema film the production of which was mainly for showing in cinemas. He advised that the usage of commonly adopted words in the legislation was not restricted to the term "movie", for instance, the common term "Internet" was used in the Copyright Ordinance as no proper legal definition could be found for the term.

29. The Chairman requested the Administration to consult the entertainment industry on the categories of copyright works to be included in

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the exception and the definition of the terms, and to revert to the Bills Committee in due course.

III Any other business

Date of coming meetings

30. Members agreed that the second meeting should be held on Friday, 18 May 2001 at 8:30 am to receive deputations. A list of organizations including all those which had made submissions to, or had indicated interest in meeting the Bills Committee, was tabled for members' information. The Secretariat would send written invitations to all the organizations on the list to attend the meeting scheduled for 18 May 2001.

(Post-meeting note: Invitation letters were sent to 49 organizations on 11 May 2001.)

31. Members also agreed that the third meeting should be scheduled for Tuesday, 22 May 2001 at 6:30 pm.

32. There being no other business, the meeting ended at 10:40 am.

Legislative Council Secretariat
20 September 2001