

立法會
Legislative Council

LC Paper No. CB(1) 2189/00-01

(These minutes have been seen
by the Administration)

Ref: CB1/BC/11/00/2

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

**Minutes of meeting
held on Tuesday, 22 May 2001, at 6:30 pm
in the Chamber of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai (Chairman)
Hon Kenneth TING Woo-shou, JP
Dr Hon LUI Ming-wah, JP
Hon Margaret NG
Hon CHAN Kam-lam
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon YEUNG Yiu-chung
Hon SZETO Wah
Hon LAW Chi-kwong, JP
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon Cyd HO Sau-lan
Hon Eric LI Ka-cheung, JP
Prof Hon NG Ching-fai
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon HUI Cheung-ching
Hon Timothy FOK Tsun-ting, SBS, 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 R G TURNBULL
Senior Assistant Director of Public Prosecutions

Mr Jeffrey GUNTER
Senior Assistant Law Draftsman

Mr Michael LAM
Senior Government Counsel

Mr Vincent POON
Assistant Commissioner of Customs and Excise

Attendance by invitation : International Federation of Reproduction Rights Organizations (IFRRO)
International Publishers Association (IPA)

Ms Caroline MORGAN
Corporate Counsel, Copyright Agency Limited

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 Meeting with deputations

The Chairman invited Ms Caroline MORGAN, Corporate Counsel, Copyright Agency Limited, to present her views. Ms MORGAN represented the International Federation of Reproduction Rights Organizations (IFRRO) and the International Publishers Association (IPA).

2. Ms Caroline MORGAN said that both IFRRO and IPA were non-government organizations which had consultative relations with the United Nations. IFRRO was a federation of reproduction rights organizations representing the interest of authors and publishers, collecting licence fees from copyright users for the authorized copying of printed copyright works. IPA represented 77 publishers associations in different countries. She pointed out that protection of copyright was crucial to the development of a knowledge-based economy and thus should be an issue of concern for both the government and copyright owners. IFRRO and IPA were opposed to the Copyright (Suspension of Amendments) Bill 2001 (the Bill) for the following reasons:

- (a) the wide scope of suspension which included the press, books and other forms of publications could not be justified if the public concern was focussed mainly on the need for information dissemination. As authorization mechanisms were in place for the legitimate copying of published copyright works through organizations such as the Hong Kong Reprographic Rights Licensing Society (HKRRLS), users could always apply for authorized use through the proper channel;
- (b) it was inappropriate for the Government to make a value judgement on different types of copyright works by excluding four categories of copyright works from the scope of suspension, i.e. computer software, movie, television dramas and musical works. The different levels of legal protection provided to different types of copyright works might send a wrong message that the rights of some copyright owners were more important than that of the others. It was unfair to the publication industry as the sale of books and journals had also been affected by piracy. According to the estimation of IPA, the industry suffered a loss of US\$ 2 million annually because of piracy. If movies and television dramas were to be excluded from the scope of suspension among other films, the same principle should apply to publications and those with commercial value and rampant piracy should also be excluded from the scope of suspension; and
- (c) the Bill was unnecessary as there were other feasible measures which could serve the purpose of enabling free-flow of information, such as working out mutually agreeable guidelines between users and owners on the acceptable use of the copyright works and issuing of prosecution guidelines by the Government to set out clearly the circumstances under which criminal complaints could be lodged and pursued.

Discussion with members

3. Miss Margaret NG said that the Bill sought to suspend the implementation of the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (the Amending Ordinance) in relation to the criminal provisions regarding the possession of an infringing copy of copyright works in business. The suspension was considered necessary as the provisions in the Amending Ordinance had such an extensive coverage that even ad hoc copying of newspaper articles for information dissemination purpose would be a criminal offence. Such harsh penalties for ad hoc copying did not exist in the copyright laws in other jurisdictions. She explained that the Bill was not an attempt to reduce protection for intellectual property rights but an interim measure to alleviate public concern over the need for the free-flow of information. The Administration had undertaken to work out long-term measures which would strike a balance between protection of intellectual property rights and information dissemination during the suspension period, which would end on 31 July 2002.

4. Ms Caroline MORGAN said that the scope of criminal liability in the Amending Ordinance was not particularly extensive when compared with other countries such as Australia. She pointed out that a thorough analysis of the copyright laws around the world would have shown that the laws in Hong Kong were not too harsh, as copyright users possessing infringing copies were subject to criminal penalties in other places of the world.

5. Ms Audrey EU sought clarification from IFRRO and IPA on how the example of excluding movies and television dramas from the scope of suspension could be applied to publications. She had doubts as to how this suggestion could be achieved in practice. In addition, she sought information about the representativeness of IFRRO and IPA in the publication industry, the percentage of market share that they represented, as well as the channels through which copyright users could obtain the authorization for copying the required works.

6. Ms Caroline MORGAN pointed out that the commercial value of publications was undermined in the Bill. The Government should not overlook the fact that many printed copyright works, such as textbooks, were not simply "information" relating to topics of common concern or current affairs. Though it was not desirable for the Government to make any judgement on the value of copyright works, standardized treatment should be given to different types of copyright works if such a judgement had to be made. The same principle of excepting some works with high commercial value from the scope of suspension should thus be applied to all types of works, including films, software and publications. On the representativeness of IFRRO and IPA, Ms MORGAN said that IFRRO represented around 30 reproduction rights organizations around the world, providing authorization mechanisms for copyright users and collecting licence fees for distribution to copyright owners. In Australia, it represented over 90% of local publishers. HKRRLS represented the publishers in Hong Kong and it had

established a collective mechanism for the legitimate use of copyright works.

7. Mr Viking YAM, General Manager of HKRRLS, supplemented that over 80% of local textbook publishers and writers were members of HKRRLS. It represented 1,700,000 publications worldwide including books, journals and periodicals. He pointed out that since the enactment of the Copyright Ordinance, HKRRLS had encountered difficulties in enforcement and the Amending Ordinance was crucial to combating piracy. He added that there had been a significant drop in enquiries about the application for licence from HKRRLS after the introduction of the Bill. The entire community should be educated to respect intellectual property rights and to comply with the law in the use of copyright works. This was an important step towards the development of a knowledge-based economy in Hong Kong.

8. Mr Howard YOUNG opined that ad hoc copying of newspapers would be necessary for information dissemination purposes and thus should not be subject to the same legal liability as the copying of other publications such as textbooks. In response, Ms Caroline MORGAN reiterated that the Government should avoid making any value judgement on copyright works. There should not be any distinction in the legal protections given to copyright works and in the case of the Bill, the distinction had been drawn incorrectly. She informed members that in Australia, there was an authorization mechanism for copying of newspapers. The charge for ad hoc copying of current newspapers was relatively low while that for copying out-dated papers would be higher as the articles required in the latter case were considered as archives.

9. The Chairman thanked the deputations for attending the meeting and invited them to give their written submissions to the Bills Committee, if any.

II Meeting with the Administration

(LC Paper Nos. CB(1) 1250/00-01(11), 1297/00-01(01) to (03))

10. The Chairman invited the Administration to brief members on the draft Committee Stage Amendments (CSA) proposed to the Bill, which were set out in LC Paper No. CB(1)1297/00-01(01).

11. The Deputy Secretary for Commerce and Industry (DS/CI) briefed members on the draft CSA, as follows:

- (a) to amend clause 2(2)(c) by replacing "substantial" by "predominant" so that the purpose of the clause could be reflected more accurately;
- (b) to introduce new clauses 2A, 2B and 2C for exempting the use of parallel-imported computer software from criminal liability; and

- (c) the new clause 3A was a technical amendment. Subclause 3A(a) provided that an infringing copy of computer program did not include an infringing copy that was in a printed form. Subclause 3A(b) provided that if a copy of a work (not being a computer program itself) was made available to the public and to facilitate the viewing or listening of that work by members of the public, it was technically necessary to provide an associated computer program, a copy of that computer program was not an infringing copy for the purposes of clauses 2A, 2B and 2C.

Discussion with members

12. Miss Margaret NG sought clarification on the purpose of drafting three clauses, 2A, 2B and 2C for exempting the criminal liability of the use of parallel-imported computer software.

13. DS/CI explained that in order to suspend the criminal liability of the use of parallel-imported legitimate computer software and to exclude other computer software from the scope of suspension, clauses 2A, 2B and 2C were drafted to cover infringing copies produced locally, abroad and those lawfully made in countries where there were no or very low level of copyright protection.

14. Miss Margaret NG pointed out that as the Assistant Legal Adviser (ALA) had pointed out in her letter to the Administration (LC Paper No. CB(1) 1279/00-01(01)), the criminal offence enacted in the Amending Ordinance seemed to go beyond the requirement under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). She had doubts as to whether such stringent criminal sanctions should be introduced at this stage taking into consideration the absence of well-established and effective authorization mechanisms in Hong Kong. She urged the Administration to suspend the application of the expression "in connection with any trade or business" in relevant sections of the Amending Ordinance, so that it would only be a criminal offence if a person possessed an infringing copy of a copyright work for the purpose of, or in the course of, any trade or business.

15. DS/CI explained that the relevant article in TRIPS only stipulated for members the basic criminal sanctions required. It did not bar members from imposing more severe criminal sanctions to meet their needs. It was reasonable for the criminal provisions in the Amending Ordinance to exceed that of the TRIPS requirements to combat rampant copyright piracy activities in Hong Kong.

16. As to Miss NG's suggestion of deleting the expression "in connection with any trade or business", DS/CI said that the Administration had considered the views raised by members at the Bills Committee meeting held on 11 May 2001 and had given its response vide LC Paper No. CB(1) 1297/00-01(03). Where legislative

intent was concerned, the Government had proposed in a consultation paper published in 1999 that "possessing an infringing article other than for personal, domestic use" would be considered a criminal offence. The proposal had gained the support of the public and the Legislative Council. In fact, the scope of the expression "in connection with any trade or business" was no wider than that of the proposal. Moreover, the Administration was of the view that the deletion of this expression would give rise to some other new problems. For example, it would be difficult to determine whether the cases mentioned in paragraphs 12 to 14 in LC Paper CB(1) 1196/00-01(05) would involve criminal liability if the above expression was to be deleted. However, all these cases fell within the ambit of the original legislative proposal, and over the past months, the Government had publicized that such cases would incur criminal liability. Deletion of the expression would create confusion among the public. The Government planned to conduct wide public consultation upon the enactment of the Bill in order to work out a widely acceptable solution. Regarding the areas to be reviewed, the Government had an open mind and was prepared to listen to the views of various sectors.

17. ALA enquired about the applicability of the expression "in connection with any trade or business" in the case of the possession and broadcasting in public of a pirated copy of music disc by a charitable organization in a fund-raising event.

18. In response, the Deputy Director of Intellectual Property (DD/IP) said that the term "business" as defined in section 198 of the Copyright Ordinance included a trade or profession. In addition, according to English case law, the meaning of "business" was not defined primarily on the basis of whether the business was profit-making. As far as the Government's legislative intent was concerned, the target of the Amending Ordinance was not restricted to commercial establishments. Therefore, the Administration considered that the term "business" was not confined to commercial activities, but could also cover educational, charitable or government activities. The possession of a pirated copy of music disc by a charitable organization would thus fall within the ambit of this provision.

19. Dr LUI Ming-wah had doubts of the need for Hong Kong to introduce such stringent copyright legislation with criminal sanctions going beyond the requirement of TRIPS. He cautioned that the Administration should not make stringent legislation on the ground that Hong Kong was a developed territory. To assess the propriety of criminal sanctions in the legislation, the Administration should make reference to copyright laws in jurisdictions which were comparable to Hong Kong in terms of economic development. He requested the Administration to provide an information paper on such a comparison for members' consideration.

(Post-meeting notes: the relevant information was provided by the Administration and circulated to members vide LC Paper No. CB(1) 1359/00-01(03) on 26 May 2001.)

20. Dr YEUNG Sum opined that the criminal sanctions imposed on the possession of an infringing copy of copyright works by all organizations, including those non-profit making and charitable ones, were too severe and inappropriate. He urged the Administration to consider strengthening the legal tools in copyright protection gradually, so that possession of an infringing copy of copyright works not for commercial use would not be considered a criminal offence.

21. Miss Margaret NG shared Dr YEUNG's views and commented that although the Administration had gained public support on the criminal liability for possession of an infringing copy other than for personal, domestic use during the consultation in 1999, the extensive application of the criminal provision to charitable organizations might not have been clearly explained to the public during the consultation exercise. She had doubts as to whether the proposal would gain the support of the community if the example quoted by ALA on the possession of a pirated music disc was given in the consultation paper.

22. DS/CI said that exemption was given under the Copyright Ordinance for charitable organizations to broadcast copyright works without the authorization of copyright owners. Nevertheless, the possession of a pirated copy of copyright works would be a criminal offence regardless of whether the organization in question was profit-making or not. He reiterated that though all possible cases which would constitute criminal offences were not given in the consultation paper in 1999, the principle of the criminal liability of the possession of an infringing article other than for personal, domestic use had gained public support. The present scope of application under the Amending Ordinance was no wider than that of the proposal in 1999. The Administration had noted the wide public concern about the effect of the Amending Ordinance and planned to work out a long term solution during the suspension period. Careful deliberation and detailed discussion would be made in the review which included, inter alia, the criminal and civil provisions related to infringement of copyright under the Copyright Ordinance.

23. Ms Audrey EU considered the legislation to be rather illogical in that the possession of a pirated copy of copyright works would be a criminal offence while the unauthorized broadcasting of copyright works by charitable organizations would be exempted.

24. DD/IP explained that in the legislation for protection of intellectual property rights, the copyright owners had the right to prevent the unauthorized reproduction, distribution, circulation and sale of their works. However, there were no international rules governing the protection of owners' right in preventing the performance of their works in public. Unauthorized public performance of copyright works was a criminal offence before 1997; but in 1997 amendments were made to the effect that such an act would only incur civil liability.

25. The Chairman enquired about the need to prove the intention of the offender during the course of prosecution in the application of section 118(1)(d) which

provided that "a person commits an offence if he, without the licence of the copyright owner possesses for the purpose of , in the course of , or in connection with, any trade or business with a view to committing any act infringing the copyright".

26. DD/IP explained that it was necessary to prove the intention of an offender for a criminal offence. For civil offence, the proof of intention was only required in some cases.

Date of next meeting

27. Members agreed that the next meeting should be scheduled for Monday, 28 May 2001 at 4:30 pm in the Chamber of the Legislative Council Building for clause-by-clause examination of the Bill.

28. There being no other business, the meeting ended at 8:20 pm.

Legislative Council Secretariat

4 October 2001