

Legislative Council Bills Committee

Copyright (Suspension of Amendments) Bill 2001 Response to the Views of the Legislative Council Legal Service Division

Purpose

This paper sets out the Administration's response to the views of the Legislative Council Legal Service Division on the draft Bill and the Bill expressed in the Division's letters dated 23 April and 16 May to the Government and in the paper (CB (1) 1196/00-01 (03)) submitted to the Bills Committee on 11 May.

Transitional provisions

2. The Assistant Legal Adviser asked if the Administration had considered making transitional provisions in the Bill to cover the enforcement and investigative actions in respect of copyright works which would be affected by the suspension of amendments during the period between 1 April and the enactment of the Bill.

3. We do not think such provisions are necessary. On 12 April, the Government announced the intention to suspend certain amendments through legislative means and made it clear that any complaint received before the commencement of the suspension of amendments would be followed-up according to the law. However, consideration will be given to the legislative intent announced by the Government and to the public interest before a final decision is made on the action to be taken.

Section 122 of the Copyright Ordinance

4. The Assistant Legal Adviser asked whether the Bill should suspend or amend Section 122 of the Copyright Ordinance as well, which involves "infringing copy of a copyright work", so that the suspension would be applicable to this Section.

5. We consider it not necessary to do so. The amending Ordinance, which commenced on 1 April, did not make amendment to Section 122, nor did it revise the definition of "infringing copy of a copyright work".

Interpretation of “for the purpose of trade or business”

6. The Assistant Legal Adviser asked whether the Government, during prosecution process, would still adopt the narrow interpretation of the phrase “for the purpose of trade or business” after the commencement of the Bill to the effect that enterprises would be prosecuted only if they engaged in dealing in infringing copies of copyright works. The answer is in the affirmative. We have already reiterated such approach in previous meetings and papers.

Burden of proof on the element of “without the licence of the copyright owner”

7. The Legal Service Division pointed out that under Section 94A of the Criminal Procedure Ordinance, it was not necessary for the prosecution to prove the element of “without the licence of the copyright owner” in a prosecution relating to Section 118 of the Copyright Ordinance. Therefore, the burden of proof would lie on the defendant.

8. The above understanding is consistent with the legal advice we have sought. However, in the course of prosecution, the prosecution is required to prove that the copies in question are infringing copies. Thus, the prosecution usually requires the copyright owner to give evidence in respect of whether a licence of the copyright work has been granted to the defendant, in order to facilitate prosecution.

Meaning of the term “business”

9. The Legal Service Division considered that the term “trade or business” should be confined to commercial activities. The Division also requested the Administration to provide the legal basis for including educational, charitable or government activities in the term “business”.

10. The term “business” as defined in Section 198 of the Copyright Ordinance includes a trade or profession. The Oxford English Dictionary defines “profession” as “paid occupation, especially one requiring advanced education and training”. As such occupations are not restricted to occupations in commercial activities but could also cover occupations in educational, charitable or government institutions, we consider that the term “business” is not confined to commercial activities.

11. In addition, according to a U.K case law¹ relating to copyright

¹ In *Pensher Security Door Co. Ltd. V Sunderland City Council* ([2000] RPC 249), the defendant

legislation, certain Government activities have been classified as “business”. According to another case, the meaning of the term “business” almost covers any occupation or duty which requires attention. Moreover, according to a British legal publication *Halsbury’s (para.7, vol.47, 4th edition)*, the meaning of “trade” or “business” is not defined based primarily on whether the “trade” or “business” is profit-making. As far as the Government’s legislative intent is concerned, the target of the amending Ordinance effective from 1 April is not restricted to commercial establishments. All in all, we consider that the term “business” is not confined to commercial activities, but could also cover educational, charitable or government activities.

Agreement on Trade-Related Aspects of Intellectual Property Rights

12. The Assistant Legal Adviser pointed out that Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) stipulates that members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. The criminal offence imposed in Hong Kong has gone beyond what is required under the TRIPS Agreement.

13. According to our understanding, the Article only stipulates for members the basic criminal sanctions required. It does not bar members from imposing severe criminal sanctions to meet their needs. The enactment of the amending Ordinance, which took effect on 1 April, is to combat the rampant copyright piracy activities in Hong Kong and to provide better protection to intellectual property.

Clause 2(2)(c) of the Bill

14. The Assistant Legal Adviser took the view that nearly every film has background music or narratives right from the beginning to the end and therefore meets the requirements for films as stipulated in Clause 2(2)(c). As such, all films are in fact included in Clause 2(2)(c). The Assistant Legal Adviser also pointed out that the Chinese version of the Clause (“完全是或有實質部分是由音樂作品或任何有關的文學作品所構成的聲音紀錄或影片”) does not tally with its English version.

15. The adoption of the word “film” in this provision aims to exclude

(Sunderland City Council) was a local Government authority.

categories of films such as music TV and Karaoke discs from the suspension measures. Music and songs (including melodies and lyrics) are the predominant parts of such films. In view of the Assistant Legal Adviser's comments, we are now drafting the relevant Committee Stage Amendments to amend Clause 2(2)(c) by replacing "substantial part" with "predominant part" and by replacing "或" with "及" in the Chinese version.

16. The narratives of films are usually not regarded as the "related literary work" of a musical work stipulated in Clause 2(2)(c). Generally speaking, "related literary work" refers to the lyrics of a musical work.

Commerce and Industry Bureau
May 2001