

立法會
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**Subcommittee on
Draft Copyright (Suspension of Amendments) Bill 2001**

**Minutes of meeting
held on Wednesday, 25 April 2001, at 8:30 am
in the Chamber of the Legislative Council Building**

- Members present** : Hon Kenneth TING Woo-shou, JP
Hon James TIEN Pei-chun, JP
Hon Cyd HO Sau-lan
Prof Hon NG Ching-fai
Hon Margaret NG
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon HUI Cheung-ching
Hon CHAN Kam-lam
Hon SIN Chung-kai
Hon Howard YOUNG, JP
Hon Timothy FOK Tsun-ting, SBS, JP
Hon LAW Chi-kwong, JP
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon LEUNG Yiu-chung
Hon YEUNG Yiu-chung
Hon CHOY So-yuk
- 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

Miss Pancy FUNG
Assistant Director of Intellectual Property

Mr Jeffrey GUNTER
Senior Assistant Law Draftsman

Mr Michael LAM
Senior Government Counsel

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

Staff in attendance : Mr Jimmy MA
Legal Adviser

Mr S.C. TSANG
Senior Assistant Secretary (1)7

I Election of Chairman and Deputy Chairman

Mr Kenneth TING, the Member who had the highest precedence in the Council among members of the Subcommittee, presided at the election of the Chairman. Mr James TIEN nominated Mr SIN Chung-kai for chairmanship and Miss Margaret NG seconded the nomination. There being no other nomination, Mr SIN Chung-kai was elected Chairman of the Subcommittee. He then took over the chair.

2. The Chairman invited members to consider the election of a deputy chairman for the Subcommittee. Members considered that it was not necessary to do so.

II Meeting with the Administration

3. The Chairman invited the Administration to brief members on the revised draft Copyright (Suspension of Amendments) Bill 2001 (the "draft Bill").

4. The Deputy Secretary for Commerce and Industry (DS/CI) said that in preparing the draft Bill, the Administration had taken into account members' views expressed at the special meeting of the Panel on Commerce and Industry held on 19 April 2001. The draft Bill did not list out the types of copyright works to which the suspension would apply to avoid any ambiguity over their interpretations. It was, however, drafted in such a way that the suspension would apply to all copyright works except computer programs, sound recordings or films the whole or a substantial part of which consisted of musical works and any related literary works, television dramas, and movies. These copyright works generally had substantial commercial value and piracy of these works was rampant. The Administration was inclined to maintain the position that the high level of copyright protection as laid down in the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 ("the amending Ordinance") should continue to apply to them.

5. DS/CI said that the Administration had not set an end date to the suspension in the first draft of the Bill in order to allow sufficient time for the Government to work out a long-term solution to address the issues involved. Nevertheless, taking into account members' concerns raised at the special meeting of the Panel on Commerce and Industry held on 19 April 2001, the draft Bill proposed that the suspension should end on 31 July 2002. However, to provide some flexibility, the end date could be extended by the Secretary for Commerce and Industry by a notice published in the Gazette and with the approval of the Legislative Council.

6. Mr Howard YOUNG expressed concern about the criminal liabilities with regard to the photocopying of newspapers and the use of such materials in business enterprises and schools. He asked about the Government's plan on seeking a long-term solution. DS/CI replied that at present, the Government did not have any definite time table as to when a long-term solution could be worked out in relation to the photocopying of newspapers. However, the Administration would consult both the newspapers industry and the business community before taking a decision on the matter. He understood that the Newspapers Society of Hong Kong (NSHK) was examining the issue with its members. The NSHK hoped to reach a consensus on establishing a collective licensing mechanism for photocopying of newspapers and the use of such materials in business and educational sectors. The Administration would keep in touch with the NSHK regarding the progress of its work.

7. Miss Margaret NG pointed out that it would be necessary to re-examine the criminal liabilities under the amending Ordinance and those proposed under the draft Bill to see whether they were too broad. She suggested that the Administration should adopt a holistic approach on the matter and should make reference to the legislative intent of the Copyright Ordinance.

8. DS/CI pointed out that the amending Ordinance was enacted in response to the community's demand to strengthen the criminal provisions against the use of

copyright infringing copies in business, particularly those involving computer software and audio-visual products where the problem was rampant.

9. To achieve the objective, the amending Ordinance replaced the phrase "for the purpose of trade or business" with "for the purpose of, in the course of, or in connection with, any trade or business" in the key criminal provisions of the Copyright Ordinance. The amending Ordinance further made it clear that it was immaterial whether the trade or business consisted of dealing in infringing copies of copyright works.

10. Although the Administration took the view that in principle all copyright works should enjoy the same level of protection, it was accepted that the licensing mechanism for different copyright works was at different stages of development. In the absence of a convenient mechanism for obtaining the required authorization and faced with the threat of criminal sanction, the amending Ordinance had hampered the dissemination of information in enterprises and teaching in schools.

11. Clause 2(2) of the draft Bill proposed that the suspension would not apply to computer software, movies, television dramas and music recordings. These copyright works were not normally disseminated in enterprises or schools as "information". In addition, the licensing mechanism for these works was simple and clear. These works generally had substantial commercial value. Piracy of these work in Hong Kong and elsewhere was rampant. It was therefore necessary to exclude them from the suspension and provide a higher level of protection for these works as laid down in the amending Ordinance.

12. Miss Margaret NG expressed concern that the phrase "in the course of" or "in connection with" as set out in the amending Ordinance might have broadened the scope of criminal liabilities under the Copyright Ordinance. Referring to the Assistant Legal Adviser's letter of 23 April 2001 to the Secretary for Commerce and Industry, she commented that the draft Bill mainly focused on dealing with sections 118 and 120 but not section 31 of the Copyright Ordinance which provided for the circumstances under which a person might infringe the copyright of a work. In response, DS/CI said that while the phrase "in the course of" was proposed in line with the existing copyright legislation of the United Kingdom, the expression "in connection with" was a new addition. He admitted that both phrases had extended the coverage of the criminal provisions in the Copyright Ordinance. The Deputy Director of Intellectual Property (DD/IP) said that the amending Ordinance amended not only sections 118 and 120 of the Copyright Ordinance but also sections 31, 32, 95, 96, 109, 207, 211, 228 and 273.

13. In view of the far-reaching consequences triggered by the commencement of the amending Ordinance, Mr CHAN Kam-lam said that the draft Bill should be made as simple and as direct as possible and should take into account both the

interests of the public and the copyright owners. Referring to clause 2(2) of the draft Bill, he asked whether the four types of copyright works excluded from the suspension were generally accepted by business associations. DS/CI replied in the affirmative. In response to Mr CHAN Kam-lam, DS/CI said that the term "computer program in a printed form" in clause 2(2)d referred to the those computer programs published in printed form for teaching purposes.

14. Having considered that there would be a time gap after the commencement of the amending Ordinance and before the draft Bill was to take effect, Mr Kenneth TING asked whether the amending Ordinance would continue to be enforced during the transitional period. DS/CI replied in the affirmative and said that the amending Ordinance would continue to be enforced until such time when the draft Bill had been enacted and come into force. However, consideration would be given to public interests and the legislative intent announced before a final decision on the action to be taken on a case. He drew members' attention to the fact that so far, the Customs and Excise Department had not received any identifiable complaints regarding copyright works other than computer software, movies and musical products after the commencement of the amending Ordinance. In addition, the NSHK had also decided not to raise any criminal complaints relating to photocopying of newspapers in April.

15. Although the newspapers industry had indicated that their position was not to raise complaints against any infringement act in April, Mr James TIEN expressed concern that there might still be a risk of complaints from copyright owners other than from the newspapers industry. In response to Mr James TIEN, DS/CI clarified that with the introduction of the draft Bill, the key criminal provisions in the Copyright Ordinance would revert to the position before the commencement of the amending Ordinance. As regards the definitions of 'movies' and 'literary work' as set out in clauses 2(2)(a) and 2(2)(c) respectively, DS/CI said that the word 'movie' was intended to cover films produced to be shown in cinemas while the term 'literary work' covered lyrics in a song. He added that the expressions used in the draft Bill were basically in line with those in the Copyright Ordinance.

16. Ms Audrey EU expressed concern about the extent to which the amending Ordinance had broadened the scope of criminal and civil liabilities in the Copyright Ordinance. She considered that it was important from a policy perspective for the Administration to re-examine the matter using a holistic approach since any piecemeal amendment might further complicate the matter.

17. Mr HUI Cheung-ching asked what action the Government would take if the newspapers industry was unable to reach a consensus on the collective licensing mechanism upon the expiry of the suspension period as proposed in the revised draft Bill. DS/CI said that he was unable to advise on this point at the present stage. The Administration would, however, monitor the situation and take into account any views from the industry before adopting a long-term solution.

18. In response to Ms Audrey EU's question on the supply of computer software, DS/CI said that the Administration was aware of the shortage after the commencement of the amending Ordinance. To address the issue, the Administration had already obtained an assurance from the Business Software Alliance (BSA) that the supply of computer software would resume normal shortly. As for the price increase for computer software, he replied that it might be attributed to the reduced discount given by wholesalers to buyers after the commencement of the amending Ordinance. In respect of outdated pirated software used by business enterprises, DS/CI said that a special "downgrading arrangement" had been made by BSA which allowed enterprises to purchase licences of updated software and in return, received permission to continue to use the current pirated copies.

19. Mr LAW Chi-kwong raised concern about the possibility of any copyright infringement in the use of film for educational purpose. DD/IP said that if the use of such work was within the scope of permitted acts for educational establishments, users would unlikely incur any criminal liabilities under the existing legislation. The Chairman supplemented that sections 41 to 45 of the Copyright Ordinance had already laid down provisions for exemption on use of copyright works for educational purposes.

20. In view of the concerns from both the business and educational sectors, Prof Hon NG Ching-fai advised that the Administration should re-examine the concept of "reasonable extent" relating to photocopying of newspapers in order to alleviate their worries.

21. Miss Margaret NG suggested that the Administration should consult the business sector again, in particular the small and medium enterprises, to solicit their views on copyright issues pertaining to computer software. She further requested the Administration to brief members at the next Subcommittee meeting on the changes made to both criminal and civil liabilities under the Copyright Ordinance after the commencement of the amending Ordinance.

22. Ms Audrey EU sought clarification on the criminal liabilities covered by the expression "possesses for the purpose of" in section 118(1)(d) of the Copyright Ordinance. DS/CI cited the example of a karaoke which possessed and used pirated musical recordings to illustrate what was considered to be an infringement act according to that expression.

23. In views of the complexity and far-reaching consequences of the copyright issue, the Chairman suggested and members agreed that the Administration should provide the Subcommittee with the following information to facilitate its deliberations at the forthcoming meeting:

- (a) a paper to identify the provisions in the Copyright Ordinance which

were amended by the amending Ordinance, and to explain the legal effect of these provisions before and after its commencement, and the legal effect on these provisions in the draft bill and more specifically an explanation of the relationship between section 31 and sections 118 and 120 of the Copyright Ordinance;

- (b) the rationale for the categorization provided in clause 2(2) of the draft Bill and detailed explanation with examples on what each category would cover; and
- (c) the rationale for limiting the scope of the draft Bill to criminal provisions, i.e. sections 118 and 120 of the Copyright Ordinance only and the Administration's response to some members' suggestion that the scope of the draft Bill should cover all provisions of the Copyright Ordinance as amended by the amending Ordinance.

24. Legal Adviser (LA) pointed out that since both the amending Ordinance and the draft Bill focused mainly on the criminal liabilities, issues relating to civil liabilities would fall outside the present scope of the draft legislation. Miss Margaret NG, however, considered that while the Subcommittee was not a Bills Committee and the draft Bill had not been formally introduced into the Legislative Council, there was no reason why the civil liabilities involved could not be touched upon. LA drew members' attention to the fact that clause 2(1) of the draft Bill had already set out the scope of the proposed legislation.

25. In view of the urgency of the matter and the community-wide impact of the copyright issue, Mrs Selina CHOW considered it necessary for the Subcommittee to set out a timetable for its deliberations on the matter.

26. Mr CHAN Kam-lam said that while he was aware of the urgency of the matter, he understood that there were still many areas in the amending Ordinance which required further clarification, for instance, the concept of "reasonable extent" for photocopying of newspapers, criminal liabilities resulting from the expressions "possesses for the purpose of", "in connection with", etc. He suggested that a more prudent approach should be adopted before a long-term solution could be achieved. Ms Cyd HO shared the view of Mr CHAN Kam-lam.

27. DS/CI indicated that the Government was firmly committed to alleviating the anxiety and inconvenience caused to the community by the amending Ordinance. He said that the Administration's target was to introduce the draft Bill to the Legislative Council for First Reading on 2 May 2001.

28. The Chairman suggested and members agreed to schedule the next Subcommittee meeting for 3 May 2001 at 8:30 a.m. to have a preliminary vetting of

the Bill after its First Reading on 2 May 2001. Although it was expected that a Bills Committee would be formed by the House Committee at its meeting scheduled for 4 May 2001, LA however advised that the quota for the legislative proposals for deliberation in the current legislative session had been filled and the House Committee might need to extend this quota in order to accommodate the Bill.

III Any Other Business

29. There being no other business, the meeting adjourned at 10:30 a.m.

Legislative Council Secretariat

7 November 2001