

立法會
Legislative Council

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by the Administration)

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

**Minutes of meeting
held on Thursday, 3 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 James TIEN Pei-chun, JP
Hon Cyd HO Sau-lan
Hon Margaret NG
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon HUI Cheung-ching
Hon CHAN Kam-lam
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung
Hon Timothy FOK Tsun-ting, SBS, JP
Hon LAW Chi-kwong, JP
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Prof Hon NG Ching-fai
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

Miss Pancy FUNG
Assistant 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 : Mr Jimmy MA
Legal Adviser

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

Withdrawal of membership

The Chairman informed members that Mr LEUNG Yiu-chung decided to withdraw membership from the Subcommittee due to other work commitments.

Submissions received by the Secretariat

2. The Chairman also briefed members that submissions had been received by the Secretariat from the following organizations:

- (a) Hong Kong Society of Accountants;
- (b) The Law Society of Hong Kong;
- (c) Business Software Alliance (Hong Kong); and
- (d) International Federation of Reproduction Rights Organizations.

3. Copies of these submissions were tabled for members' reference.

I Meeting with the Administration

4. The Deputy Secretary for Commerce and Industry (DS/CI) informed members that the Copyright (Suspension of Amendments) Bill 2001 (“the Bill”) as per Annex A to the Legislative Council Brief No. CIB 09/46/12 was more or less the same as the one which had been submitted for members' consideration at the Subcommittee meeting held on 25 April 2001.

5. DS/CI highlighted to members that the major change brought about by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (‘the amending Ordinance’) was the replacement of the expression “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 sections 31, 32, 95, 96, 109, 118, 120, 207, 211, 228 and 273 of the Copyright Ordinance. The amending Ordinance also added to each of the above sections a provision that “it is immaterial whether or not the trade or business consists of dealing in infringing copies of copyright works”. Apart from the above provisions, the amending Ordinance had also technically amended section 119(1) of the Copyright Ordinance by putting “on indictment” after “conviction” and that such an amendment did not involve any policy changes.

6. DS/CI explained that the offence under section 118(1)(d) was made up of two parts. The first part was the "possession" of an infringing copy of a copyright work. The second part was "with a view to committing any act infringing the copyright". The acts infringing copyright referred to the acts restricted by copyright under sections 22 to 34. Under section 31(1)(a), possessing an infringing copy of a copyright work for the purpose of, in the course of, or in connection with any trade or business, knowing or having reason to believe that the copy was an infringing copy of the work amounted to an infringing act. Thus, under sections 31 and 118(1)(d), a person committed an offence if he possessed an infringing copy of a copyright work (such as pirated computer software) in the course of business, knowing or having reasons to believe that it was an infringing copy of the software (section 31(1)(a)).

7. In addition, DS/CI said that the amending Ordinance also introduced amendments to sections 118(4) and (8), and 120(2) relating to the making, importing, exporting, selling, letting for hire, offering or exposing for sale or hire or possessing articles designed for the making of infringing articles to tie in with the criminal liabilities under the expression "for the purpose of, in the course of, or in connection with, any trade or business".

8. Although members raised concern about the scope of the Bill, DS/CI said that the Administration was inclined to maintain the position that the suspension should not apply to works such as movies, television dramas, video or sound

recordings of music, or computer programs, as described in clause 2(2) of the Bill as these works were not normally “information” for dissemination purpose. Moreover, they were generally of substantial commercial value and piracy of such works was rampant.

9. Taking into account the fact that the public concern was focused mainly on the criminal liabilities of the amending Ordinance, DS/CI said that the suspension proposed by the Bill would not affect the civil liabilities already in place.

10. Mr James TIEN appreciated the Government’s intention to propose a suspension of the amending Ordinance to minimize its undesirable impact before a long-term solution could be worked out. He, however, raised concern on the possibility of prosecutions which might be initiated by the Customs and Excise Department (C&ED) and enquired whether the Government would relax the current restriction on parallel import of computer software to secure its supply.

11. DS/CI replied that according to the current practice of the Government, C&ED would follow up any identifiable complaint received. However, it would require the copyright owner concerned to assist in providing relevant evidence to facilitate the prosecution. DS/CI said that the Business Software Alliance (BSA) acting on behalf of its members had indicated that it would not raise any complaint against any company until September 2001. Regarding the supply of computer software, the Administration was aware of the business sector’s concern and had sought assistance from the BSA over the matter. He explained that the recent increase in the price of computer software might be due to the reduced discount given to buyers. Nevertheless, BSA would undertake to monitor the pricing trend to ensure that it was kept at a reasonable level. As for the possibility of allowing parallel importation of computer software, DS/CI said that the Administration would keep an eye on the matter and would consult relevant sectors in the community before a decision was taken. The Assistant Commissioner for Customs and Excise (AC/CE) supplemented that since the commencement of the amending Ordinance, no complaint from BSA had been received by the C&ED.

12. Mr James TIEN asked about the representativeness of the BSA since he was worried that those suppliers of computer software who were not members of the BSA might still lodge complaints with the C&ED. Nevertheless, he urged the Administration to seriously consider the proposal of relaxing the current restriction on parallel importation of computer software. In response, DS/CI said that the BSA covered almost all suppliers of mainstream computer software. If there was any identifiable complaint lodged by suppliers who were not BSA members, C&ED would need to follow up on the case. AC/CE explained that an identifiable complaint referred to one which had sufficient information to enable C&ED to pursue the case.

13. Mrs Selina CHOW said that the current restrictions on parallel importation

could be traced back to the previous strong demand from the film-making and musical work production industries for enhanced copyright protection for their products. As the restrictions were not aimed at computer programs, she proposed that the Administration should review the situation and if possible lift the restrictions in view of the cost implications arising from an inadequate supply of computer software. The Chairman shared Mrs Selina CHOW's view. Mrs Selina CHOW further expressed doubts about the exclusion of "non-drama" television programmes from clause 2(2) of the Bill. She considered that they were also of considerable commercial value and would deserve higher copyright protection.

14. DS/CI agreed in principle to Mrs Selina CHOW's suggestion of lifting the restrictions on parallel importation of computer software. He pointed out, however, that most software companies adopted single pricing worldwide for computer software. As such, allowing parallel importation might help to a limited extent only. To provide assistance to local business enterprises, the Hong Kong Productivity Council (HKPC) had made an effort to negotiate collectively on their behalf for a discounted price for some mainstream computer software and had made an analysis and comparison on the pricing of computer software internationally. As regards Mrs Selina CHOW's concern about the term 'movies', DS/CI said that the term referred to films produced for being shown in the cinemas. They covered those works which had been screened or were scheduled to be played in cinemas and the content could be dramatic, documentary or otherwise.

15. Mr CHAN Kam-lam supported the idea of removing the existing restrictions on parallel importation of computer software and expressed concern about the timing for their removal. DS/CI undertook to look into the matter.

16. Ms Audrey EU expressed concern about the need for parallel importation of computer software. She asked whether there was any expedient measure if the existing supply of computer software proved to be inadequate and whether it was possible for local business enterprises to continue to use their existing software instead of the new version of computer software without being liable for copyright infringement. She also enquired the legality of downloading any computer programs from the Internet. In response, DS/CI pointed out that since the amending Ordinance did not touch upon section 35 of the Copyright Ordinance, it was technically not feasible to make any amendment in the current Bill to relax the restrictions on parallel importation of computer software. For computer software which was already outdated, he said that the BSA had made a "downgrading arrangement" where the business enterprises concerned would be required to buy a licence for an updated version of software and be permitted to use the outdated computer software. In respect of downloading copyright programme from the Internet, DS/CI pointed out that proper authorization should be obtained from the copyright owners as far as practicable. On the issue of 'casual copying' raised by Ms Audrey EU, the Assistant Director of Intellectual Property (AD/IP) emphasized that there was still a need to see if such copying fell within the permitted act(s) under

the Copyright Ordinance before a judgment could be made on the criminal liability involved.

17. Ms Audrey EU requested the Administration to prepare an information paper to address the copyright issues relating to computer programs. She hoped that such an information paper could serve to provide guidance for compliance by members of the public.

18. Miss Margaret NG considered that the comparison prepared by the Administration regarding the impact of the amending Ordinance before and after its commencement was not sufficiently detailed to give an overview on the issue. She expressed grave concern that the expression “for the purpose of, in the course of, or in connection with, any trade or business” was too all-embracing to affect those who should not have been affected by the amending Ordinance.

19. In response to Miss Margaret NG's request for an information paper to illustrate the types of infringement acts covered or not covered by the amending Ordinance, DS/CI said that it would be extremely difficult to draw up an exhaustive list.

20. Ms Cyd HO raised concern about the criminal liabilities which might result from the amending Ordinance. Taking into account the strong reaction from the industry and the community, she urged the Administration to conduct thorough consultation over the matter.

21. In response to Mr HUI Cheung-ching’s enquiry, DS/CI clarified that before the commencement of the amending Ordinance, the Government had not taken any action against those who had only used pirated software in the course of business.

22. In anticipation that a Bill Committee would be formed by the House Committee on 4 May 2001, the Chairman requested the Administration to provide the following information to facilitate the discussion by the Bills Committee:

- (a) a FAQ setting out the circumstances under which the possession or use of infringing works, in particular computer software programs and works downloaded from the Internet, would or would not attract civil or criminal liability after the enactment of the Bill;
- (b) examples of specific acts of infringement covered by the expression “for the purpose of, in the course of, or in connection with, any trade or business” in the relevant sections of the Copyright Ordinance. Examples of such acts and those acts not covered by the expression should be provided;
- (c) the problems, including those relating to the dissemination of information, faced by various sectors of the community after the implementation of the amending Ordinance;

- (d) the impacts of the amending Ordinance on small and medium enterprises (SMEs) and the measures to be taken to assist those SMEs which had difficulties in complying with the law;
- (e) the Administration's plans for consulting the various sectors of the community on the long-term solution to the problems identified, and the timing and scope of the consultation exercise;
- (f) the legality of offering "downgrade rights" to computer users, as proposed by the BSA in its submission to the Bills Committee dated 27 April 2001; and
- (g) the arrangements relating to parallel importation and the government's views on how this could be relaxed.

23. The Chairman informed members that since a Bills Committee would be formed by the House Committee on 4 May 2001 to continue to scrutinize the Bill, the Subcommittee would be dissolved and he would make an oral report to the House Committee on the progress made by the Subcommittee.

IV Any Other Business

24. There being no other business, the meeting adjourned at 10:30 am.

Legislative Council Secretariat

7 November 2001