

立法會
Legislative Council

(Revised)

LC Paper No. CB(1) 2099/99-00

(These minutes have been seen
by the Administration and cleared
by the Chairman)

Ref : CB1/BC/7/99/2

**Bills Committee on Intellectual Property
(Miscellaneous Amendments) Bill 2000**

**Minutes of second meeting
held on Friday, 9 June 2000, at 8:30 am
in Conference Room B of the Legislative Council Building**

Members present : Hon SIN Chung-kai (Chairman)
Hon Ronald ARCULLI, JP
Hon HUI Cheung-ching
Hon YEUNG Yiu-chung

Member absent : Hon MA Fung-kwok

Public Officers attending : Mr Kenneth MAK
Deputy Secretary for Trade and Industry

Mr Philip CHAN
Principal Assistant Secretary for Trade and Industry

Mr Stephen SELBY
Director, Intellectual Property Department

Miss Pancy FUNG
Assistant Director, Intellectual Property Department

Mr Johann WONG
Assistant Secretary for Trade and Industry

Mr Jeffrey E GUNTER
Senior Assistant Law Draftsman

Mr CHEUNG Wing-leung
Senior Government Counsel

Mr Vincent Y K POON
Assistant Commissioner of Customs & Excise

Clerk in attendance : Mrs Mary TANG
Chief Assistant Secretary (1)6

Staff in attendance : Miss Anita HO
Assistant Legal Adviser 2

Ms Sarah YUEN
Senior Assistant Secretary (1)4

I Meeting with the Administration

(LC Paper No. CB(1)1801/99-00 as well as the list of follow-up actions arising from the first meeting on 1 June 2000 and the Administration's response thereto tabled at the meeting and circulated thereafter vide LC Paper No. CB(1)1806/99-00)

At the Chairman's invitation, the Deputy Secretary for Trade and Industry (DSTI) briefed members on the Administration's response to concerns raised at the first meeting of the Bills Committee held on 1 June 2000.

Permitted copying by educational institutions

2. Mr YEUNG Yiu-chung enquired if there were any restrictions on the amount of copying conducted for educational purposes. In reply, DSTI referred members to paragraph 4 of the Administration's response, which said that the extent of copying should be reasonable. Although there was no specific definition on what extent would be reasonable, he estimated that multiple copying of a part of a book or newspaper would be considered to be within a reasonable range, while the copying of the whole book or newspaper would be unreasonable.

3. Mr Ronald ARCULLI was concerned about the implications of the Bill on the legality of the newspaper copying service which many Government departments and the Executive Council were engaging. In response, the Director of Intellectual Property (DIP) confirmed that the companies providing the service were presently operating under a general licence from all papers of Hong Kong. DSTI supplemented that the Administration was aware of the possible implications of the Bill on this kind of service. As such, before the Bill took effect, sufficiently wide and effective

publicity measures would be undertaken to publicize its implications. In addition, the Administration would also take the initiative of approaching relevant newspaper associations to urge them to consider how they could provide convenient licensing service for such companies upon enactment of the Bill. In response to Mr ARCULLI's comment that the newspapers might be unwilling to grant the licence, he said that the Government would ensure that it would not engage any illegal service.

4. The Chairman pointed out that the specific acts relating to educational purposes permitted under sections 41 to 45 in Division III of Part II of the Copyright Ordinance seemed to cover only artistic works, published literary, dramatic or musical works, and enquired whether the copying of software by schools would be permitted. In reply, DIP explained that both locally and internationally, software was defined as a kind of literary work. In this regard, the Principal Assistant Secretary for Trade and Industry (PAS/TI) referred members to sections 4(1)(b) and (c) of the Copyright Ordinance, which said that "literary work" included a computer program and preparatory design material for a computer program.

Mandatory warning signs on the prohibition of unauthorized possession of video recording equipment

5. Mr Ronald ARCULLI opined that to prevent the Bill from catching the general public or tourists unawares, it should, as in the designation of smoking and non-smoking areas, include a mandatory requirement for the relevant cinema or other places of public entertainment to put up a warning notice on the prohibition of unauthorized possession of video recording equipment. This was especially important as the proposed prohibition would carry criminal liability, and the definition of "place of public entertainment" was in his view ambiguous. His views were shared by Mr YEUNG Yiu-chung.

6. In response, DSTI emphasized that the Administration was in principle agreeable to the above suggestion on mandatory warning signs. It was only concerned about how the technical details such as the prescription of size, content and location of placement of the notices could be worked out in time to enable the Bill to be passed within the current legislative session.

7. The Chairman commented that the provisions on mandatory warning signs could be introduced in the form of a subsidiary legislation to overcome the time constraints highlighted above. Mr YEUNG Yiu-chung and Mr Ronald ARCULLI echoed his point. Mr YEUNG, in particular, said the principle of the requirement could simply be that the warning signs should be exhibited in a conspicuous place as in the case of the certificates of registration of schools. As such, while the above principle would be incorporated in the Bill per se, the details could be stipulated by the relevant Policy Secretary in the subsidiary legislation later.

8. In this regard, the Assistant Legal Advisor 2 (ALA2) referred members to section 38 of the Prevention of Copyright Piracy Ordinance (Cap. 544), which provided that the Secretary for Trade and Industry might make regulations prescribing anything required or permitted to be prescribed under the Ordinance, and proposed that a Committee Stage amendment (CSA) be introduced to this section to enable the making of subsidiary legislation to stipulate details of the requirement of warning signs. She further pointed out that under the Smoking (Public Health) Ordinance, there were similar requirements for the provision of mandatory warning signs to prohibit against smoking in non-smoking areas albeit the mere possession of cigarettes was not a criminal offence under the Ordinance.

Admin

9. In response, DSTI and PAS/TI agreed to consider introducing provisions on mandatory warning signs. They also agreed to examine whether these provisions should be included in the Bill or in the form of a subsidiary legislation to be introduced later.

Concerns about the proposed strict liability

10. Mr Ronald ARCULLI found it unacceptable that the mere possession in a place of public entertainment of any video recording equipment would constitute a criminal offence where the purpose of possessing the equipment was not relevant. He considered such intended liability excessive and unsettling, especially as the proposed offence might easily catch the public unawares with the increasingly common use of the digital camera, which being able to capture moving images would be covered by this provision. In his view, cinema operators should make more efforts to maintain order in their premises instead of calling for more stringent laws to protect their interest, lest such over-regulation should be further extended to prohibit other uses, such as the use of mobile phones in public places.

11. In response, DSTI, DIP and PAS/TI made the following points in support of the proposed strict liability -

- (a) The proposed arrangement had in fact stemmed from the need for an additional tool to overcome the enforcement hurdles in tackling the specific problem of the production of pirated optical discs from unauthorized recordings in local cinemas, where because of a darkened and usually crowded environment, unauthorized recordings were difficult to discover. Moreover, even though the bootlegger was caught "red-handed", the evidence might very likely have gone before the Police came because such acts were normally done by groups of people, and it would still be necessary for the court to be satisfied beyond reasonable doubt that the recording was made for sale or hire and not for private or domestic use.

- (b) The decision to criminalize the mere possession of video recording equipment instead of the act of unauthorized recording in cinemas had been made after thorough consultation. There had been wide support for the proposed prohibition in recognition that bootlegging was seriously threatening the survival of the local film industry.
- (c) In recognition of the serious consequences of the proposed prohibition, the Administration would ensure that the relevant provisions would not take effect until after sufficiently wide and effective publicity measures were undertaken, and that clear warning signs would be posted. The Administration was confident that after a short period of implementation, people would be aware of the prohibition, especially as such prohibition was not uncommon considering that it was also a criminal offence to have in one's possession video recording equipment when passing the customs of many countries.
- (d) Many libraries and museums also prohibited the possession and use of video recording equipment. The Hong Kong Theatres Association Limited had undertaken to provide secure storage facilities for deposit of the equipment to minimize the inconvenience caused by the prohibition.

12. Notwithstanding the above, Mr YEUNG Yiu-chung was still concerned about the strict criminal liability carried by the proposed prohibition. Mr Ronald ARCULLI, on the other hand, was not convinced that the proposed prohibition was a common provision worldwide. In relation to the Administration's claim that there was wide support for the proposed prohibition, ALA2 also pointed out that the general consensus of the Law Society of Hong Kong was that the mere possession of an unauthorized recording of a film should not constitute an offence.

13. Commenting on the Chairman and Mr YEUNG Yiu-chung's suggestion that the criminal liability carried by the proposed prohibition be replaced by heavier fixed penalties instead, DSTI assured members that the provision would not be as harsh as it appeared because it was expected that the cinema operators would as a first step advise the persons who had in their possession video recording equipment to place the equipment in the storage facilities provided before deciding whether to call in the enforcement departments. As such, the Bill would only affect those who really had the intention to do bootlegging. Mr Ronald ARCULLI however opined that to ensure fairness, it would be undesirable to allow cinema operators to exercise the above discretion.

The need for defence provisions

14. Regarding the implications of the proposed prohibition, Mr Ronald ARCULLI enquired whether a reporter who rushed into a cinema on fire to cover the incident with a video camera would commit an offence if the proposed

prohibition came into effect. In response, DIP said that in the above case the reporter would be exempted from the prohibition if permission had been obtained from the manager concerned. Mr ARCULLI was not convinced and said that in a hurry to capture the scene, the reporter would not wait for permission to enter the premises. He further pointed out that there could be cases where a person might have just bought a new video recording equipment before he went to the cinema.

15. In consideration of the cases quoted above, Mr Ronald ARCULLI urged the Administration to seriously consider providing a defence of “reasonable excuse” for offence in relation to the proposed prohibition. In this regard, ALA2 referred members to the proposed section 31C(1) in clause 25, which said that “any person who, without lawful authority, has in his possession in a place of public entertainment any video recording equipment commits an offence”, and pointed out that by adding the phrase “or without reasonable excuse” to it, a defence would be created. Mr ARCULLI however opined that to lift the onus of proof on the prosecution, it might be better to add the phrase to the proposed section 31C(2) instead.

16. In reply, DSTI and PAS/TI cautioned that the defence of “reasonable excuse” might render the proposed prohibition ineffective having regard that those who were intent on bootlegging in cinemas could think of all kinds of excuses. Mr Ronald ARCULLI did not agree and argued that even with the defence, the Bill could facilitate enforcement by enabling cinema operators to detain as evidence the video recording equipment used for bootlegging. At the Chairman’s request, the Administration agreed to seriously consider providing a defence provision which was both acceptable to members and effective at the same time.

Admin

Other concerns about the consequences of the proposed prohibition

17. In reply to Mr Ronald ARCULLI, PAS/TI advised that the maximum penalty for unauthorized possession of video recording equipment in cinemas and other places of public entertainment would be a fine at level 2 (maximum \$5,000) on first conviction, and a fine at level 5 (maximum \$50,000) and imprisonment for three months on a second or subsequent conviction.

18. As to Mr Ronald ARCULLI’s question on whether the video recording equipment found in unauthorized possession would be forfeited, ALA2 referred him to the proposed section 34 in clause 28, which provided that any optical discs, machinery, equipment, video recording equipment or other things seized, removed, detained or sealed were liable to forfeiture. DIP however clarified that despite this provision, the above items were essentially seized as evidence and whether they would be confiscated at the end would be a decision of the court by way of a court order.

19. On whether Hong Kong would be the first place introducing this kind of prohibition, DIP said in reply to Mr Ronald ARCULLI that the Mainland had also imposed such prohibition. While admitting that there were no overseas precedents, DSTI and PAS/TI pointed out that bootlegging was a problem unique to Hong Kong

and hence need to be tackled by such a special legislative proposal.

Committee Stage amendments (CSAs)

20. DSTI, the Senior Government Counsel and the Assistant Commissioner of Customs and Excise briefed members on the CSAs which the Administration intended to move to the Bill.

II Any other business

21. Members in principle supported the resumption of the Second Reading debate on the Bill at the last Council Meeting to be held on 26 June 2000. To enable the Administration to brief members on any CSAs they might agree to move in relation to mandatory warning signs and the defence of “reasonable excuse”, members agreed to schedule an additional meeting for 14 June 2000 at 10:45 a.m.

22. The meeting ended at 9:30 a.m.

Legislative Council Secretariat
4 October 2000