

立法會
Legislative Council

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Paper for the House Committee meeting on 7 January 2000

**Report of the Subcommittee to study the
Organized and Serious Crimes Ordinance
(Amendment of Schedule 1) Order 1999**

Purpose

This paper reports on the deliberations of the Subcommittee to study the Organized and Serious Crimes Ordinance (Amendment of Schedule 1) Order 1999 (the Order).

Background

2. Part of the approach adopted by the HKSAR Government to protect intellectual property rights is to maintain a comprehensive legal framework. The protection of intellectual property rights is recognized as an important factor in developing Hong Kong into a centre for technology and innovation. The lucrative profits derived from piracy and counterfeiting activities have all along been attractive to criminal syndicates. The present laws relating to intellectual property are considered inadequate in providing sufficient powers to tackle the problem.

3. The Government issued a public consultation paper in February 1999 to seek views on various options to further enhance the intellectual property laws in Hong Kong. Taking into account the results of the consultation exercise, the Government decided to proceed with a series of legislative amendments including, as a first step, the inclusion of piracy and counterfeiting offences in Schedule 1 to the Organized and Serious Crimes Ordinance (OSCO), Cap. 455.

The Order

4. The Administration proposes to provide special investigative and enforcement powers available under the OSCO to deal with piracy and counterfeiting offences where organized crimes may be involved. The Order amends Schedule 1 to OSCO to add offences relating to the infringement of trade mark rights and the import or export of goods bearing a forged trademark under sections 9, 12 and 22 of the Trade Descriptions

Ordinance, Cap. 362 and offences relating to the making or dealing with infringing copies of copyright works under sections 118 and 120 of the Copyright Ordinance, Cap. 528. Once added to OSCO, such offences will be subject to the provisions of OSCO which provide for additional powers of investigation into certain crimes and proceeds of crimes, the confiscation of proceeds of crimes and related matters.

The Subcommittee

5. The Administration briefed the Trade and Industry Panel on the Order on 1 November 1999 with the intention of seeking LegCo's approval at the Council meeting on 3 November 1999. Members of the Panel noted a recent case involving a fake authorization document found in a licensed optical disc factory and expressed concern over the possibility that innocent manufacturers might be held liable for producing pirated goods if they failed in verifying the authenticity of authorization documents. In view of the impact of the Order on optical disc manufacturers, members considered it necessary to hear the views of the trade before the Order was considered. The Administration hence agreed to defer the introduction of the Order pending the decision of the House Committee.

6. At the House Committee meeting on 12 November 1999, members agreed to form a Subcommittee to study the Order before it was introduced. Hon Mrs Selina CHOW LIANG Shuk-ye was elected Chairman of the Subcommittee. The Subcommittee has held three meetings with the Administration and has met ten deputations which included optical disc manufacturing associations and copyright-based industries. A membership list of the Subcommittee and a list of deputations received by the Subcommittee are at **Appendices I** and **II** respectively.

Deliberations of the Subcommittee

Impact of the Order on optical disc manufacturers

7. The Subcommittee received representations from two trade associations representing optical disc manufacturers, namely the Optical Disc Manufacturing and Technologies Association Limited (ODMTA) and the Hong Kong Optical Disc Manufacturers Association.

8. The ODMTA, which claims to represent over 75% of the optical disc manufacturers in Hong Kong, strongly objects to the introduction of the Order. According to ODMTA, optical disc manufacturers have difficulties in tracing the chain of title of copyrights, particularly those from the Mainland and other Southeast Asian countries. As a result, they have been victimized and made scapegoats for piracy offences. They have all along urged the Government to provide support in copyright verification by establishing a copyright authentication centre providing authenticating services and copyright information to the trade, and have requested the Government to provide guidelines in copyright verification. As optical disc manufacturers have already

had a hard time meeting the requirements of copyright legislation, the introduction of the Order would pose further difficulties to the industry. ODMTA originally requested exemption from the Order, but in its latest submission to the Subcommittee, it sought a two-year deferment in the implementation of the Order to allow time for formulating guidelines and setting up an authentication centre.

9. The Hong Kong Optical Disc Manufacturers Association (HKODMA), on the other hand, is in support of the introduction of the Order and did not agree with the ODMTA that optical disc manufacturers should be exempted from the application of the Order since the law should be equitably applied to all. For the same reason, the HKODMA would not support any legislation which would exclusively target against optical disc manufacturers. It considers that due diligence should be exercised by the manufacturers in verifying the authorization documents before accepting orders. Nevertheless, assistance should be provided in verifying the authenticity of authorization documents.

Views of the copyright-based industries

10. The copyright-based industries and the companies of the Hong Kong Copyright Alliance (HKCA) (see Appendix II) has made a joint submission to the Subcommittee expressing support for the introduction of the Order. HKCA believes that copyright piracy cannot be effectively eliminated if organized and serious criminal elements continue to involve in the illicit trade. The additional investigative powers under OSCO are considered necessary tools that can be effectively employed by enforcement officers to fight against extensive criminal networks involved in copyright piracy. Copyright-based industries are keen to cooperate with optical disc manufacturers and are prepared to provide assistance in copyright verification. HKCA stresses that issues relating to copyright verification should not distract discussions on the Order. It considers that any delay in the introduction of the Order would only further damage the already struggling copyright industry.

The Administration's stance

11. Members of the Subcommittee are concerned about the impact of the Order on optical disc manufacturers, in particular the latter's ability to verify authorization documents from copyright owners/publishers. During the course of deliberation on the Order, the Subcommittee has exchanged views with the Administration on the issues raised by the trade, and the extent of assistance that could be rendered for purposes, such as the authentication of copyright authorizations.

12. The Administration's stance is that it is ultimately the responsibility of the concerned parties to exercise due diligence to ensure that any business deals are in compliance with the laws of Hong Kong. In the case of the optical disc manufacturers, it remains their onus to verify the authenticity of the authorization of the relevant copyright owners before proceeding to reproduce the disc. Failure to do so could amount to an infringement of copyright under the Copyright Ordinance and the offender is liable to prosecution. However, if the manufacturers are able to prove that they did not know and

have no reason to believe that the copy or article in question is an infringement copy of the copyright work, they would be sufficiently protected by the defence provisions under section 118(3) and (5) of the Copyright Ordinance.

13. The Administration emphasizes that there are no hard and fast rules as to how the authenticity of copyright authorizations should be verified. Prudent procedural safeguards and good trade practices would include verifying and ascertaining the authorization documents and licensing information with the copyright owners, requiring the client to provide identification information and inspecting the disc for inconsistency in the copyright information or other irregularities. These guidelines should be formulated and observed by the trade. However, compliance with these safeguards would not absolve the responsibility of the concerned parties to ensure the legitimacy of their business transaction. There is no legal obstacle for optical disc manufacturers to request their customers to indemnify them from claims of copyright infringements, but independent legal advice should be sought. Where there is doubt on the copyright authorization, consideration should be given to refusing the acceptance of the orders. As regards the liaison with the Mainland, the Administration advises that the Customs and Excise Department is stepping up its liaison with Mainland counterparts and will reflect the difficulties faced by some manufacturers in verifying copyright authorizations from the Mainland.

14. Regarding the request for the setting up of a central authentication centre for copyright verification, the Administration advises that this is not a practicable arrangement as there are no legal obligations for copyright owners and licensees to register their rights. It is impossible for any government to maintain an up-to-date register of all copyright works given the vast amount of titles involved and the complete freedom in transfer of ownership. International treaties on the protection of intellectual property rights stipulate that copyright protection shall not be subject to any formalities. Any statutory registration requirement will therefore contravene these international standards.

15. On the impact of the Order on optical disc manufacturers, the Administration stresses that the trade would not be affected if they exercise due diligence in their business transactions. The special investigative and enforcement powers available under the OSCO would be applied to the more serious copyright infringement cases where organized crimes may be involved. The Secretary for Justice has to apply to the Court of First Instance for an order for the purpose of investigation under OSCO.

Views of the Subcommittee

16. Members of the Subcommittee are generally in support of the Order. Members note that the inclusion of the offences under the Trade Descriptions Ordinance to Schedule 1 of OSCO is intended to target at manufacturers and importers/exporters of counterfeit goods and not dealers of parallel imports or retailers and that the offences to be included would only relate to the infringement of trademark rights and the import or export of goods bearing a forged trade mark. The Subcommittee concurs with the Administration that it is inappropriate to give special exemption to the optical disc manufacturers since such exemption has not been provided for in other copyright

legislation. The Subcommittee notes that even among optical disc manufacturers, there is diversity of views on whether the Order should be supported.

17. Regarding ODMTA's request for a two-year deferment in the implementation of the Order, members of the Subcommittee are not convinced that a deferment is justified. On the contrary, members consider that there is an urgent need to combat piracy and counterfeiting activities, hence the early implementation of the Order. Nevertheless, members appreciate that optical disc manufacturers will face difficulties in authenticating copyright authorizations. They have therefore urged the Administration to take more proactive measures to assist manufacturers in the verification process. For example, the Customs and Excise Department should make clear its requirements to the manufacturers. In striking a balance between the protection of copyright and the protection of the interest of the manufacturers, care should be taken to ensure that the innocent would not be unnecessarily caught by the Order. As these issues are associated with the enforcement of the Prevention of Copyright Piracy Ordinance, Cap. 544 and not the Order itself, members have decided to refer the matter to the Trade and Industry Panel.

Recommendation

18. The Subcommittee supports the introduction of the Order and agrees that it be introduced to Legislative Council at its meeting on 12 January 2000.

Advice sought

19. Members are requested to support the recommendations of the Subcommittee at paragraph 15 above.

Council Business Division 1
Legislative Council Secretariat
4 January 2000

研究《1999 年有組織及嚴重罪行條例
(修訂附表 1) 令》的
小組委員會
Subcommittee to study the
Organized and Serious Crimes Ordinance
(Amendment of Schedule 1) Order 1999

委員名單
Membership list

周梁淑怡議員(主席)	Hon Mrs Selina CHOW LIANG Shuk-ye, JP (Chairman)
馬逢國議員	Hon MA Fung-kwok
涂謹申議員	Hon James TO Kun-sun
陳鑑林議員	Hon CHAN Kam-lam
單仲偕議員	Hon SIN Chung-kai

合共： 5 位議員
Total: 5 Members

日期：1999 年 11 月 22 日
Date: 22 November 1999

**Subcommittee to study the
Organized and Serious Crimes Ordinance
(Amendment of Schedule 1) Order 1999**

List of organizations received by the Subcommittee

Optical Disc Manufacturing and Technologies Association Limited

- * Hong Kong Optical Disc Manufacturers Association
- * International Federation of the Phonographic Industry (Hong Kong Group) Limited
- * Music Publishers Association of Hong Kong Limited

- * Business Software Alliance

Software Publishers Association

- * Motion Picture Association
- * Motion Picture Industry Association
- * UA Cinema

Movie Producers and Distributors Association of Hong Kong Limited

Total: 10 organizations

- * These organizations, together with HMV Media (Hong Kong) Limited belonged to the Hong Kong Copyright Alliance. The Alliance has presented a joint submission to the Subcommittee expressing support for the introduction of the Order.