

立法會
Legislative Council

LC Paper No. CB(1) 812/99-00
(These minutes have been seen
by the Administration)

Ref: CB1/HS/2/99/1

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

**First meeting on
Monday, 22 November 1999 at 10:45 am
in Conference Room A of the Legislative Council Building**

Members present : Hon Mrs Selina CHOW LIANG Shuk-ye, JP (Chairman)
Hon MA Fung-kwok
Hon James TO Kun-sun
Hon CHAN Kam-lam
Hon SIN Chung-kai

Public officers attending : Mr Philip CHAN
Principal Assistant Secretary for Trade and Industry

Mr Vincent POON
Assistant Commissioner of Customs & Excise

Mr Kevin ZERVOS
Senior Assistant Director of Public Prosecutions

Miss Betty CHOI
Senior Government Counsel

Mr Johann WONG
Assistant Secretary for Trade and Industry

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

Staff in attendance: Miss Anita HO
Assistant Legal Adviser 2

Ms Rosalind MA
Senior Assistant Secretary (1)9

I. Election of Chairman

Mrs Selina CHOW was elected chairman of the Subcommittee.

II. Meeting with the Administration

2. The Principal Assistant Secretary for Trade and Industry (PAS/TI) briefed members on the background to the introduction of the Organized and Serious Crimes Ordinance (Amendment of Schedule 1) Order 1999 (the Order). The Administration issued a public consultation paper entitled “Combating Intellectual Property Rights Infringement in the HKSAR: Possible Additional Legal Tools” in February 1999 to seek views on various options to further enhance the intellectual property legislation. The consultation ended on 30 April 1999 and one of the proposals which gained general support was to include piracy and counterfeiting offences in Schedule 1 to the Organized and Serious Crimes Ordinance (OSCO). The proposal was considered at meetings of the LegCo Panel on Trade and Industry on 7 June 1999 and 1 November 1999. At the meeting on 1 November 1999, members raised concern over the difficulties faced by the optical disc manufacturers in checking the authenticity of the authorization documents.

3. In response to members’ concern, PAS/TI explained that there were defence provisions under section 118 (3) and (5) of the Copyright Ordinance which provided protection to persons who did not know and had no reason to believe that the copy or article in question was an infringing copy of copyright work. Optical disc manufacturers should exercise due diligence in ensuring that their business deals were in compliance with the laws in Hong Kong. Regardless of whether the Order was introduced or not, it remained the ultimate responsibility of the manufacturers to verify authenticity of the authorization document before accepting an order for production of optical discs. Therefore, difficulties in verifying the authenticity of the authorizations should not constitute sufficient grounds for the manufacturers to object against the Order. Nevertheless, the Administration would arrange meetings with the manufacturers and the relevant organizations to assist them in verifying the authorizations and to explore means of streamlining the procedures of verification. He also assured members that the power given under the Order would not be abused by the Customs and Excise Department (C&ED) as there were adequate checks and balances. He sought members’ support to the Order.

Assistance to optical disc manufacturers

4. Mr CHAN Kam-lam urged the Administration to adopt a cautious approach in the handling of piracy offences. It would be unfair to hold manufacturers responsible for producing pirated discs when the actual culprit was in fact the originator of the fake authorization. The Administration should explore means to provide simple and quick verification of authorization. If the verification procedures were too lengthy, the commercial interest of the manufacturers would be adversely affected. He was concerned that the introduction of the Order would have a negative impact on the optical disc manufacturing industry since manufacturers would have hesitation in accepting orders.

5. PAS/TI clarified that in the case of a fake authorization, the originator was in fact infringing copyright and would be investigated by the C&E officers. The relevant copyright publishers for movies, musical works and computer software were willing to provide assistance to manufacturers in the verification of authorizations and the process usually took only a few days. As to the possible impact on the business of the optical discs manufacturers, he said that manufacturers had all along been required to ensure the authenticity of authorizations and no additional responsibility was brought about by the Order.

6. In response to Mr SIN Chung-kai's question on whether a letter of warranty from the copyright owner would indemnify the manufacturer against infringement claims, PAS/TI said that copyright infringement cases could not be generalized and had to be dealt with on a case by case basis. The content of the authorization had to be examined to establish whether there were reasons to believe that it was genuine. In order to assist manufacturers in verifying the authorization documents, Mr SIN Chung-kai suggested that the Administration should consider providing them with codes of practice/guidelines listing out the basic steps required in establishing the authenticity of authorization documents from the claimed copyright owners. The Assistant Commissioner of Customs & Excise (AC/C&E) said that being the enforcement agent of the legislation, the C&ED would not be in a position to provide codes of practice to the manufacturers. This should be worked out among the members of the industry and the relevant organizations. However, the Administration could consider providing guidelines on the proper procedures to be taken by the manufacturers. He emphasized that the Administration could not undertake that prosecution action would not be taken against manufacturers who had complied with the basic requirements provided in the guidelines. In addition, Mr SIN Chung-kai requested the Administration to provide the names of the recognized organizations for verifying the authorizations and sample of letters of warranty from copyright owners for the manufacturers' reference.

Admin

Admin

Difficulties in verifying authorizations with origins from overseas and the Mainland

7. Mr James TO enquired about the percentage of copyright infringement cases involving licensed factories producing pirated goods under fake authorizations. The

Chairman shared similar concern and enquired about the number of convicted piracy cases. AC/C&E replied that in past cases involving piracy offences, nearly all of the pirated goods were produced in illegal underground factories. It was only recently that some licensed factories had been found to engage in the production of optical discs without a valid authorization. This could be attributed to the upsurge in popularity of Mainland television productions, the chain of title of which was not easy to trace. However, there were only a few cases detected so far. The Administration was in the process of arranging formal discussion with the Press and Publication Administration and the National Copyright Administration of the Mainland on ways to establish the procedures of verifying copyright authorizations from the Mainland.

8. In response to Mr James TO's question on the percentage of optical discs of Mainland origin produced by local licensed factories and the percentage of pirated items among these discs, AC/C&E said that 60% of the total production of the factories involved orders from the Mainland. However, the Administration did not have statistics on the percentage of pirated items among these discs as most of the cases were still under investigation.

9. Mr MA Fung-kwok supported the Order and commented that a responsible manufacturer would be able to verify the authenticity of an authorization by requesting the copyright owner to provide the chain of title. Moreover, the manufacturers should be more cautious in accepting orders. They could better protect themselves by receiving orders placed through a known organization or an individual with proper identification. In order to assist the manufacturers in verifying the authorizations from the Mainland, he requested the Administration to provide a contact list of Mainland publishers/copyright owners. AC/C&E responded that the Administration was working with the Mainland authorities on measures to assist manufacturers. PAS/TI said that if a manufacturer accepted an order only through the telephone or fax without adequate knowledge of the organization or individual who placed the order, he/she was not performing due diligence in this process. The manufacturers had the responsibility to verify the authorizations and it was impossible for the Administration to provide contact lists of copyright owners in countries all over the world. The Chairman opined that for those intellectual property right (IPR) items originated in the Mainland, it would be very difficult for the manufacturers to verify the authenticity of the authorization. It would not be easy to develop a mechanism for the verification even with the assistance of relevant Mainland authorities.

10. Addressing Mr MA Fung-kwok's concern about the restrictions imposed by the Mainland authorities on the production and import of audio visual products, AC/C&E said that there was restriction on the manufacturers in the Mainland to divert the production of these products outside the territory of Mainland. However, the Hong Kong authorities were not in a position to take enforcement actions against the violation of the restriction. As regards the restriction on import of audio-visual products, he said that the C&ED had no information in this respect.

11. Mr James TO commented that unless the Administration could work out with Mainland authorities a very effective mechanism in verification of authorization, it would be difficult from the legal point of view for the Administration to prove that those manufacturers with an invalid authorization had not performed due diligence. Therefore, it would be unlikely that innocent manufacturers would be held responsible for infringing copyrights. The Chairman said that the provisions of the legislation should try to strike a balance between prevention of copyright infringement and protection of innocent manufacturers. PAS/TI responded that the Administration was arranging discussions with the Mainland authorities with a view to working out an effective mechanism for verifying authorizations. He assured members that the power given to the enforcement agencies would not be abused and the Administration would take prosecution action against infringement cases which were supported by strong evidence.

Infringement of trade mark rights

12. Mr SIN Chung-kai sought clarification on the provisions under Sections 9, 10, 12, and 22 of the Trade Descriptions Ordinance. The Senior Assistant Director of Public Prosecutions explained that these provisions were mainly applicable to counterfeiting goods with forged trade mark and not parallel imports. AC/C&E supplemented that the inclusion of these offences in Schedule 1 to the OSCO was meant to target at the manufacturers and importers/exporters of goods with forged trade mark. The major targets were in the upper stream of the counterfeiting process and not the lower stream of the retailers and consumers. On the enforcement of these provisions against consumers purchasing forged trade mark items for personal use, AC/C&E said that C&ED was empowered to take enforcement actions against these individuals for possession of goods with forged trade mark for the purpose of trade and business or when they knowingly imported these goods through the control points. However, these were not the major targets of the Order and focus would be placed on the production or import and export of large amount of these items for business purpose.

13. As to the provisions under Section 22, PAS/TI explained that this was used to combat against counterfeiting activities where goods with forged trade mark were produced outside Hong Kong. The mastermind who placed the order for production of these goods could be taken to court under this provision.

14. Mr MA Fung-kwok enquired whether the retailers of pirated optical discs would be charged under the provisions of OSCO as he observed that some of the retailers were actually backed up by triad society. PAS/TI responded that the definition of an “organized crime” had been listed in paragraph 10 of the Legislative Council Brief on the Order. Where the enforcement agent could prove to the court that the activities of the retailers in question constituted an organized crime, it could charge the retailers under the provisions of OSCO.

Justifications for introducing the Order

15. In response to the Chairman's request for justifications for the introduction of the Order, PAS/TI said that there had been calls from both the Legislative Council Members and members of public for stepping up measures against piracy and counterfeiting activities in the past years. The outcome of public consultation revealed that the public was generally supportive of the proposal of including piracy and counterfeiting offences in Schedule 1 of OSCO. As lucrative profits derived from these activities had made them attractive to criminal syndicates, the present legislation relating to intellectual property was not considered adequate in providing sufficient powers to tackle the problem. Therefore, the Administration had proposed that the special investigation and enforcement powers available under the OSCO should be used to deal with piracy and counterfeiting offences where organized crime might be involved.

16. Concluding the discussion, the Chairman said that members were generally supportive of the principle of the Order. On exercising the powers available under OSCO, the impact on the members of the trade would have to be assessed. In this regard, representatives from copyright based industries and the optical disc manufacturers should be invited to the next meeting of the Subcommittee to express their views.

17. Members agreed that the next meeting of the Subcommittee would be held on Wednesday, 1 December 1999, at 8:30 am in Conference Room A of the Legislative Council Building.

III. Any other business

18. There being no other business, the meeting was adjourned at 12:00 noon.

Legislative Council Secretariat

18 January 2000