



**SUBMISSION BY HONG KONG CABLE TELEVISION LIMITED
TO THE BILLS COMMITTEE OF THE LEGISLATIVE COUNCIL
ON COPYRIGHT (SUSPENSION OF AMENDMENTS) BILL 2001**

1. Urgent Need to Reinforce the Legal Protection for Cable Programmes

- 1.1 The Government aims to make Hong Kong a regional broadcasting hub. To achieve this, there must be adequate measures to protect the telecasters' copyrights. This is particularly important for those operators who rely on, and have been licensed to rely on subscription as their primary source of revenue. The local cable operators are not the only sufferers from pirated viewing. Local and overseas programme providers, whose programme licence fees will be directly or indirectly tied to the subscriptions received by the cable operators, have been suffering too. This could have a knock-on effect on their continuing investments in the local broadcasting market and hence the development of Hong Kong as the regional broadcasting hub.
- 1.2 Lately, piracy of cable programmes is rampant. Leaflets on sale and installation of unauthorised decoders for receiving our programmes are widely distributed in the streets. Many of them emphasize that 'customers' could save our programme fees for life. Unauthorised decoders are available not only in the local market but also in Mainland China, usually at a more 'attractive' price. There is a growing trend that people bring in from Shenzhen unauthorised decoders for self-use, as gift or even as commodity. Worse still, a portion of the general public has been treating pirated viewing as a norm. They openly compare the quality and pricing of different unauthorised decoders. They pass around the contact details for acquiring the unauthorised decoders. They make available on Internet detailed instructions on how to modify computers to unauthorised decoders capable of receiving our programmes. By estimation, our loss arising from pirated viewing amounts to millions of dollars each month.
- 1.3 So far, Hong Kong has not had an effective law to combat fraudulent viewing of pay TV programmes. Control on provision and trading of equipment for fraudulent viewing is not as useful as expected because such illegal activities are conducted principally outside Hong Kong where the Hong Kong law does not



apply.

- 1.4 Where the law cannot restrain piracy at the supply level, there needs a restrain at the consumption level. Since 1980s, it has been an offence in the United Kingdom to dishonestly receive pay television programmes with intent to avoid payment. The prevailing legislative provision reads as follows (s.297 - 1988 Copyright, Design and Patents Act):

“(1) A person who dishonestly receives a programme included in a broadcasting or cable programme service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(2) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

In relation to a body corporate whose affairs are managed by its members "director" means a member of the body corporate.”

- 1.5 The Copyright Ordinance has replicated most of the provisions of its UK counterpart. Nonetheless, section 297 of the Act was not adopted when the Ordinance was promulgated in 1997. Same prohibition is found in other jurisdictions like New Zealand and Fiji Islands though, rather ironically, they appear to be not as ambitious as Hong Kong on the development of communications (including television broadcasting). From this perspective, Hong Kong legislation is seemingly lagging behind the international standard.
- 1.6 Given the increasing proliferation of pirated viewing as mentioned earlier, Hong Kong Cable would urge the Government to redress the problem immediately by adding in the Copyright Ordinance a provision similar to section 297 of the Act.



2. Access to Cable Programmes Not Prejudiced

- 2.1 The Government expressed its concern in the Panel Meeting on Commerce & Industry on April 19, 2001 that in the absence of proper licensing schemes for the copyright works other than those specified in Section 2(2) of the Suspension Bill (gazetted on April 27, 2001), application of the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (the “Amending Ordinance”) would hinder the flow of information.
- 2.2 In Hong Kong Cable’s view, there should not be a cause for such concern over cable programmes.
- 2.3 There are two usual forms of licensing schemes, namely individual licensing and collective administration of licensing rights. Individual licensing of television programmes has been existing in the industry for decades and is simple, clear and well-functioning.
- 2.4 Collective administration is appropriate only if there are multiple users of a large number of works of the same kind which are owned by different right holders. For example, a broadcaster may use hundreds of songs and musical sound recordings each day. The rights of these works usually belong to different publishers, authors and record companies, both local and overseas. Instead of contracting with each of these right holders, the broadcaster normally deals with one or two collecting societies which represent the right holders.
- 2.5 The concept of ‘collective administration of licensing rights’, however, does not apply to cable programmes. So far, there are only two subscription service providers with three more preparing to launch services in the coming year. Hong Kong Cable’s rates and other terms of service are always made public and our programmes/channels can be subscribed easily over the phone. We trust existing and new operators would adopt similar practice. Thus, it is always more convenient for the users to access pay TV programmes through direct contact with the operators than via an intermediary.
- 2.6 The absence of a collective administration scheme in relation to cable programmes will not obstruct the flow of information. The Copyright Ordinance contains provisions which allow the use and recording of cable programmes for



education, archive and public administration purposes (s.41-59). The public could record our programmes for time-shifting purposes (s.79). They are also allowed to use our programmes under the ‘fair dealing’ rules (s.38-40) and other statutory exceptions.

- 2.7 Hong Kong Cable supports the public’s right to information. We have been voluntarily making available in public places part of our programmes, notably those concerning public interest, under a controlled manner. Thus, for instance, people may watch our news programmes at the Times Square and other public places.

3. Should Not Discriminate Against Non-dramatic Programmes

- 3.1 The Suspension Bill freezes all copyright works EXCEPT movie, television drama, musical sound recording/ film and computer program.

- 3.2 The Government explains that the exceptions are justified because (i) the underlined works generally have substantial commercial value and (ii) piracy of these works is rampant. In Hong Kong Cable’s view, the explanation does not reflect the whole truth.

- 3.3 The license fee for televising a tournament could be much higher than the production cost of a television drama. This is particularly true for the grand or popular tournaments like the Olympic Games, World Cup, European Soccer and NBA. The production costs of world-class documentary programmes are huge. Even the production costs of our news programmes are comparable to those of certain television dramas. Each year, we invest several hundred million dollars in the non-dramatic contents. We simply could not accept that television dramas have more commercial value than non-dramatic programmes. Furthermore, as we said in paragraph 1.2 above, we cannot accept that piracy of cable programmes is less rampant than the excepted works.

- 3.4 In fact, the exceptions in the Suspension Bill may create uncertainties when it comes to implementation. For example, in the absence of a definition for ‘television drama’, how could dramatic and non-dramatic programmes be differentiated with certainty and consistency? Would programmes partly containing dramatic elements like ‘Police Magazine (警訊)’ of RTHK, ‘Crying



Forest (哭泣的森林)’ of ATV, ‘Do the Right Thing (人生交叉點)’ and ‘E.Y.T. (歡樂今宵)’ of TVB be considered television dramas?

3.5 The selective exceptions could also give rise to unfairness. While a cable programme has its own copyright, its constituents (including the film, script, music, lyrics and their recordings, recordings of non-musical sounds, props, sets and costumes) have separate copyrights which are often owned by several parties other than the cable TV station. Pursuant to the Suspension Bill, where a pub uses an unauthorised decoder to show a cable programme for its customers’ enjoyment, only the music record company and possibly the film owner whose works having been incorporated in the cable programme could resort to criminal action. The cable TV station and owners of other constituent works may not have the same entitlement, even though their works have been infringed at the same time. This contravenes the notion that all copyright works should enjoy the same level of protection without differentiation.

4. **Conclusion**

4.1 To make Hong Kong a regional broadcasting hub, the Government must improve the legal protection of the copyrights of all television licensees. As we explained in our letter of April 18, 2001 to the Secretary for Commerce and Industry (copy attached¹), the legislation made before April 1, 2001 fails to protect the cable programme operators effectively in both the civil and criminal dimensions. The Amending Ordinance could correctly address the legislative inadequacy as far as commercial piracy is concerned. It is therefore not appropriate to suspend the application of the Amending Ordinance in relation to cable programmes.

4.2 Meanwhile, the Government should adopt a provision similar to s.297 of the 1988 Copyright, Design and Patents Act to remove fraudulent viewing of cable programmes at home or elsewhere. Only with the subsistence and strict implementation of both legislative provisions could the cable programme piracy problems be resolved.

4.3 Given that cable programmes are not normally information disseminated in

¹ When the letter was dictated, the draft Suspension Bill was not yet available to the public. The term ‘musical works’ referred to on the 2nd page of the letter should now be read as ‘musical sound recordings/films’.



business organisations (including small and medium enterprises), government bodies or schools and there exist in place protections for the public's right to information (mentioned in paragraph 2.6 above), strengthening the legal protection for cable programmes will not jeopardise the public interest. The strengthening will catch only the intent culprits but not the innocent public.

Hong Kong Cable Television Limited

May 2001



Attachment

April 18, 2001

(copy)

Mr. Chau Tak-hay
Secretary for Commerce and Industry
Commerce & Industry Bureau
Level 29, One Pacific Place
88 Queensway
Hong Kong

URGENT

By fax & by post
(Fax no.: 28694413)

Dear Brian,

The Intellectual Property (Miscellaneous Amendments) Ordinance 2000

We notice that the Government intends to suspend indefinitely implementation of the above ordinance over various copyright works. We consider the suspension in relation to cable programmes inappropriate.

Since the commencement of our television service in 1993, we have been facing the headache of pirated viewing in both private and public places. The problem deteriorates with the increasing availability of aggressively priced unauthorized decoders in the markets of Mainland China and Hong Kong. By estimation, our loss of subscription revenue amounts to millions of dollars each month. This is a serious blow to a business which relies (and is fully licensed by the Government to rely) on subscription as its primary source of revenue.

We have considered but concluded civil remedies would not really be useful. The procedures involved are complicated and time-consuming. By the time the case is tried, the culprit may have wound up its business on the writ and continue its infringement in a different business name at a different location. Moreover, civil actions have no deterrent effect. Given the huge legal costs and the slim chance of recovery, we could sue only a handful of culprits. Their majority are 'pardoned'. Even if we are fortunate enough to get damages from the defendants, the sum obtained is minimal, compared to our loss in aggregate.

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(copy)

Although the suspension would not apply to films and musical works, that would not help our case at all. Like other pay TV operators, a large proportion of our contents are acquired by licence. Our rights in many programmes and almost all the musical works are non-exclusive. As a non-exclusive licensee, we have no right to institute proceedings for pirating the corresponding copyright works. Even if we hold the exclusive rights over some programmes, we may not be able to sue on our own unless the copyright owners are joined in the actions or the court grants a special leave.

The Broadcasting Ordinance contains a section which purportedly bans unauthorized decoders. Nonetheless, it targets traders but not users of unauthorized decoders. Thus, for instance, pubs and karaoke bars using such decoders to provide our programmes to their customers are not liable under the Broadcasting Ordinance. Nor are they liable for sure under the original Copyright Ordinance which requires the infringement be made 'for the purpose of trade or business'. The Amendment Ordinance removes the uncertainty and addresses the inadequacy in the Broadcasting Ordinance. If Hong Kong is to become a regional broadcasting hub, it needs clear and sufficient measures to combat not only trading but also use of apparatuses for infringing copyrights.

The recent public complaints about the Amendment Ordinance revolve around the reproduction of cuttings of newspapers and other publications which are necessary for the daily operation of all educational institutions, business entities and government agencies. Nonetheless, very few of them need to record or receive our programmes for their legitimate business. Thus, the continuance of the Amendment Ordinance over cable programmes will not jeopardize the public interest.

For the reasons aforesaid, we would urge the Government to take out cable programmes from the list of suspension.

Yours sincerely,

Sd.

Stephen T. H. Ng

c.c. Legislative Council
Panel on Commerce & Industry
(Attn: Mrs. Florence Lam)