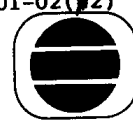


CB(1) 683/01-02(12)

Television Broadcasts Limited
電視廣播有限公司



Our Ref: KW/01/12/137

18th December 2001

Ms. Connie Szeto
Clerk to Panel
Legislative Council Secretariat
3rd Floor, Citibank Tower
3 Garden Road
Central, Hong Kong

BY POST

Dear Ms. Szeto,


Re: **LegCo Panel on Commerce and Industry**
Review of Certain Provisions of Copyright Ordinance

We refer to your letter dated 23rd November 2001 addressed to Mr. T K Ho, our General Manager - Television Broadcasting.

We are pleased to enclose our written views on the Consultation Document on Review of Certain Provisions of Copyright Ordinance published by the Government.

Thank you for your attention.

Yours sincerely,


Karen Wan
Legal Counsel
Legal Department

KW/ps
Encl.

c.c. Mr. T K Ho (TVB)
Mr. Orlando Chan (TVB)
Mr. Stephen Chan (TVB)
Ms. Winnie Ho (TVB)

TVB's Submission on the Review of Certain Provisions of Copyright Ordinance Consultation Document

Chapter 1 Criminal Provisions Related To End-Users Piracy

1. Employees' Criminal Liability

Public's views are sought on whether employees in possession of an infringing copy supplied by the employer for use in business should be criminally liable. We submit that employees should not be criminally liable as it would impose substantial hardship on the employees in the course of performing their duties at work. However, employees should be liable to criminal prosecution if they possess an infringing copy for use in their work without the permission of the employer unless they have no reasonable ground to believe that the copy is an infringing copy of a copyright work.

2. Who and How to Determine Rampant Piracy

- 2.1 Some suggest that criminal sanction against end-users should apply only to those copyright works afflicted by rampant piracy. Our concern is how to decide the piracy of a particular type of copyright work is rampant and who is going to give a judgment on which type of copyright work is afflicted by rampant piracy.
- 2.2 It can be rather arbitrary in the process if there is none of a well-established mechanism to determine the degree of rampancy. This may arouse public outcry for unfair treatment to different types of copyright works.
- 2.3 It is our considered view that all copyright works should be given the same degree of protection as a matter of principle, irrespective of the extent to which they are afflicted by rampant piracy.

3. End-User Exempt from Criminal Liability

- 3.1 We fully support the intent of the Government to combat the use of infringing copies of copyright works directly for the purpose of, in the course of, or in connection with any trade or business particularly that such use of infringing copies is for commercial purpose or the generation of profits.
- 3.2 However, the act of copying articles from newspapers, magazines and other publications that are relevant to business for internal disseminating and reference and not for any commercial purpose or profit making should be exempt from criminal liability. If these copying activities are caught, it will inevitably and

seriously hinder the efficient distribution and dissemination of news and information within an organization. This in turn will affect the ability of an organization to respond promptly to the public relating to its business.

- 3.3 In fact, the copying activities described in 3.2 above do not conflict with a normal exploitation of the work by the copyright owner and do not unreasonably prejudice the legitimate interests of the copyright owner. We believe that the Government should be heading for striking a balance between protecting the legitimate interests of the copyright owners and the importance of efficient use and dissemination of information.

4. Should Not Exclude Non-Dramatic Television Programmes

- 4.1 The Copyright (Suspension of Amendments) Ordinance 2001 (the "Suspension Ordinance") was enacted to suspend the new criminal provisions introduced by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 except that four categories of works were excluded from the suspension.
- 4.2 We strongly disagree with the exclusion of non-dramatic television programmes from the exception part of the Suspension Ordinance. We have explicitly explained the reasons of our protest in our previous submission on the Copyright (Suspension of Amendments) Bill dated 9 May 2001 and also our supplemental submission dated 17 May 2001, a copy of each of the submissions is attached for easy reference. Our stance has not changed in this regard.
- 4.3 We cannot accept the explanation of the Government for the selected exceptions that the excepted works generally have substantial commercial value and piracy of these works is more rampant. It is a misconception that television dramas must have higher commercial value than non-dramatic programmes. Huge production costs can be incurred for producing high quality documentary programmes and news programmes, which are also commercially valuable. It is known that the production costs of some documentary programmes produced by BBC and Walt Disney are huge and are comparable to those of certain television dramas. Their commercial value in the market is no less than television dramas. In addition, it is indiscreet to put forward an allegation that the piracy of non-dramatic programmes is less rampant than television dramas. There is no concrete evidence or figure to justify this belief.
- 4.4 Exclusion of non-dramatic programmes from the exceptions would constitute an unjustifiable unfair treatment to different types and genres of television programmes, all of which should be entitled to the same level of protection as a matter of principle. It seems to suggest to the general public that non-dramatic programmes are less valuable and the infringement of the copyright thereof is less serious than to the television dramas.

- 4.5 We reiterate and strongly submit that all television programmes must be included in the exceptions to the suspension as the economic and commercial value of all types of television programmes are equally substantial and important.

Chapter 4 Permitted Acts Related to Free Public Showing or Playing Broadcast or Cable Programme

1. We do not protest the extension of the statutory exemption in respect of the captioned permitted acts to cover all public places PROVIDED THAT the permitted acts are only confined to the showing or playing in public of on-air programmes but NOT the recorded version of the off-air programmes. In fact, we believe that the permitted showing or playing in public of a broadcast or cable programme (other than an encrypted broadcast or cable programme) under section 258 of the Copyright Ordinance should be referring to the broadcast of on-air programmes but not otherwise. It goes without saying that recording of any television or cable programmes by whatever means without the permission of the copyright owners is not permitted under the Copyright Ordinance unless it is a permitted act under the Ordinance. No one is allowed to make use of the statutory exemption provided under section 258 of the Ordinance to get away from the punishment for a wrongdoing that is not an exempted act under the laws.
2. For the avoidance of doubt, we submit that the exemption should not apply where goods or services are supplied at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme.

Chapter 5 Parallel Importation of Copyright Works Other Than Computer Software

1. We are strongly against the liberalisation of parallel importation for all types of copyright works and opine that the current 18-month threshold should not be reduced. We submit that importation of a copy of a copyright work without permission of the copyright owner is an infringement of copyright and should be punishable as an offence. Needless to say, parallel importers should also bear civil liabilities for their infringement acts. Such an act of infringement should be treated the same as other acts of infringement.
2. If Hong Kong is to decriminalise parallel importation, it would lead to an increasing unauthorised import of copyright goods into the Hong Kong market and it in turn will confuse and make it difficult for the consumers to distinguish between counterfeit products and genuine copyright products. It is because the culprits may mislead the consumers to think that they are selling parallel imported copies of a copyright work, which are in fact counterfeit products. The general public cannot be expected to possess the requisite knowledge to distinguish

between counterfeit products and the genuine ones. It will eventually harm the interests of the general public.

3. It is wrong to expect that liberalising parallel import would definitely result in more choices and lower retail prices for the consumers. As we mentioned in paragraph 2 above, liberalising parallel import would open the floodgate of counterfeit products to the local market. It fails to provide wider choices of genuine copyright products to the consumers but rather causing confusion to the consumers to differentiate between genuine copyright products and the counterfeit ones. Further, the culprits may sell their forged products at more or less the same retail prices as of the genuine copyright products pretending that they are selling high quality products comparable to the genuine products. Thus, we do not see there is any guarantee for a lower retail price after liberalising parallel import.
4. The local manufacturing industry is now facing difficult time in terms of high costs and business loss in this slowdown economy, the proposed liberalisation of parallel import will just further discourage investment in Hong Kong. It will, at the end, force a number of members in the industry to close their business and finally lead to increase in the unemployment rate. Besides, it would also eliminate the incentive of the potential investors to invest in the local business if they find that their rights are not fully protected and they cannot obtain a satisfactory economic return after their huge investment in production and promotion of their products.
5. For example in the entertainment industry in Hong Kong, investor would invest a lot of money in training up and promoting a potential local movie artiste hoping that the artiste will be able to earn fame and recognition in the local market one day. By starring in different movies which are shown and broadcast extensively in Hong Kong, the artiste may enjoy substantial reputation and become a well-known performing artiste in the local market. With a view to fully exploiting the copyright of the artiste's product internationally, the investor would assign or grant the right to different overseas companies in different regions to distribute the copyright work of the artiste in the overseas markets but at the same time keeping the copyright for the territory of Hong Kong to itself. If parallel import is liberalised, overseas products would be imported from those overseas agents who are not the official local distributors and it would inevitably lead to competition with the locally distributed products. It will have a devastating effect on the business of the investor who has the exclusive right to exploit the work or the business of the sole distributor who has the exclusive licence to distribute the work in the local market. At the end of the day, it will only discourage potential investors to make investment in the local movie stars or singers given the aforesaid market condition.
6. In addition, we need not mention that piracy of CDs or VCDs is rampant in Mainland China. If parallel import is legalised, massive flowing in of pirated products is expected. It will worsen the already-serious piracy problem.

7. Last but not least, we submit that the current law is already sufficient to protect the rights of the retailers and the consumers as a copy of a work is not an infringing copy and can be imported into Hong Kong at any time after the 18-month restriction period. It has already catered the respective demand of the retailers and the consumers.

Chapter 6 Unauthorised Reception of Subscription Television Programmes

1. We support the introduction of criminal sanction as well as civil remedy against fraudulent reception of subscription television programmes. Unarguably, the rights of the copyright owners are infringed by pirated viewing and they should be entitled, inter alia, to an injunctive remedy or damages or other civil remedies. Besides, the perpetrators should also be criminally liable for unauthorised reception of subscription television programmes because it is analogous to an act of theft. Fraudulent reception of subscription television programmes should not be treated differently from fraudulent abstraction of electricity or fraudulent use of a public telephone, both of which are offences in Hong Kong.
2. In fact, fraudulent reception of subscription television programmes is prohibited in many jurisdictions. Hong Kong is lagging behind the international standard in this regard. We do not think it would be drastic or imposing hardship on the members of the public by making this fraudulent act an offence. If the Government continues to keep silent and adopt a lenient approach towards these fraudulent activities, it will give a wrong impression to the public that fraudulent reception of subscription television programmes is pardoned and worse still, it will encourage the public to continue or go ahead to commit such wrongdoing.
3. We cannot agree with the view that criminal sanction should not be introduced because it is too difficult to enforce the law, in particular in the aspect of private and domestic use and the enforcement will interfere with the normal lives of the private users. We do not believe the enforcement agency will often make a raid on domestic premises, at its own discretion, to check whether someone inside has committed the fraudulent act. It should only be done after a complaint is lodged and proper investigation is made. The fear that the daily lives of the members of the public will be intruded by introducing the criminal sanction against fraudulent viewing is unnecessary. We submit that just relying on civil remedy (if it is to be introduced) is not an effective measure to combat the increasingly serious pirated viewing problem. Needless to say, civil actions lack the deterrent effect let alone the huge amount of time and costs that may be involved.
4. Reliance on the service providers to explore and employ advanced encryption technology is not a solution to the problem. It will inevitably increase the investment costs of the service providers, which would not have been incurred had there been no fraudulent viewing problem. It is not surprising that the burden of such increased investment costs would be shifted to the consuming public at

the end of the day. In addition, we should not ignore the fact that the culprits are also very 'professional' in exploring new technology to upgrade the equipment to facilitate pirated viewing of subscription television programmes. Competing with them in the technological aspects is definitely not an appropriate strategy to tackle the matter. It will only hinder the normal development of the subscription television broadcast industry in Hong Kong thus affecting its attractiveness as a regional broadcasting hub.

5. We support the Government to introduce both criminal sanction and civil remedy against the possession of an unauthorised decoder for commercial purposes. This act obviously conflicts with the normal exploitation of the copyright work by the copyright owners and it unreasonably prejudices their legitimate interests, which is always the primary consideration of the legislative body when enacting the laws to protect the rights of the owners.

TVB's Submission on the Copyright (Suspension of Amendments) Bill 2001

General Support of the Suspension Bill

1. We support the Government's initiative to temporarily suspend the application of the criminal provisions in the Copyright Ordinance as amended by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 ("the Amended Ordinance") in relation to certain works before formulating a long term solution to address the problem encountered by the business organizations in dissemination of information internally.

Exceptions to the Suspension

2. However, we disagree with the categories of works that the Bill proposed to be excepted from the suspension of amendments. The main reason for the suspension of the criminal provisions is to address and facilitate the practical need of the business organizations to be able to freely and timely distribute and disseminate information that are relevant to their trade or business.
3. We submit that the exceptions stipulated in Section 2(2) of the Bill does not correctly reflect the types of works that a trade or business could be reasonably expected not to require for its internal distribution and reference. Section 2(2) of the Bill provides that the suspension provision in Section 2(1) does not apply in relation to an infringing copy of a movie, TV drama, sound recording or film of music or song and a computer program. We would question the rationale to preserve the criminal provisions in relation to these categories of works only but not the others. In particular, we do not see any justification to specify TV drama only in this subsection. This subsection effectively discriminates different types of works such that some of which will remain to be protected by criminal sanctions but some will not.
4. We strongly believe that all films, broadcasts or cable programmes should be included in this Section 2(2). Merely specifying TV drama will exclude many other types of TV programmes such as variety shows, our Miss Hong Kong Contests, travelogues, game shows, sporting events, news and public affairs etc. These are all non TV drama programmes.
5. The Amended Ordinance has been widely criticized because it does not cater for the practical needs of most business organizations to make a timely copies of news information about their companies or industries for internal reference. We do not see the need for any organization to make copy of any films, broadcasts or cable programmes, which are not relevant and not necessary for internal dissemination by business organizations. The proposed exceptions in the Bill

clearly go beyond that are necessary to address the current problem arisen from the Amended Ordinance.

6. We believe it would make more sense to consider provisions of the Bill in light of the respective interests and requirements of the business communities and the copyright owners.

TVB's Recommendation

7. We would strongly recommend that as an interim measure, the proposed Section 2(2) of the Bill should provide exception for all films, broadcast or cable programmes.
8. For the longer run, the principle of protecting copyright works should be preserved while certain exceptions in the legislation may be made where appropriate. In this respect, we would like to refer to our previous submission dated 11 April 2001, in particular to paragraphs 7 and of 8 our submission, a copy of which is attached for reference. We believe the Amended Ordinance should be reviewed. We would welcome further opportunities to make comments on future legislation on the Copyright Ordinance.

Dated 9 May 2001

TVB's Supplemental Submission on the Copyright (Suspension of Amendments) Bill 2001

We refer to our submission made to the Bills Committee on the Copyright (Suspension of Amendments) Bill 2001 (the "Bill") on 9 May 2001 and would like to make further representations to the members of the Bills Committee.

General

It is of crucial importance to note that all television programmes are intellectual properties and copyrighted material. Therefore, **ALL** copyrighted programmes, regardless of types and genres, must be protected equally. One important basic protection of any copyrighted television programmes is that its signals cannot and should not be redistributed by any means (including but not limited to tapes or via closed-circuit television) without the licensor's approval. That is why we as copyright holder of our own productions have always charged every schools a pro-forma licence fee.

Non-Dramatic Television Programmes

1. The Government proposes to suspend the application of the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 ("the Amended Ordinance") to all copyright works except movies, television dramas, visual or audio recordings of music or songs and computer programs. The reasons given are that the works excluded from the suspension generally have substantial commercial value, are not normally information disseminated in enterprises or schools and piracy of these works in Hong Kong and elsewhere is rampant.
2. We submit that the reasons given do not only apply to our television dramas. All our television programmes, not only television dramas, have substantial commercial value. For example, we have invested substantially in the production of many of our documentary series, news and public affairs programme, entertainment programmes such as Miss Hong Kong Pageant, the costs of which are comparable to a television drama if not more. We have also from time to time gained international awards and recognitions for many of our non-dramatic television programmes. These programmes have a high commercial value as in television dramas and should be given the same level of protection as that given to television dramas, movies and other works listed in Section 2(2) of the Bill. We see no justification to give different treatment to different types of television programmes.
3. Further, we do not see how other non-dramatic television programmes are information normally required to be disseminated in enterprises or educational establishments. In the case of enterprises in particular, we do not believe it is the general practice of enterprises to record television programmes on a continuing basis for dissemination internally. It is questionable whether they have the television and recording equipment to record television broadcast at their premises and to circulate recordings internally for review. We believe the greatest pressure from the community to suspend the Amended Ordinance is in relation to the printed media which can be easily copied and circulated internally. In any case, we could not see what further general information the business community

could gain from recording television programmes as they could have already obtained sufficient if not more information from the printed media.

4. As to the recording of television programmes by education institutions, we would like to point out that Sections 41 to 45 of the Copyright Ordinance have specifically permitted copying of works by education institutions. In particular, Section 44 further allows the recording of a whole broadcast or cable programme. There is no restriction that programme can only be recorded to "a reasonable extent". We would also refer to paragraphs 8 and 9 of our submission below as to how any organization can easily obtain appropriate licences from TVB.
5. We would also like to emphasize that not only television dramas have encountered piracy problems, some of our non drama programmes have faced with similar problems overseas.
6. We are also concerned that by singling out television dramas would give a wrong impression to the public that all other television programmes have lesser value and could be freely copied.
7. Further, inclusion of movies and visual or audio recordings of music or songs in Section 2(2) of the Bill but excluding other television programmes would also give rise to an anomaly that other television programmes which contain some music or songs would not have the same level of protection as a product which contains wholly or substantially musical works. It appears that musical works have been treated differently depending on in which media they are being carried or incorporated.

A Convenient Licensing mechanism does exist

8. One of the main concerns of the Government and the business community is that there is no convenient mechanism to obtain the required authorisation and this would hamper their dissemination of information. We believe this concern is directed at the printed media. For many years, TVB has been granting licences to educational institutions and government departments for them to record our programmes from time to time.
9. We have a well established and published clear channel of communication. In addition to our widely publicised hotline, our official web site has also provided email address and point of contact. The public has been well informed of how they may contact TVB for any enquiries, including the application for any licence to copy our programmes. There is no reasonable justification to say that there is an absence of a convenient mechanism for the public to obtain licence from TVB.

Conclusion

10. For the reasons stated above, we strongly submit that all television programmes must be included in Section 2(2) of the Bill. The reasons given by the Government are not justified in the case of television programmes as the economic and commercial value of all types of television programmes are equally substantial and important. Further, the

concerns of the public have already been addressed with the presence of an existing licensing mechanism which are easily accessible by the public.

17 May 2001