

For discussion
on 11 July 2005

Legislative Council
Panel on Information Technology and Broadcasting

**Implementation of the Broadcasting (Amendment) Ordinance 2004
and Domestic Pirated Viewing of Pay Television Services**

Purpose

This paper briefs Members on the implementation of the Broadcasting (Amendment) Ordinance 2004 and informs Members of the Administration's position on whether criminal sanctions should be provided for domestic pirated viewing of pay television services licensed in Hong Kong.

Background

2. The Broadcasting Ordinance (Cap. 562) provides for criminal sanctions against import and export, manufacture, sale and supply of unauthorised decoders. Such decoders refer to illicit devices that circumvent conditional access technologies to enable viewing of pay television services licensed in Hong Kong without payment of a subscription. In Hong Kong, the problem of pirated viewing of pay television services related mainly to the availability of unauthorised decoders in the black market for circumventing the Hong Kong Cable Television Limited (HKCTV)'s conditional access technologies. The illicit devices enabling pirated viewing of HKCTV's pay television service broadcast in the analogue format are inexpensive (about \$200). The other two domestic pay television programme service licensees, PCCW Media Limited and Galaxy Satellite Broadcasting Limited, have been broadcasting their services in the digital format since they began their operation. So far, we are not aware of pirated viewing problems or availability of unauthorised decoders in relation to their services.

3. To step up the fight against pirated viewing of licensed pay television service, the Broadcasting (Amendment) Ordinance 2004 (the

Ordinance) was enacted to provide for criminal sanctions and civil remedies against endusers of unauthorised decoders for commercial purposes, and civil remedies against endusers for domestic purposes.

4. There were suggestions that the Ordinance should provide for criminal sanction against domestic endusers of unauthorised decoders. The Government indicated that it should wait until local subscription television has been completely digitised to assess the seriousness of the problem before such suggestion would be considered. The Government undertook to report to the Panel on Information Technology and Broadcasting 12 months after the implementation of the Ordinance on the effectiveness of digitisation in combating pirated viewing and the enforcement situation. To address concern whether the sentence imposed by the Court can achieve deterrence, the Government also undertook to examine the sentences imposed by the Court on decoder-related offences. The Ordinance became effective on 7 July 2004.

Digital transmission

5. Pay television operators use conditional access technologies to ensure that only subscribers who have paid the subscription fees have access to the service. It is relatively easy and inexpensive to circumvent conditional access technologies when the transmission is in the analogue format. Digital transmission makes such circumvention more difficult and costly because it is not easy to crack the digital encryption keys. Operators can also change the encryption keys frequently without too much hassle. Operators would however need to upgrade such protective technologies regularly. To the best of our knowledge, the industry norm worldwide for such upgrade is every 12 to 18 months.

6. HKCTV has almost completed the migration from analogue to digital transmission. 98% of its subscribers are using digital set-top boxes to receive digital television signals. The remaining 2% (around 13,000 subscribers) receiving analogue signals are mainly building management companies which subscribe to HKCTV's Channel "A"¹ for in-building retransmission.

¹ Channel "A" is a stand-alone channel of infotainment programmes provided by HKCTV to certain residential buildings. The building management pays a collective subscription fee, and the service is distributed to all residential units via the building's communal aerial broadcast distribution system.

7. Digitisation will not eradicate pay television piracy. Digital unauthorised decoders for reception of HKCTV's service can be found in the black market. However, the cost of an illicit decoding package, consisting of a digital set-top box and a smart card, is at least \$1,200, much higher than that of an analogue unauthorised decoder. It is difficult to assess the numbers of users of unauthorised decoders before and after HKCTV's digital migration. However, according to observation by the staff of the Office of the Telecommunications Authority (OFTA) on regular patrols, the selling of unauthorised decoders at blackspots has decreased substantially since HKCTV's digital migration. This is a good indicator that the problem of pay television piracy has reduced to a large extent.

Enforcement and penalties

8. The enforcement agencies have stepped up enforcement actions against both upstream dealers who import and export, manufacture, sell and supply unauthorised decoders as well as commercial endusers of such decoders.

Upstream dealers

9. OFTA and the Police mounted 13 raids against illegal sale of unauthorised decoders in 2004, as compared to six raids in 2003. The number of persons arrested or invited to assist in further investigation rose to 47 in 2004 from 31 in 2003. In the first quarter of 2005, OFTA and the Police maintained the momentum and had carried out three raids, during which 10 persons were arrested or invited to assist in investigation.

10. As a result of the above raids, 30 persons were convicted of offences of sale of unauthorised decoders in 2004, as compared to 17 in 2003. Penalties imposed by the courts since 2004 were generally heavier than those in previous years. Notably, there were two unprecedented cases where the convicts were sentenced to imprisonment of three and four months respectively without suspension in 2004. For the rest of the cases, 11 offenders were sentenced to imprisonments suspended for one to two years, one was sent to detention centre, two were placed on community service orders, and the remaining 14 were fined \$4,000 to \$10,000. In contrast, for the cases in 2003, there were no sentences to imprisonment or community service order, and all offenders were fined \$2,000 to \$10,000.

Commercial endusers

11. Since July 2004 when criminal sanctions against use of unauthorised decoders for commercial purposes were introduced, OFTA has carried out 12 raids on commercial establishments including pubs, restaurants, guesthouses and nightclubs. A total of six persons were arrested or invited to assist investigation. Among these, OFTA pressed charges in respect of one case on the ground of use of unauthorised decoders for commercial purposes. The offender was fined \$8,000. For the other cases, the devices are legitimate decoders supplied by HKCTV although they are provided under subscription at household rate for domestic use only, i.e., the user has merely breached its contractual obligation to use the decoder for domestic purposes only.

12. Pay television operators may also take civil actions against piracy under the Ordinance. OFTA has repeatedly urged HKCTV to take civil actions against commercial and domestic pirated viewing. HKCTV has not taken any such actions so far.

Publicity and consumer education

13. In addition to enforcement actions, we have mounted a publicity campaign, including the broadcast of announcements of public interest on television and radio since September 2004 and a series of radio consumer education programmes in July 2004. Posters are displayed and leaflets are distributed in all districts, public housing estates and other prominent locations.

Views of the Industry

14. The pay television industry maintains that imposing criminal liability on domestic enduser of unauthorised decoders will yield effective deterrent effect. They contended that there are still a large number of such users in Hong Kong.

Assessment

15. The Broadcasting Ordinance as it currently stands provides for different levels of sanction and liability commensurate with the harm caused by different acts related to unauthorised decoders. We have imposed heavy criminal sanctions against upstream activities which

enable pirated viewing such as the manufacture, import and export, and sale and supply of unauthorised decoders. At the downstream level, there are also criminal sanctions against commercial pirated viewing which causes aggravated economic loss to the pay television operators. For individual pirated viewing for domestic purposes, taking into account the degree of harm, enforcement considerations, and the fact that digitisation has contained the problem, civil remedies are the appropriate legislative measure.

16. In particular, we need to examine the suggestion to introduce criminal sanction against individual pirated viewing for domestic purposes from the following perspectives -

- (a) *Proportionality of legislative measures.* Legislative sanction would need to be proportional to the harm caused by the misdeed in question. The problem of pirated viewing of HKCTV's pay television service has been substantially contained after digitisation. Moreover, operators can upgrade conditional access technologies regularly to make pirated viewing difficult and costly. It is therefore doubtful if criminal sanction should be introduced to address the problem of use of unauthorised decoders for domestic purpose.

Since it is practically difficult to detect the use of unauthorised decoders outside the relevant domestic premises, it would not be easy to identify the target for enforcement. In situation where enforcement of legislative provision with criminal sanction is to be mounted, it would entail intrusive action like entering into domestic premises, search and seizure as well as arrest. We are not convinced that the wrongdoing in question should warrant such treatment. To the best of our knowledge, even in jurisdictions where there are criminal sanctions against domestic endusers, such as the US and Canada, there is no active enforcement. The enforcement agents target mainly at commercial activities.

- (b) *Operators' role versus government's responsibility.* Pay television operators have the responsibility to safeguard the integrity of their conditional access technologies by using the best available encryption technology. This is as espoused by the European Commission (EC) (EC

Recommendation No. R(91)14 on legal protection of encrypted television services). When evaluating the implementation of Directive 98/84/EC on the legal protection of services based on, and consisting of, conditional access, the EC observes that pay television operators are continuously and routinely monitoring the piracy market and striking back with anti-piracy technologies. They reduce the vulnerability of their systems by upgrading the encryption and enhancing the key schemes used to identify individual users.

We recognise that combating piracy requires a public-private partnership. The Ordinance has already provided for civil remedies against users of unauthorised decoders. We will continue to use public resources to target upstream dealings and commercial use of unauthorised decoders.

Conclusion

17. We conclude that civil remedies rather than criminal sanctions are the proportionate legislative measure against endusers of unauthorised decoders for domestic purposes. We also think that the courts have handed down penalties of appropriate severity against offenders related to sale of unauthorised decoders. OFTA will continue with their rigorous enforcement of the Ordinance.

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