

Bills Committee on Copyright (Amendment) Bill 2006

Programmes broadcast simultaneously over the Internet

Purpose

At the Bills Committee meeting on 4 January 2007, the Chairman asked whether the proposed section 41A(4) would also cover programmes which were broadcast simultaneously over the Internet. This note provides our response to the Chairman's enquiry.

Broadcast or cable programme under the Copyright Ordinance

2. The new section 41A(4) is about the acknowledgement that is required, in the context of the fair dealing provision for education, when making a recording of a broadcast or cable programme or a copy of such a recording. Whether this new section covers programmes which are broadcast simultaneously over the Internet (i.e., viewers cannot choose the time for viewing the programmes) depends on whether such programmes fall within the meaning of "broadcast" or "cable programme" under the Copyright Ordinance (CO).

Definition of "cable programme"

3. Section 9(1) of the CO defines "cable programme" as meaning "*any item included in a cable programme service*". The term "cable programme service" in turn means "*a service which consists wholly or mainly in the **lawful sending by any person, by means of a telecommunications system** (whether run by himself or by any other person), of sounds, visual images, other information or any combination of them either -*

(a) *for lawful reception, **otherwise than by wireless telegraphy**, at 2 or more places in Hong Kong or elsewhere, whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service; or*

(b) *for lawful reception, **by whatever means, at a place in Hong Kong or elsewhere** for the purposes of their being presented there either to members of the public or to any group of persons,*

and includes such a service that has as a component a multipoint microwave distribution system, but does not include the services excepted under section 9(2)¹.

¹ Section 9(2) of the CO excludes a number of services/systems from the definition of "cable programme services". Examples of the services/systems excluded are video conferencing and video telephony services, intercom systems in single premises, vehicles, vessels or aircrafts, closed circuit TV systems within buildings or in-house alarm surveillance systems, audio/visual distribution systems in restaurants or Karaoke etc.

4. The terms “lawful sending” and “lawful reception” are not defined in the CO. It appears that they refer to the legality of the transmissions/reception under other laws of Hong Kong, for example, licensing requirements under other ordinances (where appropriate).

5. The term “telecommunications system” is defined in section 198 of the CO as “a system for transmitting visual images, sounds or other information by electronic means”. The term “electronic” is broadly defined in the same section to mean “actuated by electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy”.

6. Section 9(1)(a) refers to a transmission to the public through a wired telecommunication system. On the other hand, section 9(1)(b) refers to a transmission (whether by wire or wireless means) that is transmitted for reception at a particular point and then distributed to members of the public. Section 9(1)(b) was specifically crafted to cover the local cable network which does not cover the entire territory whereas transmission to certain remote parts of the territory was (and is still the case today) effected by a multipoint microwave distribution system.

Definition of “broadcast”

7. Section 8(1) of the CO defines “broadcast” as “*a transmission by wireless telegraphy of sounds or of visual images and sounds or of representations thereof which-*

- (a) *is capable of being lawfully received by members of the public in Hong Kong or elsewhere; or*
- (b) *is transmitted for presentation to members of the public in Hong Kong or elsewhere,*

otherwise than through a service for making available to the public of copies of works or fixations of performances.

8. “Wireless telegraphy” is defined in section 198 of the CO as “*the sending of electro-magnetic energy over paths which are not provided by any material substance constructed or arranged for that purpose*”.

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9. The definitions of “cable programme”, “cable programme service” and “broadcast” in the existing CO were drafted based on traditional cable programme and broadcast services. They came into being prior to the recent developments in digital technologies. Given that they are crafted in general broad terms, it could be argued that programmes broadcast simultaneously over

the Internet fall under the existing section 9(1)(a) of the CO. In other words, they should be protected as “cable programmes” under the existing CO. With the advances in technology, Internet transmissions could now be done through wireless networks by wireless telegraphy. Should that be the case, such programmes would fall within the definition of “broadcast” in the CO. Hence, they should be protected as “broadcast” under the CO.

10. In the light of the foregoing, the proposed section 41A should also apply to those programmes which are broadcast simultaneously over the Internet.

Concluding remarks

11. Although the definitions of “cable programme”, “cable programme service” and “broadcast” in the existing CO are capable of covering programmes which are broadcast simultaneously over the Internet in general, the provisions may not be able to cater for all circumstances involving the transmission of content across different media by means of different communication technologies.

12. In the consultation document on “Copyright Protection in the Digital Environment” released in December 2006, one of the issues covered is whether an all embracing right of communicating copyright works to the public should be introduced into the copyright law of Hong Kong. If such a right is introduced, it will help ensure that copyright works are adequately protected irrespective of what technology may be used to transmit the works now or in the future. In formulating proposals in that context, we will examine if the definitions of “broadcast” and “cable programme” should be improved to cope with technological developments.

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