

**For discussion on
19 February 2008**

**Legislative Council Panel
on Information Technology and Broadcasting**

Regulation of radio broadcasting

Purpose

This paper briefs Members on the regulation of radio broadcasting and the use of radiocommunications apparatus for the purpose of radio broadcasting under the Telecommunications Ordinance (the Ordinance)(Cap. 106).

Background

2. The provision of radio broadcasting service through airwave involves use of frequency spectrum, which is a scarce public resource. Like various jurisdictions over the world, radio broadcasting is licensed and regulated by relevant legislation in Hong Kong. Illegal operation of broadcasting and telecommunications equipment will cause harmful interference to legitimate spectrum users such as operators of telecommunications and broadcasting services. It is an offence under the Ordinance.

Licensing of sound broadcasting services

3. With respect to licensing sound broadcasting services in Hong Kong, Part IIIA of the Ordinance provides that a licence may be granted to or held only by a corporation that is –

- (a) a company formed and registered in Hong Kong under the Companies Ordinance (Cap. 32);
- (b) not a subsidiary; and

- (c) empowered under its memorandum of association to comply fully with the provisions of the Ordinance and the terms and conditions of its licence.

4. An eligible corporation may apply to the Broadcasting Authority (BA) for a licence to establish and maintain a sound broadcasting service. The BA is required to consider applications and make recommendations thereon to the Chief Executive in Council (CE-in-Council). Having considered the BA's recommendations in respect of an application for the licence, the CE-in-Council may grant a licence to the applicant subject to the terms and conditions he may specify.

5. Section 8(1)(a) of the Ordinance specifies that no persons shall establish or maintain any means of telecommunications except under an appropriate licence. Any person who contravenes this provision shall be liable to a fine of \$50,000 and to imprisonment for 2 years on summary conviction, and a fine of \$100,000 and to imprisonment for 5 years on conviction on indictment.

6. Under section 23 of the Ordinance, any person who knowing or having reason to believe that a means of telecommunications is being maintained in contravention of the Ordinance, transmits or receives any message by such means of telecommunications or performs any service incidental to the transmission or reception of any such message or delivers any message for transmission by such means of telecommunications or takes delivery of any message sent thereby shall be guilty of an offence. Such persons are liable to a fine of \$50,000 on summary conviction.

7. The Telecommunications Authority has a statutory duty to enforce the above provisions. The Office of the Telecommunications Authority (OFTA) will carry out necessary investigation into such illegal broadcasting activities and collect available evidence. If the evidence assembled is such as to justify further consideration, OFTA will consult the Department of Justice (D of J) on the viability of instituting prosecutions under sections 8(1) and 23 of the Ordinance.

Enforcement against establishment and maintenance of unlicensed means of telecommunications

8. From 2003 to 2007, OFTA carried out investigation against 538 cases of establishing or maintaining means of telecommunications without licence under section 8(1)(a) of the Ordinance. Such investigation has resulted in 515 prosecuted cases.

Prosecution policy relating to participation in unlicensed broadcasting activities

9. The prosecution policy relating to offences of participation in unlicensed broadcasting activities under section 23 of the Ordinance mirrors prosecution policy generally. A charge is only ever appropriate if there is sufficient evidence and it is in the public interest. In determining where the public interest lies in any particular case, the prosecutor must examine all the circumstances. In general, the more serious the offence, the more likely is it that the public interest will require a prosecution.

10. Once the evidence establishes that there is a reasonable prospect of conviction, the prosecutor must decide if a prosecution is strictly necessary. The prosecutor does not operate as a rubber stamp, and it would not be right to pursue every case without regard to the justice of the situation. The exercise of the prosecutorial discretion is guided by established prosecution policy guidelines which seek to ensure that such decisions are made fairly and judiciously.

11. When cases of participation in unlicensed broadcasting activities are examined by prosecutors, they are processed in the same way as any other cases. The first stage involves a consideration of the evidence. If the case does not satisfy the evidential test it does not go ahead, no matter how important or how serious it may be. If the case passes the evidential test, the prosecutor will then decide if a prosecution is needed in the public interest.

12. Before a prosecution for an offence of participation in

unlicensed broadcasting activities can be instituted, prosecutors must be satisfied that the evidence is such as to establish:

- (a) that there was a means of telecommunications being maintained in contravention of the Ordinance,
- (b) that a message was transmitted using that means of telecommunications,
- (c) the identity of the party who participated in transmitting the message, and
- (d) the knowledge or belief of the person identified that a message was being transmitted contrary to the law.

13. In 2007, arising from two incidents which allegedly occurred on 20 April and 25 May respectively, five persons were prosecuted for delivering messages by unlicensed means of telecommunications, contrary to section 23 of the Ordinance in respect of the first incident, and three persons for the same offence in respect of the second incident. Each of these cases is currently before the courts.

14. Prior to the institution of these two prosecutions for participation in unlicensed broadcasting activities, certain other persons were suspected of having committed similar offences in 2006. In late 2006, certain number of persons openly participated in unlicensed outdoor broadcasting activities on the street. However, prosecutors decided against the prosecution of anyone for such offences at that time, in the hope that specific warnings against the participants would suffice to deter any such conduct in future. At the same time, OFTA issued a general warning to the public at large. The cumulative effect of these warnings was to make clear to everyone that anyone who participated in unlicensed broadcasting activities committed an offence and was liable to prosecution.

15. It has been suggested that despite these unequivocal warnings having been issued, the prosecutions which have resulted for participation in unlicensed broadcasting on 20 April and 25 May 2007 somehow reflect a policy of selective prosecution. Nothing

could be further from the truth. Prosecutors have acted throughout in complete good faith, and have applied maximum restraint. They have done their utmost to use prosecution as a tool of last resort. But no civilised society can allow its laws to be broken with impunity, not least because this undermines the rule of law itself. No one is above the law, and after the warnings had been given, anyone suspected of participating in unlicensed broadcasting activities must expect to be prosecuted, evidence permitting.

Commerce and Economic Development Bureau
Office of Telecommunications Authority
Department of Justice

February 2008