



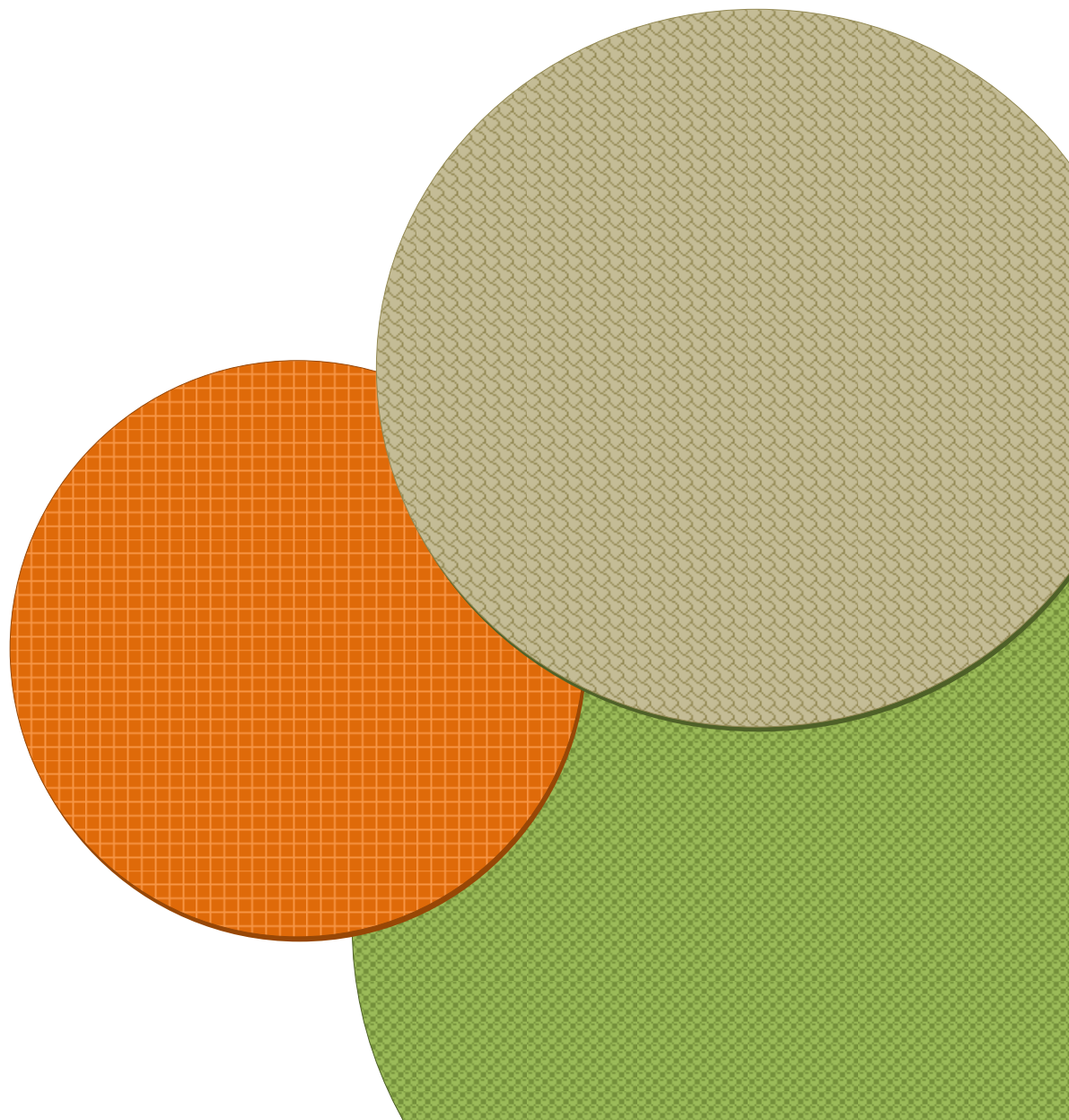
社區發展動力培育

**Community
Development
Initiative (CDI)**

香港廣播業的困局與未來發展的路向

The Predicament of Hong Kong Broadcasting Industry and Its Future Direction

二〇一〇年八月 August 2010



行政撮要

- I. 香港廣播業多年來一潭死水，發展停滯不前。作為普通市民，我們的選擇就只有兩家免費電視台，三家收費電視台，一家公營電台，和兩家商營電台。廣播業的持續劣勢，已經令香港被其他地區迎頭趕上，落後於人。廣管局作為推動香港廣播業發展的機構，擁有執法、發牌等權力，在過去幾十年卻了無功績，對於今天這個困境，廣管局應負上最大責任。
- II. 無線電視在香港一直都有「獨大」的情況。過往公眾對無線提出的指控有很多，包括無線禁止藝人亮相其他電視台；藝人面對其他傳媒必需用廣東話以外的語言；亞視的外購劇不能播出無線合約藝人的廣東話原聲對白等。以上這些做法是違反了《廣播條例》第十三條「禁止反競爭行為」¹及第十四條「禁止濫用支配優勢」²。但廣管局多年來坐視不理，任由無線壟斷坐大。就算亞視提出投訴，也是肆意拖延。廣管局疏於執法絕對是導致今天廣播業發展嚴重傾斜的最大原因。
- III. 香港廣播業的發牌制度存在極大問題。現時廣管局的組成由行政會議任命，發牌制度也是由廣管局及行政會議作最後決定，不能上訴，亦不需要解釋，整個程序欠缺透明度、問責性、獨立性。從民間電台案我們可以看到政府濫用權力，獨攬大氣電波這項公眾資源，打壓民間聲音，破壞《基本法》及《香港人權法案》賦予我們的言論自由和廣播自由，這種行為跟一些獨裁國家無異，亦完全不符合「聯合國教科文組織」和「歐洲委員會」制訂的廣播規管指引³。另一方面，他們卻運用權力，發牌給不合乎跨媒體條例的無線收費電視，發牌給有大財團撐腰的雄濤廣播卻不發牌給有能力並有財力廣播的民間電台，可見制度的不公平。
- IV. 今次的免費電視發牌，會成為香港廣播業的轉捩點。雖然目前公眾及業界仍對跨媒體擁有權、網絡是否能覆蓋全港、申請人財政、投資承擔以及會否有接駁費和機頂盒等額外費用有所疑慮，但我們認為有更多元化的選擇、促進競爭、打破無線壟斷，都符合公眾利益。我們希望廣管局在能確保之後廣播質素及解決公眾疑慮的前題下，應盡量放寬限制，讓更多申請者投入競爭；並協助申請者解決以上可能發生的問題。此外，在延長的諮詢期內，應主動設立不同渠道收納公眾意見，如多辦幾場公聽會，以作出最符合公眾利益的

¹ 「持牌人不得從事廣管局認為目的在於防止、扭曲或在相當程度上限制電視節目服務市場競爭的行為，亦不得從事該局認為會有如此效果的行為」

² 「處於支配優勢²的持牌人，其行為如有防止、扭曲或在相當程度上限制電視節目服務市場競爭的目的或效果，即須當作濫用其支配優勢。」

³他們要求規管機構獨立於政府，而發牌和規管工作都不應受到政治干預

決定。

V. 今次的免費電視牌照申請只是開始，我們相信廣管局大有空間推動廣播業發展，為此我們有以下提議：

- **維持廣播業的公平競爭，防止壟斷：**廣管局必需正視這個問題，盡快執法，依法懲罰違規的牌照擁有人，並可考慮在續牌時加入條件要求其遵守。另外，應該為「公平競爭」和「支配優勢」加入更多解釋和定義，使其更貼近國際上對公平競爭的定義。
- **提高決策透明度和問責性，保障人權和自由：**現時的發牌制度為人垢病，所以必需正視及改變才能促進廣播業發展，並保障公民受憲法保護的自由及權利。
- **積極執法，維持廣播界的公平環境：**廣管局執法非常緩慢，往往需要很多個月的時間處理，譬如商台的政治宣傳事件。無線的問題就更加是多年積累，廣管局一直坐視不理，即使收到投訴行動也極度緩慢，不停拖延。我們希望廣管局未來可以更加積極和嚴謹地執行廣管法例，維持良好的業界環境，達到其成立目標。
- **定期公開諮詢公眾，採納公眾意見：**過住的幾場公聽會反應熱烈，廣播頻道作為大眾共同擁有、共同享用的資源，公眾都期望以後的政策能更貼合他們需要，因此廣管局應定期（如每一年、每一季）進行公眾諮詢，舉行公聽會，在制訂政策時考慮市民意見，方可保障公眾利益。
- **開放媒體市場，以公眾利益為依歸：**首先，競爭愈激烈，參與者愈要靠製作高質素的節目脫穎而出，令廣播業百花齊放。第二，將不同背景的投資者帶入市場，照顧不同社群的利益。第三，公眾參與的大眾媒體能更有效反映民生問題，並發揮第四監察權⁴，幫助政府改善施政。第四，言論自由、廣播自由是人權，政府不能剝削踐踏。廣播頻道是公共資源，現在技術普及，廣管局還獨攬著這項重要的公共資源，違反自由市場原則，亦是香港廣播業無法蓬勃發展的一大原因。
- **盡快推廣數碼廣播，以容納更多頻道：**數碼廣播可以開闢更多頻道予公眾申請，讓觀眾更多選擇，促進競爭，亦能解決香港因山多而容易接收不清的問題。廣管局應盡快推動這項科技的發展，而不是以規限廣播模式為藉口來規限廣播業的發展。

⁴傳媒是除行政、立法、司法外的第四監察權，負責監察政府施政，將不足與缺陷的地方揭露，鞭策政府改善施政，要他們聆聽市民聲音。

- **鼓勵社區電台、社區電視、社區多媒體中心的發展：**社區媒體可以讓民間參與廣播業，讓個別社群的口味得到照顧，同時間，市民可以透過參與節目製作和頻道發展，建立社區網絡，發展區內經濟，實踐創意工業，足見其好處。
- **製播分家，要求外判部分節目製作：**現在內地都逐漸實行製播分家，香港卻仍然沿用其垂直式經營的手法，製作大多是電視台自己包辦，缺乏衝擊。現在英國規定每個電視台有一定百分比的節目必需外判讓獨立製作公司製作，香港可仿效這個做法作為發牌要求，激活節目創作
- **設立公眾頻道，加強社會參與，促進言論自由：**香港政府在審批牌照給有線電視時曾經提及要設立公眾頻道。當時是規定有線必須撥出頻道的一些播放時間去讓公眾的團體去廣播其節目，但後來則推說沒有需求云云。公眾頻道是一個可以讓公眾通過大氣電波表達聲音的渠道，既能促進言論自由，也能做到社區電視的部分目的。政府好應考慮在開放免費牌照的同時也設立公眾頻道。

Executive Summary

- I. Broadcasting industry in Hong Kong has been a pool of backwater, and the development has been sluggish. Hong Kong Citizen choices are limited to two free TV stations, three pay TV station, one public radio station and three commercial radio stations. The persistent poor industry environment makes Hong Kong lagging behind other regions. Hong Kong Broadcasting Authority (HKBA) being the organization that aims to promote growth in the industry, which owns the power to execute ordinance and licensing, has done nothing much in the past tens of years. If someone has to be accountable for today's predicament, HKBA is the one to bear the biggest responsibility.

- II. Hong Kong Television Broadcasts Limited (TVB) has been dominating the sector for a long time. Accusations as such include TVB forbidding artists to take part in functions of other TV stations; artists have to be interviewed by other media other than TVB in languages other than Cantonese; Asia Television Limited (ATV) cannot play the original voice of the artists contracted with TVB in purchased drama episode etc. The above behaviors already violate "Broadcasting Ordinance" – Section13"⁵ "Prohibition on anti-competitive conduct" and Broadcasting Ordinance" – Section14"⁶ "Prohibition on abuse of dominance". Nevertheless HKBA has neglected this for many years, allowing TVB to dominate and expand without any restrictions. Its competitor, ATV has fired an official complaint, but not much progress is made. HKBA's loose execution of law is definitely the cause of today's seriously tilted broadcasting environment.

- III. The licensing process of Hong Kong broadcasting industry is very problematic. The formation of HKBA is appointed by the ExCo. The final decision power also lies in the ExCo in the current licensing system, there is no appeal mechanism and no explanation is required. The whole procedure lacks transparency, accountability and independence. The Citizens' Radio case shows how Hong Kong government abuses its power, monopolizes our public airwaves, suppresses public voice, and damaged the freedom of speech and broadcast that guaranteed

⁵ "a licensee shall not engage in conduct which, in the opinion of the Broadcasting Authority, has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market",

⁶ "A licensee who is in a dominant position is deemed to have abused its position if, in the opinion of the Broadcasting Authority, the licensee has engaged in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market."

by “Basic Law” and “Hong Kong Bill of Rights Ordinance”. These authoritarian behavior does not adhere to the guideline formulated by UNESCO and the European Commission for regulating broadcasting services. The ExCo used their power to grant a license to TVB that violates cross-media restriction in the ordinance, licensed Wave Media supported by consortiums, but not Citizens’ Radio which is technically feasible and financially capable but run by general citizens. The fairness of the system is highly questionable.

IV. The approval of new domestic free TV license will be the turning point of Hong Kong broadcasting industry. Though the public and the industry are still in doubt on the issue of: cross-media ownership, network coverage, applicants’ financial soundness, commitment to investment and the extra charges for connection or set-top box, we think that it is to the public interests if we can have more competitions, which can lead to more options and collapse of TVB’s kingdom of monopoly. HKBA should relax the restriction and allow more players into the market, given that it can ensure quality of broadcasting in the future and resolve public concerns. Moreover, HKBA should set up more channels to collect public opinions, such as more public hearing sessions during the extended consultation period to ensure it makes the decision that serves public interests the best.

V. The domestic free TV license application is only the beginning of improving today’s industry environment. We believe there are still rooms for HKBA to promote growth of the industry. Our suggestions are as follows:

- **Maintain a fair environment for competition, Prevent any form of dominance:** HKBA has to face the problem and execute its power as soon as possible to penalize law-violating licensee, and consider making it a condition for license renewal. Moreover, it should explain and define “fair competition” and “dominating advantage” in greater details or something closer to the international standard.
- **Raise accountability and transparency of licensing procedures, Protect human rights and freedom:** The fairness of existing licensing system is highly questionable, therefore the system has to be changed to encourage healthy development of the industry, and hence citizens’ freedom and right are protected.
- **Proactive law execution to maintain a fair environment:** HKBA takes too long to conclude a case, the CRHK political advertisement incident need more than a month to execute and the monopoly of TVB has also persisted for years, HKBA chooses to turn a blind eye to it, and even after it received complain,

and it has been too slow to respond and delayed in definitely. Therefore we hope HKBA can be more proactive and rigorous in ordinance execution, in order to maintain a healthy environment for the industry, and fulfill its objectives.

- **Regularly consult the public, adopt public opinions:** The consultation sessions held in the past had received a lot of feedbacks. As Broadcasting channels are resources that are owned and shared by the public, thus, the public deserved to be consulted for better formulation of broadcasting policy to fulfill their needs. Therefore HKBA should regularly hold consultation sessions (i.e. every quarter, every year), and consider public feedback before planning its future strategy. This could better protect public interests.
- **Open the media market, place public interests in the first priority:** Firstly, when there are more competitions, the players will have to produce higher quality programmes to stand out, which in turn will diversify our programme choices. Secondly, different types of investors will represent interest from different groups. Thirdly, widening public participation can effectively reflect problems of people's livelihood, strengthening the fourth power⁷, in order to monitor and improve governance. Fourthly, the freedom of speech and broadcast are human rights that should be protected by Hong Kong government. Nowadays, the development of broadcasting technology has lower the entry cost to broadcast themselves, and we do not see any needs for HKBA to guard the broadcasting from the public. And we also argue that the monopoly of broadcasting by the HKBA is against the free market principal and is the major factor that obstructing the broadcasting industry to flourish.
- **Implement digital broadcasting technology as soon as possible, Increase number of available channels:** Digital broadcasting can provide more channels for the public to apply. More providers means increasing industry competition, and a larger variety of programmes. The problem of weak and unstable signals because of Hong Kong's hilly geographical characteristics can also be solved. HKBA should quickly promote this technology, and refrain from using the same excuse, saying that there are insufficient channels to slow down the development of broadcasting industry.
- **Encourage the setting up of community radio stations, community TV and community multi-media centre:** community mass media allows citizens to participate in production, and tastes of individual groups be taken care of.

⁷ Media is the fourth power, apart from legislation, executive and judiciary, to monitor governance, expose flaws, and give an impetus for the government to improve on its ruling and urge them to listen to the people.

At the same time, people can build social network, develop local economy, and promote development of creative industry through involvement in production.

- **Separating production and broadcasting, request market players to outsource part of the production:** Nowadays mainland China is gradually practicing the separation of production and broadcasting, but Hong Kong still sticks to its original vertical mode of operation that the TV stations produce their own programmes. Now UK requires each TV station to outsource a certain percentage of its programme to external independent producers. Hong Kong can follow the practice, make it a requirement for renewal or approval of license to create some sparks for Hong Kong production.
- **Set up public access channels, strengthen social participation, promote freedom of speech:** When Hong Kong government licensed Cable TV, it had mentioned and supported the idea of setting up public access channel but later it backed down and argued that there was no demand. Public access channel is a way for the public to make use of the airwaves. The setting up of public channels can promote freedom of speech, which is also one of the objectives of community TV. The government should seriously consider adding such a requirement when approving the new domestic free TV licenses.

1. 簡介

廣播業發展停滯不前

- 1.1. 香港是少數沒有民主政制但言論尚算自由的地方。雖然如此，要踏足廣播業的門檻卻是相當高。多年來，我們就只有兩家免費電視台，三家收費電視台，一家公營電台，和兩家商營電台。自二十年前起，就沒有再多的電視台和電台供市民選擇。⁸開放收費電視市場一舉固然為有能力的市民提供更多選擇，但對於沒有能力的市民來說，選擇仍是少得可憐。台灣就有近二百個電台，連北韓這個言論自由不開放的國家也有十六個 AM，十四個 FM 電台和十一個短波廣播電台。⁹台灣以至中國的二三線城市，一開電視電台有至少幾十個頻道¹⁰，競爭非常激烈，製作單位沒有辦法不用心製作更高質素的節目來吸引觀眾才能在市場立足，香港的「慣性收視」、「一台獨大」局面基本上不會發生。從經濟學的角度看，缺乏競爭會使行業營運者沒有效率，消費者選擇少，直接影響到公眾的利益。
- 1.2. 今時今日的廣播業來這個境地有很多原因：市場不開放，多年來沒有批出牌照；廣管局沒有依法阻止壟斷；科技上遠遠落後其他國家，沒有推行數碼聲音廣播，令頻道數目不足等。然而，廣管局的職能就是要推動廣播業的發展，促進競爭，幫助行業帶入新科技，這些廣管局都有能力去辦得到。今天，香港的廣播發展無論在內容、技術、多元化的方面都遠遠落後於其他地區，造成今天這個局面，廣管局責無旁貸。
- 1.3. 另外，傳媒是除行政、立法、司法外的第四監察權，負責監察政府施政，將不足與缺陷的地方揭露，鞭策政府改善施政，要他們聆聽市民聲音。對傳媒的限制也是限制了第四權的影響力。近來，傳媒自我審查、峰煙節目被取消等事導致人心惶惶，擔心言論自由被收窄，有很多民間的組織已經在網上開發很多不同頻道去反映他們不同聲音，問題只是大氣電波沒有開放（或所謂全被佔用，但不是事實）所以最終我們還是只有兩家電視台和三家電台。因此，廣播業已經不只是娛樂性的問題，而是關乎市民大眾的知情權和言論自由的問題。
- 1.4. 這份研究報告將會深入研究以往幾個廣播業的事件，包括香港電視廣播有限

⁸ 《香江風情—箝制民間電台 港府悖離潮流》，鄭漢良，2010年1月24日，中國時報

⁹ 《香江風情—箝制民間電台 港府悖離潮流》，鄭漢良，2010年1月24日，中國時報

¹⁰ 《電視混戰 見小不見大》，馮應謙，2010年4月14日，明報

公司（無線電視）的反競爭個案，免費電視廣播牌照申請，民間電台風波和商台賣政治廣告的事件，去了解香港廣播業發展為甚麼停滯不前，然後提出改善的建議，以扭轉現今局面。

2. 背景資料

《廣播條例》中的反競爭條文

- 2.1. 香港雖無跨界別公平競爭法，但在《廣播條例》內有反壟斷限制。廣管局作為監管機構有權就懷疑反競爭的投訴作出調查及懲處。
- 2.2. 《廣播條例》第十三條「禁止反競爭行為」的條例列明「持牌人不得從事廣管局認為目的在於防止、扭曲或在相當程度上限制電視節目服務市場競爭的行為，亦不得從事該局認為會有如此效果的行為」。而那些反競爭行為明文包括「防止或限制向競爭者提供貨品或服務的行為」、「對交易上的其他各方所訂立的相等協議施加不同的條件，以致他們處於競爭劣勢」和「規定協議的其他各方須接受附加的義務方與其訂立協議，而該等附加的義務，就其性質或商業慣例而言，是與協議的標事項無關的」。
- 2.3. 《廣播條例》第 14 條「禁止濫用支配優勢」的內容如下：「處於支配優勢的持牌人，其行為如有防止、扭曲或在相當程度上限制電視節目服務市場競爭的目的或效果，即須當作濫用其支配優勢。」而要鑑定電視台是否有濫用支配優勢，廣管局有以下的描述：「假如持牌人利用此優勢，直接或間接妨礙競爭過程，以及損害競爭對手、供應商、顧客／觀眾的利益，即屬濫用支配優勢。¹¹」
- 2.4. 在評估廣播持牌人是否有反競爭行為，其中的基準包括「縱向限制」¹²。「縱向限制」指在產品或服務的供應過程中，處於供應鏈不同層面的機構之間達成協議，限制其中一方或多方，或其他競爭對手的自由商業活動。縱向限制有時候可產生防止、扭曲或在相當程度上限制競爭的目的或效果。「縱向限制」包括但不限於「獨家交易協議，即合約的一方限制另一方選擇和誰人交易或交易的內容，這可能預先排除市場上的競爭對手。」

廣管局的職能

¹¹ 《廣播條例保障競爭條文援引指南》第 77 條

¹² 《廣播條例保障競爭條文援引指南》第 74 項

- 2.5. 廣播事務管理局是於一九八七年根據《廣播事務管理局條例》(第 391 章) 成立的獨立法定組織，負責確保廣播服務維持適當的標準；協助香港特別行政區政府執行廣播政策；以及推行一切相關的法例和牌照規定。
- 2.6. 廣管局在其網頁聲稱其「理想」是令廣播機構能夠在一個備受支持而且公平的環境中提供廣播服務、不斷創新；令社會人士得能享受各式各樣資訊啓智、教育娛樂兼備的優質節目。
- 2.7. 廣管局又稱其「使命」和「廣播政策的目標」是為市民提供更多節目選擇，以照顧社會不同人士的品味及興趣；鼓勵廣播界多加投資、創新並進行技術轉移；確保廣播機構可在公平而有效的競爭環境中提供服務等；及推動香港成為區域廣播與通訊中心。

憲制賦予的言論及出版自由

- 2.8. 《基本法》列明香港居民享有言論、新聞、出版的自由¹³。
- 2.9. 《香港人權法案》明確指出「人人有發表自由之權利；此種權利包括以語言、文字或出版物、藝術或自己選擇之其他方式，不分國界，尋求、接受及傳播各種消息及思想之自由。¹⁴」

3. 無線電視的壟斷

- 3.1. 無線電視在香港一直都有「獨大」的情況。據香港浸會大學新聞系助理教授杜耀明的資料顯示，過去 16 年，無線和亞視各佔本地粵語頻道的市場份額，由 1994 年的 7:3，到 1999 的 8:2，到 2007 年變成 9:1。¹⁵其他研究也有類似的結果。無線電視在回歸前佔的市場份額超過 75%¹⁶，香港超過 80% 的電視廣告收入也有無線獨享¹⁷。這些數據都顯示無線佔的市場份額遠高於廣管局定義擁有「支配優勢」的 50% 佔有率¹⁸。無線電視的收視率在黃金時段，向來都有平均 20 多至 30 多點的收視；而亞洲電視的

¹³ 《基本法》 第三章第 27 條

¹⁴ 《香港人權法案條例》 第 16 條

¹⁵ 《解構行業新機遇電視業新時代》，《盛世雜誌》2006 年 10 月號

¹⁶ "Hong Kong", Karen Gwinn Wilkins, The Museum of Broadcast Communications, accessed on 8 Jul 2010, <http://www.museum.tv/eotvsection.php?entrycode=hongkong>

¹⁷ "The Other Hong Kong report", pp 390, Joseph Y.S. Cheng, HK: Chinese University Press, 1992

¹⁸ 根據《廣播條例保障競爭條文援引指南》第 55 條，「支配優勢」的定義為「假如持牌人市場佔有率持續高於 50%，則在沒有相反證據支持的情況下，會假定該持牌人處於支配優勢。」

任何節目很少會過 10 點¹⁹。這個「慣性收視」的情況已在香港持續多年。就算無綫電視和亞洲電視在同一時段播映同一節目，共用同一組訊號及畫面，無綫電視的收視仍會大幅超越亞洲電視，例如煙花匯演、沈殿霞追悼會、港台節目、特首答問大會等²⁰。紀錄指無綫電視曾因發射站故障令所有觀眾未能收看該台節目達三十分鐘之久，畫面只有雪花，仍成功取得五成多收視²¹。根據這些情況，我們絕對可以斷定無綫電視在香港的電視市場裡有「支配優勢」。

- 3.2. 在零八及零九年，廣管局接到有關對於公平競爭法的投訴分別為一宗²²及零宗。二零一零年的預算投訴數字已去到九宗²³，其中亞洲電視對無綫電視作出反競爭行為的投訴受到關注。
- 3.3. 亞視提出的指控包括：無綫通過與藝人或歌手在不成文規則下，禁止藝人亮相其他電視台，令藝人未必能與亞視合作，藝人面對其他傳媒的訪問，也必需用廣東話以外的語言回答，從而壟斷藝人；亞視的外購劇集內若有與無綫有合約的藝人，不能播出廣東話原聲對白，要特意為其配音，影響作品效果；無綫為廣告商提供大額折扣，令其不在亞視賣廣告；香港電台一些高收視節目只在無綫播放等。而關於這宗投訴的調查正在進行中²⁴
- 3.4. 無綫電視以低廉條件（數百元車馬費，必須參與一定數量的節目）與本港大部分歌星簽訂合約，限制他們加盟其他電視台；簽約無綫的歌星接受其他電視台訪問時，不得以廣東話發言，並不能參與其他電視台的節目和演出²⁵。這種情況，在外國鮮有發生。在其他國家，歌手屬自由身，除非有特定節目的演出合約，否則可以到不同的電視台演出。電視台與歌手的關係是互惠互利，歌手希望藉亮相增加知名度；電視台亦希望能藉歌手的知名度增加收視。香港早前爆出的四大唱片公司風波²⁶，正正就揭發了這種不平等合約對歌手以及弱勢電視台的影響。

¹⁹目前兩台的收視調查是由 CSM 公司負責，2006 年開始，合約期為五年。調查對象是香港四歲以上的電視觀眾，數目為 6294000 人。調查方法是抽樣形式，樣本訂戶數目是 600 至 650 之間，不能少於 600。

²⁰《六月份電視節目收視分析》，丹斯，1997 年 7 月號，傳媒透視，香港電台

²¹這是坊間流傳的說法，未有實質數據支持。

²²有線電視被投訴在 2007 年採用的終止服務手法涉嫌阻礙其訂戶終止有線電視服務及轉用競爭對手的服務，後來廣管局裁定沒有足夠證據，投訴不成立。

²³2010-2011 年財政預算案 pp.334

²⁴《亞視揭發無綫與藝人簽不公平合約》，2010 年 01 月 25 日，星島日報

²⁵杜耀明聯署信內容

²⁶無綫電視與 EMI、Sony、環球、華納因為版稅問題未能達成共識，無綫因而禁播及杯葛四大唱片公司旗下歌手出鏡機會

- 3.5. 根據現實證據，我們有理由相信無線電視的確違反了《廣播條例》中的反競爭條文以及濫用支配優勢條文。無線限制藝人亮相其他電視台以及規定不能以廣東話進行採訪，與廣管局列舉的其中一種反競爭手段，「獨家交易協議，即合約的一方限制另一方選擇和誰人交易或交易的內容，這可能預先排除市場上的競爭對手。」²⁷相符，所以無線的行為正正就是「限制向競爭者提供服務」，並在「協議施加不同的條件，以致他們處於競爭劣勢」²⁸。
- 3.6. 廣管局對「協議」一詞的定義為「協議無論可否在法律上執行、是書面或口頭性質，以及所謂君子協議，皆包括在內。²⁹」因此，即使合約上沒有白紙黑字地寫明違反《廣播條例》的規定，只要有證據去證明，即使不是書面的協議，指控也可以成立。而且，民間有些組織已取得過往無線的藝員合約作為證據，在真憑實據下，廣管局絕不能讓無線逃之夭夭。
- 3.7. 廣管局亦清楚說明「因藝人合約產生的反競爭問題，不在《廣播條例》規定的豁免範圍內，若協議的限制條文在影響其他藝人的類似合約內重覆出現，就有可能違反保障競爭條文的規定」³⁰。
- 3.8. 以上陳述的狀況持續多年而且有不斷惡化的跡象，廣管局卻坐視不理，鮮有執法，造成今天強弱懸殊的局面。更諷刺的廣播局長曾說廣管局「採取…鼓勵競爭的規管模式，……也包括法定競爭條文的執行。」他們多年來雖坐擁管理廣播業最大的權力，卻沒有盡負上輕微的義務，如無牙老虎般任由廣播業界被蠶食，更加無法履行自己所作出的大部分承諾。為此廣管局必須負上責任。

4. 免費電視牌照申請

- 4.1. 城市電訊 (香港)有限公司、奇妙電視有限公司(有線電視)及香港電視娛樂有限公司（電訊盈科）分別在二零零九年年尾和二零一零年提出免費電視牌照的申請。³¹
- 4.2. 廣管局會依據現行的《廣播條例》列出的審批條件去審批。在《本地免費電

²⁷ 《廣播條例保障競爭條文援引指南》第 74 項

²⁸ 《廣播條例》第 13 條

²⁹ 《廣播條例保障競爭條文援引指南》第 16 項

³⁰ 《廣播條例保障競爭條文援引指南》第 21 項

³¹ “免費電視風雲一觸即發”，2010 年 7 月 10 日，東方互動

視節目服務牌照申請指南》V部羅列了申請免費電視牌照的「評核準則」：**(a)**財政上的穩健程度和在投資方面所作出的承擔 **(b)** 在管理及技術方面的專門知識**(c)**節目的種類、數量和質素**(d)**技術可行性及服務質素**(e)**開展服務的速度**(f)**對市民造成最少不便**(g)**為本地廣播業、觀眾／消費者及整體經濟帶來的利益**(h)**控制質素及遵守規定。

跨媒體擁有權限制

- 4.3. 現在的三位申請人都同時擁有收費電視。《廣播條例》(第562章)附表1第2部訂明對跨媒體擁有權限制的規定，這樣的條列是為了保障公眾利益。一般來說，持有一種媒體牌照(報章、電視、雜誌、廣告宣傳代理、聲音廣播)的持有人並不能持有第二個同類或不同類的媒體牌照；控制媒體持有人的人士、其東主、其控權人及相聯者，亦不合資格，除非取得行政長官會同行政會議的事先書面批准。政府訂立這些規定的目的，是為了避免廣播業及其他相關界別出現利益衝突、媒體壟斷和編輯單一化³²。
- 4.4. 關於跨媒體擁有權限制，我們可以參考過去案例。二零零六年，李澤楷被指同時擁有電訊盈科旗下的**Now**寬頻電視，以及《信報》的控制權，可能違反了《廣播條例》跨媒體擁有權限制的規定。
- 4.5. 就某人是否對某公司「行使控制」的法律釋義為「(i)該公司的董事或主要人員；(ii)實益擁有該公司多於15%的有表決權股份的實益擁有人；(iii)該公司多於15%的有表決權股份的表決控權人；或(iv)憑藉規管該公司或任何其他公司的組織章程大綱或章程細則或其他文書所賦予的權力，具有權力確保該公司的事務是按照其意願處理的人。」³³
- 4.6. 後來廣管局調查後³⁴，得悉李澤楷是控股公司「盈科拓展集團」的財產受予人；「盈科拓展集團」間接持有「盈科亞洲拓展」約75%股份；「盈科亞洲拓展」則持有「電盈」約23%股份。擁有**Now**收費電視的是「電盈媒體」，「電盈媒體」則是「電盈」的全資附屬機構，而李澤楷是「電盈」的主席。
- 4.7. 根據廣管局的調查報告，基於(i)李澤楷並非「電盈媒體」的董事或主要人員(李當時為「電盈」主席，「電盈媒體」和「電盈」是不同機構)；(ii)從法律而言，「電盈媒體」的實益擁有人只有PCCW Interactive Media Holdings

³² 《廣播條例》(第562章)附表1第2部

³³ 《立法會十九題：跨媒體擁有權限制》，2006年12月20日，香港政府新聞稿

³⁴ 《廣播事務管理局於二零零八年五月二日公布就與電訊盈科媒體有限公司和信報財經新聞有限公司相關人士是否遵守《廣播條例》的調查結果》，2008年5月2日，廣管局新聞稿，廣播事務管理局秘書處

Limited，不是李澤楷本人；(iii) 其公司的表決權不屬於他本人，而是屬於有關信託公司的專業受託人(iv) 其公司毋需遵從李澤楷的意願行事，故此李澤楷並沒有在《條例》的定義範圍內對電盈媒體行使控制。

- 4.8. 至於《信報》的持有，李澤楷並不願意提供有關資料。據悉李澤楷以離岸信託公司Clermont Media Limited的名義去購買《信報》的股權，法例上李澤楷只是委託人，非《信報》話事人；而李澤楷過去多次透過電盈及個人名義捐款予慈善組織，故信託基金的受益人乃慈善機構不是他本人。因而，在法例上，持有《信報》的是信託基金而非其人³⁵。不過，由於廣管局已裁定李澤楷本人沒有持有「電盈媒體」，所以無論李澤楷是否持有《信報》也沒有觸犯《廣播條例》（沒有同時持有兩種牌照），亦毋需繼續調查。
- 4.9. 另一個可供參考的案例為無線旗下的收費電視申請收費電視牌照。1998年，無線電視成立「銀河衛星廣播有限公司」（銀河衛視）；2004年，政府開放收費電視市場，銀河衛視競投收費電視牌照。限於《廣播條例》，無視電視已擁有免費電視收費牌照，所以不能同時擁有收費電視牌照，除非得到政府行政會議批准。
- 4.10. 當時業界和立法會議員擔心發牌給無線，會造成壟斷，而且豁免是給予特權的做法。而無線則反指其優勢來自其競爭力，所以政府不應為了扶助弱者而懲罰有競爭力的市場參與者。後來，行政會議最終還是以「公眾利益」為由，連同其他四名申請者，將牌照批予銀河衛視³⁶。
- 4.11. 不過，另一方面行政會議亦對銀河衛視加上「防火牆」附帶條件³⁷，包括無線電視不可擁有銀衛多於49%控制權；銀河衛視須獨立運作；不得與無線相互補貼；銀衛須競投無線電視製作的節目頻道（在獨家情況下），不得簽署獨家節目合約，；無線電視自製節目在其免費頻道播放後一年內，不得在收費電視播放等；而銀衛亦必須在獲准發牌後18個月才能經營收費電視，以免搶占先機。
- 4.12. 雖然九倉已擁有有線電視的收費電視牌照，而電盈媒體也擁有Now 寬頻，根據法例他們不能同時擁有免費電視牌照。但根據李澤楷的電盈案例，現在九倉及電盈分別以奇妙電視及香港電視娛樂來申請牌照，未必會觸犯跨媒體擁有權限制，這要看股分比例及控制權等等。而就算他們真的在這部分不獲通過，也有機會如無線一樣得到豁免。

³⁵ 《信報李澤楷權益捐作慈善 迴避跨媒體規例理據 受益非本人》，2006年12月7日，明報

³⁶ 《七月傳媒事件簿》，梁麗娟，2000年8月號，傳媒透視，香港電台

³⁷ 《七月傳媒事件簿》，梁麗娟，2000年8月號，傳媒透視，香港電台

在二零零四年，收費電視市場只有兩名參與者有線電視及互動電視，而有線電視可算是在該市場「獨大」，情況就同現在的免費電視市場一樣。廣管局當年的發牌和行政會議的豁免是爲了引入競爭，引入新經營模式及節目概念，令服務趨向更多元化。若果當年行政會議認爲六個收費電視經營者也不夠，要再加入第七個競爭者無線才符合「公眾利益」；那麼現在免費電視的市場尚且比收費電視更大（因更多人有能力去收看免費電視），行政會議沒有理由不去豁免九倉和電盈（若觸犯條例），讓他們能同時擁有兩個牌照。而就算三個牌照全數批出，免費電視也只有五個競爭者，比當年的收費電視市場的七家經營者³⁸仍然是較少。因此，若果符合公眾利益，即使是觸犯了跨媒體擁有權限制，行政會議也應該豁免。若行政會議不願意豁免，在沒有合理理由的情況下，就證明了一點：行政會議偏幫無線電視，用競爭及「公眾利益」理由令無線有機會加入收費電視的競爭，卻漠視「公眾利益」去保護無線免費電視免受競爭。

覆蓋全港的網絡

- 4.13. 另一個申請免費電視牌照的條件是「以節目能在全港接收(以廣管局感到滿意者爲準)的方式提供服務。」³⁹
- 4.14. 免費廣播慣常使用的大氣電波UHF頻譜，經數碼壓縮技術擴容後有五組，但已全被佔用或留用：一組供無線作數碼及高清廣播、一組供亞視作數碼及高清廣播、一組供亞視和無線繼續提供傳統模擬廣播、一組預留給香港電台的數碼公共廣播頻道，最後一組將作公開競投，引入流動電視服務。由於現時五組大氣電波頻譜已全被佔用或留用，新申請者須另行設法解決傳送問題，例如使用光纖、微波、衛星廣播或其他技術傳送信息。若單一傳送技術不足以覆蓋全港用戶，也可混合其他技術一同使用，達至全民可收看⁴⁰。
- 4.15. 城市電訊現時採用的是香港寬頻的光纖網絡傳送訊息至大廈公共天線，對於在唐樓、郊區等地區，訊號未必能完全覆蓋；而電盈的電視訊號現時主要透過網上行寬頻傳送入屋，若要以此技術廣播，收看免費電視的用戶需額外加裝機頂盒，以及須擁有電盈的寬頻接駁，因而也是一個障礙。有線電視在計劃書提出以混合光纖同軸線網絡提供服務⁴¹。根據有線電視的資料，他們現有的地下網絡已經覆蓋香港 97% 的地區，比免費電視的98.3%略

³⁸ 九倉有線、銀河衛視、Yes TV(HK) Ltd、譜樂視(TV Plus 原爲太平洋數碼衛視)、香港寬頻(城市電訊)、電盈(NOW.COM)寬頻電視、美亞電視

³⁹ 《本地免費電視節目服務牌照申請指南》第 3.9 條

⁴⁰ 《城電有線難辦免費電視 大氣電波頻譜全遭佔用》2010年1月7日，明報

⁴¹ 《免費電視戰升級電盈參戰》2010年1月19日，香港商報

低。即使大氣電波中沒有足夠頻譜，奇妙電視仍能提供服務，而且有關的服務可以立刻展開⁴²。

- 4.16. 「節目能在全港接收」的定義是「以廣管局感到滿意者為準」，十分含糊。若果奇妙電視真的做到97%的覆著率，廣管局又會否以仍然未能在全港接收為由駁回其申請？我們認為，大眾都想有更多的媒體可供選擇，引入競爭或可改善壟斷局面，絕對符合公眾利益，所以廣管局應在這方面放寬多少限制，並公開是次申請的客觀覆蓋標準，如93% 或 95%，讓發牌變得更透明和公開。
- 4.17. 至於有市民擔心沒有機頂盒及網絡，而需要多付一筆金錢去安裝頻道，變相並非免費；又或根本科技上不能做到導致不能收看新的免費電視，變成三等甚至四等觀眾。這些都必需交由申請人去解釋他們的做法，如津貼機頂盒，再由廣管局決定是否發牌。

財政上的穩健程度和在投資方面所作出的承擔

- 4.18. 《本地免費電視節目服務牌照申請指南》第5.1(a) 條註明，「申請人須證明能對建議計劃作出充裕的投資承擔，並須具有足夠的財政能力以作出所需數額的投資。廣管局在評估申請人所提交的履約保證時，會考慮有關保證能否有效約束申請人履行其所作承擔和責任。」⁴³
- 4.19. 首先，條例中「充裕」一詞意義含糊，很難斷定多少億的投資是「充裕」，廣管局最好將此意義說明清楚，否則若果以此原因否定發牌，難以令人說服。
- 4.20. 城市電訊宣稱斥資二億一千萬元⁴⁴，至於奇妙則六年內會投資十億⁴⁵。無綫電視單是零九年的支出就達二十八億元⁴⁶，亞視近年搞數碼廣播，大股東查懋聲入股時注入的八億元，不到年半已燒完⁴⁷，所以有說城市電訊的投資太少，未能顯示誠意，廣管局可能以此為由，拒絕發牌。

⁴² 《有線撼無綫 只欠一個牌 申請進軍免費電視 聲言萬事俱備》2009年7月29日，明報

⁴³ 《本地免費電視節目服務牌照申請指南》第5.1(a) 條

⁴⁴ 《魔童王維基申辦免費電視》2010年1月1日，太陽報

⁴⁵ 《奇妙電視擬免費電視營運首6年投資逾10億元》，2010年07月09日，匯港通訊

⁴⁶ 無綫2009年度報告，計算損益表中各項經常及非經常性支出

⁴⁷ 《年蝕\$8億 大股東急斬纜 王維基狼吞亞視》，封面故事，第979期，壹周刊

4.21. 雖然，有分析員指，二億元只能製作時事等資訊性節目，難以仿倣無線電視做大型製作。不過他亦指香港寬頻的新聞部只有亞視三分一人手，但同樣可以運作⁴⁸。我們認為一個市場入面應該可以容納大大小小的投資者，不一定要大財團才可以加入，只要該公司如《廣播條例》所言，能履行它申請書上的注資承諾，而申請書上的發展計劃也是其注資可以支持到，即使注資沒其他電視台多，也應批予牌照，讓電視台試行。就算是電影行業，也有小本投資和獨立電影可以得獎和獲得青睞；零售業也有很多小商戶；商界也有非常多中小企；而外國也不盡全是大電視台，有很多小的地方電視台會製作與大電視台不一樣的節目，讓不同的觀眾群的口味都受到照顧。說不定這些牌照申請者可以為電視業帶來新的經營模式，能很好地控制成本之餘也能製作好節目，廣管局不應該以「小本」的原因去阻止這些投資者加入市場，扼殺他們發揮的機會。

4.22. 若果說怕這些投資者最後會挨不住而倒閉或退出，所以不能批予牌照，也是不合理的說法。我們不能因為一個跑手有機會輸就不讓他們參與比賽，若他們最後真的不能持續，那是他們抵不過市場競爭，亦無話可說，但至少我們要給他們在市場佔一席位的機會。另外，亦有說開放免費電視市場可能會令亞視倒閉，令無線毫無對手，這個原因亦不足以支持不發牌的說法。亞視長期積弱，若果真的在開放後抵不住競爭而倒閉，那是競爭低下必然會發生的事，是市場汰弱留強的自然結果。另一方面，新來的投資者若果是有能力的，自然會取代亞視本來的份額。這個制度可令強者留下來，弱者離開，或激發弱者的潛能去突破及做更好的節目給觀眾。從那方面說對觀眾都是好事。容許競爭去選拔強者，才是對公眾利益有交待的做法。

4.23. 經濟發展及勞工局局長葉澍⁹表示「行政長官會同行政會議可以公眾利益為理由，批准不符合持牌資格人士對本地免費或本地收費電視節目服務持牌人行使控制。根據《廣播條例》附表1第3(3)條的規定，行政長官會同行政會議考慮公眾利益時，須考慮（但不限於）下述事項：(i) 對有關服務市場的競爭的影響；(ii) 觀眾獲提供更多元化電視節目的選擇的程度；(iii) 對廣播業的發展的影響；及(iv) 對經濟所帶來的整體利益。」⁴⁹因此，無論申請者是否完全符合標準，只要批出牌照符合公眾利益，行政會議實可給予豁

⁴⁸ 《收費電視流血 免費電視熱炒》第 1036 期，香港壹週刊

⁴⁹ 《立法會十九題：跨媒體擁有權限制》，2006 年 12 月 20 日，香港政府新聞稿

免。

4.24. 有議員表達認為諮詢時間極倉卒，應多作點公眾諮詢才發牌⁵⁰。事實是自去年年底及今年年頭開始廣管局已接納這些申請，只是一直以來都沒有交代進度，直到最近才突然加速進展。廣管局應從那時開始就多作公眾諮詢聽取民意。就現階段看，我們同意廣管局應多作幾場公聽會，並定在今年年底前必需完成審批，解決更多公眾的疑慮。

4.25. 總括而言，有更多元化的選擇符合公眾利益，廣管局在能確保之後廣播質素及解決公眾疑慮的前題下，應盡量放寬限制，讓更多申請者投入競爭。

5. 民間電台案

5.1. 香港民間電台是由由市民在二零零五年自發籌辦的非牟利電台，並向廣管局申請牌照。自二零零四年，鄭經翰及黃毓民被封咪事件，令人憂慮言論自由被收窄。而香港一直以來只有三家電台，市民的聲音在這些事件發生後，可以透過大氣電波發聲的渠道越來越少。民間電台是爲了擴展公眾發言權的空間而成立的。

5.2. 有關當局一直沒有給予民間電台回覆，直到二零零六年尾工商及科技局宣布，行政長官會同行政會議已拒絕民間電台的聲音廣播牌照申請⁵¹。其中最具爭議性的拒批原因，是廣播頻譜有限，現時沒有足夠頻道讓大眾的電台播放，無牌廣播可能對警方、消防、急救、民航通訊等部門造成干擾，而申請者並不具備應有的技術和財力，又認為香港毋需設立社區電台。

5.3. 行政會議拒批牌照的這幾個「原因」並不成立。首先，香港是有足夠的頻道去開放大氣電波給市民申請。根據國際電信聯盟⁵²的 FM 聲音廣播頻道劃分，一般 FM 電台節目廣播所使用的 頻率在 VHF (FM) 在 88.1 至 107.9MHz 之間，理論上每 0.1 區間便可劃爲一個頻道，即香港在理論上可提供差不多 200 條頻道；實際上，外國的一個地區也有超過一百多個電台

⁵⁰劉慧卿及黃毓民議員在立法會的資訊及科技委員會《關於申請本地免費電視節目服務牌照的公眾諮詢》內討論時提出

⁵¹《民間電台牌照申請不獲批》，2006年12月12日，政府新聞處

⁵²國際電聯是主管信息通信技術事務的聯合國機構。作爲世界範圍內聯繫各國政府和私營部門的紐帶，國際電聯通過其麾下的無線電通信、標準化和發展部門。

頻道。而就算說，香港山多，爲了在偏關的地方都能穩定收到，可能需要去到每 0.2 區間才劃一個頻道，那還有差不多一百個頻道。而技術上要避免台與台之間互相干擾並非不可能⁵³。

5.4. 而目前爲止，每年有 3000 多宗公用服務（警方、消防）受電波干擾的事件（如手機，車輛安裝非法通訊裝置等），只有 2008 年 8 月 27 日接獲民航處的一項投訴疑與民間電台有關。電訊管理局副總監在法庭上亦沒有指出有任何一宗是受民間電台頻道的干擾。政府零八初申請禁制令禁制各人再「開咪」時，亦被時任高院法官夏正民指當局未能提出證據⁵⁴。因此，說民間電台的廣播干擾這些公用服務的通信是謬論、藉口。

5.5. 而且，既然廣管局知道頻道不足夠，就好應該推行數碼廣播，增加頻道數量。數碼廣播技術也可解決香港山多訊號容易受干擾的問題，音質更聲稱可媲美唱片。英國一九九五年已開始發展數碼廣播，當時全國約有二百個電台，都屬於公營和少量商營機構。到二零零七年，電台總數大幅增加到 510 個，其中 172 個使用數碼廣播，並湧現了一批新的商營電台，專門提供小眾節目⁵⁵。數碼廣播的技術根本一早就存在，廣管局在 1998 年起已進行數碼廣播試播⁵⁶，但 12 年間竟也未成功推行數碼廣播，令廣播業毫無發展，是未有好好履行其推動廣播業應用新科技和帶動業界進步的責任。

5.6. 行政會議表示民間電台不具備應有的技術和財力去廣播，也並不合理。民間電台過去曾成功進行多次網上試播、大氣電波試播，甚至多次非法廣播，這都證明民間電台有技術及財力去進行廣播。

5.7. 更加過份的是，在行政會議拒絕發牌的一年後，由鄭經翰籌備的「雄濤廣播」，在二零零八年一月遞交廣播申請，在同年八月就獲行政長官會同行政會議批准有效期長達 12 年的牌照，整個過程只用了半年的時間⁵⁷。這就證明根本大氣電波有空間去容納其他廣播，這個發牌的動作完全在行動上自我推翻之前的理由，證明之前的全是謊話。

⁵³ 陳方安生議員發言，立法會會議過程正式紀錄，2008 年 1 月 23 日

⁵⁴ 《指控民間電台干擾 電訊局共接 1 宗投訴》，2008 年 12 月 13 日，明報

⁵⁵ 《不進則退的香港特區廣播格局》，甄美玲，傳媒透視 2009 年 08 月號，香港電台

⁵⁶ 香港電台數碼廣播測試 <http://www.rthk.org.hk/about/digitalbroadcasting/>

⁵⁷ 《行政長官會同行政會議批准雄濤廣播的聲音廣播牌照申請》，2008 年 7 月 9 日，香港政府新聞稿

- 5.8. 鄭經翰的「雄濤廣播」是聯同富豪，包括東亞集團主席李國寶、信興集團董事長蒙民偉等成立的；而眾所周知，鄭經翰本人與特首曾蔭權關係密切⁵⁸。而「民間電台」，由一眾泛民人士組成，節目內容不泛對政府的批評，和敏感的議題包括「六四、七一」。在這個前題下，政府發牌予前者而不發予後者，後者又不是沒能力去經營電台，就證明了政府是選擇性執法，偏幫財團，打壓異見人士。
- 5.9. 民間電台後來為《電訊條例》提出司法覆核，認為其違法違憲。東區裁判法院在零八年一月裁定，《電訊條例》中有關審批電台牌照申請的條文缺乏透明度，賦予特首及行會過大權力，違反《基本法》和《人權法》，下令撤銷三名民間電台負責人的無牌非法廣播控罪，此裁決後被政府上訴得值而推翻。東區裁判法院認為《電訊條例》違法違憲的理據為(一) 發牌與否，完全由行政長官會同行政會議決定，不受任何限制和監督；(二) 沒有法定機制，讓申請人就決定提出上訴；(三) 行政會議和廣管局不是獨立於政府；(四) 未有具體列明發牌與否的考慮範圍⁵⁹。
- 5.10. 這件事正正說明現時處理發牌的廣管局組成及發牌制度缺乏獨立性。由於一些國家仍利用廣播發牌和規管制度來打壓表達自由，「聯合國教科文組織」和「歐洲委員會」近年分別制訂廣播規管的指引，要求規管機構獨立於政府，而發牌和規管工作都不應受到政治干預，並需提高決策透明度和問責性等。歐洲人權法院亦曾下達兩個判決，指有關的東歐國家拒絕發出電台牌照給某些申請者，整個程序極不透明，決定亦顯得任意⁶⁰。香港的情況是，廣管局全數成員由行政長官委任，整個發牌機制又由行政長官及行政會議擁有最終決定權；若廣播牌照的申請失敗，當局無須解釋任何原因，在國際的基礎來說，是侵犯了自由和人權。這個機制，與及政府對廣播業的態度必須改變。

社區電台

- 5.11. 至於工商及科技局通訊及科技科說香港不需要社區電台⁶¹港可謂相當落後與保守。世界多個國家包括英國、澳洲、美國、加拿大、玻利維亞、厄瓜

⁵⁸ 《鄭經翰新電台獲批 12 年牌》，2008 年 7 月 10 日，明報

⁵⁹ 《曾蔭權獨攬電訊條例大權》，2010 年 1 月 18 日，太陽報

⁶⁰ 《不進則退的香港特區廣播格局》，甄美玲，傳媒透視 2009 年 08 月號，香港電台

⁶¹ 立法會資訊科技及廣播事務委員會參考文件《有關廣播服務的事宜》，2005 年 11 月 14 日

多爾、匈牙利、印度、日本、佐敦、菲律賓、尼泊爾、南非、南韓、瑞典、佐敦等都有合法的民間電台在運作中⁶²。這些國家亦同時有非法廣播的電台進行廣播，但有很多都採取容忍的態度，在功能上與合法的一樣。對比起香港的嚴厲打壓，其他國家更明白社區電台的重要性。

5.12. 社區電台是以小規模經營的非牟利廣播服務，志在提供一些大眾化的電台不會提供的節目、提供地域化的資訊，以及為特定的社群服務。聯合國教科文組織一直以來都在鼓勵社區電台和社區多媒體中心的發展，其研究也有指出發展社區電台的好處⁶³。廣播服務是一項珍貴的資源，開放社區電台就是志在提供社區資源予不同社區，令不同的社群都能利用廣播去達到他們的目的，不讓大財團專美，紓緩社會廣播資源不均及影響力不平等的問題。

5.13. 社區電台的實踐，一方面可以讓社群參與節目製作，讓基層有機會接觸新技術和知識，另一方面可以建立社區互助網絡，強化社區內人與人的關係，創造一個空間討論和分享及解決生活種種問題，亦能擴大他們的聲音讓社會及政府作出回應。對於一些弱勢人士，少數族群，如新移民，外籍人士，少數族裔社群，社區電台對他們尤其重要，而他們可以以自己熟悉的語言經營社區電台。另外，也有發展區內經濟的作用，讓區內的小店舖，小生意，自僱工等，以廉宜的價格賣廣告，在社區裡做有效的資源配對。政府近年提倡的創意工業，只聞樓梯響，沒有實質行動。社區多媒體中心就是一個實踐創意的空間，能為香港的文化創意工業培養一些有實質經驗的本地人材。

5.14. 眾人皆知，香港政府如此不能容忍社區電台的出現，是因為懼怕民間聲音，不能接受批評。民間電台的出現，可以抗衡公營及私營電台的壟斷，所以以公眾利益為前題，香港政府好應該擺出泱泱大度，設立制度發牌給社區電台。

從民間電台案看免費電視發牌

5.15. 從以上個案可見，政府的而且確限制言論自由，拒絕聆聽市民聲音，作為一個發達地區政府，完全沒有包容和接納批評的度量。無論是聲音廣播或免費電視，行政會議都有發牌，或給予豁免的能力。大家必需以民間電台

⁶² 維基百科

⁶³ Community Radio Handbook, UNESCO-United Nations Educational, Scientific and cultural organization

事件為鑑，若果三間申請免費電視牌照的公司，在沒有足夠的理據下被拒發牌，或長期拖延進度，廣管局以至行政會議也要背上柑制言論自由的污名，所以我們在此警戒有關當局必需審慎考慮。

6. 商台政治宣傳事件

- 6.1. 商業電台在二零一零年四月，接受民建聯的贊助，讓民建聯以大約六十萬的價錢，買下十八個星期深宵二至六點的時段，製作一個名為《十八仝人愛落區》的節目。同時，劉慧卿亦以私人名義用三萬八千四百元在商業電台播出呼籲市民參加遊行的廣告⁶⁴。
- 6.2. 《廣播條例》附表4第12條明確列明「持牌人不得將任何屬宗教或政治性質或關於任何工業糾紛的廣告納入在其服務內。」廣管局設定的《電台業務守則——廣告標準》第28條也訂明：「除非得到廣管局事先批准，否則不得播放有政治色彩的廣告」。劉慧卿自己也承認其廣告為政治廣告，而事件沒有申請豁免，所以屬於違例。⁶⁵至於民建聯的節目，則極具爭議性。
- 6.3. 商台辯稱，香港沒有政黨法，而民建聯亦沒有註冊做政黨，所以未能界定民建聯為政黨。其代表又說，這個節目是先有構思，再找贊助，此乃節目而非廣告，所以不是一個政治宣傳。民建聯亦說其節目內容並非宣傳其黨及當中政治人物，所以沒有違法。
- 6.4. Kaid(2004)為「政治廣告」下了一個定義：在一般狀況之下是由一個候選人或政黨買下或選擇各類機會，透過大眾媒體將企圖想要影響選民認知、態度，以及行為之政訊息傳佈出去，因此政治廣告可被視為一種傳播的過程⁶⁶。McNair(2003)總結「政治廣告」為「支付了商業利率購買和使用廣告空間，以傳遞政治信息給大眾。」⁶⁷
- 6.5. 觀乎《十八仝人愛落區》已播出的節目內容，便是由民建聯力捧五名黨員出任常任嘉賓主持，並由民建聯現任議員充當客席主持，如劉江華、陳克勤、葛珮帆等，以預先錄音或現場直播的方式，去談論一些日常話題。節目內不斷重復其政黨名稱，議員名稱，並褒獎其黨和其黨員的政績。首

⁶⁴ 《播政治廣告「罪成」 商台罰款》2010年7月20四日，星島日報

⁶⁵ 《劉慧卿終認賣政治廣告》，2010年5月1日，新浪香港新聞

⁶⁶ Lynda Lee Kaid, Chapter 7 "Political Advertising" of "Handbook of political communication research", Routledge: 2004

⁶⁷ Denton,R.E. & Woodward.G.C.1985 Political Communication in America, Praeger Publishers

集廣播便不斷出現「民建聯與你關心社會」宣傳聲帶，民建聯之嘉賓主持又在節目推銷地區政策，以及找來黨員大談其爭取興建沙田海灘的功勞等等。這些內容與以上「政治廣告」的定義非常吻合，因為政黨賣的正是政綱及其人，能提高知名度對他們來說是莫大得益。根據以上資料及定義，很難說這個《十八仝人愛落區》這個節目有影響大眾對未來候選人的認知，令市民增加這些人的興趣，並給予機會展現這些客席主持的貢獻，而背後還有支付金錢代價，很難說這不是「政治廣告」。

6.6. 至於說香港沒有政黨法，於是不能介定民建聯是否政黨的說法，是強詞奪理。《廣播條例》第 12 條只是說「政治性質的廣告」，並非一定要是政黨，所以民建聯是政黨與否，商台都已經觸犯《廣播條例》。況且，民建聯是政黨，這是常識。香港大學民意調查有定期就「政團」的認知度作民意調查，「民建聯」由九七年這個調查有紀錄開始，直到現在都是「政團」。直到最近一次調查，當問卷調查員問到「請你講出你最認識果十個政治團體既名稱」時，「民建聯」這個答案獲得所有政團中最多的回覆⁶⁸。「政黨」(political party)（或「政團」、「政治組織」、「政治團體」）是指主要以選舉來取得政權為目標而成立的組織⁶⁹，根據民建聯以往派員參與大大小小的區選直選，沒有理由說民建聯並非政黨。

6.7. 商台的其他論據是，《十八仝人愛落區》乃節目而非廣告，不受政治廣告條例限制，毋須事先申請批准的限制，只須遵守《電台業務守則 — 節目標準》第 50 條規定，「持牌人對受贊助節目或節目環節的內容必須負責。節目或節目環節中可提及贊助商號的產品，但不可太過頻密，亦不可影響節目的趣味或娛樂成分。」

6.8. 可是，《電台業務守則 — 廣告標準》中第 5 條廣告釋義，「廣告」或廣告材料是「泛指任何…用以推銷商品或服務，或用以增進任何機構、商行或個人利益的材料」，包括「文字」、「音響效果」、「宣布」、「廣告口號」、「描述及其他形式發放的材料，以及節目中宣傳任何產品和服務的語句」。而豁免贊助人的條件為「只要(1)持牌人沒有因提及字眼而取得報酬；(2) 沒有過分強調有關字眼及有關字眼(3)沒有影響節目的趣味或娛樂成分」民建聯付費贊助的時段，很明顯能增進民建聯及其成員的認知度，是政黨利益重要的一部分，而且重覆播「民建聯與你關心社會」及多次高談闊論其政績明顯是「過分強調」，所以很難說商台不是容許民建聯賣政治廣告。

⁶⁸ 香港大學民意調查，十大政治團體評分

⁶⁹ “political party is a group organized to gain control of government in the name of the group by winning election to public office”, The New American Political Party, Joseph A. Schlesinger, The American Political Science Review, Vol. 79, No. 4 (Dec., 1985), pp. 1153

- 6.9. 廣管局在五月六日已接獲多達 800 多宗的投訴，在七月二十四日初步裁定商台違反《電台業務守則—廣告標準》第 28 條，如上文所述相符。如電台違反規定，初犯最高罰款八萬元，次犯二十萬元，以後再犯最多罰四十萬元⁷⁰。
- 6.10. 對於政治廣告合法化，我們的立場是除非香港有政黨法去監察政黨的資金，以及開放大氣電波，否則難以讓政黨在公平的環境賣廣告。較富裕的團體人士很可能藉其財力優勢透過電台廣告推廣其政治立場，所以若以上兩個條件不成立，就應繼續嚴格監管政治廣告的播放。
- 6.11. 這次事件可見大眾或媒體對政治廣告的定義不甚了解，而條文概括的範圍卻十分廣闊，建議廣管局為政治廣告下更清晰的指引。

7. 總結

沒有執行條文

- 7.1. 從以上廣播業裡的幾個事件，我們留意到廣播業的發展存在著很多問題，而其中很多都是歸究於廣管局及行政會議沒有依法辦事及履行自己的責任，亦沒有尊重人權和自由。
- 7.2. 廣管局沒有執行《廣播條例》中有關公平競爭和反壟斷的條文，讓免費電視的市場長期處於一個壟斷的局面。同時間，也有很多令人懷疑廣管局及行政會議選擇性執行廣播條例，例如遲遲不答覆及後拒絕民間電台的牌照申請，卻又在半年內極速批出牌照給雄濤廣播。免費電視牌照的申請仍在審批當中，公眾可再次看清楚廣管局有否背離法例，偏幫某些團體及集團。這是個與大眾利益有密切關係的決定，廣管局必須拿出足夠理據支持其決定，才能服眾。商台賣政治廣告一案基本上與多條法例及守則中所寫非常吻合，事實擺在眼前，證據確鑿，沒有太多爭議的地方，廣管局在罰則上應緊貼法例，以阻嚇同類事件再度發生，維持公平的環境。

沒有履行職能

⁷⁰ 《播政治廣告「罪成」 商台罰款》，2010年7月20日，星島日報

- 7.3. 廣管局就其功績而言，並未有履行其所承諾的「理想」「使命」和「廣播政策的目標」。我們在上述已說明廣管局如何對無線電視多年來的壟斷坐視不理，縱之任之，令競爭環境出現嚴重的傾斜，去到難以收拾的地步。另一方面也沒有促進廣播市場的開放，就算有投資者希望投資，也困難重重，難以鼓勵創新。在缺乏競爭下，製作模式單一，內容重覆及抄襲，節目選擇少，及更枉論令節目更多元化及照顧社會不同人士的品味及興趣。
- 7.4. 當台灣、中國的二三線城市，打開電視都有超過一百個頻道讓人選擇，而香港卻停留在只有兩個免費電視台的境地。現在很多內地電視台，在節目製作上都比香港的電視台更創新前衛，以在激烈競爭中爭取更多觀眾。此外，內地近來採取近似的「製播分家」制度，以一改該行業因長期缺乏競爭而缺乏市場活力、創新動力和發展動力的局面。這在內地更被視為電視業改革的第一步⁷¹。
- 7.5. 另一方面，香港電視發展停滯不前，令香港電視頻道的市場佔有率在大中華地區受到威脅。亞視在中國大陸的市場佔有率，自零一年起開始萎縮，原本在90年代擁有70%的佔有率，零二年剩下約35%佔有率，直到2006年，佔有率僅剩下5%，淪為第三線的電視臺。無線電視則萎縮至不足10%，第一線的地位被中國南方電視台取代。⁷²
- 7.6. 在九十年代末，香港曾經討論過要爭取更多衛星電視頻道以香港為上下行(Up-linking/Down-linking)的基地，與新加坡競爭。⁷³十年間，廣管局毫不進取的態度，令香港廣播業錯失得益，也與其「令香港成為區域廣播與通訊中心」的目標越走越遠。

沒有遵守《基本法》、《人權法》的精神

- 7.7. 傳媒並不單止是娛樂大眾的工具，更加擔當很重要的角色，就是三權以外的「第四權」——「傳媒監察權」。「第四權」性質並不隸屬於任何政府機關，並以獨立方式透過向受眾傳播資訊與揭露社會陰暗面進而發揮影響力與監督

⁷¹ 《解構行業新機遇 電視業新時代》，2006年10月號，盛世月刊

⁷² 《香港電視發展的專題報導》，2007年5月號，信報財經月刊

政府施政，並為公眾行使及設定話語權⁷⁴。可是多年來行政會議及廣管局都不大願意去開放市場，在大眾都可以接觸得到的免費電視、聲音廣播市場，一直以來只有兩家電視台及三家電台運作；對上一次批出這些免費市場的牌照，除了近來批出的「雄濤廣播」已是二十年前⁷⁵。香港《基本法》及《香港人權法案》賦予人民自由去發表言論及廣播，之前民間電台申請牌照，就是希望將民間的聲音帶進大氣電波，但遭政府拒絕。現時的《電訊條例》賦予行政會議巨大的權力去控制廣播業，民間電台的風波就顯示出這個制度的問題，令政府有機會去剝削市民的知情權及監察權。

- 7.8. 即將要公開審批結果的免費電視牌照程序，遇上的問題亦一樣。若果行政會議及廣管局沒有合理的理由，去阻止有能力的申請人去作廣播，就是再一次踐踏人民的自由和監察政府的權利。
- 7.9. 由以上可見，廣管局一不依法行事，二沒有達到組織成立的目的與達到目標，三違反《基本法》和《人權法》賦予的自由與人權的精神。

8. 我們的建議

- 8.1. 無線電視的壟斷令到其他免費電視台難以競爭，導致節目質素下降、內容單一化等問題，而另一方面聲音廣播和電視業的發展因為開放速度過於緩慢所以停滯不前。很多時廣管局都有選擇性執法和徇袒的嫌疑；執法時依照的《廣播條例》也被批評為未能為市民服務或與時代脫節，所以有修改的必要。為此，我們有以下的建議：
- 8.2. **維持廣播業的公平競爭，防止壟斷：**無線電視壟斷了免費電視業的發展，一台獨大，擁有支配優勢的情況非常明顯，違反了《廣播條例》關於公平競爭和支配優勢的條文，令市民的選擇大大減少，與廣管局的「使命」去維護公眾利益讓市民能觀看多元化的節目相違背。在情在理，廣管局必需正視這個問題，盡快執法，依法懲罰違規的牌照擁有人，並可考慮在續牌時加入條件要求其遵守。另外，應該為「公平競爭」和「支配優勢」加入更多解釋

⁷⁴ 《探索「第四權」概念發展與新聞自由及傳媒理論兩者之間的關係》，阮兆倫，《文化研究@嶺南》，嶺南大學，第十七期 2010年1月

⁷⁵ 《香江風情—箝制民間電台 港府悖離潮流》，2010年1月24日，《中國時報》

和定義，使其更貼近國際上對公平競爭的定義。

- 8.3. **提高決策透明度和問責性，保障人權和自由：**現時廣管局的組成由行政會議任命，發牌制度也是由行政會議作最後決定，不能上訴，並不需要解釋，整個程序欠缺透明度、問責性和獨立性。行政會議可以一言堂地控制整個機制，發牌給不合乎跨媒體條例的無線電視，發牌給雄濤廣播卻不發牌給有能力並有財力廣播的民間電台，制度為人垢病，也是整個廣播業來到今日這個局面的元凶，所以必需正視及改變才能促進廣播業發展，並保障公民受憲法保護的自由及權利。
- 8.4. **定期公開諮詢公眾，採納公眾意見：**廣播局由政府委任，經常閉門造車，政府很多時在未經諮詢下提出方案，聲稱「公眾不需要」或「民意所歸」，引起市民不滿。過往的幾場公聽會反應熱烈，廣播頻道作為大眾共同擁有、共同享用的資源，公眾都期望以後的政策能更貼合他們需要，因此廣管局應定期（如每一年、每一季）進行公眾諮詢，舉行公聽會，在制訂政策時考慮市民意見，方可保障公眾利益。
- 8.5. **積極執法，維持廣播界的公平環境：**從很多案例我們可以看到廣管局的執法都非常緩慢，需要很多個月的時間處理，譬如商台的政治宣傳事件，到有結果時節目已差不多播映完畢，只是事後懲罰。而無線的問題就更加是多年積累，廣管局在沒有受到投訴時只會坐視不理，即使收到投訴行動也極度緩慢，不停拖延。因此我們希望廣管局未來可以更加積極和嚴謹地執行廣管法例，維持良好的業界環境，達至其成立目標。
- 8.6. **開放媒體市場，以公眾利益為依歸：**開放媒體市場，對公眾利益百利而無一害。首先，有愈多的參加者，競爭愈激烈，參與者愈要靠製作高質素的節目脫穎而出，令廣播業百花齊放。第二，將不同背景的投資者帶入市場，令不同聲音也有渠道發放，照顧不同社群的利益。第三，公眾參與的大眾媒體能更有效反映民生問題，並發揮第四監察權，幫助政府改善施政。第四，言論自由、廣播自由是人權，政府不能剝削踐踏。根本廣播頻道是公共資源，以往技術有限制，不是人人都有能力申請牌照。現在技術普及，廣管局還獨攬著這項重要的公共資源，違反自由市場的原則，亦是香港廣播業無法蓬勃發展的一大原因。
- 8.7. **盡快推廣數碼廣播，以容納更多頻道：**廣管局常推說因大氣電波

頻道不足而無法容納更多電台電視台，當鄰近地區都已經積極發展數碼廣播多年，香港的電視及聲音數碼廣播仍在試行階段，拖延甚久。數碼廣播可以開闢更多頻道予公眾申請，讓觀眾更多選擇，促進競爭，亦能解決香港因山多而容易接收不清的問題。廣管局應盡快推動這項科技的發展，而不是以規限廣播模式為藉口來規限廣播業的發展。

8.8. 鼓勵社區電台、社區電視、社區多媒體中心的發展：社區媒體可以讓民間參與廣播業，讓個別社群的口味得到照顧，同時間，市民可以透過參與節目製作和頻道發展，建立社區網絡，發展區內經濟，實踐創意工業，足見其好處。世上許多國家都已認識到社區多媒體中心的好處，並付諸實行。當技術和財力都沒有問題，香港政府的封閉式態度就成為窒礙社區多媒體中心發展的最大阻力。

8.9. 製播分家，要求外判部分節目製作：除了鼓勵更多的參與者，廣管局可從發牌上鼓勵創作。現在內地都逐漸實行製播分家，香港卻仍然沿用其垂直式經營的手法，製作大多是電視台自己包辦，缺乏衝擊。現在英國規定每個電視台有一定百分比的節目必需外判讓獨立製作公司製作，香港可仿效這個做法作為發牌要求，激活節目創作。

8.10. 設立公眾頻道，加強社會參與，促進言論自由：香港政府在審批牌照給有線電視時曾經提及要設立公眾頻道並大力支持。當時是規定有線必須撥出頻道的一些播放時間去讓公眾的團體去廣播其節目，但後來不了了之，最後到二零零四/五年的立法會會期，雖然大部分議員都讚成，但政府卻大打退堂鼓，推說沒有需求云云。公眾頻道是一個可以讓公眾令使用到大氣電波，促進言論自由，也能做到社區電視的部分目的。政府在開放免費牌照的同時也設立公眾頻道。



香港廣播業的困局與未來發展的路向

二零一零 年八月

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**顧問:**

高德禮博士  
單仲偕先生

**研究員:**

杜耀明博士  
歐贊年先生  
林旭華先生  
袁穎嫻小姐

**項目管理經理:**

沈子成先生  
巫堃泰先生  
~~~~~

1. Introduction

The stagnant broadcasting industry

- 1.1 Hong Kong is the very few places in the world that is undemocratic but respects freedom of speech, although the entry barrier of the broadcasting industry is still very high. For the previous 20 years, we have only 2 free TV stations, 3 pay TV stations, 1 public and 2 commercial radio stations and there is no more choice⁷⁶. Opening the paid TV market of course could provide more choices for the wealthy households, leaving the less wealthy ones with limited choices. Taiwan has about 200 radio stations, even North Korea, a country that is notorious for its oppression of freedom, has 16 AM, 4 FM and 11 shortwave radio stations⁷⁷. If you switch on the television of Taiwan or of some second or third tier cities in China, you can access at least tens of channels⁷⁸. With the intense competition, the producers have to produce more high quality programmes to attract audience and reinforce itself in the market. The “habitual ratings” phenomenon and monopoly market structure of Hong Kong are very rare in other places. From the perspective of economics, lack of competition will lead to inefficiencies and limitation of consumer choices. This is certainly affecting public interest.
- 1.2 Many reasons could have led our broadcasting industry to the current circumstance: the closed market without issuing new licenses for years; Hong Kong Broadcasting Authority (HKBA) does not penalize anti-competition behavior according to law; technology-wise Hong Kong falls behind other countries; and weak initiative to launch digital audio broadcasting leads to insufficient channels. These are exactly what HKBA should have worked on: to promote the development of the broadcasting industry, encourage competition and help the industry to adopt new technologies; and HKBA is capable to execute all these. Today, Hong Kong broadcasting development is far behind other regions, and HKBA has to bear the major responsibility.

⁷⁶ 《香江風情—箝制民間電台 港府悖離潮流》，鄭漢良，24th January 2010，China Times

⁷⁷ 《香江風情—箝制民間電台 港府悖離潮流》，鄭漢良，24th January 2010，China Times

⁷⁸ 《電視混戰 見小不見大》，馮應謙，14th April 2010, Ming Pao Daily

- 1.3 Moreover, media is the fourth power, apart from legislation, executive and judiciary, to monitor governance, expose flaws, and give an impetus for the government to improve on its ruling and urge them to listen to the people. Restriction on media is a restriction on the fourth power. Recently, suspected media self censorship practice and the shutting down of politically sensitive programmes stirred up anxiety of restriction of freedom in the society. . Many organizations have already opened many internet channels to put their voice through, the problem is at the end we only have 2 TV stations and 3 radio stations because the airwaves are not opened to the public(or so called all being occupied, which is not the truth). Therefore, broadcasting industry is no longer only about entertainment, but the matter of right to know and freedom of speech.
- 1.4 This paper looks into 4 representative cases in the broadcasting sector to understand the causes of our stagnant industry development and make constructive suggestions. The cases include Hong Kong Television Broadcasts Limited (TVB)'s anti-competition case, applications for domestic free television programme service licenses, Citizens' Radio illegal broadcasting and Commercial Radio Hong Kong (CRHK) accepting political advertisements.

2 Background Information

- 2.1 Although Hong Kong does not have a cross-sector anti-trust law, there are anti-trust restrictions in "Broadcasting Ordinances". HKBA as the watchdog organization has the authority to investigate and penalize suspected anti-competition behavior.
- 2.2 "Broadcasting Ordinance" – Section 13 "Prohibition on anti-competitive conduct" states that "a licensee shall not engage in conduct which, in the opinion of the Broadcasting Authority, has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market", and that includes "conduct preventing or restricting the supply of goods or services to competitors"; "applying dissimilar conditions to equivalent agreements with other trading parties, thereby placing them at a competitive disadvantage"; "making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which, by their nature or according to

commercial usage, have no connection with the subject of such agreements.”

- 2.3 “Broadcasting Ordinance” – Section 14 “Prohibition on abuse of dominance” states that “A licensee who is in a dominant position is deemed to have abused its position if, in the opinion of the Broadcasting Authority, the licensee has engaged in conduct which has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market.” To judge whether the licensee has abused its dominant power, HKBA states that “if a dominant licensee has engaged in conduct which has the purpose or effect of preventing, distorting, or substantially restricting competition in a television programme service market, then that licensee will be deemed to have abused its dominant position.”⁷⁹”
- 2.4 One of the criteria to evaluate whether a licensee has anti-competitive behavior is “Vertical Restraints”⁸⁰. Vertical restraints refer to “agreements between firms at different levels of the supply chain which restrict the commercial freedom of one or more parties to the agreement or other competitors.” That may include (not exclusively) “dealing arrangements whereby one party to the agreement imposes restrictions on the other’s ability to choose with whom, or in what, it can trade may result in market foreclosure.”

The functions of HKBA

- 2.5 HKBA is set up as a legal entity in 1987 according to “Broadcasting Authority Ordinance” (Chapter 391) to secure proper standards of broadcasting; to assist the Government of the Hong Kong Special Administrative Region in the execution of its broadcasting policies; and to administer all relevant legislative requirements and license conditions.
- 2.6 HKBA in its website claims that its “vision” is to help the industry players to deliver, innovate, and compete in a supportive environment and on a level playing field, and let the community enjoy a wide range of quality

⁷⁹ “Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance” Article 77

⁸⁰ “Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance” Article 74

programmes which are informative, enlightening, educational and entertaining.

- 2.7 HKBA also says its “mission” and “policy objective” are to widen programming choice to cater for the diversified tastes and interests of the community; encourage investment, innovation and technology transfer in the broadcasting industry; to ensure fair and effective competition in the provision of broadcasting services; to work with overseas regulators to keep abreast of world trends and issues in broadcasting; and to promote Hong Kong as a regional broadcasting and communications hub.

Freedom of speech and freedom of Press Guaranteed by Constitution

- 2.8 Basic Law states that Hong Kong residents shall have freedom of speech and of the press and of publication⁸¹
- 2.9 “Hong Kong Bill of Rights Ordinance” clearly states “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁸²”

3 TVB’s Monopoly Kingdom

- 3.1 TVB has always been dominating the Hong Kong market. According to the information of Prof To Yiu-ming of Hong Kong Baptist University, in the past 16 years, the market share of TVB and Asia Television Limited (ATV) changed from 7:3 in 1994, to 8:2 in 1999, and finally 9:1 in 2007.⁸³ Other research yields similar results. TVB has market share of over 75% before the handover of Hong Kong⁸⁴, over 80% of TV advertising money belongs to TVB⁸⁵. These data demonstrate that TVB market share is much higher than 50%⁸⁶, the threshold set by HKBA as having “dominating power”.

⁸¹ “Basic Law” Chapter 3 Article 27

⁸² “Hong Kong Bills of Rights Ordinance” Article 16

⁸³ 《解構行業新機遇電視業新時代》，Prime Magazine, October 2006

⁸⁴ “Hong Kong”, Karen Gwinn Wilkins, The Museum of Broadcast Communications, accessed on 8 Jul 2010, <http://www.museum.tv/eotvsection.php?entrycode=hongkong>

⁸⁵ “The Other Hong Kong report”, pp 390, Joseph Y.S. Cheng, HK: Chinese University Press, 1992

⁸⁶ According to “Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance” Article 55, “There will be, however, a presumption of dominance, in the absence of

TVB usually has ratings of 20 to 30, while ratings of ATV's programmes are consistently under 10⁸⁷. This "habitual rating" phenomenon has persisted a long time. Even TVB and ATV broadcast the same programme with the same signal and display, TVB's ratings still bypass ATV's by a significant amount, for instance, fireworks show, Lydia Shum memorial service, RTHK programme and Chief Executive Question and Answer Session⁸⁸. Record shows TVB had once experienced failure in transmission station. The broadcast was halted by 30-minute, with only snowflakes on the screen, but still attracted more than 50% of the rating⁸⁹. From all these evidence we can conclude that TVB does have dominating power in the market.

3.2 In 2008 and 2009, HKBA received one⁹⁰ and no complaints concerning fair competition respectively. In 2010, the number soared to 9⁹¹. Among them, we are most concerned with the complaints fired by ATV towards TVB's anti-competitive behavior.

3.3 ATV's accusations include TVB's under informal rules, forbids artists to take part in functions of other TV stations, leave no chance for ATV to work with these artists; artists have to be interviewed by other media other than TVB in languages other than Cantonese; if ATV purchases an overseas drama episode, it has to specifically dub the voice of the artists contracted with TVB because it is not allowed to play the original dialogue; TVB provides huge discount for its clients to prevent them from buying from ATV; some popular programmes of RTHK are only broadcasted in TVB etc. The complaint is in the process of investigation⁹².

3.4 TVB signs contracts with most singers in Hong Kong (a few hundred dollars of allowance for attending a show and required to attend a minimum

evidence to the contrary, if a licensee has a market share persistently above 50 per cent"

⁸⁷ Ratings report of the 2 TV stations is now handled by CSM since 2006 with a 5-year contract. Objects in the investigations are TV audiences in Hong Kong aged 4 or above, with the population being 6294000. It applies methodology of random sampling. Number of samples should be within 600 – 650, with the number no less than 600.

⁸⁸ 《六月份電視節目收視分析》，丹斯, Media Digest, RTHK, July, 1997,

⁸⁹ This is a widely circulated myth in the society which we have not found concrete evidence

⁹⁰ Hong Kong Cable Television Limited (HKCTV) was alleged of its service termination practices in 2007 had prevented HKCTV subscribers from terminating their service arrangements with HKCTV and transferring to its competitor. HKBA ruled that there is insufficient evidence and the complaint is unsubstantiated.

⁹¹ "2010-2011 The Budget" pp.334

⁹² 《亞視揭發無線與藝人簽不公平合約》，25th January 2010, Sing Tao Daily

number of shows) to restrict them from joining other TV stations; contracted singers are not allowed to be interviewed by competitors in Cantonese, and are not allowed to appear in programmes of competitors⁹³. This is very rare in foreign countries. In other countries, singers are independent and normally work with all TV stations except special performance contract. TV stations and singers are mutually benefiting each other when cooperate. Singers rely on TV programmes to gain popularity, while TV stations rely on singers' appearance to score higher ratings. The breaking of partnership between the four major record companies and TVB⁹⁴ exposes how the unfair contracts have undermined business opportunities of singers and minor TV stations.

3.5 With the evidences in hand, we have a strong ground to substantiate that TVB violates the anti-competitive conduct and abuse its dominating advantage as written in the ordinance. The fact that artists are banned from appearing in other TV stations' programme and are forbidden to be interviewed in Cantonese, concurs with the description of an anti-competitive behavior cited by HKBA: "exclusive dealing arrangements whereby one party to the agreement imposes restrictions on the other's ability to choose with whom, or in what, it can trade may result in market foreclosure."⁹⁵; therefore TVB is definitely "preventing or restricting the supply of goods or services to competitors" and "applying dissimilar conditions to equivalent agreements with other trading parties, thereby placing them at a competitive disadvantage"⁹⁶,

3.6 The definition HKBA gives "Agreement" is as such: "'Agreement" has a wide meaning and covers agreements whether legally enforceable or not, written or oral; it includes so-called gentlemen's agreements. There does not have to be a physical meeting of the parties for an agreement to be reached"⁹⁷ Therefore, even TVB's contracts do not explicitly state the requirement that violates the "Broadcasting Ordinance", if there is evidence to prove such anti-competitive behavior, the allegations substantiate. In

⁹³ Contents of Prof To yiu-ming's joint letter

⁹⁴ TVB could not reach consent with EMI, Sony, Universal and Warner in royalty matter, TVB ban the music and boycotted the artists under these 4 companies from appearing in programmes of TVB.

⁹⁵ "Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance" Article 74

⁹⁶ "Broadcasting Ordinance" Article 13

⁹⁷ "Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance" Article

addition, some organizations already obtain contracts of TVB artists as black and white evidence. HKBA cannot let TVB escape if concrete evidence exists.

3.7 HKBA also states clearly that “Competition issues arising from artists’ contracts with licensees are not exempted from the provisions of the Ordinance and as such are subject to the same prohibitions as any other agreement.”⁹⁸

3.8 The above situation has persisted for many years and is worsening, HKBA however has done nothing. It never executes its power and this is how it leads to today’s circumstance. Ironically, the Chairman of HKBA says the authority “adopts ...pro-competition regulatory approach... including how the statutory competition provisions are administered.” They own the greatest power to rule, but bear the least responsibility to manage its business. They act like a “toothless tiger” and allow the industry to be eroded. HKBA has not done much of its promises, and it should be held responsible for the poor development of the broadcasting industry.

4 Applications for Domestic Free Television Programme Service Licences

4.1 City Telecom (HK) Limited (“CTI”, Wharf), Fantastic Television Limited (“Fantastic TV”, Cable TV) and HK Television Entertainment Company Limited (“HKTVE”, PCCW) applied for Domestic Free Television Programme Service License in 2009/2010⁹⁹.

4.2 HKBA would assess the application according to the criteria laid out in “Broadcasting Ordinance”. Part V of “Guidance Note for Those Interested in Applying for Domestic Free Television Programme Service Licences in Hong Kong” sets out “factors for the assessment” : (a) Financial soundness and commitment to investment (b) Proven managerial and technical expertise (c) The variety, quantity and quality of programmes (d) Technical soundness and a satisfactory quality of service (e) Service roll-out (f) Minimum inconvenience to members of the public (g) Benefit to the local

⁹⁸ “Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance” Article 21

⁹⁹ “免費電視風雲一觸即發”, 10th July 2010, on.cc

broadcasting industry, viewers/customers and the economy as a whole (h)
Quality control and compliance.

Cross-media ownership

- 4.3 The 3 applicants are all owners of paid TV. “Broadcasting ordinance” (Chapter 562) Appendix 1 Section 2 sets the limitation for cross-media ownership. In general, licensee of one type of license (newspaper, TV, magazine, advertising agent and sound broadcasting) cannot be licensee of a second license, whether they are of the same type or not. Persons that have control on licensee, its owner, its controller and related personnel are also “disqualified persons” (to apply for a license), unless the Chief Executive in Council, on application in the specified form by a licensee, is satisfied that the public interest so requires and approves otherwise. This is to avoid conflict of interest, media concentration and editorial uniformity in the broadcasting industry and other relevant sectors¹⁰⁰.
- 4.4 Concerning cross-media ownership, we can refer to previous cases. In 2006, Mr. Richard Li Tzar-kai is found to own PCCW Now Paid TV, and Hong Kong Economic Journals(HKEJ) at the same time, which may violate the restriction of cross-media ownership in “Broadcasting Ordinance”
- 4.5 The Ordinance provides for the legal definition of whether or not a person is "exercising control" of a company. Under the Ordinance, a person exercises control of a company “if (i) he is a director or principal officer of the company; (ii) he is the beneficial owner of more than 15% of the voting shares in the company; (iii) he is a voting controller of more than 15% of the voting shares in the company; or(iv) he otherwise has the power, by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating that company or any other company, to ensure that the affairs of the first-mentioned company are conducted in accordance with the wishes of that person.¹⁰¹”
- 4.6 After HKBA’s investigation¹⁰², they found that Mr. R Li is the settlor of certain trusts which holds Pacific Century Group Holdings Limited

¹⁰⁰ “Broadcasting Ordinance” Schedule 1 Chapter 2

¹⁰¹ “Cross-media ownership restrictions”, 20th December 2006, Hong Kong government Press release

¹⁰² “Broadcasting Authority releases findings of investigation into compliance with Broadcasting Ordinance by entities in connection with PCCW Media Limited and Hong Kong Economic Journal

("PCGH"). PCGH indirectly holds approximately 75% of shares of Pacific Century Regional Developments Limited ("PCRD"), which in turn holds approximately 23% of PCCW. PCCW Media is a wholly-owned subsidiary of PCCW; and Mr. R Li is the Chairman of PCCW.

- 4.7 According to HKBA's investigation report, i) Mr. R Li is not a director or principal officer of PCCW Media (Mr Li is "chairman" of "PCCW", "PCCW" & "PCCW Media" are different companies); (ii) Mr. R Li is not a beneficial owner of PCCW Media, there is only one beneficial owner of PCCW Media and that is PCCW Interactive Media Holdings Limited; (iii) Mr. R Li is not a voting controller, the voting rights are vested in the discretionary professional trustees; (iv) Mr. R Li does not otherwise have the power, by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating PCCW Media or any other company, to ensure that the affairs of PCCW Media are conducted in accordance with his wishes.
- 4.8 Richard Li is not willing to provide information about his holding of HKEJ. It is reported that Richard Li purchased HKEJ shares through the title of an offshore trustee Clermont Media Limited. By law, Richard Li is only a commissioner, and not controller or owner of HKEJ. Richard Li has donated to charity through PCCW and on his own name, so the beneficiary is the charity organizations and not himself. Therefore, legally speaking, the owner of HKEJ is not Richard Li but the trustee¹⁰³. Nevertheless, HKBA already ruled that Richard Li himself does not own "PCCW media", so whether he owns HKEJ, it does not violate "Broadcasting Ordinance" (he is not licensee of more than one license at the same time), so no further investigation is needed.
- 4.9 Another case for reference is subsidiary of TVB's application of paid TV license. In 1998, TVB set up Galaxy Satellite Broadcasting Limited. In 2004, the government opened the paid TV market, Galaxy applied for the paid TV license. Ruled by "broadcasting Ordinance", TVB already owned domestic free TV license, so it was not eligible to own the paid TV license at the

Company Limited", 2 May 2008, HKBA Press Release, HKBA Secretariat

¹⁰³ 《信報李澤楷權益捐作慈善 迴避跨媒體規例理據 受益非本人》, 7th December, 2006, Ming Pao Daily

same time, unless exemption from the Executive Council (ExCo) is granted.

4.10 At that time, other market players and legislators worried that granting the license to TVB would create monopoly, and an exemption is privileging TVB. In the opposite, TVB said its superiority comes from its competitiveness, therefore the government should not penalize competitive player for the sake of helping the weaker players. Then the ExCo announced it decided to, for the reason of “public interest”, granted the license to Galaxy TV, together with 4 other applicants¹⁰⁴.

4.11 On the other hand, the ExCo however has imposed additional “firewall” conditions¹⁰⁵ to Galaxy TV, including TVB cannot own more than 49% of Galaxy TV; Galaxy TV has to operate independently, Galaxy TV cannot subsidize TVB in mutual terms; Galaxy TV has to bid for TVB’s programme channel (under exclusive circumstance) and they cannot sign exclusive programme contract; TVB’s homemade programme in its free TV cannot be broadcasted in paid TV within 1 year; Galaxy can only start operation 18 months after the license is granted to prevent it from taking first mover advantage etc.

4.12 Though Wharf already owns Cable TV and PCCW media also owns Now TV, according to law they are “disqualified persons”, Richard Li’s PCCW case told us, now that Wharf and PCCW applied through Fantastic TV and HK Television Entertainment and HKTVE, it may not constitute to a violation of cross-media ownership. Further details on shares distribution and voting control have to be examined. Even if they are rejected in this sense, it is possible for them to have an exemption like TVB.

4.13 In 2004, paid TV market only had 2 participants, Cable TV and Interactive TV. Cable TV dominated the market, which was quite similar to today’s free TV market. HKBA and ExCo opened the paid TV market in the provision to introduce competition, new mode of operation and programme ideas to diversify the services. If the ExCo thought that 6 providers in the paid TV market were not sufficient, and only by allowing the seventh one, TVB could meet “public interest”, then today the domestic free TV market

¹⁰⁴ 《七月傳媒事件簿》，梁麗娟，Aug 2000，Media Digest, RTHK

¹⁰⁵ 《七月傳媒事件簿》，梁麗娟，Aug 2000，Media Digest, RTHK

is much larger than paid TV (because more people are capable to access), the ExCo has no reason not to exempt applicants (if they violate the ordinance) and allow them to have more than one licenses. And even if all 3 applicants are granted licenses, there are only 5 participants in the market, which is still fewer than 7 participants in paid TV in the past. Therefore, by reason of public interest, the ExCo should exempt applicants from cross-media ownership restriction. If the ExCo is reluctant to exempt them, without valid reasons, it can be construed as the ExCo biases towards TVB, because it allowed TVB to compete in the paid TV market for the reason of “public interest”, but neglects “public interest” to protect TVB from competition in free TV market.

A network that covers all parts of Hong Kong

4.14 Another criterion for assessment is whether the applicant is able to “provide the service in such manner as to enable the service to be received throughout Hong Kong to the satisfaction of the BA.”¹⁰⁶

4.15 The UHF spectrum is commonly used in free TV broadcasting. After compressing by digital compression technology, there are 5 spectrums in Hong Kong but all of them are already in used or reserved for use: one for TVB digital and high definition broadcasting, one for ATV digital and high definition broadcasting, one for TVB and ATV to continue its traditional analogue broadcasting, one reserved for RTHK digital public broadcasting channel and one will be open for bidding for mobile TV broadcasting. Since all the spectrums are occupied, applicants have to think their own ways to solve the broadcasting problem, such as optical fibre, microwaves, satellite or other methods to deliver signals. Mixed technology can be adopted if single technology is insufficient to cover all the users in Hong Kong¹⁰⁷.

4.16 CTI now uses Hong Kong Broadband’s optical fibre network to transmit its signals to public antenna of buildings, the signals may not be able to cover residents living in tenements or rural area. PCCW’s TV signals will reach residents through Netvigator’s broadband, if it plans to adopt this technology for broadcasting, users may need to install set-top box and are

¹⁰⁶ “Guidance Note for Those Interested in Applying for Domestic Free Television Programme Service Licences in Hong Kong” Article 3.9

¹⁰⁷ 《城電有線難辦免費電視 大氣電波頻譜全遭佔用》，7th January 2010, Ming Pao

required to have PCCW's broadband feeder, so it is also an obstacle. Cable TV proposed to make use of its hybrid optical fibre and coaxial cable network for transmission¹⁰⁸. According to Cable TV's proposal, their underground network already covers 97% of Hong Kong, which is slightly lower than 98.3% of free TV airwaves. So even no free spectrums are available, Fantastic TV can still provide services, immediately¹⁰⁹.

4.17 The requirement of "the service to be received throughout Hong Kong", is "to the satisfaction of the BA", which is very vague. If Fantastic TV really can fulfil 97% coverage, can HKBA reject its application on the grounds that the signals cannot reach the whole of Hong Kong? We believe it is of public interest to introduce more media and competition into the industry, which may improve the anti-competition situation. Therefore HKBA should relieve the restriction, and set an explicit requirement for the geographical coverage requirement, for example, 93% or 95%. This could make the whole application and approval process more transparent and open.

4.18 Some people worry that without the set-top box and network, they may have to be responsible for the expense to install the broadband, in a way it is no longer free TV. They also worry that it is just technologically unfeasible for some of them to receive the signals of free TV, making them tier 3 or tier 4 audiences. These all have to be explained and solved by the applicants, such as subsidizing set-top box, and then HKBA can decide whether to grant them the licenses.

Financial soundness and commitment to investment

4.19 In "Guidance Note For Those Interested in Applying For Domestic Free Television Programme Service Licences", 5.1(a) states that "The applicant must demonstrate commitment to invest sufficiently in the proposed project and must possess sufficient financial capability to invest to the level proposed. The proposals on performance bond will be evaluated on their effectiveness as a means to bind the applicant's commitments and obligations."¹¹⁰

¹⁰⁸ 《免費電視戰升級電盈參戰》，19th January, 2010, Hong Kong Commercial Newspapers

¹⁰⁹ 《有線撼無綫 只欠一個牌 申請進軍免費電視 聲言萬事俱備》，29th July 2009, Ming Pao

¹¹⁰ "Guidance Note for Those Interested in Applying for Domestic Free Television Programme Service Licences in Hong Kong" Article 5.1(a)

4.20 First of all, the term “sufficient” in the ordinance is ambiguous. It is hard to tell how many billions of investment are “sufficient”. HKBA better states it out clearly, or it will not be a sound reason if it decides to reject application.

4.21 CTI claims that they will invest 210Million¹¹¹, while Fantastic TV will invest 1Billion in 6years’ time¹¹². TVB’s expense in 2009 is already 2.8 Billion¹¹³; when ATV implemented the digital broadcasting technology, its major shareholder Payson Cha’s investment of 800 million ran out in no more than 1 and a half year¹¹⁴. Some said CTI is investing too little to show its determination in the business. HKBA may reject its application because of this.

4.22 Though an analyst said 200 Million are only good for current affairs and informational type of programme, and it is hard for CTI to follow TVB to engage in large-scale production , he also said HKBN’s news group still functions well with only 1/3 employees of ATV¹¹⁵. We think that a market should contain both large and small enterprises, and not only the financially most capable one. As long as on it fulfills what it said in the application and dedicated corresponding amount of funds that can support its plan, as the “Broadcasting Ordinance” says, even if the amount is much smaller than its current competitors, HKBA should still grant them the licenses. Occasionally small capital and independent movies are awarded prizes; and small enterprises always exist in retail industry and in general the business sectors. The same applies to the TV industry. In other countries, not all the TV stations are large ones, many small local TV stations can have very different production from the major ones to cater the taste of different audiences. These applicants may bring in new operation model into the broadcasting industry, and produce high quality programmes with relatively low cost. HKBA should not prevent these players from entering the market just because they are so called “small capital” and close the door for them to flourish in the industry.

¹¹¹ 《魔童王維基申辦免費電視》, 1st January, 2010, The Sun Newspaper

¹¹² 《奇妙電視擬免費電視營運首 6 年投資逾 10 億元》, 9th July 2010, Infocast

¹¹³ TVB’s 2009 Annual Report, all the regular and extraordinary expenses, cost of goods sold in Profit and Loss statement

¹¹⁴ 《年蝕\$8 億 大股東急斬纜 王維基狼吞亞視》, Cover Story, no.979, Next Magazine

¹¹⁵ 《收費電視流血 免費電視熱炒》, No. 1036, Hong Kong Next Magazine

4.23 Some are worried that new players may not be able to compete with the dominate player in the market and would result in bankruptcy or closure, so the licenses should not be granted to them, is not a valid argument. We cannot deprive an athlete's opportunity to compete because we foresee that he is going to lose the competition, and if they really have to leave the track at the end because of fierce competition then it is still a fair game, but at least we have to give them a chance. Some also said opening the market will lead to collapse of ATV, leaving TVB a pure monopoly, therefore the licenses should not be granted, is also not true. ATV has long been a weak player, if it actually closes down because of competition; it is just survival to the fittest. On the other hand, if new players are capable, they would replace ATV and takes its original market share. This system enables stronger players to stay, and weaker players have to either actualizes its potential or leave, which in the end may lead to programmes of better quality. The system selects strong players which aligns with the public interests, so to the audience, it is definitely a positive thing.

4.24 Secretary for Economic, Development and Labour, Mr Stephen Ip said "The Chief Executive-in-Council may approve disqualified persons to exercise control of a domestic free or domestic pay television programme service licensee in the public interest. Under section 3(3) of Schedule 1 to the Ordinance, the Chief Executive-in-Council shall take account of, but not limited to, the following matters when public interest is to be considered – (i) the effect on competition in the relevant service market; (ii) the extent to which viewers will be offered more diversified television programme choices; (iii) the impact on the development of the broadcasting industry; and (iv) the overall benefits to the economy."¹¹⁶ Therefore, even if some applicants may not completely fulfill all the requirements laid out, if it proves to benefit the public as a whole if given a license, the ExCo is empowered to grant them an exemption.

4.25 Some legislators expressed that the open consultation period for the application is too short, more consultation should be conducted before issuance of license¹¹⁷. The fact is since the end of last year and earlier this year HKBA already accepted these applications, just that they have never

¹¹⁶ "Cross-media ownership restrictions", 20th December 2006, Hong Kong government Press release

¹¹⁷ Emily Lau and Raymond Wong suggested that during "Public consultation on applications for domestic free television programme service licences" hosted by Information Technology and Broadcasting Panel of LegCo

explain the progress, until recently it suddenly speeded up the process. From the current situation, we agree that HKBA should undergo at least a few more open consultation sessions, and work towards announcing the result at this year's end. This could address more public concerns.

4.26 Overall speaking, more diversified choices are of public interests. HKBA should relax the restriction as much as possible and allow more players into the market, given that it can ensure quality of broadcast and public concerns are resolved.

5 The Citizens' Radio Case

5.1 Hong Kong Citizens' Radio was established in 2005 by a group of citizens as a non-profit radio station. They applied to HKBA for a sound broadcasting license. Since 2004, concerns for restriction of freedom were aroused by the closing of Albert Cheng's and Raymond Wong's phone-in programmes. Hong Kong only has 3 radio stations, after the incidents, citizens have less and less room of expression in the mass media. Citizens' Radio was set up to extend public voice.

5.2 HKBA had not replied, and until end of 2006, Commerce, Industry and Technology Bureau announced that CE in council rejected Citizen Radio's application of sound broadcast license¹¹⁸. Some of the controversial reasons for rejections are insufficient spectrums for people's radio channels; illegal broadcast may interfere with inter-communication of police, fire department, first aid and civil aviation; applicants did not have the required technology and financial capability; Hong Kong does not need community radio stations etc.

5.3 The few reasons ExCo cited were not valid. Firstly, Hong Kong does have enough channels in the airwaves for the public to apply. According to International Telecommunication Union's¹¹⁹ FM channel division, normally every 0.1 interval can be set apart as one channel, which means in Hong Kong there are 200 FM channels. In reality, a region in other countries can have more than 100 channels. Even if Hong Kong is hilly,

¹¹⁸ 《民間電台牌照申請不獲批》，12th December 2006, Government Press Release

¹¹⁹ ITU is the leading United Nations agency for information and communication technology issues, and the global focal point for governments and the private sector in developing networks and services.

there can still be around 100 channels, and it is not impossible to avoid interference between channels technologically¹²⁰.

- 5.4 Up till now, out of the 3000 cases of interference communications (mobile, illegal device installed in vehicles) of public services (police, fire department), only one case in 27th August 2008 filed by civil aviation department was suspected to have involved Citizens' Radio. The Deputy Director of Office of the Telecommunication in the court also did not point out any cases out of the 3000 that may be relevant to Citizens' Radio. When government applied for injunction to forbid the programmes of Citizens' Radio from running in early 2008, the Judge also pointed out that the government lacked evidence¹²¹. Therefore, saying that Citizens' Radio's broadcast interfered with public services is a fallacy and an excuse.
- 5.5 Moreover, if HKBA knows that number of channels in Hong Kong is insufficient, it should have implemented digital broadcasting to increase the number of available channels. UK has been developing digital broadcasting since 1995. At that time there were around 200 radio stations, with majority of them public and rest of them private. In 2007 the number increased to 510, 172 of them adopted digital broadcast technology, and a new group of private radio stations specialized in minority programmes sprung up¹²². Digital broadcasting technology has existed for long, but HKBA has not yet taken the initiative to implement it, which is the main cause for underdevelopment of the broadcasting industry. HKBA does not fulfill its obligation to introduce new technology and bring the whole industry into a new era.
- 5.6 The ExCo said that Citizens' Radio station does not have the required technology and capability to broadcast, which is not true. Citizen Radio in many times had successfully broadcasted using both airwaves spectrums and in internet, although illegally, which the action itself proves its ability to broadcast.
- 5.7 One year after the ExCo's rejection, Wave media, managed by Albert Cheng, applied for the same license in January in 2008, and was granted a license

¹²⁰ Anson Chan's speech, LegCo Meeting Minutes, 23th January 2008

¹²¹ 《指控民間電台干擾 電訊局共接 1 宗投訴》，13th December, 2008, Ming Pao Daily

¹²² 《不進則退的香港特區廣播格局》，甄美玲，Aug 2009, Media Digest, RTHK

in August during the same year. The whole process only took 8 months¹²³. This proves that the airwaves actually have idle spectrum for use. The government defeated itself, what it said about insufficient channels is a lie.

- 5.8 Albert Cheng's Wave Media was formed with the support of tycoons in Hong Kong, including chairman of Bank of East Asia David Li, Shun Hing Group Chairman Mong Man Wai, and it is an open secret that Mr Cheng is a close friend with the CE Donald Tsang¹²⁴. On the other hand, Citizens' Radio was formed by a group of pan-democrats, their programmes are filled with criticisms of the government and sensitive issues such as "Tiananmen" and 1st July protest. Under this assumption, the government only granted license to the former but not the latter, when latter actually has the ability to broadcast, proves that the government selectively execute its power, inclining to the interest of consortiums, and oppressed dissidents.
- 5.9 Citizens' Radio applied for judicial review of "Telecommunications Ordinance" because they think it violates the law and constitution. Eastern Magistracy in January 2008 ruled that section in the ordinance, the process concerning radio broadcasting license is not transparent, has given too much power to CE in Council, and violates "Basic Law" and "Hong Kong Bill of Rights Ordinance". He ordered to withdraw the charges of the 3 people of Citizens' Radio, although the ruling was overthrown by government's appeal afterwards. Eastern Magistracy's support for the ordinance's violation are 1) The power to grant the license is completely in the hand of CE in council, and is free from any restriction and supervision; 2) no appeal mechanism for applicants; 3) ExCo and HKBA are not independent entity from the government; 4) criteria for application of license are not listed out clearly¹²⁵.
- 5.10 This incident exactly demonstrates the lack of independence of HKBA's formation and the licensing mechanism. Since some countries still use the broadcasting license and regulation as a political tool to oppress freedom of expression, UNESCO and the European Commission have formulated guidelines for regulating broadcasting services respectively. The guidelines require the regulatory body to be independent from the government; the

¹²³ 《鄭經翰新電台獲批 12 年牌》，10th July 2008, Ming Pao Daily

¹²⁴ 《曾蔭權獨攬電訊條例大權》，18th January, 2010, The Sun newspaper

¹²⁵ 《不進則退的香港特區廣播格局》，甄美玲，Aug 2009, Media Digest, RTHK

licensing and regulatory process should not be interfered politically; and transparency and accountability are to be raised etc. The European Court of Human Rights pointed out in 2 rulings that the license application processes in some eastern European countries are of low transparency, and their decisions to turn down certain applicants appeared arbitrary. In the case of Hong Kong, the whole HKBA is appointed by CE the , the final decision power lies in CE in council; if applicants fail to apply for the license, no explanation is required to be given by the government. These, by international standard are abuse of freedom and human right. The licensing system and the government's attitude towards the broadcasting industry have to be changed.

Community Radio

5.11 it is very conservative and backward thinking if Commerce, Industry and Technology Bureau (Communication and Technology) said Hong Kong does not need community radio stations¹²⁶. Many countries in the world, including United Kingdom, Australia, the United States, Canada, Bolivia, Ecuador, Hungary, India, Japan, Jordan, the Philippines, Nepal, South Africa, South Korea, Sweden and Jordan, all have operating legal community radio stations¹²⁷. In some of them illegal ones exist also, but they are tolerated as if they are legal. In contrast to Hong Kong's strong oppression, other countries show their understanding of importance of community radio stations.

5.12 Community radio is small scale non-profit broadcasting service, aiming to provide programmes that a popular radio station does not provide, share localized information and serve specific groups. UNESCO has encouraged development of community radio and multi media centre, its research also points out the advantage of setting up community radio stations¹²⁸. Broadcasting service is a precious resource, opening the room for community radio station can transfer the resource to different parts of the community, allowing not only the consortium but different groups to

¹²⁶ Information paper on "Issues on Broadcasting" provided by the Administration CB(1)238/05-06(03), LegCo Documents, 14th November 2005

¹²⁷ Wikipedia

¹²⁸ Community Radio Handbook, UNESCO-United Nations Educational, Scientific and cultural organization

utilize broadcasting service for their own good, which may alleviate the problem of uneven distribution of resources and unbalanced social impact.

- 5.13 The implementation of community radio, on one hand allow community to produce their own programmes, provide them the opportunity to get in touch with new technology and knowledge, on the other hand it builds social network, strengthens relationship between people in the community and creates room for discussion for sharing and resolution of daily problems. It also expands their voice so the society and the government can hear them and respond. For the under-privileged and minority groups, such as ethnic minority, new immigrants, foreigners, community radio station is especially important to them, and they can run the radio stations using their own language. Other than these, community radio station has the function of developing regional economy. Small shops, business, self-employed workers can post their own ad at an economic price, enabling effective intra-region resource allocation. Recently the government advocated creative industry, but was never worked on practically. Community radio centre is a space to utilize people's creative potential, it can cultivate some talents with concrete experience for local cultural and creative industry.
- 5.14 We all know that the reason behind government's suppression of community radio – fear for public voice and intolerance of criticism. The emergence of Citizens' Radio could break the oligopoly of current radio station, therefore with the premise that public interest is the most significant consideration, Hong Kong government should set up the system to license community radio stations.

From Citizens' Radio to Domestic TV license

- 5.15 From the above case, we can tell that the government is restricting freedom of speech and closing its channel of communication with the citizens. As a government in a developed country, it could not even tolerate opposite opinions. , the ExCo has the power to approve and disapprove either sound broadcast or TV broadcast license. In view of the Citizens' Radio case, if the 3 applicants of domestic free TV license are rejected without apparent reasons, or the process is delayed unreasonably, HKBA will have to take the blame of suppression freedom of speech. For this, we want to warn HKBA has to consider seriously.

6 Commercial Radio Political Advertisement Case

- 6.1 CRHK accepted Democratic Alliance for the Betterment and Progress of Hong Kong(DAB) 's sponsor of \$600000 to purchase the air time from 02:00 to 06:00 in the morning for 18 weeks for production of a programme called "Night Rider 18". At the same time, Emily Lau places an advertisement of \$38400 on her own name to persuade people to join the procession¹²⁹.
- 6.2 "Broadcasting Ordinance" Schedule 4 no. 12 states clearly that "A licensee shall not include in its service any advertisement of a religious or political nature or concerned with any industrial dispute." HKBA's "Radio Code of Practice of Advertising standard" also spells out in no.28, "No advertisement of a political nature shall be broadcast except with the prior approval of the BA." Emily Lau admitted that her advertisement if a political advertisement, and no exemption was asked for beforehand, so it is illegal¹³⁰. DAB's programme is more controversial.
- 6.3 CRHK argued that there is no political party law in Hong Kong, and DAB is not registered as a political party, so we cannot distinguish whether DAB is a political party. Its representatives also explain that the idea of this programme appeared before they tried to find the sponsor, it is a programme but not an advertisement, therefore it is not a political promotion. DAB also said the programme is not for promoting its party members so is not illegal.
- 6.4 Kaid(2004) gives "political advertising" a definition: "The Communication process by which a source(usually a political candidate or party) purchases the opportunity to expose receivers through mass channels to political messages with the intended effect of influencing their political attitudes, beliefs, and/or behaviors"¹³¹. McNair(2003) concludes that political advertising as "purchase and use of advertising space, paid for at

¹²⁹ 《播政治廣告「罪成」 喬台罰款》，20th July 2010, Sing Tao Daily

¹³⁰ 《劉慧卿終認賣政治廣告》，1st May 2010, Sina New Hong Kong

¹³¹ Lynda Lee Kaid, Chapter 7 "Political Advertising" of "Handbook of political communication research", Routledge: 2004

commercial rates, in order to transmit political messages to a mass audience.^{132,}

- 6.5 “Night Rider 18” was hosted by 5 DAB’s new stars as permanent guest hosts, while DAB’s current legislators Lau Kong-wah, Chan Hak-kan, Elizabeth Quat frequently join in the discussion as guest speakers to talk about daily issues by means of pre-recorded audios or live broadcast. DAB’s party name and its members’ names were repeated many times in the programme along with compliment of their contribution. In the first show, “DAB and you care about the community” promotion audio was played repeatedly, DAB’s guest speakers promoted their regional policy, and its members talked about how DAB fought for the building of Sha Tin beach etc. The contents of the programme match the definitions above, because what a party sells is its political platform and its members, they are already benefiting from the programme if their popularity is raised. According to the above definition, it is very hard to deny that “Night Rider18” does not influence the public knowledge of their future LegCo election candidate, does not stimulate the citizens’ interest on them, and does not provide opportunity for them to show their contribution to the society.
- 6.6 Saying that Hong Kong does not have party law so we cannot know whether DAB is a political party, is a sophistry. “Broadcasting Ordinance” only says “any advertisement of a political nature”, it is not necessary for DAB to be a party, and whether DAB is a party or not, CRHK already violates “Broadcasting Ordinance”. In addition, it is just a common sense that DAB is a political party. University of Hong Kong Public Opinion Programme regularly monitors public knowledge of “political groups” by survey. Since 1997 when records had been kept , DAB was always recognized as a “political group”. Dating to the latest survey, when interviewer asked respondents to “name up to ten political groups that you are most familiar with”, “DAB” was replied the most number of times¹³³. “Political party” (or “political group”, “political organization”) refers to “a group organized to gain control of government in the name of the group by winning election

¹³² ¹³² Denton,R.E. & Woodward.G.C.1985 Political Communication in America, Praeger Publishers

¹³³ Popularity of Political Groups , University of Hong Kong Public Opinion Programme

to public office¹³⁴ . DAB has run for offices in many elections, so there is no reason to say it is not a political party.

6.7 CRHK also argued that “Night Rider 18” is a programme, not an advertisement, so is not under the political advertisement section in the ordinance, and no application is required in advance, only that “Radio Code of Practice of Programme Standard” no.50 rules that “The licensee should be responsible for the content of sponsored programmes or programme segments. Mention of a sponsor related product in such programmes or programme segments may be permitted provided it does not occur frequently and does not obtrude on programme interest or entertainment.”

6.8 However, no.5 in “Radio Code of Practice of Advertising standard” defines “advertisement” as “any material ...which is designed to advance the sale of any particular product or service or to promote the interests of any organisation, commercial concern or individual, whether by means of words and/or sound effects (including .music) and whether in the form of direct announcements, slogans, descriptions or -otherwise, as well as any promotional reference in the course of a programme- to any products or services”. A sponsor can be on the list of exemption if “(1) the licensee receives no consideration for such references; (2) no undue emphasis is given to such references; and (3) the references do not obtrude on programme interest or entertainment”. The airtime that DAB paid for obviously can raise popularity of its members, which is of a political party’s core interest; the repetition of “DAB and you care about the society” and its political achievement are “undue emphasis”, therefore it is hard to deny that CRHK is not broadcasting DAB’s political advertisement.

6.9 HKBA received more than 800 complaints on 6th May, and preliminarily ruled on 24th July that CRHK violated “Radio Code of Practice of Advertising standard” no.28, concurs with the above analysis. Such violation can lead to a maximum penalty of \$80000 for first offense, \$200000 for second, and \$400000 for repeated offense¹³⁵ .

¹³⁴ “ political party is a group organized to gain control of government in the name of the group by winning election to public office”, The New American Political Party, Joseph A. Schlesinger, The American Political Science Review, Vol. 79, No. 4 (Dec., 1985), pp. 1153

¹³⁵ 《播政治廣告「罪成」 商台罰款》, 20th July 2010, Sing Tao Daily

6.10 Our view to legalizing political advertisement is only if Hong Kong has party law to monitor parties' source of funding, and open up the airwaves spectrum for the public, it will be a fair environment for political advertising. HKBA also said wealthier groups can promote its political stand by taking their financial advantage, therefore we think if the two conditions above are not satisfied, political advertisement should not be allowed.

6.11 This incident demonstrates the public and mass media's lack of understanding of the definition of political advertisement; the area covered by the ordinance however is very wide. HKBA is suggested to give clearer instructions or guidelines.

7 Conclusion

Failure to execute ordinances

7.1 From the few cases we study, we can observe many problems within the broadcasting industry. Among them, most are caused by HKBA's and the ExCo's loose execution of law, irresponsibility and the lack of respect of human rights and freedom.

7.2 HKBA does not execute the anti-competitive and anti-dominating ordinances in "Broadcasting Ordinance". At the same time many suspect HKBA and the ExCo selectively execute the ordinance, for instance, it delayed to reply and rejected Citizens' Radio's application, but granted the license to Wave Media in half a year's time. Domestic free TV license is still in the process of approval, which is an opportunity for to public to oversee whether HKBA will violate the law or privileged certain groups. This is a decision that deals largely with public interest, HKBA has to support its decision sufficiently to account to the public.

The underperformance of its functions

7.3 Judging from HKBA's work, it has not performed work to fulfill its "vision" "mission" and "policy objective". We have mentioned how HKBA has neglected TVB's anti-competitive behavior and allowed it to abuse its dominating power, making the competition environment to be extremely

favourable to TVB to a point that is irreversible. Additionally, it has not done much to open the broadcasting industry, it becomes very difficult for interested investors to enter the market, hence any creative ideas could not be implemented. Lack of competition leads to uniformity in production. Programme contents are repeated and copied, choices are little, diversity and preference of different groups are too far to be reached.

- 7.4 When Taiwan and second and three-tier cities in China have more than 100 channels, Hong Kong still lags behind with only 2 free TV stations. Nowadays many mainland TV stations innovate in their production to attract more audiences under fierce competition. They adopt a model of operation that separates production and broadcast, aiming to bring about changes in the market that lacks competition, vigour, innovation and development. This is seen as the first step to revolutionize the TV industry¹³⁶.
- 7.5 In contrast, Hong Kong TV industry is stuck at the same place for a long time. Hong Kong TV channels' market share in mainland is threatened. ATV's market share shrank since 2001, from 70% in 1990s to 35% in 2002; until 2006, it only has 5% left, making it a three-tier TV station in mainland. TVB's shrank to less than 10%. Its previous top-tier position is now replaced by Southern Television Guangdong¹³⁷.
- 7.6 In end of 1990s, there was discussion about grasping the opportunity to compete with Singapore develop Hong Kong as the up-linking and down-linking base for satellite TV¹³⁸. 10 years passed by, HKBA's passive attitude has cost the broadcasting industry competitiveness. It has led Hong Kong to run further and further away from its objective to "promote Hong Kong as a regional broadcasting and communications hub."

Freedom of speech and freedom of Press Guaranteed by Constitution

- 7.7 Media is not only a means of entertainment, it is also the fourth power other than the 3 well known ones (legislative, executive, judiciary)– "media monitoring power". "The fourth power" does not belong to any government

¹³⁶ 《解構行業新機遇 電視業新時代》，Oct 2006, Prime Magazine

¹³⁷ 《香港電視發展的專題報導》，May, 2007, Hong Kong Economic Journal Monthly

departments. It works to deliver information and expose the dark side of the society independently to monitor government's making and execution of policy. Its work is an execution of public voice¹³⁹. However, for many years HKBA and the ExCo are unwilling to open up the broadcasting market, we only have 2 TV stations and 3 radio stations that are publicly accessible. Last time when a license was approved, apart from Wave Media, was 20 years ago¹⁴⁰. "Basic Law" and "Hong Kong Bill of Rights Ordinance" in Hong Kong guarantee citizens right to express their opinion and right to broadcast. Citizens' Radio's application of license is an act to introduce public voice into the airwaves, but was rejected by the government. "Telecommunication Ordinances" gave the ExCo dominating power to control the broadcasting industry. Citizens' Radio case demonstrates the problem of this system that the government may abuse its power, to deplete people's right to know and right to monitor.

- 7.8 The results of application of domestic free TV license are to be out soon, and we face the same problem. If the ExCo and HKBA do not have valid reasons, but prevent capable applicants from getting the license, they are spoiling people's freedom and right to monitor to the government again.
- 7.9 From the above discussion, HKBA does not execute the law, fulfils its function or its objectives, nor adheres to the "Basic Law" or "Hong Kong Bill of Rights Ordinance".

8 Our Suggestions

- 8.1 TVB's dominance has twisted the competition ground for other TV stations, which leads to deterioration of programme quality and problems like uniformity in contents. The opening of the sound and TV broadcasting market is too slow and is marking time. In many times, HKBA was suspected to have favoritism and selectively execute laws, and "Broadcasting Ordinance" is being commented as unable to serve the citizens and out of touch with the times, therefore there is a need to modify it. For these reasons, we come up with the following suggestions:

¹³⁹ 《探索「第四權」概念發展與新聞自由及傳媒理論兩者之間的關係》，阮兆倫，〈文化研究@嶺南〉，Lingnan University，no. 17 Jan 2010

¹⁴⁰ 《香江風情－箝制民間電台 港府悖離潮流》，24th January 2010, China Times

- 8.2 **Maintain a fair environment for competition, Prevent any form of dominance:** TVB has monopolized the free TV broadcasting market. Its advantage over its competitors is far too obvious to deny, and it violates the anti-competitive and anti-dominance acts in “Broadcasting Ordinance”. The reality is we have very limited choice, which is the opposite of HKBA’s “mission” to diversify programming choice to cater for interests of the community. HKBA has to face the problem and execute its power according to law as soon as possible to penalize law-violating licensee, and consider make it a condition for license renewal. Moreover, it should explain and define “fair competition” and “dominating advantage” in greater details, and make it something closer to the international standard.
- 8.3 **Raise the accountability and transparency of HKBA and the ExCo, Protect human rights and freedom:** The formation of HKBA is now appointed by the ExCo. The final decision power also lies in the ExCo in the current licensing system, there is no appeal mechanism and no explanation is required. The whole procedure lacks transparency, accountability and independence. The ExCo can use its power to grant a license to a TVB that violates cross-media restriction in the ordinance license Wave Media which is supported by consortiums, but not to Citizens’ Radio which is capable and financially affordable. The system’s fairness is highly questionable, and is also the cause of the sluggish development of the broadcasting industry. Therefore the system has to be changed to encourage healthy development of the industry; hence citizens’ freedom and right are protected.
- 8.4 **Regularly consult the public, adopt public opinions:** HKBA is appointed by the government, it works on its own usually without consulting public opinions. Before the government claims that “the public does not need it”, or “this is what the people think”, often it has not consulted the public at all, and the public is dissatisfied with such behavior. The consultation sessions held in the past received great feedback. Broadcasting channels are resources that are owned and shared by the public. The public deserved to be consulted for better formulation of broadcasting policy to fulfill their need. Therefore HKBA should regularly hold consultation sessions (i.e. every quarter, every year), and consider public feedback before planning its future strategy. This could better protect public interests.

8.5 Execute law proactively, maintain a fair environment: From many cases we can see how slow it takes for the HKBA to conclude a case, some of them take months, for example in the CRHK political advertisement incident, the ruling only comes when the programme is nearly over, which is already an ex-post measure. TVB's problem is long-term, HKBA had turned a blind eye when no complaint is received; and after it received complain, it has been too slow to response and delayed indefinitely. Therefore we hope HKBA can be more proactive and rigorous in executing the ordinance, in order to maintain a healthy environment for the industry, and fulfill its objectives.

8.6 Open the media market, place public interest in the first priority: Opening the media market will greatly benefit the public. More market players will lead to more competitions, and the players will have to produce higher quality programmes to stand out, which in turn will diversify our programme choices. Secondly, the entry of investors of different backgrounds can bring different voices to the public channels, interest of different groups can be taken care of. Thirdly, mass media with public participation can effectively reflect problems of people's livelihood, strengthening the fourth power to monitor and improve governance. Fourthly, freedom of speech and broadcast are human rights, this is something the government cannot trample on. Broadcasting channels are public resources, in the past technological barrier has blocked out some people from applying a license. Nowadays the technology has become common, HKBA still tries to monopolize this important resource. It violates free market principle and is a reason why broadcasting industry cannot flourish.

8.7 Implement digital broadcasting technology as soon as possible, Increase number of available channels: HKBA always said there are insufficient channels for new TV or Radio stations. When neighbor regions have already adopted digital broadcasting, Hong Kong is still in the testing stage, and has delayed the implementation for long. Digital broadcasting can provide more channels for the public to apply, increase industry competition, and the audiences can enjoy a larger variety of programmes. The problem of weak and unstable signals because of Hong Kong's hilly geographical characteristics can also be solved. HKBA should quickly

promote this technology, and refrain from using the same excuse, saying that there are insufficient channels to slow down the development of broadcasting industry.

- 8.8 Encourage the setting up of community radio stations, community TV and community multi-media centres:** community mass media allows citizens to participate in production, take care of tastes of individual groups. At the same time, people can build social network, develop local economy, and promote development of creative industry through involvement in production. When technology and financing are no longer problems, Hong Kong government's protective attitude becomes the biggest obstacle to the development of these community mass media.
- 8.9 Separating production and broadcasting, request market players to outsource part of the production:** Other than introducing more market players, HKBA can encourage creativity in its licensing. Nowadays mainland China is gradually practicing the separation of production and broadcasting, but Hong Kong still sticks to its original vertical mode of operation that the TV stations produce its own programmes. Now UK requires each TV station to outsource a certain percentage of its programme to external independent producers. Hong Kong can follow the practice and make it a requirement for renewal or approval of license to create some sparks for Hong Kong production.
- 8.10 Set up public access channels, strengthen social participation, promote freedom of speech:** When Hong Kong government licensed Cable TV, it had mentioned and supported the idea of setting up public access channels. At that time it intended to require Cable TV to reserve certain airtime of some channels for public organizations to broadcast their own programmes, but at the end it was set aside. Finally in 2004/5 LegCo year, although most legislators agreed with it, the government backed down with the reason that there was no demand. Public access channel is a way to let the public make use of the airwaves. Setting up of it promotes freedom of speech, which is one of the objectives of community TV. The government should seriously consider adding such a requirement when licensing the new domestic free TV licenses.



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August 2010

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**Advisor:**

Dr. George Cautherley

Mr. Chung-kai Sin

**Researchers:**

Dr. Yiu-ming To

Mr. Jeffrey Tsan-nien Au

Mr. Peter Yuk-wah Lam

Ms. Vera Yuen

**Campaign Project Managers:**

Mr. Tonio Shum

Mr. Michael Mo

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