

香港特別行政區
政府新聞處處長

The Government of the Hong Kong
Special Administrative Region
Director of Information Services

Our Ref.: ISD CR4-35/2
Your Ref.: CB(4)/PAC/R60

16 May 2013

Ms Mary So
Clerk, Public Accounts Committee
Legislative Council
Legislative Council Complex,
1 Legislative Council Road,
Central, Hong Kong

Dear Ms So,

Public Accounts Committee
Consideration of Chapter 2 of the Director of Audit's Report No. 60
Administration of road safety measures

Thank you for your further questions and enquiries dated 7 May 2013 following the public hearing of 4 May 2013.

The two Announcements in the Public Interest (APIs) cited in Paragraph 6.5 in Part 6 of the captioned report are technically “owned” by the Transport and Housing Bureau, which commissioned them on behalf of the Road Safety Council (RSC) and signed the contract. The Information Services Department (ISD) acts as an agent for the RSC in the production of its APIs. All action taken by ISD in regards to the two APIs was discussed with, and agreed by, the RSC or its Secretariat. The ISD cannot act and does not act on its own – it must act on the advice and decisions of the RSC or as requested by the RSC Secretariat.

Case 1 referred to in the Audit Report

(a) The procedures adopted for awarding API contracts are generally the same and were followed for the API in question.

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Vision: To be an outstanding Government news and communications agency that pursues professional excellence.

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APIs are owned by the Bureaux or Departments (B/Ds) that commission and pay for them. Responsibility for the theme, messages, content, creative approach and storyline lies with the owner B/D.

The Local Promotions Sub-division of ISD's Publicity and Promotions Division manages the approval process as well as liaison on production logistics in close consultation with the client B/Ds.

The process is explained in Chapter V of the **“Good Practice Guide to Publicity Campaigns” (Annex A)**. Briefly, the process includes the following steps:

- Approval in principle for air time to be allocated at a future date
- Approval of the storyboard
- Approval of scripts
- Approval of rough and final cuts
- Allocation of air time for finished product

Quality Control of Contractors

Quality control of contractors is achieved in three ways:

- Approved Service Provider list
- Competitive bidding process
- Performance of Contractor assessment form

Approved Service Supplier

ISD maintains a list of Approved Service Suppliers for the production of APIs. The list is updated annually but companies can apply to be added to the list at any time.

Those wishing to be added to the list must provide certain proof of ability/track record and documentation.

This includes:

- Basic company details
- Organisation and staff (including key creative personnel)
- In-house facilities
- Financial resources

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- Business activities (detailed list of services provided)
- Reference Material (showreels, previous work etc)
- Documents (Business Registration Certificate, tax statements, insurance etc)

Currently, there are 56 Approved Service Suppliers on the list. B/Ds are encouraged to use this list when producing APIs. However, they are not obliged to and occasionally engage Service Suppliers not on the list.

Competitive Bidding Process

Most APIs are the result of a competitive bidding process.

This not only ensures a level playing field in terms of government spending, it also spurs Service Suppliers to develop creative and interesting ideas to win a contract. For API contracts, a heavier weighting is given to the creative concept than the actual contract price.

Performance of Contractor assessment form

Since late 2003, at the conclusion of a contract, client B/Ds are requested to fill in a "Performance of Contractor" assessment form.

This is put on the working file for the API, as well as a special file on the Performance of Contractors.

(b) Following the discovery of possible copyright issue with the anti-drug driving API, and the technical issue with the cycling safety API, ISD has implemented a number of operational changes to help avert such incidents in future.

These are:

- A Production Checklist kept at float of each API file to ensure all necessary procedures are completed and documented.
- Specifically ask contractors to confirm originality of their creative concept during the presentation stage of their creative ideas.

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- Internet-based search on successful creative concept to look for similar ideas, executions, storylines etc in Hong Kong or overseas (also added to Production Checklist)
- A written directive to staff not to proceed with filming unless technical experts are present for RSC APIs
- Additional written directive and item added to Production Checklist to ensure presence of technical expert during filming sessions when necessary for all APIs

(c) A document – **Information Note on the Anti-Drug Driving API** – is enclosed at **Annex B**. The note gives a timeline of relevant correspondence on the copyright infringement issue.

(d) ISD is not in a position to decide whether or not to take legal action. Such a decision rests with the RSC in conjunction with the Transport and Housing Bureau, which signed the contract. As can be seen in above “Information Note on the Anti-Drug Driving API”, legal advice was sought from the Intellectual Property Department (IPD) and Department of Justice (DoJ) on this matter, and the substance of this advice was provided to the RSC for its consideration.

Although IPD rendered advice based on its analysis of the API content, it was inconclusive. IPD stated that, ultimately, it was for the courts to decide whether a copyright breach had occurred. DoJ’s advice was that unless the UK copyright owner took action for breach of copyright, the RSC was not in a position to make a claim against the Hong Kong production house for breach of copyright or non-compliance of its contractual obligations. DoJ also stated that the Hong Kong production company was under no obligation to answer any questions put to it by ISD.

(e) Two APIs have since been produced to combat drug driving. One relates to drug driving under the influence of illicit drugs while the other relates to drug driving under the influence of prescription or medicinal drugs. The contract price was \$900,000 and included two sets of TV and Radio APIs (with pre- and post- versions); as well as design and copywriting for a poster, leaflet and roadside banner. The APIs have been on air since March 1, 2012.

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(f) The licence fee offered by the UK copyright owner was GBP5,535 which covered the period the API was on air in Hong Kong from January 24 to April 3, 2011.

(g) The UK copyright owner has informed ISD that it will not pursue action against the Hong Kong contractor.

Case 2 referred to in the Audit Report

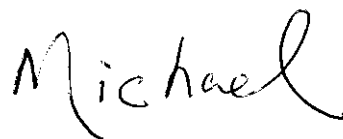
(h) The “Good Practice Guide on Publicity Campaigns” referred to in the Director of Audit’s report (**Annex A**) serves as a general information note to B/Ds on the mounting of publicity campaigns, including the production of APIs. B/Ds are encouraged to follow the Guidelines as far as practicable.

This notwithstanding, as mentioned in Paragraph (b) above, an extra category has been added to the Production Checklist for each API to ensure a technical expert is present for location filming when necessary. Where circumstances warrant, ISD may reschedule location filming to ensure the presence of an on-site technical expert.

The “Good Practice Guide on Publicity Campaigns” is being updated to include considerably more information on a number of publicity matters, including the production of APIs.

Soft copies of documents in this reply have been emailed to sywan@legco.gov.hk as requested.

Yours sincerely



(Michael Wong)
Director of Information Services

c.c. Secretary for Transport and Housing (fax no.2537 6519)
Commissioner for Transport (fax no. 2598 5575)
Commissioner for Police (fax no. 2520 1210)
Secretary for Financial Services and the Treasury (fax no. 2147 5239)
Director of Audit (fax no. 2583 9063)

***Note by Clerk, PAC: Annex A not attached.**

**Information Note on the
Anti-Drug Driving TV API**

Background

The Announcement in the Public Interest (API) for combating drug driving for the Road Safety Council (RSC) was under production between September 2010 and January 2011. It was on air on from 24 January 2011 until 3 April 2011.

Considerations

2. From the time the copyright infringement allegation was brought to the attention of the RSC and ISD, our main concern was always to ensure that there was no breach of intellectual property rights (IPR) and to protect the Government's reputation in this regard. It is our view that the Government's commitment to protecting IPR – and its actions to do so – takes precedence over any contractual dispute we may have with the Contractor that produced the TV API. This is because, in our view, the potential damage to Hong Kong's reputation as a jurisdiction committed to protecting IPR far outweighs any loss, financial or otherwise, the Government and RSC may have suffered as a result of the curtailed broadcast period of this particular TV API. Given the media attention at the time, the continued broadcast of this particular TV API – which bore resemblance to the UK video – was not in the best interests of the Government or the RSC while questions remained over the IPR integrity of the Hong Kong production.

3. As can be seen from the attached timeline of relevant correspondence on the subject, in pursuing a resolution to this matter, ISD acted on the advice of, or on behalf of the RSC.

4. This incident is a rare occurrence. In the 10 years since contractor performance reviews have been introduced for TV API productions – during which time more than 1700 TV APIs have been produced – this is the first case of its kind.

5. Nonetheless, as explained in our written answer to PAC questions, we have learnt from the experience and have taken steps to help prevent the recurrence of similar incidents.

6. **Timeline of relevant correspondence** on copyright infringement issue as follows:

2011

March 31

Media enquiries to RSC (referred to ISD) on similarities of the RSC TV API to a UK production to combat drug-driving.

ISD wrote to RSC recommending it seek further information from the Hong Kong Contractor and to take the TV API off the air.

April 1

RSC agreed to ISD suggestion, stating that the “Chairman is concerned about the issue” and asked ISD to follow up.

April 3

TV API taken off air (that is, the first available scheduling opportunity).

April 4

Contractor replied to ISD enquiry, expressing shock at the similarities with the UK video and insisting the idea for the RSC TV API was an original creative of their team. Some details were provided on their creative process, including how the “eye” idea came about. The Contractor stated that none of them had searched the “web for other TV commercials on anti-drug driving for reference”.

April 7

Next magazine published an article alleging that the RSC TV API is a copycat version of the UK video ‘Drug Driving – The Eye’.

April 15

Road Safety Council meeting was briefed on the matter and suggested ISD seek authorisation from UK copyright owner to broadcast the TV API in Hong Kong.

May 5

E-mail sent to UK copyright owner asking whether they would object to the broadcast of the TV API in Hong Kong.

May 9

E-mail from UK copyright owner expressing “major concerns” and not agreeing to the continued broadcast of the TV API until “we are able to resolve this”.

May 14

E-mail from UK copyright owner stating they had taken legal advice and believed there is a “clear IPR infringement”.

May 18

RSC meeting discussed the matter. RSC asked ISD to seek advice from IPD on whether there was an IPR infringement and possible remedies for the Government. The meeting also asked ISD to inform the UK copyright owner that the offer to pay a licence fee was being considered by the RSC.

May 24

ISD wrote to IPD seeking legal advice on whether there might be a case of IPR infringement, and if, so whether the Contractor could be held responsible under the current contract; and, what avenues were open to rectify the situation in case of a breach of IPR.

June 22

IPD provided a comprehensive response, which includes general advice on IPR law, comparisons of the two videos, and Contractor’s burden of proof. The IPD suggested that ISD seek further information from the Contractor on their creative process, after which they would provide further advice if so requested. IPD also suggested that ISD seek DoJ advice on enforceability of contract provisions.

June 27

ISD wrote to DoJ seeking legal advice on enforcement of contract provisions.

ISD wrote to Contractor asking them to provide detailed written accounts of the creative process, including such information as “timeline of creative process, minutes of meetings and brainstorming sessions, written submissions by those involved in the production, notes from files showing how the creative ideas were worked out and presented, e-mails and instructions from the client” etc.

June 28

Registered Letter returned because address of Contractor could not be found.

June 30

Letter delivered “By Hand” by ISD staff as well as by e-mail with “Return Receipt” noted and filed.

July 8

DoJ confirmed enforceability of copyright provisions in the quotation documents and recommended ISD seek advice from IPD as to the “Contractor’s

liability and your rights against the Contractor under the above quoted “Statement on Copyright”.

July 19

E-mail reminder sent to Contractor to reply to letter. “Return Receipt” noted and filed. Deadline extended to July 21.

July 20

Contractor replied by e-mail seeking extension until July 27. Extension granted.

July 29

Contractor replied, enclosing copies of original storyboard and music score; stating that the company staff had never seen the UK commercial on the Internet, and referring to its initial response of April 4.

August 18

ISD wrote to IPD providing further information on creation of the storyboard and music score.

August 31

ISD updated RSC meeting on action taken. RSC asked ISD to seek legal advice from the IPD.

September 9

IPD replied to ISD Memo of August 18, suggesting ISD seek further advice from music experts, film directors/producers; and, to press the contractor for further specific explanation, information and statements. IPD stated that “...whether infringement may be established is ultimately for the judge to decide after considering both sides’ evidence including the factual evidence given by the Contractor on the independent creation of the works should a court claim arise”. Further elaboration was also provided on the Contractor’s liability should an IP infringement be proved.

September 20

ISD sent letter “By Hand” and e-mail with “Return Receipt” noted and filed to the Contractor seeking further information within seven days. No reply.

October 13

ISD sought further input from IPD, which replied in e-mail that it did not “have any information or experience in instructing expert witnesses in music or film directing” and suggested ISD approach DoJ to see if they had such experience.

October 18

ISD sent letter “By Hand” and e-mail with “Return Receipt” noted and filed to the Contractor reminding them of the September 20 letter and asking for a reply within 7 days. No reply received.

November 9

Phone call to Contractor director who said he had not read the letter, but would check e-mail and revert.

November 10

Phone call to Contractor director who said he would read the letter and call us back.

November 11

Phone call to Contractor director. No answer.

Phone call to Contractor production co-ordinator who said they would reply within a week.

November 18

Phone call to Contractor director who would not say “yes” or “no” as to whether extra information would be provided.

December 7

ISD tabled discussion paper at RSC meeting outlining steps taken to resolve the matter and proposed to shelve the API to avoid drawing further adverse media/public comments which might have a negative effect generally on the image of the Government and the RSC. In the light of the fact that the Contractor had not responded to ISD requests for information, RSC asked ISD to write to DoJ seeking their help to issue a “demand” letter to the Contractor.

December 12

Contractor called ISD, said he had read the letter sent by ISD and felt he had already provided the information requested. He was asked to provide a written reply to that effect. No reply received.

December 23

ISD sought further advice from DoJ and suggested DoJ send a letter to the Contractor “seeking the information requested [by ISD] to see if this might provide IPD with a clearer picture of the creative process involved”.

2012

January 5

DoJ replied that “Legally, I do not think [the Contractor] is under any legal obligation to provide the required information to government. In the absence of a claim against the government or your claim that [the Contractor] has breached a term of its contract with government, I do not see what role there is for DoJ to play”.

January 13

RSC Campaign Committee updated on latest situation. In the light of DoJ’s advice of January 5, RSC asked ISD to write to the Contractor and also to seek expert advice, and then to refer the matter back to the RSC for follow up.

January 27

Further letter to Contractor seeking information within two weeks. No Reply.

January 30

ISD sought advice from the Composers and Authors Society of Hong Kong (CASH) on whether they had any experts who can advise on music copyright.

February 1

CASH replied to ISD e-mail of January 30 stating that ultimately it would be for the courts in Hong Kong to decide and that it could not provide expert advice or recommend a suitable person in relation to music copyright.

February 8

ISD sought advice from CreateHK on whether it, or contacts in the film industry, could provide expert advice in relation to alleged infringement of copyright.

CreateHK replied, stating that the two videos would need to be viewed side-by-side to consider the allegation from the two perspectives of concept and execution.

February 15

ISD sought further advice from CreateHK on whether copyright breaches might have occurred.

February 16

CreateHK replied that it discussed the two productions among six colleagues stating that the API is “very similar to the UK version”. CreateHK provided further advice on the scope of the Copyright Ordinance in Hong Kong and protection afforded to copyright of non-Hong Kong residents. CreateHK suggested ISD seek advice from the Film Section of TELA.

February 17

ISD sought advice from TELA on whether it could provide expert advice in regards to an alleged infringement of copyright.

TELA replied that it was responsible for classification and exemption of films under the Film Censorship Ordinance (FCO). “Matters in relation to copyright or intellectual property issues are outside the jurisdiction of the FCO and we have do not have the relevant expertise for the issue under concern”.

February 29

ISD updated the RSC on efforts taken to gather further information from the Contractor and to seek advice from DoJ and experts, including CASH, CreateHK, TELA.

ISD proposed to ask Contractor to pay licence fee to cover the time the TV API was broadcast in Hong Kong.

RSC decided to leave the matter and any follow up action in the hands of ISD.

March 13

ISD sent e-mail to UK copyright owner requesting details and costs of a licence fee to cover the retrospective broadcast of the API from Jan 24 – April 3, 2011.

March 16

E-mail from UK copyright owner with offer of a licence fee (at a reduced rate of GBP5,535 after request by ISD). Deadline of March 20 to accept offer.

March 19

ISD requested deadline extension to licence fee offer to secure necessary buy-in and support.

UK copyright owner agreed to extend deadline to March 27

Phone call by ISD Assistant Director to Contractor explaining seriousness of the matter and requesting them to pay a licence fee to cover the retrospective broadcast of the API.

Letter sent to Contractor by e-mail requesting reply within two days.

March 21

E-mail from Contractor requesting a deadline extension to April 4 in order to consult lawyers.

March 22

E-mail to Contractor explaining that a deadline extension was not possible because the offer on the table from the UK copyright owner was time limited.

March 27

E-mail from Contractor stating it could not accept the offer and declining to pay the licence fee.

E-mail from Assistant Director urging Contractor to carefully consider the matter before making a final decision.

March 28

Offer from UK copyright owner in regards licence fee lapsed.

ISD informed UK copyright owner that Contractor had declined to accept licence fee offer.

April 24

UK Copyright owner requested update on the case.

May 16

RSC updated by ISD on the refusal of the Contractor to pay the licence fee. ISD said that the TV API in question should not be aired and that the Contractor should be struck off the list of service providers. The RSC Minutes note: "As there was no further comment from members, and given that the new TV API against drug driving had already been launched and ISD would remove [the Contractor] from the list of service providers, the Chairman closed the discussion. Item is to be deleted."

May 24

ISD informed UK copyright owner that it was unable to take the matter any further.

UK copyright owner sought details of Hong Kong Contractor

May 25

UK copyright owner said it was talking with its legal representatives on potential direct action against the Contractor, but also stating: "I believe you have acted honourably given the situation and we are pleased that the advert has been shelved. Thank you."

2013

May 8

ISD sought update from UK copyright holder on whether it took action against the Hong Kong Contractor.

UK copyright owner replied that “While there is no question your agency breached our IPR the fact you shelved the advert and the fact we were already locked in litigation with a major company for breach of contract ... meant that we took the decision not to pursue them”.

*Information Services Department
May 16, 2013*

PAC-info note on anti-drug driving TV API