

Submission to the Bills Committee on Broadcasting Bill, Legislative Council
The Government of the Hong Kong Special Administrative Region

BROADCASTING BILL

1. INTRODUCTION

The following submission is made on behalf of all members of the International Federation of the Phonographic Industry – Hong Kong Group (IFPI HKG) regarding the Broadcasting Bill (referred to as “the Bill”) and the attached Legislative Council Brief (referred to as “the Brief”). IFPI HKG is a local group of IFPI and it represents over 50 recording companies in Hong Kong, including all the major local recording companies. IFPI has a membership of over 1,300 recording companies in over 70 countries/territories, representing more than 1,000 different labels.

Members of IFPI HKG have tight relationship with television broadcasters. We are major content providers of audio and audiovisual products for local broadcasters. As one of the major epicentres of pop music in Asia, products released by IFPI HKG members are extremely popular in Hong Kong and the South East Asia region, creating a huge demand for television programs focusing on music. Meanwhile, both audio and audio–visual products released by our members are prevalently integrated in broadcasters’ programs. As many broadcasters have shifted to more content specified programming, music products have become the main content for certain broadcasters such as MTV and other music channels.

2. PROSPECTIVES OF CONTENT PROVIDERS

i. Competition issues – Vertical Integration and Media Concentration

IFPI HKG welcomes the initiative taken by the Bills Committee to consult the record industry and we would like to take this opportunity to present our views as an important content provider to television broadcasters.

As part of the media market, television broadcasting, especially analogue broadcasting, is virtually universal in its reach. Almost all Hong Kong households watch television and materials transmitted by local broadcasters may be regarded as relatively unsolicited but freely available. There are only two analogue broadcasters in Hong Kong, hence the power of the medium has been vested in a small number of companies, with implications for the exercise of the considerable influence which access to the airwaves confers.

Although it can be argued that the increasing number of alternatives such as cable, satellite and other subscription–based television services will dilute the influence of free access television, we do not foresee a shift of audiences in the near future. More importantly, as different media and other related industries are increasingly converged, market power in one industry can be transferred vertically to other sectors. These factors together demand that the Government formulate policies to ensure that dominant players in the television market are prohibited from exercising its acquired influence in other related industries, both horizontally and vertically.

Government must ensure that the high concentration of ownership in the existing television market will not lead to the proprietary control of other related industries and their contents and technology.

As different media sectors are increasingly converged in the digital environment, relationships between them and the traditional free access television sector [i.e. "Domestic Free Television Programme (Domestic Free) Services", referred to as "DFTPS"] involve a degree of mutual dependence which creates tensions. IFPI HKG has pointedly urged in our previous submissions that the Government should pay close attention to the possible development of broadcaster with major market sharing and competitive advantage diverting in other industries vertically (such as the record industry, etc) and hence using its market power to complete unfairly with existing players.

IFPI HKG believes that the Bill has not addressed adequately of issues of "vertical integration" and "convergence" relating to the television market, in particularly regarding DFTPS. With this background, IFPI HKG would like to stress the following points:

Disqualified Persons and Competitive Clauses

While IFPI HKG agrees that "programmes suppliers" should be removed from the list of disqualified persons under Schedule 1, Part II, we would like to propose that the Government should consider strengthening competition provisions in the Bill - Clauses 13 and 14 - regarding anti-competition activities of licensees, in particularly licensees of DFTPS, in other vertically related industries such as programmes suppliers. IFPI HKG holds the view that interests of other related industries, such as programme suppliers, can also be severely affected by anti-competition activities of dominant players in the DFTPS sector.

The following are our proposals to further substantiate Clauses 13 and 14:

Clause 13

Existing wordings

- (1) Subject to subsections (4) and (5), a licensee shall not engaged in conduct which, in the opinion of the Broadcasting Authority, has the purpose or effect of preventing or substantially restricting competition in a television programme service market.
- (2) The Broadcasting Authority may consider conduct to fall within subsection (1) as including, but not limited to -

Proposed amendments

- (1) Subject to subsections (4) and (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*** restricting competition -
 - (a) in a television programme service market, or
 - (b) in ***a market with co-dependent relationship with a television programme service market.***
- (2) The Broadcasting Authority may consider conduct to fall within subsection (1) as including, but not limited to -

(a) direct or indirect agreement to fix the price in a television programme service market;

(b) conduct preventing or restricting the supply of goods or services to competitors;

(c) – (f) NO SUGGESTION REGARDING THESE SUBSECTIONS

(3) Subject to subsection (4), a provision in an agreement is void in so far as it provides for or permits, whether directly or indirectly, conduct which contravenes subsection (1).

(4) The Broadcasting Authority may –

(a) on an application made to it in the specified form by a licensee;

(b) on a prescribed ground; and

(c) by notice in writing served on the licensee,

exempt conduct specified in the application from subsection (1) subject to such conditions as the Broadcasting Authority thinks fit specified in the notice.

(a) direct or indirect agreement to fix the price or **any other trading conditions** in a television programme service market **and/or a market with co-dependent relationship with a television programmes service market;**

(b) conduct preventing or restricting the supply of goods or services to competitors **in a television programmes service market and/or a market that has co-dependent relationship with a television programmes service market;**

(3) Subject to subsection (4), **any agreement or decision** is void in so far as it provides for or permits, whether directly or indirectly, conduct which contravenes subsection (1).

Note: IFPI HKG does not agree with this extensive discretion power entrusted to the Broadcasting Authority in exempting a licensee from subsection (1). In order to maintain an acceptable level of transparency and accountability, IFPI HKG suggests the following points to be incorporated in the Bill:

- The Broadcasting Authority should, either in the form of Guidelines or a Schedule of the Bill, spell out with a high degree of clarity on grounds that a licensee may be exempted from subsection (1);
- Any such application for exemption made by a licensee (in particularly a licensee of DFTPS) should be publicised. A procedure to hear other licensees' and the applying licensee's trading partners' objections, if any, to the application should be incorporated in a Guideline or a Schedule.
- The Broadcasting Authority should determine, in accordance to proper guidelines, firstly, whether the exemption, if granted, might affect the interests of any objecting parties or put them in a competitive disadvantage position with the

licensee. If the answer is affirmative, the Broadcasting Authority should consider their views before reaching a decision to exemption in accordance to subsection (4).

- An administrative procedure for appeal should be established for an applying licensee and the objecting parties on a decision made by the Broadcasting Authority in accordance to subsection (4).
- Finally, if an exemption is granted, the Broadcasting Authority should be empowered to cancel it if there has been a material change of circumstance. IFPI HKG suggests that a subsection similar to Section 5 of the UK Competition Act 1998 should be inserted in clause 13.

(5) Subsection (1) shall not operate to prevent any restriction imposed on –

- (a) the inclusion in a television programme service of a television programme produced by the licensee of the service; or
- (b) any person from using or exploiting his artistic talent or ability.

Note: IFPI HKG agrees that talents are major assets of broadcasters, in particularly for those that are producing a high portion of their own programmes. In this regard, it may be justifiable to the exemption of talents from subsection (1). However, it should be noted that a dominant licensee can also abuse its dominant position by forcing talents and artists, which depend on its extensive coverage and market share (in particularly of DFTPS) for promotion, etc., to enter into exclusive contracts.

For example, as recording artists rely on broadcasters for promotion to sell their products, a dominant licensee may be able to directly and indirectly force performance artists to enter into exclusive contracts by, for example, threatening to cut off their airtime. It will also put a licensee's competitor in a disadvantageous position as exclusively signed recording artists are forbidden from appearing in other licensees' programmes.

IFPI HKG urges the Government to seriously reconsider the exemption set out in subsection (5)(b).

Clause 14

(1) A licensee in a dominant position in a television program should not abuse its

(1) ***Any conduct on a part of one or more licensees which amounts to the abuse of***

position.

dominant position in a television programme service market and/or a market with co-dependent relationship with a television programmes service market is prohibited.

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| (2) A licensee is in a dominant position when, in the opinion of the Broadcasting Authority, it is able to act without significant competitive restraint from its competitors and customers. | (3) A licensee is in a dominant position when, in the opinion of the Broadcasting Authority, it is able to act without significant competitive restraint from its competitors, customers <i>and trading partners.</i> |
| (3) In considering whether a licensee is dominant, the Broadcasting Authority shall have regard to relevant matters including, but not limited to – | (3) In considering whether a licensee is dominant, the Broadcasting Authority shall have regard to relevant matters including, but not limited to – |
| (a) the market share of the licensee; | (a) the market share of the licensee; |
| (b) the licensee’s power to make pricing and other decisions; | (b) the licensee’s power to make pricing and other decisions, <i>including but not limiting to any other trading conditions in a television programme service market and/or a market with co-dependent relationship with a television programmes service market;</i> |
| (c) any barriers to entry to competitors into the relevant television programme service market; | (c) any barriers to entry to competitors into the relevant television programme service market; |
| (d) such other relevant matters as may be stipulated in guidelines concerning the test of dominance issued under Section 4 by the Broadcasting Authority in consultation with the licensees in the relevant television service market. | (d) [See Notes below] |

Note: IFPI HKG agrees that the Broadcasting Authority should maintain the flexibility in introducing new criteria in considering whether a licensee is a dominant player in the relevant service market. In other such guidelines and the provision itself, IFPI HKG would like to pointedly urge the Government to consider the following:

- As mentioned above, a dominant licensee, in particularly of DFTPS, enjoys enormous competitive advantages not only over competitors in its own relevant television service market, its influences can spread to other television service markets as well as “market with co-dependent relationship”. This fact must be considered as “relevant issue” in determining whether a licensee is dominant.

- IFPI HKG does not agree that consultation process for the drafting of the guidelines concerning the test of dominance should be restricted to “licensees in the relevant television service market”. We urge the Government to extend its scope of consultation to other sectors as well as reputable and independent experts on competition laws and policies.
- (4) 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 or substantially restricting competition in a television programme service market.
- (4) 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 or substantially restricting competition in a television programme service market ***and/or a market with co-dependent relationship with a television programmes service market is prohibited.***

(5) NO SUGGESTION REGARDING THIS SUB-SECTION

(ii) Copyright Issues

IFPI HKG has also urged the Government to incorporate certain copyright protection as licensing conditions for both television and radio broadcasters. The Government should not limit its mindset to only analogue broadcasting. For programme suppliers such as record companies, which are copyright owners of works used by broadcasters in their programming, their main concern is security issues arisen from the operations of digital broadcasting.

As digitised audio-visual works (such as music videos) can be reproduced flawlessly and subsequently re-delivered through other digital media (such as optical discs and the Internet), it is essential to the legitimate interests of copyright owners and performers to prevent their works delivered by broadcasting, intended as contents only for broadcast programming, from such unauthorised reproduction.

One of the solutions adopted by the record industry to prevent unauthorised reproduction of their works is encryption technology. For example, for digital data, copyright owners can incorporate such security coding system such as the Serial Copy Management System (SCMS). SCMS works by placing copy prohibit bits on digital data and a digital recording device with SCMS built-in can restrict the copying of the digital sound recordings delivered by, for example, digital broadcasters, thereby minimising the risk of sound recordings being massively reproduced.

Similar encryption technology is also being developed and adopted for audio-visual materials. For example, the Content Scrambling System (CSS) is a security encryption program protecting digital data of motion picture and sounds stored in DVD from unauthorised copying.

While digital broadcasting is an imminent trend in Hong Kong, it is not difficult to foresee that most contents to be delivered by broadcasters, regardless of their television programme service market, will be in digital format. With the exposition of Internet and digital broadcasting, it has become increasingly important to protect such anti-copying devices and other right management information embedded in copyright works intended to prevent unauthorised copying.

Under the Copyright Ordinance, there are technological provisions that protect copyright owners against devices designed to circumvent copy-protection (Section 273) and the removal, altering, and other unlawful interference of rights management information (Section 274). In order to further protect the interests of copyright of programme suppliers:

- ***IFPI HKG again urges the Government to consider introducing a licensing condition that require all licensees to ensure that any security “devices” and right management information embedded in copyright works by copyright owners must not be disabled.***

3. CONCLUSION

IFPI HKG appreciates the Government’s and the Bills Committee’s efforts to consult the record industry on the Broadcasting Bill. We support any policy initiatives and laws to widen programming choice to cater for Hong Kong audiences and to ensure that all broadcasters can compete in a fair and efficient manner. However, when considering the implication of possible abuses perpetrated by dominant licensees, the Government should not limited its scope of power in regulating anti-competition behaviours only in the television markets.

As media becomes increasingly converged, market power acquired by one dominant player in one industry, in particularly when it is a licensee of DFTPS, can have significant implication on other industries. As experiences of the record industry can demonstrate, a dominant television broadcaster can extract significant influence over programme suppliers to their detriment as well as other broadcasters. Besides our recommendation regarding incorporating copyright protection as a licensing condition, IFPI HKG once again urge the Government to take our views seriously in formulating anti-competition provisions in the Bill.