

Submission Paper by the IFPI Hong Kong Group
05/26/2000

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

**SUBMISSION FOR DISCUSSIONS FOR MEMBERS OF THE BILLS COMMITTEE,
BROADCASTING BILL ON 30 MAY, 2000**

Representing the interests of the recording industry, IFPI – Hong Kong Group has made three submissions to the Committee urging the Administration to reconsider their positions relating to competition. Essentially, we are concerned that the two competition clauses – namely Clauses 13 and 14 – do not provide enough safeguard against potential abuses of dominant market power by broadcasting licensees.

IFPI – HKG is appreciative to amendments made by the Administration regarding the two clauses and we are glad that the Administration and members of Committee have taken onboard some of our views. However, in order to make sure that the future television service market is fair one that allows healthy co-existence of a local record industry under the new Broadcasting Ordinance, IFPI – HKG would again urge the Administration and members of the Committee to consider the following amendments.

1. Exemption in Clause 13(5)(b)

The fact we must recognise is that "exclusive contracts" between talents and licensees can be an anti-competition tool. Whilst we accept the both licensees and talents should have the flexibility of determining under what terms they should enter into service/employment contracts, the underlying principle is that the Administration should not grant such far-reaching exemption that such exclusive contracts are put outside the sanction of the Broadcasting Authority.

As already stated by the Administration, it should again be emphasised that the current competition clauses do not cover licensees' anti-competitive behaviours outside of the television programme service market. And by declassifying "programme supplier" as "disqualified persons", licensees can enter into our record industry without any statutory restriction.

Since television is one of the most important avenue for record companies to promote their artists and products, a licensee, which can also enter into the record industry under the Bill, can easily engage in anti-competition behaviours in the record industry by using exclusive contracts to "lock in" recording artists. Hence a licensee, with interest in the record industry, can seriously distort competition within the record industry by, for example, favouring its own artists by special promotion arrangements that are not available to artists of other record companies. The current exemption in Clause 13(5)(b) will not only be unable to stop licensees from engaging in behaviours mentioned before, it will also effectively exclude the anti-competition regulatory regime of the Broadcasting Authority for anti-competition behaviours within the television programme service market.

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Ultimately, competition within the television programme service market will also be affected as a dominant licensee can, by using exclusive contracts, "lock in" recording artists and popular music contents. Consumer interests and choices will also be restricted because the current exemption has explicitly excluded any agreements between person "using or exploiting his artistic talent or ability" and a licensee.

However, if the current **Clause 13(5)(b)** must persist, IFPI – HKG strongly urges the Administration to accept the following amendment to **Clause 13(5)(b)**:

Existing Clause

(b) any person from using or exploiting his artistic talent or ability.

Proposed Amendment

(b) any person from using or exploiting his artistic talent or ability ***in television programmes produced by a licensee in which the licensee owns copyright.***

Meanwhile, to ensure that those exclusive contracts are not entirely outside the regulatory scope of the Broadcasting Authority, we also propose to amend **Clause 14(4)** as follows:

Existing Clause

(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.

Proposed Amendment

(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 **notwithstanding section 13(5)(b).**

2. Future Review of the Broadcasting Ordinance

Our recommendations in point (1) are only partial remedies to ensure that licensees could not spread their market powers to the record industry. As stressed above, licensees have an advantageous position over record companies because they control our most important promotion avenue. Once our current protection under the existing Broadcasting Ordinance – in which "programme suppliers" are classified as "qualified persons" – is taken away and the two competition clauses in the Bill only covers the television programme service market, the record industry is under serious threats of anti-competition abuses from licensees.

IFPI – HKG has proposed in our previous submissions in details to extend anti-competition protection to "market with co-dependent relationship" with a television programme service market. We have stressed that in a converged digital environment, the market power of a dominant licensee can spread outside of the television service programme market and affect other markets that have a close and mutually "dependent" relationship with the licensee.

We appreciate the arguments put forward by the Administration that, at this stage, it is not their intention to cover any other markets other than the television programme service market. However, we cannot accept that this position – namely that a licensee may engage in anti-competition behaviours in other sectors/markets with market power gained from the television programme service market – should be considered a long-term policy stand.

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As different media sectors are converging in such expeditious rate, IFPI – HKG strongly urges the Administration to make a commitment to review the anti-competition regulatory regime and reconsider our proposal regarding “*market with co-dependent relationship*” within the next three years.

3. Conclusion

It must be recognised that consumer interests – whether they are within the relevant markets and other related markets - are the ultimate consideration of maintaining a fair competition environment. IFPI – HKG again urges the Administration and members of the Committee to consider our proposals to make the current Bill a better and fairer legislation.

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