

**Bills Committee on Broadcasting (Amendment) Bill 2003**

**Administration's Response to the Chairman's request  
at the Meeting on 26 November 2003**

**Purpose**

To set out the Administration's position on providing for criminal sanctions against domestic/private unauthorized reception of licensed pay television services in Hong Kong.

**Background**

2. At the Bills Committee meeting on 30 October, Members discussed the possibility of enhancing the deterrent effect of the Bill by providing for criminal sanctions against individuals who purchase, possess, or bring in or out of Hong Kong unauthorized decoders. At the Bills Committee meeting on 26 November 2003, Members discussed the Administration's analysis on the desirability and practicality of a number of options for such sanctions against domestic/private unauthorized reception of licensed pay television services (unauthorized reception) (LC Paper No. CB(1)375/03-04(01)).

3. The Administration pointed out that in order to punish an individual by way of criminal sanctions for committing an act, no matter how light the proposed punishment would be, we needed to make such an act a criminal offence. The Administration did not consider it appropriate to make domestic/private unauthorized reception a criminal offence at this stage. In concluding the discussion, the Chairman suggested that since the Administration would consider introducing criminal sanctions against domestic/private unauthorized reception as the last resort when justified, the Administration should provide Members with details of the legislative proposal for criminalization, assuming that the last resort measure were now warranted, so that Members would understand what the practical sanctions may be.

## **The Administration's position**

4. The existing problem of unauthorized reception in Hong Kong largely stems from the Hong Kong Cable Television Limited (HKCTV)'s analogue service, which is vulnerable to unauthorized access. Providing pay television service in the digital form makes circumvention of encryption measures to enable unauthorized reception difficult and costly. The existing criminal sanctions related to unauthorized decoders in the Broadcasting Ordinance (Cap. 562) target dealers of these illicit devices for commercial purposes. Such dealers are liable on conviction to imprisonment and fine.

5. When formulating the way forward to tighten the control of unauthorized reception of licensed pay television services in Hong Kong, the Administration took into account the severity of the problem in Hong Kong, the possibility of digitization as a means to contain the problem, the outcome of public consultation, practical enforcement difficulties and the privacy issues. Based on these considerations, the Administration has proposed a cautious approach of, as the first step, introducing civil remedy for unauthorized reception in domestic premises, and criminal sanctions against unauthorized reception for commercial purposes. If the problem is still rampant after HKCTV has completed digitization by end-May 2005, we will, as the last resort, consider introducing criminal sanctions against domestic/private unauthorized reception. We consider this gradual approach sensible, appropriate and most acceptable to the community.

6. Our approach of targeting primarily dealers and commercial users of unauthorized decoders, and encouraging HKCTV to deploy adequate measures to contain the problem is in line with the practice in many advanced economies. For example, the European Union (EU) maintains that the most effective way of thwarting piracy is to concentrate on combating commercial activities enabling illegal access. Providers of encrypted TV services have the responsibility to use the best available encryption technology<sup>1</sup>. The relevant EU Directive<sup>2</sup> requires sanctions to be imposed only on commercial activities favouring

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<sup>1</sup> Recommendation R(91)14 of the Council of Europe

<sup>2</sup> The EC Directive on Conditional Access 98/84/EC

unauthorized reception, not on unauthorized reception as such. Similarly, the Australian Copyright Amendment (Digital Agenda) Act 2000 introduces remedies and offences in relation to the manufacture, sale and other dealings with broadcast decoding devices that facilitate unauthorized access to encoded broadcasts only. The provisions do not prevent the personal use of such devices, but a civil remedy is provided for the use of a decoding device for a commercial purpose (for example, the unauthorized reception of an encoded sporting event in a hotel or pub).

7. Even in jurisdictions such as the US, the UK and Canada where there are criminal sanctions against unauthorized reception of pay television services, enforcement action has been targeting dealers of illicit devices instead of end-users. In Canada, the recent proposed legislative amendments to the Radiocommunication Act are also aimed at enhancing sanctions against dealers of satellite pay television pirate devices rather than end-users (see **Annex A**).

A

### **Extent of the problem and effectiveness of digitization in containing the problem**

8. At present, as far as we are aware, unauthorized decoders available in the black market are mainly those for enabling access to HKCTV's analogue television service. These illicit devices become useless in areas where HKCTV's television service has been digitized. **In fact, i-Cable Limited, HKCTV's holding company, officially states that "anti-piracy measures, in particular, digitization of television services, implemented by the Group has been effective" in its 2003 Interim Report released on 14 August 2003 (see Annex B).** HKCTV has roughly completed 56% of its digitization project. We believe that the problem of unauthorized reception will be substantially contained after HKCTV has completed digitization by end-May 2005.

B

### **Tentative legislative proposal for criminalization as last resort at later stage**

9. Should the Administration need to introduce criminal sanctions against domestic/private unauthorized reception as the last resort, we will draw reference to the relevant legislation in other English

common law jurisdictions, primarily the UK and Canada. In the UK, a person who dishonestly receives a programme provided from a place in the UK with intent to avoid payment of charge commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale (£5,000) (section 297(1) of the *Copyright, Designs and Patents Act 1988*). In Canada, an individual who decodes an encrypted subscription programming signal or encrypted network feed without authorization by the lawful distributor of the signal or feed commits an offence and is liable on summary conviction to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both (sections 9(1)(c) and 10(2.1) of the Canadian *Radiocommunication Act*). Extracts of the relevant provisions of the UK and Canadian Acts are at **Annex C**.

C

10. With reference to the UK and Canadian legislative provisions quoted above, the tentative legislative proposal for criminalization will include the following provisions -

- A person who possesses or uses an unauthorized decoder<sup>3</sup> commits an offence. This provision is meant to catch all and will have incorporated the proposed provision targeting commercial users in the Bill.
- In order to avoid catching the innocent owner or user of an unauthorized decoder, the offence provision will need to include the following elements –
  - (a) a defence will need to be provided along the lines of lawful authority or reasonable excuse;
  - (b) mere possession of the unauthorized decoder will need to be accompanied by the intention to use it in a dishonest way (that is, to avoid the payment of subscription).
- Appropriate power should be given to enforcement officers, which may include the following –

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<sup>3</sup> “Unauthorized decoder” means a decoder by means of which encrypted television programmes or encrypted television programme services provided under a licence can be viewed in decoded form without payment of a subscription where a subscription is required to be paid.

- (a) require the suspect to produce for their inspection any decoder;
  - (b) require the suspect to produce identity card for their inspection;
  - (c) enter and inspect any premises at, to or from which the officers reasonably believe that the suspect is about to commit, is committing or has committed the offence;
  - (d) to stop and search suspects, or to stop, board and search vehicles; and
  - (e) seize, remove and detain any unauthorized decoders.
- Domestic premises shall not be entered or searched except pursuant to a warrant issued by a magistrate.
  - A person who commits this offence will be liable on summary conviction to a fine (to be specified). A person, including a company, who commits this offence for commercial purpose will be liable on conviction to imprisonment and fine.

11. If the possession of unauthorized decoders with intent to avoid payment of a subscription becomes an offence, the disposal of the unauthorized decodes will fall under section 102 of the Criminal Procedure Ordinance (Cap. 221), which empowers the court to order for the forfeiture of the unauthorized decoders that have come into the possession of a court or the police or the Customs and Excise Service (see **Annex D**).

12. The scope of the above criminal liability will cover the possession of an unauthorized decoder with the intent to avoid payment of a subscription under any circumstances, including at points of sale after purchase and at border checkpoints where a person is bringing an unauthorized decoder in or out of Hong Kong, as well as in domestic

premises.

13. The enforcement of the above tentative legislative proposal would be difficult and could still be intrusive as enforcement agents may enter domestic premises, with the necessary warrant, should they reasonably believe that the offence is being or has been committed on the premises.

14. We wish to reiterate that it is not appropriate to introduce fixed penalty as a sanction against possession of unauthorized decoders as explained in our previous analysis in paragraph 13 of LC Paper of No. CB(1)375/03-04(01) because it is likely to be inconsistent with the Hong Kong Bill of Rights to penalize a person for mere possession of the device without proving the mental element that the possession is with the intent for avoidance of payment of a subscription.

## **Conclusion**

15. The Administration maintains that it is more appropriate to target dealers rather than purchasers or users of unauthorized decoders. The legislative proposal to criminalize domestic/private unauthorized reception is only justifiable as the last resort when unauthorized reception is still rampant after less intrusive and socially acceptable solutions (e.g. digitization) have been exhausted. As the major operator of pay television service in Hong Kong has already officially stated that digitization is effective in containing the problem, the Administration strongly objects to implementing the criminalization proposal outlined in paragraph 9 above prematurely at this stage.

**Communications and Technology Branch  
Commerce, Industry and Technology Bureau  
December 2003**

**Extract from “Legislative Amendments to the Radiocommunication Act Respecting Direct-to-Home Satellite Television - Questions and Answers” at the website of Industry Canada, updated on 5 November 2003.**

**Question:**

Who is the main target of these proposed changes to the Act?

**Answer:**

The changes to the *Radiocommunication Act* are aimed at increasing penalties to corporations convicted of manufacturing, modifying, importing, or distributing satellite pirate devices. Other changes to the Act are intended to deter the importation and sale of unauthorized equipment in Canada by dealers. Our intention is to make it more difficult for dealers to import illegal equipment into Canada, and have them face stiffer penalties if found guilty of this activity. We also intend to introduce an additional remedy by prescribing statutory damages in civil proceedings involving signal theft.

**Full version of the Questions and Answers are available at <http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/vwGeneratedInterE/sf01968e.html>**



The subscriber growth also indicated that anti-piracy measures, in particular, digitisation of television service, implemented by the Group has been effective. About half of the Group's subscribers are now receiving digital television service and the pace of conversion will accelerate in the latter half of the year.

Turnover decreased by HK\$34 million to HK\$844 million year-on-year but increased by HK\$11 million when compared to the second half of 2002, reflecting the resilience of this core business against a difficult business environment. ARPU was HK\$219, compared to HK\$244 and HK\$222 in the first and second halves of 2002 respectively.

Continuing tight control over programming and other operating costs enabled EBITDA to improve by HK\$57 million or 19% to HK\$353 million while operating profit rose by HK\$57 million or 37% to HK\$210 million.

On top of introducing new channels to its platform, the Group started to introduce sports events on a "Pay-per-event" basis as a means to offer additional choice to subscribers and to derive additional revenue. Events introduced during the first half included World Cup Cricket, NCAA basketball finals and NHL playoff matches. Riding on the success of the month-long World Cup Cricket, a new premium channel of World Cricket Live was introduced in April. These initiatives also served to further consolidate the Group's position as the leading Sports station in Hong Kong.

Five new channels were launched in the first half of 2003. The Basic Package was enhanced with Creation TV and Macao Cultural Channel. ABC, TVE and NHK World TV were added to the International Package to expand its appeal to viewers. By August, the Group is offering 62 programming channels on its digital platform.



*Fraudulent reception of transmissions*

Offence of fraudulently receiving programmes.

**297.**—(1) A person who dishonestly receives a programme included in a broadcasting or cable programme service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(2) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

In relation to a body corporate whose affairs are managed by its members "director" means a member of the body corporate.

Rights and remedies in respect of apparatus, &c. for unauthorised reception of transmissions.

**298.**—(1) A person who—

(a) makes charges for the reception of programmes included in a broadcasting or cable programme service provided from a place in the United Kingdom, or

(b) sends encrypted transmissions of any other description from a place in the United Kingdom,

is entitled to the following rights and remedies.

(2) He has the same rights and remedies against a person who—

Extract of the Canadian Radiocommunication Act

OFFENCES AND PUNISHMENT

Prohibitions

9. (1) No person shall
- (a) knowingly send, transmit or cause to be sent or transmitted any false or fraudulent distress signal, message, call or radiogram of any kind;
  - (b) without lawful excuse, interfere with or obstruct any radiocommunication;
  - (c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;
  - (d) operate a radio apparatus so as to receive an encrypted subscription programming signal or encrypted network feed that has been decoded in contravention of paragraph (c); or
  - (e) retransmit to the public an encrypted subscription programming signal or encrypted network feed that has been decoded in contravention of paragraph (c).

Prohibition

- (1.1) Except as prescribed, no person shall make use of or divulge a radio-based telephone communication
- (a) if the originator of the communication or the person intended by the originator of the communication to receive it was in Canada when the communication was made; and
  - (b) unless the originator, or the person intended by the originator to receive the communication consents to the use or divulgence.

Idem

- (2) Except as prescribed, no person shall intercept and make use of, or intercept and divulge, any radiocommunication, except as permitted by the originator of the communication or the person intended by the originator of the communication to receive it.

Exceptions

- (3) Subsection (2) does not apply in respect of radiocommunication that consists of broadcasting, a subscription programming signal or a network feed.

1989, c. 17, s. 6; 1991, c. 11, s. 83; 1993, c. 40, s. 24.

Penalties

- 9.1 Every person who contravenes subsection 9(1.1) or (2) is guilty of an offence punishable on summary conviction and liable

(a) in the case of an individual, to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding one year, or to both; and

(b) in the case of a person other than an individual, to a fine not exceeding seventy-five thousand dollars.

1993, c. 40, s. 25.

Offences

**10. (1)** Every person who

(a) contravenes section 4 or paragraph 9(1)(a) or (b),

(b) without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9,

(c) contravenes or fails to comply with an order issued by the Minister under paragraph 5(1)(f), or

(d) contravenes or fails to comply with a regulation, where no punishment is prescribed by regulations made under paragraph 6(1)(r) for that contravention or failure to comply,

is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

Idem

(2) Every person who contravenes or fails to comply with subsection 8(5) or (6) is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars.

Idem

(2.1) Every person who contravenes paragraph 9(1)(c) or (d) is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

Idem

(2.2) Every person who contravenes paragraph 9(1)(e) is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding twenty thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case

of a corporation, to a fine not exceeding two hundred thousand dollars.

- Exception (2.3) No person who decodes an encrypted subscription programming signal in contravention of paragraph 9(1)(c) shall be convicted of an offence under that paragraph if the lawful distributor had the lawful right to make the signal available, on payment of a subscription fee or other charge, to persons in the area where the signal was decoded but had not made the signal readily available to those persons.
- Not lawful excuse (2.4) Nothing in subsection (2.3) shall constitute a lawful excuse for any person to manufacture, import, distribute, lease, offer for sale or sell any equipment or device, or any component thereof, in contravention of paragraph (1)(b).
- Due diligence (2.5) No person shall be convicted of an offence under paragraph 9(1)(c), (d) or (e) if the person exercised all due diligence to prevent the commission of the offence.
- Continuing offence (3) Where an offence under this section is committed or continued on more than one day, the person who committed the offence is liable to be convicted for a separate offence for each day on which the offence is committed or continued.
- Injunctions (4) Where a court of competent jurisdiction is satisfied, on application by the Minister, that an offence under paragraph (1)(a) is being or is likely to be committed, the court may grant an injunction, subject to such conditions as the court considers appropriate, ordering any person to cease or refrain from any activity related to that offence.
- Federal Court (5) For the purposes of subsection (4), the Federal Court is a court of competent jurisdiction.
- Limitation (6) A prosecution for an offence under this Act may be commenced within, but not after, three years after the day on which the subject-matter of the offence arose.
- 1989, c. 17, s. 6; 1991, c. 11, s. 84.

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**Section of Enactment**

Chapter:	221	Title:	CRIMINAL PROCEDURE ORDINANCE	Gazette Number:	39 of 1999
Section:	102	Heading:	<b>Disposal of property connected with offences</b>	Version Date:	01/07/1997

Remarks:

Adaptation amendments retroactively made - see 39 of 1999 s. 3  
 Disposal of property

(1) Where-

- (a) any property has come into the possession of a court, the police or the Customs and Excise Service in connection with any offence;
- (b) it appears to a court that an offence has been committed in respect of any property in the possession of the court, the police or the Customs and Excise Service; or
- (c) it appears to a court that any property in the possession of the court, the police or the Customs and Excise Service has been used in the commission of an offence,

then, whether or not the offence was committed or appears to have been committed in Hong Kong, a court may dispose of such property in the manner provided in this section. (Amended 46 of 1977 s. 16)

(2) Of its own motion or upon application, a court may-

- (a) in respect of property to which subsection (1)(a) applies-
  - (i) make an order for the delivery of any such property to the person who appears to the court to be entitled thereto;
  - (ii) where the person so entitled is unknown or cannot be found, make an order that the property be sold or retained in the possession of the court, the police or the Customs and Excise Service; or (Amended 46 of 1977 s. 16; 13 of 1995 s. 56)
  - (iii) if the property is of no value, order that the property be destroyed;

and (Added 13 of 1995 s. 56)

(b) in respect of property to which subsection (1)(b) or (c) applies-

(i) deal with such property under paragraph (a) in the like manner as property to which subsection (1)(a) applies; or

(ii) make an order for the forfeiture of the property.

(3) Save where the property is perishable, no order for the delivery, sale or forfeiture of property shall be made under subsection (2) unless the court is satisfied that the property will not be required as an exhibit in any proceedings before a court.

(4) Where under subsection (2) a court orders the sale or retention of property, and no person establishes a claim to the property or the proceeds of sale thereof within 6 months from the date such order is made, the property or the proceeds of sale shall become the property of the Government. (Amended 39 of 1999 s. 3)

(5) An order made under subsection (2), other than an order for the retention of property, shall not, except when the property is a live animal, bird or fish or is perishable, be carried out until the period allowed for making an appeal against the order has expired or, where such an appeal is duly made, until the appeal has been finally determined or abandoned.

(6) Where by any other Ordinance it is provided that any particular property or class of property shall or may be forfeited, destroyed or disposed of, then the provisions of such Ordinance shall prevail.

(7) The power conferred on a court by subsection (2)(b)(ii) to order the forfeiture of property shall not apply in respect of immovable property or any aircraft, motor vehicle or ship.

(8) In this section "court" (法院、法庭) includes a magistrate.

(Replaced 70 of 1967 s. 4)

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