

**Paper for the Bills Committee on
Broadcasting (Amendment) Bill 2003**

**Information paper on options of criminal sanction against
domestic pirated viewing of pay television programme services**

Purpose of paper

This paper sets out various possible options of criminal punishment to deal with the problem of domestic pirated viewing of pay television programme services.

The act to be proscribed

2. It is generally felt that the problem of domestic pirated viewing of pay television programme services arises because of the abundant supply of unauthorized decoders and the lack of effective enforcement against importing, selling or offering for sale an unauthorized decoder in the course of trade or business.

3. It has been considered that measures targeting at deterring people from buying and possessing unauthorized decoders may be adopted to tackle the problem of domestic pirated viewing. These measures may include the prohibition of the import and the possession of unauthorized decoders. The scope of the prohibition would cover unauthorized decoders found at the border check-points or otherwise. The proscribed act of possession can be confined to possession in a public place to avoid the possibility of intrusion into private domestic premises in enforcement actions if the act is one of simple possession only¹.

¹ Under section 31C of the Prevention of Copyright Piracy Ordinance (Cap. 544), possession of video recording equipment in a place of public entertainment without lawful authority or reasonable excuse is an offence punishable by a fine at level 2 (\$5,000) on a first conviction, and a fine at level 5 (\$50,000) and imprisonment for 3 months on a second or subsequent conviction.

4. The above measures primarily target at the conduct of possessing unauthorized decoders. However, with the advance of computer technology, it may be possible for a person to receive the encrypted transmission of a pay television programme service without payment of subscription through the computer network or other means instead of through the use of an unauthorized decoder. To tackle this situation, members may consider whether it is necessary to proscribe the unauthorized reception of any pay television programme service with intent to avoid payment of any charge or subscription applicable to the reception of the programme, in line with the approach adopted in the United Kingdom². Alternatively, members may consider adopting the Canadian model under which the decoding of an encrypted subscription programming signal or encrypted network feed without authorization from the lawful distributor of the signal or feed is an offence³.

Offences punishable by a fine

5. If a proscribed act is made an offence⁴ under an Ordinance, possible options of punishment for the offence include a fine and imprisonment. Under the existing criminal justice system, the court may upon conviction of an offence under an Ordinance impose a fine on the offender if the court considers it appropriate to do so. In considering the amount of fine, the court will consider a number of factors relevant to sentencing such as the offender's background, the seriousness of the offence concerned, etc. provided that the amount of fine will not exceed the maximum fine as prescribed by the Ordinance concerned. However, there are specific acts for which a fixed penalty is provided as an alternative to a fine imposed by courts. These acts relate to minor traffic offences or contraventions and minor public cleanliness offences. Implementation of the fixed penalty system for these offences or contraventions is effected through various Ordinances, namely, the Fixed Penalty (Traffic Contraventions) Ordinance (Cap. 237), Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240) and Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570). Under those Ordinances, a wrongdoer who has been issued a fixed penalty notice may choose to pay the fixed penalty to discharge his liability whereby no further proceedings will be taken against him in respect of the act for which a fixed penalty notice is issued. Alternatively, he may choose to dispute his liability in court.

²Under the UK Copyright, Designs and Patents Act 1988, it is an offence for a person to dishonestly receive 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. The offence is punishable summarily by a fine.

³ Section 9(1)(c) of the Canadian Radiocommunication Act.

⁴ According to section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), "offence" (罪、罪行、罪項、犯法行為) includes any crime and any contravention or other breach of, or failure to comply with, any provision of any law, for which a penalty is provided.

6. When considering the appropriateness of making the proscribed acts referred to in paragraphs 3 and 4 above punishable by a fixed penalty, members may wish to take into account the following matters:

- (a) the criminality and the degree of seriousness of the objectionable conduct in minor traffic and public cleanliness offences on one hand and the acts of importing and possession of an unauthorized decoder, and unauthorized reception of pay television programme services on the other;
- (b) the potential triable issues that are involved in the acts concerned (for example, the alleged wrongdoer's *mens rea*, knowledge regarding the nature of the decoder, etc.) appear to be more appropriate to be determined by a court of law in the interests of justice so that the alleged wrongdoer may consider exercising his right to dispute liability in court and to require the prosecution to discharge its burden of proving its case against him; a fixed penalty system may have the unintended effect of discouraging the alleged wrongdoer from exercising his right; and
- (c) there is no precedent under existing legislation which makes the offence of importing, or possession of, an object punishable by a fixed penalty⁵.

Offences punishable by forfeiture of prohibited objects or articles

(a) Forfeiture by courts under existing legislation

7. There are provisions under specific Ordinances which confer on the courts the power to forfeit under specified circumstances. Under some Ordinances, the court's power to order forfeiture is exercisable only upon the conviction of a person of an offence under the Ordinances concerned⁶. In other Ordinances, the court may order forfeiture of any object or article in respect of which an offence under the Ordinances concerned has been committed whether or not any person has been convicted of any such offence⁷. On the other hand, there are provisions in some

⁵ But note the power of the Commissioner of Customs and Excise under section 47A of the Dutiable Commodities Ordinance (Cap. 109) to compound the offence of possession of dutiable goods not under and in accordance with that Ordinance if the alleged offender pays 5 times the duty payable on the dutiable goods concerned as a penalty. On acceptance of the payment, the Commissioner shall release the goods and no further proceedings shall be taken against the offender or goods.

⁶ Examples of these Ordinances include the Amusement Game Centres Ordinance (Cap. 435) and Karaoke Establishments Ordinance (Cap. 573).

⁷ Examples of these Ordinances include the Antibiotics Ordinance (Cap. 137), Pharmacy and Poisons Ordinance (Cap. 138), Gambling Ordinance (Cap. 148), Smoking (Public Health) Ordinance (Cap. 371) and Prevention of Child Pornography Ordinance (31 of 2003).

Ordinances which provide for the court's power to order forfeiture whether or not any person has been charged with an offence under the relevant Ordinances⁸. In the absence of a specific provision on disposal of property connected with offences in an Ordinance, section 102 of the Criminal Procedure Ordinance (Cap. 221) will apply under which the court is empowered to make an order for forfeiture of any property that have come into the possession of a court, the Police or the Customs and Excise Service in connection with any offence.

(b) Forfeiture otherwise than through judicial process under existing legislation

8. Under the existing law, there are provisions providing for forfeiture of objects or articles in respect of which an offence under the relevant Ordinances has been committed without going through the judicial process. These provisions primarily relate to public health and the objects or articles in question are perishable in nature. For example, under the Public Health (Animals and Birds) Ordinance (Cap. 139), which provides for, among others, the quarantine and the prevention of disease among animals and birds, the senior veterinary officer or any person acting under his direction, may seize any animal or bird dealt with in contravention of the Ordinance or any regulation thereunder, and may order the forfeiture of such animal or bird. It is further provided that the forfeiture will not prejudice or avoid any prosecution for breach of the Ordinance or any regulation thereunder.

9. Another example can be found in the part of the Public Health and Municipal Services Ordinance (Cap. 132) (PHMSO) that relates to the control and regulation of food and drugs for human consumption. Under the PHMSO, it is an offence for any person to sell, or has in his possession for the purpose of sale, any food intended for, but unfit for, human consumption, or any drug intended for use by man but unfit for that purpose. A public officer authorized in writing by the Authority concerned may destroy or otherwise dispose of any food or drug which he considers to be unfit for human consumption or for use by man. The destruction or other disposal of the food or drug concerned may however be challenged in court and if the public officer's act was disallowed, the court may order payment of compensation to the affected party.

⁸ Examples of these Ordinances include the Gas Safety Ordinance (Cap. 51), Telecommunications Ordinance (Cap. 106), Dangerous Goods Ordinance (Cap. 295), Dangerous Goods (Consignment by Air)(Safety) Ordinance (Cap. 384) and Broadcasting Ordinance (Cap. 562).

(c) Forfeiture of unauthorized decoders

10. If members consider that it is appropriate to make importing or possession of unauthorized decoders an offence and that the offence should target primarily at the unauthorized decoders instead of the alleged offenders, provisions may be made to confer on the court the power to order forfeiture of unauthorized decoders whether any person has been charged with the offence or not. This is indeed the approach adopted in the Telecommunications Ordinance (Cap. 106) and Broadcasting Ordinance (Cap. 562)⁹.

11. Alternatively, members may consider whether it is appropriate to adopt a "mixed" approach under which seized objects or articles may be forfeited by courts or otherwise depending on circumstances. This is the approach adopted in copyright-related legislation, for example, the Copyright Ordinance (Cap. 528).

12. Under the Copyright Ordinance, an officer authorized by the Commissioner of Customs and Excise (the Commissioner) may seize, remove or detain any article which appears to him to be an infringing copy of a copyright work in respect of which an offence under the Ordinance has been committed. Any article so seized, removed or detained is liable to forfeiture. Procedural safeguards are provided in the Copyright Ordinance whereby the owner of the article concerned or a person who was in possession thereof at the time of seizure or detention, or a person who has a legal or equitable interest in the article, may within 30 days from the date of seizure or detention, give notice to the Commissioner and claim that the article is not liable to forfeiture. If no notice of claim has been given to the Commissioner on the expiry of the 30-day period, the seized or detained article will be forfeited to the Government, except where a person is charged with an offence relating to the article. If a notice of claim is given within the time limit, the Commissioner or his authorized officer may apply to the court for forfeiture of the article. In the event that a person is charged with an offence in connection with the seized or detained article under the Copyright Ordinance, the court may order the forfeiture or other disposal of the article whether or not the person charged is convicted of the offence¹⁰.

⁹ Under section 36 of the Telecommunications Ordinance (Cap. 106), a magistrate or the court, may upon application by or on behalf of the Telecommunications Authority or by any authorized public officer, order that any apparatus in respect of which there has been a contravention or attempted contravention of the Ordinance shall be forfeited to the Government, whether or not proceedings have been taken against any person in respect of the contravention or attempted contravention. A magistrate or court is given the same power of forfeiture in respect of an unauthorized decoder under section 6(8) of the Broadcasting Ordinance (Cap. 562).

¹⁰ The forfeiture provisions applicable to an infringing copy of a copyright work under the Copyright Ordinance are also applicable to any video recording equipment seized and detained as evidence for the offence of possession of video recording equipment in a place of public entertainment under the Prevention of Copyright Piracy Ordinance (Cap. 544).

Conclusion

13. The above possible options are offered for members' consideration from a purely legal perspective. When deliberating on the appropriateness of any of these options, members will no doubt have their own views. However, it is proposed that they may wish to take into account the following:

- (a) whether importing an unauthorized decoder, or possession of an unauthorized decoder in a public place, or unauthorized reception of pay television programme services, or decoding an encrypted subscription programming signal without authorization should be made an offence;
- (b) if so, whether it is appropriate for the offence to be punished by a fixed penalty, having regard to the criminality and the degree of seriousness of the relevant offence;
- (c) if it is considered that forfeiture of unauthorized decoders would be effective in tackling the problem of domestic pirated viewing, under what circumstances and by whom the unauthorized decoders may be forfeited; and
- (d) the views of the Administration and members of the public.

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