

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

### **Administration's Response to the Issues Raised at the Meeting on 2 February 2004**

#### **Purpose**

To set out the Administration's response to the issues raised by Members during the clause-by-clause examination of the Bill at the meeting on 2 February 2004.

#### **The need to define "business"**

*Clause 3 – proposed sections 6(1) (a) and 6(1)(b) (Para. 6 of Minutes)*

2. As explained in our previous submissions to the Bills Committee<sup>1</sup>, we tend to think that the term "business", where it appears in the English expression "*trade or business*" **and** in the Chinese version "營商或業務" as in our case, is sufficiently clear in conveying the narrow sense of commercial transactions rather than the general sense of all activities. The latter meaning is more likely if the word is used alone or in some other contexts. However, if Members consider that the term should be defined in the Bill, then we will instruct the law draftsman to propose a draft Committee Stage Amendment for Members' consideration.

#### **The construction of the defence provisions**

*Clause 3 – proposed sections 6(6) to (9) (Paras. 7-8 of Minutes)*

3. For the proposed offences in relation to infringing copies of the four particular categories of works under the Copyright (Amendment) Bill 2003 (CAB), there is a proposed defence for an employee who can "prove that his possession of the infringing copy occurred in the course of his employment and that the infringing copy was provided to him by or on behalf of his employer for use in the course of his employment". The proposed employee's defence was drawn up in response to the outcome of a public consultation exercise conducted in end-2001. The public was

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<sup>1</sup> Please see Para. 4 of CB(1)895/03-04(01) and Para. 3 of CB(1)181/03-04(05).

concerned that criminal sanction was too harsh for employees, who might not be able to reject the use of pirated products for fear of losing their jobs, and hence the defence provision. In drawing up the Broadcasting (Amendment) Bill 2003, we had taken into account the proposed defence provision under the CAB and considered that similar defence needs to be included in our bill. Consistent with our approach in presuming a person who possesses or uses an unauthorized decoder knew that the decoder was an unauthorized decoder unless there is evidence to the contrary, we have specifically provided that the employee should also prove that he "had no reasonable grounds to believe that the decoder was an unauthorized decoder" in addition to "he was acting in accordance with the instructions given to him by his employer in the course of his employment".

*Clause 4 - proposed sections 7(3D) to (3G) (Para. 9 of Minutes)*

4. Our position is the same as set out in paragraph 3 above.

#### **The need for specifying a time limit for bring civil action**

*Clause 5 – proposed section 7B (Para. 10 of Minutes)*

5. Limitation period curtails the right or ability of a plaintiff to pursue a claim. In theory, it enhances the deterrent effect of the legislation if there is no such a time limit. On the other hand, a time limit for civil action is justifiable on the fairness ground because it is unreasonable that a potential defendant should be subject to an indefinite threat of being sued. It discourages a plaintiff from unreasonably delay in instituting proceedings.

6. A review of comparable legislation in overseas common law jurisdictions suggests that there is no standard practice regarding the provision of an express provision to specify the time limit. We are aware that the US *Digital Millennium Copyright Act 1998*, the UK *Copyright, Designs and Patents Act 1988* and the UK *Conditional Access (Unauthorized Decoders) Regulations 2000* do not specify a limit period for bringing civil action.

7. There is however such a time limit in the Canadian and Australian legislation. Section 18(5) of the *Canadian Radiocommunication Act of 1985* (as amended in 1991) provides that the time limit for bringing a civil action against a person who decodes an encrypted subscription programming signal or encrypted network feed without authorization is within three years after the conduct giving rise to the action was engaged in. Sections 135AN(8) and 135ANA(7) of Australian Copyright Act 1968 (as amended by the *Copyright Amendment (Digital Agenda) Act 2000*) provides that the time limit for bringing a civil action against a person who manufactures, deals with, imports, advertises, markets, supplies or uses a circumvention device for commercial purposes is six years from the time when the person did any of the aforesaid acts.

8. In Hong Kong, the *Copyright Ordinance (Cap. 528)* does not provide a time limit for civil action against infringement of copyright. However, section 4 of the Limitation Ordinance (Cap. 347) provides a six-year period for actions for tortuous infringements which are applicable to copyright infringements. During the scrutiny of the Bill, Members have expressed concern about the deterrent effect of the legislative provision. On balance, we propose not to specify the time limit for civil action in the Bill. However, if Members consider that a time limit would be necessary, the Administration will have no objection to specifying a time limit of six years from the time when the person committed infringement.

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