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## Facsimile Transmission

Date : 8/22/2003 4:55 PM  
To : Ms Polly Yeung  
Fax No : 2121 0420  
From : Simon Twiston Davies  
Subject : Submission  
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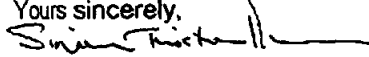
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Dear Ms Yeung,

Attached you will find a registration by CASBAA to attend the meeting of the Bills Committee at 2:30pm on September 10<sup>th</sup>.

Also, you will find our written submission on the proposed Broadcasting (Amendment) Bill 2003 which has been prepared by our retained Council.

Yours sincerely,

  
Simon Twiston Davies  
CEO, CASBAA

Broadcasting Amendment Bill 2003

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Implications of the Bill  
on Trading in Illegal Decoders

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## **Introduction**

1. We have been asked to comment upon the implications of the Broadcasting Amendment Bill 2003 (the “Bill”) on trading in television decoders obtained in territories outside Hong Kong, and the importation into and use of such apparatus in Hong Kong, in circumstances where the supply and use of such decoders is legitimate in the territories in which they are originally distributed but where their import into and use in Hong Kong is not authorized. We will refer to such decoders in this paper as “illegal decoders”, to distinguish them from “unauthorized decoders” defined in the Broadcasting Ordinance (the “Ordinance”).
2. In this paper, we will address three main issues:
  - (i) whether importing illegal decoders into Hong Kong, and subsequent dealings and use of them in Hong Kong, will constitute a criminal offence pursuant to the Ordinance, as amended by the Bill;
  - (ii) whether the conduct described in (i) above will attract civil liability pursuant to the Ordinance, as amended by the Bill; and
  - (iii) what changes to the Bill would be necessary to ensure that the activities described in (i) above constitute criminal offences and/or attract civil liability (as the case may be).

## **Background**

3. A significant number of CASBAA members are engaged in the business of broadcasting pay tv channels to customers in the Asian region. These channels are normally broadcast by the channel owners to local distributors who are allocated particular territories in which they are permitted to retransmit these television channels. In Hong Kong, for example, the principal distributor of pay tv channels is Hong Kong Cable. Similarly, UBC, Astro and Dream<sup>1</sup> are the distributors who have been appointed to retransmit such CASBAA members’ channels to Thailand, Malaysia and the Philippines respectively.
4. UBC, Astro and Dream retransmit broadcasts by satellite. The signals are encrypted, which means that the distributors can distribute these pay tv channels on a “conditional access” basis, thus ensuring that they get paid for them. The distributors charge their customers subscription fees and supply decoders and smart cards in connection with those subscriptions which enable these customers to unscramble the encrypted signal and watch the channels. Hong Kong is within the footprint of the satellites which are used by each of these (and others) distributors. Thus a person with the appropriate apparatus can receive and watch the transmissions of, among others, UBC, Astro and Dream in Hong Kong.

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<sup>1</sup> These distributors are taken as examples, on the basis that they were selected during the civil proceedings referred to in paragraph 6 to demonstrate how this activity is carried on.

5. An illicit and clandestine practice has developed in which (legitimate) subscriptions for UBC, Astro and Dream's services are acquired in their respective territories and then the decoders obtained in connection with those subscriptions are imported and supplied to customers (both commercial and domestic) in Hong Kong, a practice which is not authorized by either the distributors or the channel owners.
6. A number of pay television channel owners were recently successful in a civil action brought pursuant to the Copyright Ordinance against a number of suppliers of these illegal decoders in Hong Kong. The channel owners obtained summary judgment against those traders, who were unable to produce even a prima facie defence to these proceedings. The High Court of Hong Kong confirmed that not only was the import into Hong Kong and subsequent trading in this equipment illegal, but so was its use by customers (both commercial and domestic).<sup>2</sup>
7. The question which has arisen is whether or not trading in these illegal decoders (and their use, in particular, on commercial premises for public performances) falls within the ambit of the criminal sanctions laid out in the Ordinance as intended to be amended pursuant to the Bill and, to the extent that it does not, what further amendments to the legislation would be required to provide that it does. Sections 6 and 7 of the Ordinance set out the relevant provisions.

#### **Section 6: Unauthorized Decoders**

8. Section 6 is designed to criminalize trading in unauthorized decoders (as defined) and, if the amendments contained in the Bill are enacted, their use on commercial premises. The definition of "unauthorized decoder" contained in the Bill is "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".<sup>3</sup> A "subscription" is already defined in the existing Ordinance to mean "a fee payable by or on behalf of any person for the right to view a television programme service *in Hong Kong*".
9. It is clear that illegal decoders are not "unauthorized decoders" for the purposes of the Ordinance. The reasons for this are two-fold. The encrypted television programmes/encrypted television programme services provided by UBC, Astro and Dream are not "provided under a licence" for the purposes of the Ordinance, since these distributors are not licensed in Hong Kong. Furthermore, it cannot be said that a "subscription is required to be paid", as no fee is in fact payable for the right to view such television programme services in Hong Kong (as the distributors are not permitted to broadcast in Hong Kong they are prohibited from charging fees here).

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<sup>2</sup> See copy judgment attached at Annex A.

<sup>3</sup> "decoder" is defined in wide terms in the existing Ordinance and covers smart cards in addition to the decoder boxes themselves.

10. Accordingly, trading in and use of illegal decoders in Hong Kong is not a criminal offence pursuant to section 6 (as amended).

**Section 7: Offence of providing decoders and reception equipment for television programme service on subscription basis without licence**

11. If the activities described above do not attract criminal liability under section 6, do they fall within the ambit of section 7 (as amended)? Section 7 concerns dealings in decoders for use with a “Television Receive Only System” which is defined as a system “for receiving satellite television signals for use by a single specified premises and the received signals are not distributed to others”. Section 7(1) prohibits dealings in any such decoders where they enable the TVRO “to receive a broadcasting service which is not licensed on a subscription basis”. It can be seen that this provision, as it currently stands, is couched in somewhat clumsy terms. Apparently, a “broadcasting service which is not licensed on a subscription basis” is intended to mean “a subscription broadcasting service which is not licensed in Hong Kong”.<sup>4</sup>
12. The sanction in section 7(1) on its face seemingly applies to dealings in illegal decoders, as these are used to receive broadcasting services not licensed in Hong Kong. However, on closer analysis a difficulty again arises because of the definition of “subscription”, which requires a fee to be payable for the right to view the television programme service *in Hong Kong*. The subscriptions payable for UBC, Astro and Dream services do not give the right to view any television programme service in Hong Kong. Not only do the terms of the subscription agreements themselves prohibit use of the associated decoders outside of the territories allocated to these distributors, but also the distributors are not permitted by the pay tv channel owners to distribute such channels in territories outside those allocated to them.
13. It is submitted that illegal decoders do not fall within the terms of section 7 either. It remains unclear what section 7, in practical terms, is intended to prevent.

**Suggested further amendments to section 7**

14. If dealings in illegal decoders are intended to be criminalized in Hong Kong, we suggest that one way of achieving this would be to amend the definition of “subscription” so as to add the words “or elsewhere” at the end of the existing wording. In our view the effect of this change would mean that, provided fees were payable in connection with a subscription, then (no matter where the subscription was implemented) any dealings in decoders associated with that subscription in Hong Kong would be a criminal offence.
15. If commercial use of any such equipment is intended to be criminalized, additional changes similar to those intended to be made to section 6 of the Ordinance should be contemplated. This could be effected by repealing the existing subsection (1) of section 7 and substituting –

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<sup>4</sup> See Legislative Council Brief on Broadcasting Amendment Bill 2003, paragraph 12.

- “(1) Subject to subsection (2), a person shall not –
- (a) in the course of trade or business, import, export, manufacture, sell, offer for sale or let for hire any decoder for use by a Television Receive Only System to receive a broadcasting service which is not licensed on a subscription basis; or
  - (b) for the purpose of, or in connection with, trade or business, possess or use, or authorize another person to possess or use, any decoder for use by a Television Receive Only System to receive a broadcasting service which is not licensed on a subscription basis”.

### **Section 7B – Civil remedy**

- 16.** Turning to the question of whether or not persons sustaining loss or damage from a breach of section 6(1)(a) or (b), or section 7(1)(a) or (b) (if in the latter case the suggested further amendments are accepted) can claim relief through the civil courts, the Bill at present provides that only a licensee can claim such relief and only in respect of a breach of section 6(1)(a) or (b). Thus pay tv channel owners cannot claim in respect of the losses which they may have suffered through contravention of that section.
- 17.** Naturally, it can be argued that pay tv channel owners can pursue civil remedies via the mechanism provided in section 275 of the Copyright Ordinance, as has been done in the recent civil action referred to above.<sup>5</sup> However, following this line of reasoning it could be argued that licensees could also take advantage of section 275, which would make the proposed new section 7B redundant.
- 18.** It appears to us that the intention behind section 7B is that, in circumstances where an infringer has been convicted of an offence pursuant to section 6(1)(a) or (b) (and/or section 7(1)(a) or (b) were these amendments to be accepted), civil liability should follow where persons can show that they have suffered loss or damage as a result of the infringer’s activities (and without having to surmount the additional hurdle of showing that they fall within the meaning of section 275).
- 19.** If pay tv channel owners are to be able to benefit from the provisions of section 7B, a new definition would be needed to set out who would benefit from the additional rights, which we submit could be drafted in the following terms:

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<sup>5</sup> While it is indeed the case that this provision does provide for civil remedies in the circumstances described, it is nevertheless inconvenient to use. Channel owners are forced to adduce substantial evidence to demonstrate that they have the locus standi to make a claim under this section, an exercise which is time-consuming and expensive. The advantage of being able to use section 7B is that this provides a more streamlined route to obtaining the appropriate relief.

““television programme service provider” means any person providing a television programme service;”

Section 7B should then be amended by adding the words “or television programme service provider” after the references to “licensee” in subsections (1), (2) and (3) and further by adding “or section 7(1)(a) or (b)” after the references to “section 6(1)(a) or (b)” in subsections (1) and (2).

Section 7B will also need to be amended by adding the following subsection (4):

“(4) A television programme service provider may bring an action for damages, an injunction or other appropriate remedy, order or relief against any person who possesses or uses, or authorizes another person to possess or use, any decoder for use by a Television Receive Only System to receive a broadcasting service which is not licensed on a subscription basis.”

20. Finally, additional changes will be required in sections 7 and 7A if the suggested amendments to section 7(1) are accepted. These, and the other changes described above, are set out in the amended bill at Annex B.
21. If anyone has any questions in relation to the subject matter of this note, they are invited to contact either Nigel Francis (partner) or Richard Keady (associate) for whom the contact details are set out below.

**Nigel Francis**            Direct telephone: 2101 4002  
Email: [nigel.francis@herbertsmith.com](mailto:nigel.francis@herbertsmith.com)

**Richard Keady**            Direct telephone: 2101 4178  
Email: [richard.keady@herbertsmith.com](mailto:richard.keady@herbertsmith.com)

HERBERT SMITH  
16<sup>th</sup> June 2003

**Annex A**

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HCA 3976/2002

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE**

**ACTION NO. 3976 OF 2002**

BETWEEN

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- (1) SATELLITE TELEVISION ASIAN REGION LIMITED
  - (2) CABLE NEWS NETWORK LP, LLLP  
(a Delaware limited partnership, limited liability limited partnership)
  - (3) TURNER ENTERTAINMENT NETWORKS ASIA, INC. (a Georgia corporation)
  - (4) ESPN STAR SPORTS (a Delaware general partnership)
  - (5) DISCOVERY ASIA INC. (a Delaware corporation)
  - (6) NGC NETWORK ASIA, LLC (a Delaware limited liability company) **Plaintiffs**

and

- (1) ALPHA COMMUNICATIONS TECHNOLOGY LIMITED
- (2) YEUNG CHUN WAH, ANDY
- (3) GAMESTAR TECHNOLOGY LIMITED
- (4) YEUNG FEI LAP, PHILIP trading as J P TECHNOLOGY
- (5) TONGYONG YOUHE LIMITED
- (6) LI KA SIU
- (7) FLYING DRAGON ENGINEERING LIMITED trading as YAU PO SATELLITE COMPANY **Defendants**

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Coram: Deputy High Court Judge Gill in Chambers

Dates of Hearing: 23-25 April 2003

Date of Judgment: 2 May 2003

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J U D G M E N T

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1. This is an application for summary judgment. It stems from a writ brought by the plaintiffs against the seven defendants for breach of copyright. The usual remedies, being injunctions, delivery up of material and inquiry as to damages are sought. Prior to the hearing D1, an incorporated company in Hong Kong, and D2, a director of D1, agreed to submit to final judgment. The application is against the remaining five defendants.

2. The plaintiffs claim to be the owners, operators and broadcasters of television programmes. P1's are broadcast under the trade marks "STAR Movies" and "STAR World". P2's are distributed under the trade marks "CNN" and "CNN International". P3's are broadcast under the trade mark "Cartoon Network". P4 operates "ESPN" and "STAR Sports". P5's broadcasts are under the names of "Discovery Channel", "Animal Planet" and "Discovery Travel and Adventure Channel". And P6 broadcasts under the names of "Adventure One" and "National Geographic". By virtue of their respective rights to own and operate the plaintiffs' claim copyright in their programmes under the Copyright Ordinance Cap. 528.

3. The plaintiffs control the exploitation of their copyrights by encrypting the signals transmitted during a broadcast, so that the programme can only be viewed by those supplied with a decoder and an SIM card which together are capable of unscrambling the encrypted signals. And only those who, for a fee, subscribe to a distributor authorised by the

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plaintiffs to retransmit the programmes in a particular territory are entitled to a decoder and SIM card.

4. The territories throughout which an authorised distributor is licenced to operate are defined by national or territorial boundaries. For instance the distributor known for short as PSMI operates under the trade name "Dream" in the Philippines. UBC retransmits in Thailand and MEASAT under the trade name "Astro" rebroadcasts in Malaysia. But because the scope of satellites via which the signals are transmitted extends beyond the territorial limits of a distribution agreement, it is possible for a signal available to, say, subscribers to Dream in the Philippines to be viewed in Hong Kong, using a decoder and SIM card intended for Dream subscribers in the Philippines. As the rights associated with a subscription are strictly non-transferrable and limited for use in the designated territory, the plaintiffs' case is that transfer of a decoder and SIM card intended for use in a territory outside of Hong Kong to a customer for use in Hong Kong is in breach of the plaintiffs' copyright.

5. D3, D5 and D7 are limited liability companies in Hong Kong. D4 is a sole proprietorship. D6 is a director of and runs D5. The defendants are engaged in the supply to customers both commercial (such as bars, karaoke lounges, clubs and the like) and domestic of such equipment as satellite dishes, antennae, decoders and so on to enable their televisions to receive programmes broadcast via satellites. It is the plaintiffs' case that the defendants have been subscribing to programmes through distributors licenced to retransmit outside Hong Kong and have then, for a fee, transferred those rights unlawfully to their own customers in Hong Kong, including the installation of the offshore SIM card. It is this

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alleged activity which by these proceedings the plaintiffs seek to restrain, and for which compensation and incidental remedies are sought.

6. Whilst the remaining defendants oppose the claims, D6's position is that if D5 is found liable he must also be as a joint tortfeasor because of his close association with D5.

7. The plaintiffs claim to be able to invoke the provisions under the Copyright Ordinance under two heads; namely, as owners of works in which rights of copyright subsist whose rights have been infringed and or in the alternative under section 275, where rights of copyright ownership do not have to be established. Section 275 states in part:-

" **Fraudulent reception of transmissions**

**275. Rights and remedies in respect of apparatus, etc. for unauthorized reception of transmissions**

(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 Hong Kong or elsewhere; or

(b) sends encrypted transmissions of any other description from a place in Hong Kong or elsewhere;

is entitled to the following rights are remedies.

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

(a) makes, imports, exports or sells or lets for hire any apparatus or device designed or adapted to enable or assist persons to receive the programmes or other transmissions when they are not entitled to do so; or

(b) publishes any information which is calculated to enable or assist persons to receive the programmes or other transmissions when they are not entitled to do so,

as a copyright owner has in respect of an infringement of copyright.

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8. The plaintiffs are variously based in Hong Kong and the United States. Evidence in support of their application for summary judgment has been adduced in various affidavits filed. Predominant as a deponent is one Richard Keady who is a solicitor employed by Messrs Herbert Smith, solicitors for the plaintiffs, and who has conduct of the litigation; he made six in all. As a preamble to each he records he has been authorised by the plaintiffs to make them. And he states in each case:-

"The contents of this affidavit are true and are either within my own knowledge (gained in the capacity identified above) or true to the best of my information and belief. In the latter case I identify in this affidavit the source of my information."

9. In his first affidavit based on information including documents received from the plaintiffs, he swears to the truth and accuracy of the statement of claim, whose essential details I have already summarised. He exhibits printouts from the websites of the three distributors which promote and set out the mechanism by which the plaintiffs' programmes under licence are received and then retransmitted to their customers within the authorised territories in each case. He also exhibits sample subscription agreements without which, with attendant monthly payment, a viewer in the appropriate territory is not entitled to receive the broadcast. He produces printouts which reveal that the 'footprints' of the satellites via which the distributors relay the designated programmes encompass much more landmass than the territory controlled by each distributor; in particular, that Hong Kong falls within the footprints, so that unauthorized use of a SIM card and decoder in Hong Kong enables a broadcast to be received and viewed. He produces a printout from the website of the Telecommunications Authority in Hong Kong which lists those entitled to provide pay television in Hong Kong. Dream Astro and UBC are not on the list.

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10. He further deposes that Kroll Associates (Asia) Limited, commercial investigators in Hong Kong, were engaged to investigate activities of the defendants relative to suspected illicit activity undertaken by them; he produces copies of the reports prepared. He also produces internet printouts and an SCMP advertisement which indicate that D's 3,4,5 and 7 were continuing to promote activities complained of in the statement of claim even after the writ was filed and served on them. And finally he expresses the belief that there is no defence to the plaintiffs' claims.

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11. One Thomas Martin Keaveny deposes to being a vice president of P5. He produces by way of example copies of the agreement by which it gives exclusive licence to broadcast its product in turn to UBC in Thailand and MEASAT (Astro) in Malaysia, redacted to remove sensitive material.

12. In his second affidavit Mr Keady produces by way of example copies of agreements made between P4 and UBC, MEASAT and PSMI in turn granting exclusive licence to rebroadcast in Thailand, Malaysia and the Philippines, but not elsewhere, similarly redacted.

13. In his third affidavit Mr Keady deposes to having been provided with particulars of the works the subject of this litigation, where they were made and by whom, with whom copyright subsists and who the distributors are that are licenced to deal with them. This information was provided him by senior personnel of all six plaintiffs, whose names and titles he lists.

14. In his fourth affidavit Mr Keady produces six letters from senior personnel of each of the six plaintiffs confirming the truth and accuracy of the statement of claim as it relates to the plaintiffs in each case.

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15. Next I come to an affidavit of one Francis Cheng, a vice president of P1. He produces by way of example, the following documents, namely:-

- (a) a distribution agreement between P6 and P1 giving P1 the right to distribute P6's product in Asia;
- (b) a licence agreement between P1 and International Global Networks BV (IGN);
- (c) distribution agreements between IGN and in term UBC, MEASAT and PSMI for their respective territories;

all documents redacted as before.

16. Then in an affidavit made by one Ian Shane Carroll, described as a attorney of P2 and a director of P3, he produces by way of example copies of a number of agreements which include those made between affiliates of P2 and P3 and UBC, MEASAT and PMSI giving licence to broadcast their products in their respective territories and sample invoices and subscriber agreements, again redacted.

17. Mr Keady's fifth affidavit exhibits translations of those parts of documents hitherto produced which are written in Chinese characters.

18. In his sixth, Mr Keady produces letters from each of the distributors UBC, Dream and Astro. In his own words, he deposes that the letters:-

- "(i) show the channels provided by the Plaintiffs to these distributors;
- (ii) confirm that each of these distributors pays fees to the various Plaintiffs for the right to retransmit their channels

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and that such fees depend on the number of the distributor's subscribers;

- (iii) in view of (ii) above, demonstrate that the Plaintiffs make charges for the reception of programmes contained in their channels;
- (iv) demonstrate that the distributors are restricted in terms of the territories to which they can redistribute the channels and that, *inter alia*, they do not offer subscriptions to receive these channels to persons in Hong Kong; and
- (v) in view of, *inter alia*, (iv) above, confirm that persons in Hong Kong are not entitled to receive the distributors' retransmissions of the Plaintiffs' channels. "

19. I come next to evidence adduced by a Mr Wong Yat Ching, an investigator employed by Kroll. He deposes that on instruction he attended the business premises of D3, D4, D5 and D7 between June and August 2002. In each case he presented himself as a prospective customer wanting to purchase and install a satellite system being advertised or offered for sale. In each case he spoke to either an employee or, in the case of D4 and D6, the defendant himself. In each case he wore a wire; thus his conversations were recorded. He produces reports which include transcripts of an initial visit and a follow-up. These are the reports first exhibited by Mr Keady in his first affidavit. I come to summarize them in turn.

20. Mr Wong went to the premises of D3 in July 2002. There he noted a television with decoder attached showing satellite TV programmes. There was a pamphlet promoting channels, for *inter alia*, Thai UBC and Malaysia Astro.

21. One Albert Lui introduced himself as manager of D3 and presented his card. During the conversation, Mr Lui stated that D3 provides the full set of apparatus including a decoder enabling access to

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various satellite networks. He quoted an annual fee for UBC for which the necessary SIM card would be provided. Asked if the installation was legal he responded –

“Normally Thai UBC services cannot be provided outside of Thailand. However, if we use the Thai UBC services in Hong Kong, we will not be sued by anybody because the laws in Hong Kong do not state that we cannot receive foreign satellite TV broadcasting.”

Asked if D3 had undertaken installations in pubs, bars and saunas, Mr Lui responded:

“There are more commercial customers than residential customers now. We have done installation for commercial customers.”

22. Following that introduction Mr Wong telephoned Mr Lui and asked for a fixed quotation to install a system capable of accessing Thai UBC. At the same time he asked for the names of commercial establishments at which D3 had provided similar systems. He was given examples including the name of the operator of a chain of karaoke lounges. A quote was subsequently faxed.

23. Next Mr Wong visited premises said to be occupied by D4. There he met one Philip Yeung, D4. The premises comprised a shop in which receivers and decoders were displayed. Sales literature for UBC and African TV were also on show. D4 explained they were the two products on offer. Asked to demonstrate, D4 pointed to a television set that was showing a Star TV programme and said that it was transmitted from Thailand by means of a UBC SIM card imported from Thailand. Asked what the difference was between Thai UBC and Cable, D4 responded that Thai UBC has more channels. He said many bars and discos in Sai Kung

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are his customers. He faxed a quote on request, citing Thaicom as the target satellite.

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24. Subsequently D4 was asked if the equipment could be tested before purchase. This was arranged at D4's premises. A staff member, called Miss Chan, assisted. She said the decoder and SIM card had been installed. Mr Wong was given the remote and flipped through the various channels that were on view. These included STAR Movies, ESPN, STAR Sports and Discovery. Then D4 arrived and the transaction was concluded; by this means Mr Wong took delivery of the decoder and SIM card.

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25. I come next to the report concerning D5. A company search revealed one Li Ka Siu to be a director and shareholder. Mr Wong visited D5's business premises, which comprised a warehouse and adjoining office. A man introducing himself as Li Kai Siu, D6, was present. D6 said they provided 'the full set of apparatus, installation and maintenance.' Asked what was on offer he mentioned amongst others 'Thai UBC' and 'Philippine Dream'. And he said that they had installed their system in many bars.

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26. Subsequently Mr Wong phoned the premises of D5 and spoke to D6 and asked for a quotation for the installation of a system with a subscription to Thai UBC. A quote was sent and with it a list of commercial establishments stated to have been supplied by D5.

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27. And so to the investigation of D7. When Mr Wong visited its premises he found it to be a shop containing some televisions and satellite products. Two televisions were showing STAR World. There was promotional material for UBC and Dream. Mr Wong spoke to a man who

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introduced himself as Chan but who declined to hand over his card. Asked what D7 provided, Mr Chan said 'We provide installation and maintenance services of satellites. We also supply the full set of apparatus including dish satellites, decoders etc'. Asked what products were offered, he said 'Thai UBC, Philippine Dream, South Africa Star and China Broadcasting Television.' And he stated they have experience installing in bars. Subsequently Mr Wong telephoned and asked for a quote for the cost of installing a system for subscribing to the Thai UBC channel. In due course a quote was faxed which incorporated a two-year fee for the UBC smart card.

28. I come shortly to summarising the evidence filed on behalf of the defendants. But before doing so it is pertinent to refer to the timetable of the litigation as it unfolded. The writ was issued on 21 October 2002. The defendants filed acknowledgements of service on 4 November. The plaintiffs' application for summary judgment was filed on 18 November supported by Mr Keady's first affidavit. Next in time the defendants each filed an affidavit in response, in opposition. All are dated 3 December. Then there was a directions hearing on 15 December at which the summons was adjourned to a date to be fixed. The defendants were given leave to file further evidence in opposition within 28 days (by 12 January); the plaintiff had 14 days thereafter to file a response. But there was no further evidence adduced by the defendants. Mr Keady's 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> affidavits and those of Messrs Cheng & Carroll were filed on 16 January. Mr Wong exhibiting his reports, was filed on 20 March. Finally Mr Keady's fifth and sixth were filed on 8 April.

29. It is apparent that the defendants chose to adduce the same evidence; the affidavits are dated the same and are virtually identical. I

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need thus to summarise only one, and turn to that filed by Miss Czarina Choi, a director of D3. She begins by disputing the appropriateness of an Order 14 application, given what she says are the complicated issues of copyright ownership in satellite transmission and broadcasting, necessitating expert opinion and extensive discovery before adjudication of the issues can be properly undertaken.

30. She also takes issue with Mr Keady having deposed to ownership in works in which copyright is said to subsist for and on behalf of the plaintiffs when, having regard to the complexities and specialist knowledge required, those having direct involvement should have done so.

31. She recites the claims of each plaintiff to ownership in the works and their copyright and complains there is no or insufficient evidence to support that; a bare assertion is not good enough. She queries whether the footprints of the satellites used by Thai UBC and MEASAT cover Hong Kong. She further states that there is nothing to show the distributors Dream, UBC and Astro are prohibited from transmitting to Hong Kong. Speaking of the business of D3 she states at para. 23:-

"The 3<sup>rd</sup> Defendant was established on 5 December 2000. Over 90% of its business is for export. It also provide general equipment installation and maintenance service. A small part of its business includes providing installation services to viewers of television programmes transmitted via satellites. This basically includes the provision and installation of a satellite dish, the connecting cable, the satellite digital receiver. After the completion of the installation, the customers will be able to receive a wide range of television programs produced throughout the World which are transmitted or broadcasted free in the air. At the request of the customers, the 3<sup>rd</sup> Defendant may also assist the customers in their purchase of SIM cards which may enable them to receive transmission via satellite of an even wider range of television programmes with an annual fee payable to the SIM card providers."

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32. As to the acquisition of SIM cards to enable a customer to receive programmes from Thai UBC, she states that it is not illegal for UBC to sell its SIM cards to Hong Kong. In support of this she exhibits an e-mail from a Miss Luckanaphisate whom she claims to be a sales representative of UBC:-

"From: Yavaluck Luckanaphisate  
Sent: 25 àÀÉÒÀ 2545 15:29  
To: 'albert/Gamestar Technology'  
Subject: RE: test

Dear sir

Good afternoon, how are you? It is Amnesty that means you can purchase smart cards legally from on April-May

1. smart card each 3500 baht
2. annual fee 14000 baht (existing rate)/card  
One name can purchase 3 cards

Best Regards  
Yavaluck"

33. It is pertinent to note that beyond Miss Choi's bare assertion there is nothing to identify the author of the e-mail or to show she had the authority to send it on behalf of UBC, nor is there an explanation for the expression 'Amnesty' or the significance of the months April and May, nor that it amounted to permitting the sale of UBC SIM cards to Hong Kong.

34. She states that D3 never received any subscription agreement from UBC, Astro or Dream and the terms of any subscription agreement if in existence are not known and thus D3 has no reason to believe an SIM purchased is in breach of any copyright. She states that the SIM cards the use of which are said to infringe provide access to channels only a few of which are relevant to these proceedings. Finally she states that the injunctive relief sought is too wide; out of all proposition to such protection the plaintiffs might be entitled to. To grant the injunction as asked for would effectively put D3 out of business when a substantial part of D3's

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business has no bearing on any rights the plaintiffs claim are breached; furthermore, because it is a complicated case, summary adjudication is not justified.

35. I come now to consider the issues and rule upon them.

36. Under the first limb, the plaintiffs each claim to be the owner of broadcasts in which copyright subsists, relying on the Copyright Ordinance to establish their proprietary rights. Hereafter section numbers I record are of the Copyright Ordinance. Section 8(1) defines 'broadcast'. Section 2 (1)(b) defines copyright as a property right subsisting in works which include broadcasts. Sections 11(1) and (2)(c) and 8(3) define the 'author' of a broadcast to be the person transmitting the programme if he has responsibility to any extent for its contents.

37. The evidence adduced by Mr Keady, in particular, that in his first and third affidavits, is evidence which purports to establish ownership and copyright in the broadcasts packaged and provided under their trade marks as set out in the statement of claim. I have already stated that the defendants challenge this evidence on the basis that it amounts to bare assertions; further that by the nature of the rights claimed the issues are complex and should be provided by deponents having particular, hands-on expertise. But the plaintiffs are entitled to invoke the provisions of section 121, the relevant parts of which are:-

**"121. Affidavit evidence**

(1) An affidavit which purports to have been made by or on behalf of the owner of a copyright work and which states-

- (a) the date and place that the work was made or first published;

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- (b) the name, domicile, residence or right of abode of the author of the work;
- (c) the name of the owner of the work;
- (d) that copyright subsists in the work; and
- (e) that a copy of the work exhibited to the affidavit is a true copy of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in any proceedings under this Ordinance.

...

(4) An affidavit may be tendered in evidence under subsection (1) or (2) if-

- (a) it is made on oath -
  - (i) before a solicitor or a commissioner as defined in the Oaths and Declarations Ordinance (Cap. 11) , if it is made in Hong Kong ; or
  - (ii) before a notary public, if it is made outside Hong Kong;
- (b) it is authenticated, so far as relates to the making thereof, by the signature of the solicitor, commissioner or notary public before whom it is made;
- (c) it contains a declaration by the deponent to the effect that it is true to the best of his knowledge and belief; and
- (d) subject to subsection (6), not less than 10 days before the commencement of the hearing at which the affidavit is tendered in evidence, a copy of the affidavit is served, by or on behalf of the prosecution or plaintiff, on each of the defendants.

(5) Notwithstanding that an affidavit is admissible as evidence by virtue of this section, a defendant or his solicitor may, within 3 days from the service of the copy of the affidavit, serve a notice requiring the attendance of the deponent to the affidavit in court.

...

(8) Without prejudice to subsection (5)-

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- (a) the party by whom or on whose behalf the affidavit was served may call the deponent to give evidence; and
- (b) the court may of its own motion or, if the defendant who has served a notice under subsection (5) satisfies the court that the subsistence or ownership of the copyright is genuinely in issue, either before or during the hearing, require the deponent to attend before the court and give evidence.”

38. Mr Keady’s affidavits were made on behalf of the plaintiffs and otherwise comply with section 121(4). There is no statutory or other authority that the evidence going to copyright ownership and so on is inadmissible if incorporated in an affidavit made by a solicitor. In his affidavits, he states that they have been sworn with authority and he has provided the source of his material. No notice under section 121(5) was served. In essence the defendants apart from the challenge of bare assertion have stated nothing to rebut the statutory presumption of section 121; indeed there was no evidence adduced after Mr Keady’s third affidavit and thus not even a bare denial.

39. I am satisfied thus the plaintiffs have established ownership and copyright in the broadcasts more specifically set out in the statement of claim.

40. Section 22(1)(a) vests in the owner of a copyright the exclusive right, in Hong Kong, *inter alia*, to copy the work. This is one of the acts exclusively available included in the statutory expression “acts restricted by the copyright”. And section 22(2) states that copyright is infringed by a person who without the licence of the copyright owner does or authorizes another to do an act restricted by copyright.

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41. Section 23(1) states that copying of the work is an act restricted by the copyright in every description of copyright work. Section 23(2) defines copying as reproducing the work in any material form. Section 23(6) provides that this includes the making of copies which are transient.

42. Section 27(3) states that the playing of a broadcast in public is an act restricted by copyright.

43. Sections 32 and 34 provide for secondary infringement for which knowledge is a prerequisite.

44. Section 32(1) states that copyright is infringed where without licence a person imports or possesses for the purpose of trade or sells or offers for sale an article specifically designed for making copies of the work knowing or having reason to believe it is to be used to make infringing copies.

45. Section 34(2) states that the person who supplied the apparatus used in a broadcast which infringes copyright is liable for the infringement if he knew or had reason to believe that the apparatus was likely to be used in such way.

46. I turn back to the evidence adduced and in particular that of Mr Wong in which he describes his visits to the premises of D's 3,4,5 and 7 and the transcripts of conversations he had with in turn D4 and D6 and representatives of D3 and D7. There is of course no evidence adduced to challenge his commentary of events as they unfolded. In the first instance against attempts to establish the contrary it is apparent from demonstrations

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he describes that the SIM cards on offer are capable of reproducing channels protected by the plaintiffs' copyright. And of course it would not be otherwise; why promote for sale in Hong Kong equipment that transmits broadcasts not capable of being viewed in Hong Kong? It is also apparent that the defendants have no licence to deal in the plaintiffs' broadcasts. It is no answer for them or those representing them to deny all knowledge of the position as to licences. One is either licenced or not; the defendants are quite obviously not. The e-mail exhibited by Miss Choi in support of the contention that UBD had 'authorized' sale to the defendants of SIM cards does not begin to state to the contrary. There is no evidence as to the status of the sender, no proper explanation of what she is stating and in particular no reference to the use of the card outside Thailand.

47. I find, as a matter of fact and law, that the customers of D's 3, 4, 5 and 7 by use of the SIM cards which enable transmission in Hong Kong of the plaintiffs' broadcasts are infringing their copyright. They are doing so because by displaying them for view, they are copying them under section 23(1), (2) and (6). In addition where the card is used in commercial premises, such as a bar, there is infringement by performance under section 27(3).

48. The defendants and each of them by authorizing the copying, are in contravention of section 22(2). And because I draw an irresistible inference from the primary evidence, I find that they knew they were importing, and possessing and supplying apparatus that was designed to infringe copyright, which makes them infringers under sections 32(1) and 34(2) as well.

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49. I come now to the protection and remedies the plaintiffs seek under section 275.

50. By virtue of the undisputed evidence that the plaintiffs charge for the reception of programmes and transmit the same by encrypted signals, the plaintiffs fall within the category of persons in section 275(1) entitled to the same rights and remedies as a copyright owner. Thus they are entitled to protection under section 275(2) against the person who imports ... or sells any apparatus ... designed ... to enable ... persons to receive the programmes ... when they are not entitled to do so.

51. On the evidence adduced I am satisfied that the defendants fall into the category of those referred to in section 275(2) giving the plaintiffs the rights and remedies afforded by section 275.

52. I come finally to the all-important issue; is this a proper claim that may be dealt with summarily under Order 14?

53. I am satisfied it is. The defendants have not shown any triable issue or arguable defence. It has been put to me in evidence and submissions that there are complex issues of fact and law because of the nature of the works in which copyright is claimed requiring expert opinions and extensive discovery. But I beg to differ. Proprietary rights in broadcasts are specifically provided for in the Copyright Ordinance. It is stated by and on behalf of the defendants that specialist material is needed. But there has not been produced anything at all to back that up. The plaintiffs' rights to the protection and remedies afforded by the Copyright Ordinance are readily ascertainable. The defendants' infringing in each case is patent and obvious.

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54. The procedure under Order 14 is to avoid unnecessary delay and expense when, notwithstanding illusions of complexity, none exists. This is precisely the situation in this case.

55. Finally the remedies sought. The defendants protest in evidence and submissions that the injunctive relief sought is too far-reaching and will effectively prevent them from operating at all. But this is an application for a final judgment, not an interlocutory one. Principles of 'balance of convenience' and 'undue hardship' play no part. And in my view justice would not be achieved if the injunctive relief were limited to the use of the SIM card. Arguably it is that use which is offensive and must be stopped. But the decoder, satellite dish and so on are part of a complete kit, marketed on the basis that the customer will have access to the broadcasts to which, as I have found, he is not entitled. In the circumstances I am satisfied the injunction granted must encompass not just the SIM card but also the associated apparatus. And the plaintiffs are also entitled as I find to an enquiry into damages, delivery up and particulars of customers supplied.

56. The defendants having been found to have infringed copyright must suffer the statutory consequences.

57. The orders as sought at paragraphs 1 to 7 and 9 are hereby granted. Costs will be *nisi* at first instance.

(D M B Gill)  
Deputy Judge of the High Court

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Ms Winnie Tam, instructed by Messrs Herbert Smith, for the plaintiffs

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Mr H F Leung, instructed by Messrs Ng, Lie, Lai & Chan, for the 3<sup>rd</sup>-7<sup>th</sup> defendants

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## **Annex B**

### **BROADCASTING (AMENDMENT) BILL 2003**

#### **CONTENTS**

| Clause |  | Page |
|--------|--|------|
| 1.     | Short title and commencement   | 1    |
| 2.     | Interpretation   | 1    |
| 3.     | Unauthorized decoders  | 1    |
| 4.     | Offence of providing decoders and reception equipment for television programme service on subscription basis without licence | 5    |
| 5.     | Sections added   |      |
|        | 7A. Provisions supplementary to sections 6 and 7   | 7    |
|        | 7B. Civil remedy   | 10   |

A BILL

To

Amend the Broadcasting Ordinance.

Enacted by the Legislative Council.

**1. Short title and commencement**

- (1) This Ordinance may be cited as the Broadcasting (Amendment) Ordinance 2003.
- (2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Commerce, Industry and Technology by notice published in the Gazette.

**2. Interpretation**

Section 2(1) of the Broadcasting Ordinance (Cap. 562) is amended –

- (a) by adding –

“ “television programme service provider” (電視節目服務供應商) means any person providing a television programme service;”

“ “unauthorized decoder” (未經批准的解碼器) 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;”;

- (b) by repealing the definition of “subscription” and substituting –

“ “subscription” (收看費) means a fee payable by or on behalf of any person for the right to view a television programme service in Hong Kong or elsewhere;”.

**3. Unauthorized decoders**

Section 6 is amended –

- (a) by repealing subsection (1) and substituting –

“(1) A person shall not –

- (a) in the course of trade or business, import, export, manufacture, sell, offer for sale or let for hire an unauthorized decoder; or

(b) for the purpose of, or in connection with, trade or business, possess or use, or authorize another person to possess or use an unauthorized decoder.”;

(b) by repealing subsections (3) to (9) and substituting –

“(3) Where it is proved that a person has –

(a) in the course of trade or business, imported, exported, manufactured, sold, offered for sale or let for hire an unauthorized decoder; or

(b) for the purpose of, or in connection with, trade or business, possessed or used, or authorized another person to possess or use an unauthorized decoder,

then, unless there is evidence to the contrary, it shall be presumed that the person knew that the decoder was an unauthorized decoder.

(4) For the purposes of this section, where a company, other body corporate or a partnership has done any act referred to in subsection (1)(a) or (b), any person who was a director of the company or body corporate, or a partner of the partnership at the time when the act was done shall, unless there is evidence to the contrary that he did not authorize the act to be done, be presumed also to have done the act.

(5) In proceedings under this section, it is presumed that, unless there is evidence to the contrary, unauthorized decoders on premises are in the possession of the licensee, tenant, lessee, occupier, person in charge and owner of the premises.

(6) Where an offence against subsection (1)(a) or (b) is committed by an employee in the course of his employment, the employer of such employee shall, without prejudice to the liability of any other person, also be guilty of that offence but shall not be liable to any term of imprisonment.

(7) Where a prosecution is brought against the employer referred to in subsection (6) by virtue of this section in respect of an offence committed by his employee, it shall be a defence –

- (a) if the employer shows that he exercised such control over his employee as would ensure that his employee was not likely to act in contravention of subsection (1)(a) or (b); or
  - (b) if the employer shows that he took all practicable steps to prevent the commission of the offence.
- (8) In proceedings for an offence under this section, it is a defence for the person charged to prove that he was acting in accordance with the instructions given to him by his employer in the course of his employment and he had no reasonable grounds to believe that the decoder was an unauthorized decoder.
- (9) Subsection (8) does not apply in the case of an employee who –
- (a) where the employer is a body corporate, is a director, manager, secretary or other similar officer of the body corporate or is a person purporting to act in any such capacity or, where the affairs of a body corporate are managed by its members, is a member with functions of management as if he were a director of the body corporate;
  - (b) where the employer is a partnership, is concerned in the management of the partnership;
  - (c) where the employer is a sole proprietorship, is concerned in the management of the proprietorship; or
  - (d) in any other case, is concerned in the management of the employer's business.”.

**4. Offence of providing decoders and reception equipment for television programme service on subscription basis without licence**

Section 7 is amended –

- (a) by repealing subsection (1) and substituting –

“(1) Subject to subsection (2), a person shall not –

- (a) in the course of trade or business, import, export, manufacture, sell, offer for sale or let for hire any decoder for use by a



Television Receive Only System to receive a broadcasting service which is not licensed on a subscription basis; or

- (b) for the purpose of, or in connection with, trade or business, possess or use, or authorize another person to possess or use, any decoder for use by a Television Receive Only System to receive a broadcasting service which is not licensed on a subscription basis”.

“(3A) Where it is proved that a person has in the course of trade or business, imported, exported, manufactured, sold, offered for sale or let for hire any decoder of the kind described in subsection (1), then, unless there is evidence to the contrary, it shall be presumed that the person knew that the decoder was a decoder of the kind described in subsection (1).

(3B) For the purposes of this section, where a company, other body corporate or a partnership has done any act referred to in subsection (1)(a) or (b), any person who was a director of the company or body corporate, or a partner of the partnership at the time when the act was done shall, unless there is evidence to the contrary that he did not authorize the act to be done, be presumed also to have done the act.

(3C) In proceedings under this section, it is presumed that, unless there is evidence to the contrary, the decoder of the kind described in subsection (1) on premises is in the possession of the licensee, tenant, lessee, occupier, person in charge and owner of the premises.

(3D) Where an offence against subsection (1)(a) or (b) is committed by an employee in the course of his employment, the employer of such employee shall, without prejudice to the liability of any other person, also be guilty of that offence but shall not be liable to any term of imprisonment.

(3E) Where a prosecution is brought against the employer referred to in subsection (3D) by virtue of this section in respect of an offence committed by his employee, it shall be a defence –

- (a) if the employer shows that he exercised such control over his employee as would ensure that his employee was not likely to act in contravention of subsection (1)(a) or (b); or
- (b) if the employer shows that he took all practicable steps to prevent the commission of the offence.

(3F) In proceedings for an offence under this section, it is a defence for the person charged to prove that he was acting in accordance with

the instructions given to him by his employer in the course of his employment and he had no reasonable grounds to believe that the decoder was a decoder of the kind described in subsection (1).

(3G).....Subsection (3F) does not apply in the case of an employee who –

- (a) where the employer is a body corporate, is a director, manager, secretary or other similar officer of the body corporate or is a person purporting to act in any such capacity or, where the affairs of a body corporate are managed by its members, is a member with functions of management as if he were a director of the body corporate;
- (b) where the employer is a partnership, is concerned in the management of the partnership;
- (c) where the employer is a sole proprietorship, is concerned in the management of the proprietorship; or
- (d) in any other case, is concerned in the management of the employer's business.”

## 5. Sections added

The following are added in Part III –

### “7A. Provisions supplementary to sections 6 and 7

- (1) Where the Telecommunications Authority or any public officer authorized in writing in that behalf by the Telecommunications Authority has reasonable grounds for believing that a person has committed or has attempted to commit an offence under section 6(1)(a) or (b) or 7(1)(a) or (b), then he may –
  - (a) require the person to produce for his inspection, at any place specified by him, any unauthorized decoder or decoder –
    - (i) imported, exported, manufactured, sold, offered for sale or let for hire by the person in the course of trade or business; or
    - (ii) possessed or used, or authorized to be possessed or used, for the purpose of, or in connection with, trade or business;
  - (b) arrest any person whom he reasonably suspects of being guilty of an offence under section 6(1)(a) or (b) or 7(1)(a) or (b);

- (c) subject to subsection (2), enter and search any premises in which he reasonably believes that the person has committed or has attempted to commit an offence under section 6(1)(a) or (b) or 7(1)(a) or (b), and require the production to him of any books or documents relating to any unauthorized decoder or decoder referred to in paragraph (a);
- (d) seize, remove and detain –
  - (i) any unauthorized decoder or decoder referred to in paragraph (a);
  - (ii) anything that appears to him to be or to be likely to be, or to contain, evidence of an offence under section 6(1)(a) or (b) or 7(1)(a) or (b).
- (2) Domestic premises shall not be entered or searched under subsection (1)(c) except pursuant to a warrant issued under subsection (3).
- (3) Where a magistrate is satisfied by informing on oath that there are reasonable grounds for suspecting that there is an unauthorized decoder or a decoder in any domestic premises possessed or used by a person whom he has reasonable grounds for believing has committed or has attempted to commit an offence under section 6(1)(a) or 7(1)(a) or (b), then he may issue a warrant authorizing the Telecommunications Authority or any other public officer to enter and search the premises.
- (4) The Telecommunications Authority or any public officer authorized in writing in that behalf, in the exercise of the powers under subsection (1) or pursuant to a warrant issued under subsection (3), may –
  - (a) break open any outer or inner door of any place that he is empowered or authorized to enter and search;
  - (b) remove by force any person or thing obstructing him or resisting any arrest, detention, search, inspection, seizure or removal that he is empowered to make or carry out;
  - (c) detain any person found in any place that he is empowered or authorized to search until such place has been searched.
- (5) A magistrate or court may, upon application by or on behalf of the Telecommunications Authority or by any public officer

authorized in writing in that behalf by the Telecommunications Authority, order that any unauthorized decoder or decoder in respect of which there has been a contravention or attempted contravention of section 6(1)(a) or (b) or 7(1)(a) or (b) shall be forfeited to the Government, whether or not proceedings have been taken against any person in respect of the contravention or attempted contravention.

- (6) Any person who willfully obstructs the Telecommunications Authority or any public officer authorized in writing in that behalf by the Telecommunications Authority in the exercise of any power conferred upon him under the section shall be guilty of an offence and shall be liable on summary conviction to a fine at level 4 and to imprisonment for 6 months.

## **7B. Civil remedy**

- (1) A licensee or television programme service provider sustaining loss or damage from a breach of section 6(1)(a) or (b) or section 7(1)(a) or (b) may bring an action for damages, an injunction or other appropriate remedy, order or relief against the person who is in breach.
- (2) A licensee or television programme service provider may bring an action under subsection (1) even though the person whom the action is brought has not been charged with or convicted of an offence by reason of a contravention of section 6(1)(a) or (b) or section 7(1)(a) or (b).
- (3) A licensee or television programme service provider may bring an action for damages, an injunction or other appropriate remedy, order or relief against any person who possesses or uses, or authorizes another person to possess or use an unauthorized decoder to view any television programme service which is intended or available for reception by the public, on payment, whether periodically or otherwise, of a subscription in Hong Kong.”
- (4) A television programme service provider may bring an action for damages, an injunction or other appropriate remedy, order or relief against any person who possesses or uses, or authorizes another person to possess or use, any decoder for use by a Television Receive Only System to receive a broadcasting service which is not licensed on a subscription basis.

## **Explanatory Memorandum**

The purpose of this Bill is to amend the Broadcasting Ordinance (Cap. 562) –

- (a) to revise the definition of “unauthorized decoder”;
- (b) to make it an offence to possess or use or authorize another person to possess or use an unauthorized decoder for commercial purposes;
- (c) to introduce presumptions to facilitate proof of offences;
- (d) to provide a defence to the employer and employee in proceedings for an offence under section 6 and 7;
- (e) to make it an offence to willfully obstruct the Telecommunications Authority or any public officer in the exercise of any power conferred upon him under the new section 7A;
- (f) to provide civil remedy for any contravention to section 6 and viewing of any pay television programme provided by a licensee without paying a subscription.