

**HONG KONG BAR ASSOCIATION'S COMMENTS ON
BROADCASTING (AMENDMENT) BILL 2003**

1. The Bar was asked to consider the captioned Bill.
2. The Bill amends the Broadcasting Ordinance (Cap 562) to introduce the new offence of possession or use or authorizing the possession or use, for the purpose of, or in connection with, trade or business, an unauthorized decoder, to introduce presumptions and defences in respect of criminal offences in that Ordinance concerning unauthorized decoders or decoders, to restate the enforcement powers of the Telecommunications Authority or authorized public officers in respect of criminal offences in that Ordinance concerning unauthorized decoders or TROS (“Television Receive Only System”) decoders, and to provide for the right on the part of a licensee under that Ordinance to seek civil remedies for contravention of the offence-creating provisions concerning unauthorized decoders or TROS decoders in that Ordinance.
3. Two areas of the Bill call for substantial comment. The first is the introduction of the new offence of possession or use or authorizing the possession or use, for the purpose of, or in connection with, trade or business, an unauthorized decoder (Clause 3(a)). The second is the introduction of presumptions and defences in respect of criminal offences in that Ordinance concerning unauthorized decoders or TROS decoders (Clauses 3(b) and 4).
4. Clause 3(a) of the Bill seeks to replace the present section 6(1) of the Broadcasting Ordinance, which only criminalizes the importation, exportation, manufacturing, selling, offering for sale and letting for hire, in the course of trade or business, of unauthorized decoders, with a new section 6(1) that in addition criminalizes the possession or use or authorizing the possession or use, for the purpose of, or in connection with, trade or business, an unauthorized decoder (the proposed section 6(1)(b)). This is an extensive expansion of criminal liability.
5. A comparison can be drawn with the amendments to the Copyright Ordinance (Cap 528) in the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (64 of 2000), which were in similar terms. Those amendments were met with enormous community outcry around the time of their commencement date and the Copyright (Suspension of Amendments) Ordinance 2001 (Cap 568) had to be quickly enacted to suspend the operation of the 2000 amendments. A review was conducted and following the review the Copyright (Amendment) Bill 2003 was gazetted and is now under scrutiny by the Legislative Council.
6. Clause 4 of the Copyright (Amendment) Bill 2003 should be noted. The proposed section 118A of the Copyright Ordinance has omitted the expression “in connection with S trade or business” as part of the criminal offence of possession of an infringing copy of certain categories of copyright work, which was the source of much of the community outcry at the time of the attempted implementation of the 2000 amendments. Clause 8 also provides a definition to the expression “doing any act for the purpose of or in the course of trade or business”.

7. Although the Legislative Council brief accompanying the Bill states that the proposed section 6(1)(b) is intended to deal with unauthorized reception of subscription television programme services for commercial purposes, the proposed section 6(1)(b), which allows the prosecution to show only an act “in connection with S trade or business”, appears to punish the presence or use of unauthorized decoders whenever and wherever there is any slightest association between such presence or use with a trade or business of a person and is arguably broader than the mischief that the Administration indicated. The Bar observes that this proposed provision seems to be casting the net of criminal liability too wide.
8. The Bills Committee is recommended to examine the scope of the proposed section 6(1)(b) with a view to tighten the scope of that provision.
9. Clauses 3(b) and 4 of the Bill seeks to introduce two sets of identical presumptions and defences for offences under section 6 and section 7 of the Broadcasting Ordinance respectively. The explanatory memorandum states that the presumptions are introduced “to facilitate proof of offences”. The Legislative Council brief accompanying the Bill describes the presumptions as Opresumption of “offence” in respect of knowledge of, authorization for the use of, and possession of, unauthorized decoders’. On the hand, the Legislative Council brief contends that the proposal “is in conformity with the Basic Law, including the provisions concerning human rights”.
10. Neither the explanatory memorandum nor the Legislative Council brief has provided the Bills Committee with justification for the introduction of the presumptions in clauses 3(b) and 4 of the Bill, apart from indicating that the prosecution would be eased of the normal requirement to prove in section 6 or section 7 offences, essential elements such as knowledge on the part of the accused that the decoder in question is an unauthorized decoder, possession on the part of the accused of the decoder in question, and criminal liability of an individual by virtue of the criminal liability of the company, other bodies corporate, partnership, or employee to which the individual is associated.
11. In other words, in a prosecution for a section 6(b) offence in respect of an unauthorized decoder found in commercial premises, counsel for the prosecution needs only to produce evidence satisfying the criminal standard of proof of an unauthorized decoder having been found in such premises to trigger the presumption of possession (in the proposed section 6(5)) against the licensee, tenant, lessee, occupier, person in charge or the owner of the premises. A bit of extra evidence satisfying the criminal standard of proof to show that the possession of the unauthorized decoder was for the purpose of, or in connection with, trade or business (such as the finding that the unauthorized decoder was connected to the multi-media projection system in the premises) would trigger the presumption of knowledge on the part of, say, the person in charge, that the decoder was an unauthorized decoder. The person in charge would have to rebut those presumptions by putting forward evidence to the contrary to the standard of proof of on balance of probabilities.
12. If the person in charge is found guilty of an offence under section 6(b) and it is found that he is an employee, the employer is also guilty of the like offence (the proposed section 6(6)) unless the employer discharges the defence that he exercised sufficient control over the employee or that he took all reasonable steps to prevent the

commission of the offence (the proposed section 6(7)). If the employer happens to be a company, a body corporate or a partnership, then the directors of the company or body corporate or the partners of the partnership are all presumed to have done the criminal act and can be held guilty of the like offence, unless he shows by evidence to the contrary that he did not authorize the act to be done (the proposed section 6(4)).

13. The scope and inter-related operation of these presumptions have ensured that the prosecution would not have to prove to the criminal standard of the essential elements of possession and knowledge (and thus the exercise of control over an unauthorized decoder or TROS decoder) for offences under section 6 and section 7 of the Broadcasting Ordinance and that criminal liability for such offences can be extended to directors, partners or employers on the basis of the conviction of an employee. The operation of the presumptions may have the effect of converting criminal offences that require the proof of knowledge (and hence mens rea) into, in effect, strict liability offences, especially in the case of directors, partners and employers. Summary conviction of a section 6 or section 7 offence attracts a fine at level 6 and imprisonment for 2 years.
14. The presumptions once triggered with the small quantity of uncontroversial evidence produced reverse the burden of proof into the hands of the accused and are prima facie inconsistent with presumption of innocence guaranteed under Art 87 of the Basic Law and Art 14(2) of the International Covenant on Civil and Political Rights.
15. Neither the explanatory memorandum nor the Legislative Council brief has provided the Bills Committee with proper justification that the presumption of innocence should be reasonably limited in respect of section 6 and section 7 offences. Rather the language used in both the explanatory memorandum and the Legislative Council brief suggests impunity to breaches of human rights guarantees because of the convenience the proposed provisions provide to the enforcement agencies and the prosecution. Such language is undesirable, to say the least.
16. The Administration is urged to provide the proper justification required to demonstrate that the enactment of the presumptions and defences in clauses 3(b) and 4 of the Bill would not be violative of Art 87 of the Basic Law and Art 14(2) of the International Covenant on Civil and Political Rights, by reference to caselaw, including Attorney General of Hong Kong v Lee Kwong Kut [1993] AC 951 and R v Lambert [2002] 2 AC 545.
17. The Bills Committee is recommended to scrutinize clauses 3(b) and 4 with great care.
18. There are two other matters to note in the Bill. Clause 5 of the Bill not only reproduces the enforcement provisions in the present sections 6(3) to (8) of the Broadcasting Ordinance but also introduces a new enforcement power of arrest in the proposed section 7A(1)(b) and the new criminal offence of obstruction of duty in the proposed 7A(6).
19. Clause 5 of the Bill also introduces the civil remedy against those who are in breach of section 6 of the Broadcasting Ordinance and also those who are not so in breach but for the absence of a connection with trade or business (such as domestic viewers who possess or use an unauthorized decoder to view a subscription television

programme service without paying a subscription). This provision does not specify a time limit, as section 15(2) of the Broadcasting Ordinance does for the civil remedy on competition matters. The Bills Committee may also find it useful to explore on the rationale for extending civil remedy to those not covered in the criminal offences in section 6.

Dated: 28 August 2003