

	MPA CC	<p>legal deterrent to develop and nurture a knowledge-based economy built on intellectual property industry.</p> <ul style="list-style-type: none"> ◆ Support to revisit the issue of criminalizing domestic pirated viewing after assessing the impact of digitization of television programme services. ◆ Agrees that criminal liability should not be imposed for end-users of domestic pirated viewing because: <ul style="list-style-type: none"> (a) It may not be easy to attribute liability to the person culpable out of a whole family that is watching a subscription service, i.e. whether the acquirer, the owner of the premises or the viewer should be liable; (b) the reception device may be acquired from a door-to-door promoter and the acquirer may be unaware of the illicit nature of the device; and (c) the device might be unwittingly taken over from a previous occupier of premises. ◆ The Government should reconsider whether the level of protection that exists for consumers against deceptive, misleading and unfair practices by businesses is adequate when it reviews the need to impose criminal liability on end-users after the service providers have employed digital transmission and advanced encryption technology.
2. Statutory definition of unauthorized decoders (proposed section 2(1) - Interpretation)	MPA MPA CASBAA	<ul style="list-style-type: none"> ◆ Expresses concern about the annual losses to cable television operators in Hong Kong from the estimated 70 000 unauthorized subscribers of television programmes amounting to almost US\$28 million, according to CASBAA. ◆ A person may import into Hong Kong for commercial purposes decoders lawfully manufactured to facilitate the reception of encrypted signals in overseas territories for unauthorized reception in Hong Kong of signals broadcast by the Asia-Pacific pay-TV operators authorized by MPA member companies/CASBAA members. As these overseas pay-TV operators are not licensed operators providing subscription television programme services in Hong Kong, it would appear that the unauthorized decoders for viewing their programmes would fall outside the proposed scope of "unauthorized decoder" as defined under the Bill. Accordingly, trading in and use of such decoders in Hong Kong may not amount to a criminal offence under proposed section 6 and this is considered a loophole.

<p>3. Unauthorized decoders (proposed section 6)</p>	<p>BAR</p>	<ul style="list-style-type: none"> ♦ Considers that proposed section 6(1)(b) is an extensive expansion of criminal liability. The proposed amendments are in similar terms with the amendments to the Copyright Ordinance (Cap 528) contained in the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (IP(MA)O) which were met with enormous community outcry and had to be suspended shortly afterwards by the enactment of the Copyright (Suspension of Amendments) Ordinance 2001 (Cap 568). The Copyright (Amendment) Bill 2003 now under scrutiny has proposed, after a review of IP(MA)O, to omit the expression "in connection with, trade or business" as part of the criminal offence of possession of an infringing copy of certain categories of copyright work. It also provides a definition for the expression "doing any act for the purpose of or in the course of trade or business". ♦ Proposed section 6(1)(b), which allows the prosecution to show only an act "in connection with, 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 what is needed to deal with unauthorized reception of subscription television programme services for commercial purposes. The proposed provision seems to be casting the net of criminal liability too wide and the Bills Committee is recommended to examine the scope of proposed section 6(1)(b) with a view to tightening its scope.
<p>4. Introduction of presumptions (clauses 3(b) and 4)</p>	<p>BAR</p>	<ul style="list-style-type: none"> ♦ Considers that the Administration has not provided justification for the introduction of the presumptions in clauses 3(b) and 4 for offences under proposed section 6 and existing section 7 and urges that the presumptions be scrutinized with great care: <ul style="list-style-type: none"> (a) In a prosecution for an offence in respect of an unauthorized decoder found in commercial premises under proposed section 6(1)(b), the prosecutor 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 against the licensee, tenant, lessee, occupier, person in charge or the owner of the premises. Evidence that the possession of the unauthorized decoder was for the purpose of, or in connection with, trade or business would trigger the

		<p>presumption of knowledge on the part of the person in charge that the decoder was an unauthorized one. The person in charge would have to rebut those presumptions by putting forward evidence to the contrary.</p> <p>(b) Likewise, if the person found guilty of an offence under proposed section 6(1)(b) is an employee, the employer (or the directors/partner in case the employer happens to be a company or a body corporate/ a partnership) is presumed to be guilty of the like offence unless he provides evidence to the contrary that he has discharged the defence under proposed section 6(7)(a) and (b), or that he has not authorized the act to be done.</p> <ul style="list-style-type: none"> ◆ The operation of the proposed presumptions in clauses 3(b) and 4 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. The presumptions once triggered reverse the burden of proof into the hands of the accused. Such presumptions 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.
<p>5. Offence of providing decoders and reception equipment for television programme service on subscription basis without licence (proposed sections 7(3A) to 7(3G))</p>	<p>CASBAA</p>	<ul style="list-style-type: none"> ◆ As the subscriptions payable for distributors re-transmitting CASBAA members' channels to Thailand, Malaysia and the Philippines do not give the right to view any of such television programme service in Hong Kong, existing section 7(1) of the Broadcasting Ordinance (BO) (Cap 562), which specifies that a decoder shall not be used to receive a broadcasting service which is not licensed on a subscription basis may not apply in the light of the definition of "subscription" under BO. ◆ Under section 2 of BO, "subscription" means a fee payable by or on behalf of any person for the right to view a television programme service in Hong Kong. CASBAA suggests to add the words "or elsewhere" after "Hong Kong" to plug the aforesaid loophole. ◆ Suggests to add a subsection to existing section 7(1) of BO to provide that subject to section 7(2), a person shall not 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.
6. Enforcement-related issues (proposed section 7A)	CGCC MPA BAR	<ul style="list-style-type: none"> ♦ The Administration should strengthen its cooperation with the Mainland authority in combating the manufacture and sale of illegal decoders so as to reduce or prevent the incidence of unauthorized reception of subscription television programme services. ♦ The television programme service providers should improve the encryption technology rendering unauthorized decoding impossible. ♦ In enforcing the Bill, the Administration should avoid causing inconvenience to the public. ♦ Agrees that the Telecommunications Authority (TA) should be further empowered to rationalize the enforcement of the provisions against decoder-related offences. It also notes that according to the Administration's information, the Police and the Customs and Excise Department have already agreed to cooperate during enforcement actions conducted by TA. ♦ Notes the introduction of a new power of arrest in proposed section 7A(1)(b) and the new criminal offence of obstruction of duty in proposed section 7A(6).
7. Civil remedy (proposed section 7B)	MPA CASBAA BAR	<ul style="list-style-type: none"> ♦ Under the Bill, only a licensee sustaining loss or damage from a breach of proposed section 6(1)(a) or (b) may seek civil remedy. MPA suggests that television programme service providers, as defined in BO, should also be allowed to pursue civil remedies against signal theft. ♦ Suggests that the scope of persons who can bring an action for civil remedies should include any person providing a television programme service who can show that they have suffered loss or damage as a result of the breach by the infringer. ♦ Points out that this provision does not specify a time limit for bringing an action for civil remedies, unlike section 15(2) of BO which does for the civil remedy on competition matters. It may also be useful to explore the rationale for extending civil remedy to those not covered in the criminal offences in proposed section 6.

Abbreviations :	BAR	Hong Kong Bar Association (LC Paper No. CB(1) 2381/02-03(04))
	CASBAA	Cable and Satellite Broadcasting Association of Asia Limited (LC Paper No. CB(1) 2381/02-03(01))
	CC	Consumer Council (LC Paper No. CB(1) 2334/02-03(01))
	CGCC	The Chinese General Chamber of Commerce (LC Paper No. CB(1) 2381/02-03(02))
	MPA	Motion Picture Association (LC Paper No. CB(1) 2381/02-03(03))
	MPIA	Hong Kong Kowloon & New Territories Motion Picture Industry Association Ltd (LC Paper No. CB(1)2426/02-03(01))
	6 television broadcasters	Joint submission (LC Paper No. CB(1) 2334/02-03(01)) from:
		- Asia Television Limited
		- Galaxy Satellite Broadcasting Limited
		- Hong Kong Cable Television Limited
		- Television Broadcasts Limited
		- TV Plus (HK) Corporation Limited
		- Yes Television (Hong Kong) Limited

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