



**Submission by Hong Kong Cable Television Limited on  
Broadcasting (Amendment) Bill 2003**

**(Executive Summary)**

It is the view of HK Cable that the draft Bill cannot adequately tackle the Pay TV piracy activities at both domestic and commercial premises. The inadequacies should be addressed by:

1. Extending criminal liability to pirate viewers at domestic premises ("Appendix I" details the justifications for such suggestion, and "Appendix II" refutes the purported arguments against such suggestion)
2. Introducing criminal sanction and civil remedy against dishonest reception of Pay TV programmes with intent to avoid payment of any applicable charge. This should apply to both domestic and commercial pirates (see para. 2.4 and 3.6)
3. Modifying the definition of "unauthorised decoder" to cover dishonest use of the official decoders of a TV company (see para. 3.1 - 3.5)
4. Adding the following to the list of prohibited acts at supply level (see para. 4):
  - repairing an unauthorised decoder
  - installing an unauthorised decoder
  - modifying an unauthorised decoder
  - marketing or promoting the use of an unauthorised decoder
  - publishing information with the intention of assisting or enabling any person to use an unauthorised decoder

- End of Summary -



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**1. Introduction**

Hong Kong Cable Television Limited (HK Cable) welcomes the opportunity to comment on the captioned subject. After careful consideration of the draft Bill, we are of the view that it cannot adequately tackle the Pay TV piracy activities at both domestic and commercial premises. We would urge the Government to address the inadequacies as pointed out below.

**2. Piracy Activities at Domestic Premises**

- 2.1 Under the Government proposal, domestic pirates of Pay TV programmes will have only civil liability. No criminal sanction will be imposed on them despite the rampancy of the misdemeanour and the fact that it has been causing serious harm to the Pay TV companies, local and overseas content providers, the Government Treasury through loss revenue, and the development of Hong Kong in its knowledge-based economy and as a regional broadcasting hub.
- 2.2 We, together with other members of the TV and related industries, have strong views that domestic piracy of Pay TV programmes cannot be contained without criminal sanction. The justifications for our views are set out in detail in the paper attached as "Appendix I" which we submitted to the Government in 2001.
- 2.3 The Government asserts that non-criminalization of domestic Pay TV piracy is justified by privacy concern, enforcement difficulty and the availability of digital technology to contain the problem. This is wrong.

The fallacies of the purported privacy concern and enforcement difficulty have been addressed in the legal opinion of Mr. John Griffiths, S.C., C.M.G., Q.C. attached as "Appendix II". In short, imposition of criminal sanction upon domestic pirates, if properly legislated, does not implicate the right to privacy. If enforcement difficulty really exists, the law-enforcers should find ways to overcome it, as it did in many other offences, rather than using it as an excuse to deprive the Pay TV companies of the necessary legal protection.

It is the experience of Europe and America that each time when a Pay TV



broadcaster deployed a new digital encryption system, it would be cracked by pirates in a year or two. As a result, the broadcasters have to modify their systems from time to time. With respect to HK Cable, pirate digital devices became available in the market 18 months after its installation of the digital encryption system. Like its overseas counterparts, HK Cable had to take counter-measures to disable the illicit devices. It demonstrates that no matter how robust a digital encryption system can be, its life span will not be long given there is a big enough illicit user market to finance the cracking of the system. Unless the users are effectively restrained from using unauthorised decoders by criminal sanction, the cat-and-mouse game between the broadcasters and illegal suppliers is endless.

- 2.4 The Bill prohibits only one form of piracy, namely possession or use of an unauthorised decoder. However, with the advance of technology, pirated viewing of Pay TV programmes can be effected without possession or use of an unauthorised decoder by the pirate viewer. Thus, we suggest adding the following prohibition in the Bill:

*"No person shall dishonestly receive an encrypted subscription television programme in a decoded form with intent to avoid payment of any charge applicable to the reception of the programme."*

Both criminal sanction and civil remedy should be provided against violation of such prohibition.

### **3. Piracy Activities at Commercial Premises at User Level**

- 3.1 The commercial end-user piracy activities most commonly found in Hong Kong are:

- (a) Use of illicit decoding devices acquired from illegal suppliers
- (b) Use of official decoders provided by a Pay TV company for *domestic* purpose, and thereby avoiding payment of the higher subscription charged to commercial subscribers. This is achieved by removing the official decoders that the Pay TV company has installed at domestic premises to the commercial premises. Usually, the pirates would keep paying the subscription at domestic rate so as to avoid discovery of such removal by



the Pay TV company.

- (c) Reception of foreign encrypted television programmes with the use of an official decoding device imported into Hong Kong without authorisation of the television company concerned.

3.2 The Bill cannot address the problems of (b) and (c) above due to the inadequate definition of "unauthorised decoder". S.2 of the Bill defines an unauthorised decoder as a decoder by means of which encrypted television programmes or encrypted television programme services provided **under a licence**<sup>1</sup> can be viewed in decoded form **without payment of a subscription** where a subscription is required to be paid (emphasis added).

3.3 Following this definition, the decoders used in case (b) above cannot be construed as "unauthorised" because the pirates have made payment of a subscription, albeit the payment is much less than what they should be liable to pay. Hence, such pirates cannot be caught under the Bill.

3.4 In relation to case (c), even though the decoding devices are used in Hong Kong without its authorisation, the foreign television company concerned is not protected under the Bill unless it holds a licence granted under the Broadcasting Ordinance. This prejudices the legitimate rights and interests of many *unlicensed* satellite broadcasters and is not consistent with the principle of protecting foreign copyright works on a reciprocal basis. It also jeopardizes the interests of the local licensed television companies if the exclusive programmes they carry can be accessed from those satellite broadcasts with the use of such decoding devices.

3.5 In our view, the loopholes stated in paragraphs 3.3 and 3.4 can be plugged by modifying the definition of "unauthorised decoder" to the following:

*"unauthorised decoder means a decoder by means of which encrypted television programmes or encrypted television programme services can be viewed in decoded form without specific authorisation from the lawful provider of such television programmes or television programme services"*

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<sup>1</sup> That means a licence granted under the Broadcasting Ordinance



- 3.6 The prohibition suggested in paragraph 2.4 above (i.e. dishonest reception with intent to avoid payment of any applicable charge) should equally apply to the pirates at commercial premises.

#### **4. Piracy Activities at Supply Level**

To ensure an effective restraints on provision of unauthorised decoders, and having considered the comparable provisions in overseas legislation as well as the modus operandi of unauthorised decoder suppliers and peddlers in Hong Kong, we would suggest adding the following to the list of prohibited acts in s.6(1)(a), s.6(3)(a), s.7(1), s.7(3A), and s.7A(1)(a) of the Broadcasting Ordinance:

- (a) repairing an unauthorised decoder
- (b) installing an unauthorised decoder
- (c) modifying an unauthorised decoder
- (d) marketing or promoting the use of an unauthorised decoder
- (e) publishing information with the intention of assisting or enabling any person to use an unauthorised decoder

These would help law enforcers tackle the acts of peddlers in modifying decoders when television companies introduce counter-measures, and in spreading message about the availability of unauthorised decoders on the Internet or by other means.

#### **5. Conclusion**

- 5.1 Piracy has severely damaged the movie and music industries in Hong Kong largely because of the lack of adequate legal protection and timely enforcement actions at the crucial time. Piracy has been attacking the Pay TV industry for considerable time and there is no effective restraint in place. The Pay TV industry will definitely suffer the same fate as the movie and music industries if the Government insists on approaching the problem in a *gradual* manner.
- 5.2 Worldwide experience has shown that technological measure alone cannot defeat pay TV piracy. There must be strong and thorough legal protection in place. In this respect, the draft Bill is inadequate compared to the protection accorded to the industry in a number of foreign jurisdictions (see last page of



Appendix I). We hope the Legislative Council and the Government would seriously study the inadequacies of the Bill and consider our suggestions for plugging the loopholes.

Hong Kong Cable Television Limited  
September 2003



## Appendix I

### Unauthorised Reception of Subscription Television Programmes

#### **1. What is pirated viewing?**

- 1.1. Programme signals are the very valuable property of Pay TV stations. All Pay TV stations restrict their programme signals to authorized persons (e.g. subscribers) only. That is achieved by “locking” the signals and providing the authorized persons with a designated key (i.e. an authorised decoder) to “open” the signals.
- 1.2. In recent years, there have been more and more people using a false key (i.e. an unauthorised decoder) to break the lock and view programmes fraudulently without payment. Such misbehaviour is commonly termed “pirated viewing”.
- 1.3. As the Consultation Document<sup>1</sup> has pointed out, pirated viewing has become increasingly rampant because of not only the ready availability of low-price unauthorised decoders (due to recent advances in piracy technology) but also the prolonged absence of an effective deterrent.

#### **2. Pirated viewing is theft**

- 2.1. Pirated viewing comprises the same elements of offence as theft namely, dishonesty, appropriation of another person’s property and an intention of permanent deprivation. In the same way that theft is punished by criminal sanctions, there is no justification to exempt the perpetrators of pirated viewing from similar sanctions.
- 2.2. Pirated viewing is analogous to the crimes of abstraction of electricity and fraudulent use of a public telephone. The interests of the electricity and telephone companies are protected by criminal law, there is no justification to treat the interests of Pay TV companies differently.

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<sup>1</sup> The consultation document entitled "Review of Certain Provisions of Copyright Ordinance" issued by the Commerce and Industry Bureau of the Hong Kong SAR Government in October 2001.



### **3. End-user criminal liability is justified**

#### *3.1. It is right and proper to penalize both the suppliers and users of unauthorized decoders –*

If the law were to provide that only the provider of a burglary tool has criminal liability while the burglar himself has not, nobody would agree that justice has been done. Likewise, justice has not been done if only the suppliers of unauthorised decoders, but not the users are subject to criminal liability.

#### *3.2. Pirated viewing cannot be effectively controlled unless it is banned at the end-user level -*

a. Although the Broadcasting Ordinance has made it an offence to supply an unauthorised decoder in the course of trade or business, it has been proved to be inadequate for tackling the pirated viewing problem in Hong Kong. So far, only a handful of traders have been convicted and all of them got off with either a small fine or a social service order. Worse still, the prohibition does not apply to the Mainland which is the major source of supply of the unauthorised decoders. As a result, unauthorised decoders are still widely and openly sold in the local markets and across the border.

b. The illicit supply will continue unless the demand is stopped. The demand will not, however, stop unless there is an effective deterrent in terms of criminal liability.

#### *3.3. The problem is severe, it has caused and is continuing to cause significant damage –*

a. Pirated viewing is more threatening and damaging than conventional infringement of pirated videograms. A pirated videogram provides users with one or two pre-recorded programmes only. Yet, an unauthorised decoder could provide the users with all the programmes of the Pay TV station on a real time basis. The more pirated videograms a user wants, the more he needs to pay. Yet, a user of an unauthorised decoder continues to gain unlimited access to programmes without cost until the unauthorised decoder is removed or disabled.





- b. It is estimated that there are at least 100,000 unauthorised decoders in use for reception of HK Cable programmes, compared to the authorised number of around 560,000. Local and international media and programming suppliers, whose revenues are directly or indirectly based on the subscription revenue received by HK Cable are equally affected. Additionally, the Government has also incurred financial loss in terms of tax revenue.
- c. The piracy problem has severely damaged the attractiveness of Hong Kong as a regional broadcasting hub. According to CASBAA<sup>2</sup>, many regional broadcasters and content providers have suspended or cancelled their investment plans in Hong Kong because they perceive their property and financial interests are not adequately protected here. In the end, Hong Kong will lose not only choice of quality programming but also foreign investments.
- d. Pirated viewing is generating enormous amounts of undue profits for the manufacturers and providers of illicit devices. AEPOC<sup>3</sup> has estimated that illegal turnover in illicit devices is in the region of 1 billion Euro yearly. Without robust legislation, Hong Kong may become a haven for the suppliers of illegal decoders which would undermine the promotion of Hong Kong as a regional broadcasting hub.
- e. Unauthorised decoders do not have a parental lock. Thus, children could be easily exposed to programmes not suitable for them. Parents who use unauthorised decoders could give children a wrong message that greed and dishonesty are acceptable.

#### 3.4. *Implementation of the criminal law is not intrusive -*

- a. HK Cable respects civil liberties and does not approve of casual entry into

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<sup>2</sup> CASBAA (The Cable & Satellite Broadcasting Association of Asia) is the region's leading non-profit trade organization for the promotion of multichannel television and data transmission via cable and satellite networks. The CASBAA membership consists of leading cable and satellite system operators and programmers; suppliers and manufacturers of cable and satellite technology; related business service providers; communications, advertising & marketing executives, members of the media, government regulatory bodies, telecom companies, new media service purveyors, network enablers and individuals committed to upholding and promoting industry standards.

<sup>3</sup> AEPOC is the European Association for the Protection of Encrypted Works and Services. Its members include 21 major players in the digital television and telecommunications sectors, operating internationally.



premises, in particular domestic premises, by law enforcement agency. Yet, it would create a big loophole if the law enforcement agency can never enter domestic premises to combat crimes.

- b. It is possible to strike a balance by requiring the law enforcement agency to seek the court's approval (in the form of a warrant) before entering any domestic premises, with no warrant issued unless the enforcement agency can provide the magistrate with sufficient information on oath and, the court is satisfied there are reasonable grounds for suspecting that a crime has been committed in the premises or evidence of crime can be collected in the premises.
- c. HK Cable believes it is possible to provide evidence technically to show reasonable grounds for suspecting the use of an unauthorised decoder without entering the premises by confirming that no service subscription exists for the premises but there is reception of Pay TV programme signals at the premises. Bearing in mind that it is a criminal offence to provide false information on oath, neither the law enforcement agency nor the Pay TV operator is likely to make an unfounded application for a warrant.
- d. Power to enter domestic premises with a warrant for law enforcement purposes is common in Hong Kong for both serious and mild offences. For example,
  - S.123(1) of the Copyright Ordinance provides, "A magistrate may, if he is satisfied by information on oath that there are reasonable grounds for suspecting that there is in any place any article or thing which may be seized, removed or detained under section 122(1)(b), issue a warrant authorizing an authorized officer to enter and search the place".
  - S.6 of the Broadcasting Ordinance provides, "Where a magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is an unauthorized decoder in any domestic premises used by a person whom he has reasonable grounds for believing has committed an offence under this section, then he may issue a warrant authorizing the Telecommunications Authority or any other public officer to enter and search the premises".

More examples could be found in other Ordinances. Foreign jurisdictions have similar requirement. These confirm that power to enter domestic premises with a



warrant is a generally accepted practice for law enforcement purposes.

- e. A householder using an unauthorised decoder to gain access to Pay TV services is defrauding the Pay TV company of at least HK\$3000 per year. This is not an inconsiderable sum. If the householder were thought to have stolen a television set of a similar value, there would be no thought of not entering the premises to gain evidence for a conviction. With the safeguards outlined above, we believe it is not unreasonable for the law enforcement agency to enter domestic premises for gaining evidence for the prosecution of the users of unauthorised decoders.

3.5. *It targets only the knowing swindlers and does not jeopardize the innocent public –*

- a. The public complaints about the imposition of end-user liability in April 2001 revolved primarily around the copying and keeping of cuttings of newspapers and other publications which are necessary for the daily operation of many schools and business entities. It is, however, unlikely that such schools, business entities or anyone else would need an unauthorised decoder to receive our programmes on legitimate grounds.
- b. It is appreciated that there could be innocent infringement of VCD, CD and software copyright since the genuine and counterfeit copies of such works may sometimes be difficult to distinguish. There is however no similar difficulty for users of unauthorised decoders because they will know whether they are making subscription payments to the Pay TV stations for the programmes received.

**4. End-user criminal liability is not a new idea**

- 4.1. In 1993, the Law Reform Commission of Hong Kong accepted that fraudulent reception of a transmission should be a criminal offence<sup>4</sup>. The Commission specifically recommended that section 297 of the UK Copyright Designs and Patents Act 1988 (i.e. offence of fraudulently receiving programmes) be adopted in its totality. This recommendation was made after extensive and thorough

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<sup>4</sup> Paragraph 11.69 of the Commission's Report on Reform of the Law Relating to Copyright (Topic 22)



discussions, researches, public consultations, debates and comparisons with the overseas laws in the six years from 1987. Unfortunately, the recommendation had not been included in the Copyright Ordinance when it was enacted in 1997.

- 4.2. HK Cable's investigations have shown that at least 12 jurisdictions as tabulated at the end of this paper, which include United Kingdom, United States, France, Canada and New Zealand, make the end users liable for gaining illicit access to encrypted television services. All of these jurisdictions provide both criminal sanctions and civil/ other remedies. It is important to note that none of these jurisdictions has regarded such measures as contravention of human rights or civil liberties (many of these jurisdictions are well-known for having high regard for human rights and civil liberties).

## **5. Civil liability alone is inadequate**

- 5.1. Some people have suggested that pirated viewing should be tackled by civil liability alone because they argue that enforcement of the criminal law is intrusive. HK Cable cannot see the logic why it will be more intrusive for a public officer than a HK Cable staff to knock at a suspect's door. The argument appears to be based on the unreasonable presumption that the public officers will abuse their powers and the statutory safeguards against unlawful entry into premises (mentioned in para. 3.4) are inadequate. We disagree with this view.
- 5.2. If no criminality liability existed, Pay TV companies would be at a significant disadvantage in controlling the usage of unauthorised decoders. Collecting evidence for civil proceedings can be particularly difficult. In the case of domestic premises for example, the caretakers may expel our investigators at the entrance of the buildings. Public places such as pubs, karaokes and places of entertainment are risky for civil investigators to collect evidence without protection of law enforcers.
- 5.3. Civil liability has no deterrent effect. Most users of unauthorized decoders believe that the probability of being sued is low because the number of such users is large. Even if caught, the consequence will be minor with nothing more serious than payment of the outstanding subscription fees.
- 5.4. Civil liability should only serve as a supplement by providing the Pay TV



companies with an opportunity to recover their losses.

## **6. Technological measure alone is inadequate**

- 6.1. HK Cable has been investing several hundred million dollars in upgrading its encryption system, including a complete digitization of the system. Nevertheless, the adoption of digital encryption system will only be able to buy time, as there is no security system which is absolutely secure. There have been reports that the digital encryption systems deployed by certain broadcasters in Europe and United States have been broken<sup>5</sup>. The broadcasters are forced to play cat-and-mouse game with illegal suppliers. The more frequent the modifications, the more business opportunities for the suppliers of illegal equipment, the more expenditure for the broadcasters, their subscribers and shareholders (many of whom are members of the general public for listed broadcasters) and the more inconvenience to the lawful subscribers. In the end, every party other than the manufactures and sellers of the illicit devices is loser.
- 6.2. There has been a suggestion that the pirated viewing problem can be tackled if HK Cable disconnects all drop cables (i.e. the wiring connecting individual home to the network of HK Cable) of non-subscribers from HK Cable's network. The suggestion does not work. By virtue of the mandatory interconnection requirement, the HK Cable's network carries, on top of its Pay TV signals, signals of other television and telecommunications companies. Thus, all these signals are transmitted via the same drop cables to individual premises. If the drop cables are disconnected, the non-subscribers will lose all such television and telecommunications services.
- 6.3. Elimination of pirated viewing cannot be achieved solely by technological measure. There must be a parallel legal deterrent.

## **7. Targeting fraudulent reception for commercial purposes only is inadequate**

- 7.1. HK Cable estimates that around 95% of unauthorised decoders in use are installed at domestic premises. Banning use of unauthorised decoders for

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<sup>5</sup> See, for example, "Cracking down on the digital pirates" (22 Feb. 2001) on [www.guardian.co.uk](http://www.guardian.co.uk) which describes the sale of pirate ONdigital cards in Scotland; "DIRECTV seizes signal theft equipment from businesses nationwide" (27 Jun. 2001) on [www.directv.com/press](http://www.directv.com/press) and "TTV Digital falls prey to smartcard piracy" (19 Sept. 2001) on [news.zdnet.co.uk](http://news.zdnet.co.uk)



commercial purposes only will not target this large and growing problem. As we have argued, pirated viewing is theft. We cannot see the justification for differentiating a theft for commercial purposes from a theft for personal gains in the determination of liability.

- 7.2. As seen on the following page, twelve overseas jurisdictions have banned pirated viewing for private purposes by one way or another. For example, although the United Kingdom legislation forbids only commercial possession of unauthorised decoders, there is a back-up provision against fraudulent reception (s.297 CDPA) which could catch domestic pirates.

## **8. Conclusion**

Pirated viewing is not merely a problem of copyright infringement. It is a crime of theft. It has caused and is continuing to cause substantial losses to the broadcasting industry, local and overseas programming partners and the Treasury of the Government. The problem is escalating. If it cannot be stopped immediately, it may dampen all the effort, time and money invested in the development of Hong Kong as a regional broadcasting hub. Overseas experiences have confirmed that the problem cannot be effectively tackled by technological measures alone nor restraints at the supply level. It has been widely accepted around the world that imposing end-user criminal liability on pirated viewing for both private and commercial purposes is both justifiable and constitutional. Irrespective of the means they employ, those people who fraudulently receive Pay TV programmes are knowingly defrauding the Pay TV companies, they are not innocent (unknowing) copyright infringers. It is therefore appropriate to make them guilty of a crime as well as liable for a civil wrong.

In addition, we would urge the Hong Kong Government to work closely with the Mainland authorities on combating the production and sale of the illicit devices in the Mainland.

Hong Kong Cable Television Limited  
December 2001



**Overseas Prohibitions on Illicit Access to Encrypted TV Service**

<b><u>Territory</u></b>	<b><u>Illegal Activities</u></b>	<b><u>Criminal Sanctions</u></b>	<b><u>Civil / Other Remedies</u></b>	<b><u>Legislation</u></b>	<b><u>Purposes of the Illegal Activities</u></b>
United Kingdom	Dishonestly receiving a TV / radio programme with intent to avoid payment	Fine	-	S.297 Copyright Designs and Patents Act 1988	Private and/or commercial
	Possessing or installing an unauthorised decoder	Imprisonment (up to 2 years) and/or fine	Delivery up, seizure, injunction, damages, recovery of costs etc.	S.297A & 298 Copyright Designs and Patents Act 1998	Commercial
United States	Intercepting or receiving any communication service offered over a cable system without authorization	Imprisonment and / or fine  (more severe penalty if the violation is for commercial advantage or private financial gain)	Injunctions, damages and recovery of full costs	S.633 Communications Act 1934 (as amended by the Telecommunications Act 1996)	Private and/or commercial
	Intercepting radio communication, receiving interstate or foreign communication by radio and using such information for personal or other benefits without authorization.			S.705 Communications Act (as amended by the Telecommunications Act 1996)	Private and/or commercial
	Circumventing a technological measure that effectively controls access to a copyright protected work	Imprisonment and/or fine	Injunctions, damages and recovery of costs, etc.	S.1201(a), 1203 & 1204 Digital Millennium Copyright Act 1998	Private and/or commercial



Canada	Decoding an encrypted subscription programming signal or encrypted network feed without authorization	Imprisonment and / or fine	Damages, injunction, accounting and other appropriate remedies	S.9, 10, 18 Radiocommunication Act	Private and/or commercial
	Operating a radio apparatus so as to receive an encrypted subscription programming signal or encrypted network feed that has been decrypted without authorization				
	Importing or possessing any equipment or device for decoding the said encrypted signal / feed without authorization				
	Fraudulently, maliciously or without colour of right obtains any telecommunication service (which, by definition, includes TV programme and Internet services)	Imprisonment	Forfeiture of the device	S.326, 327 Criminal Code	Private and/or commercial
	Possessing any device to obtain telecommunication service (which, by definition includes TV programme and Internet services) without payment				
Finland	Unlawful possession, use and import of a decoding system for a protective code.	Fine	Confiscation of such decoding system, seizure of economic benefit derived from the commission of the crime	S.25, 42, 45 ,46 Telecommunications Market Act	Private and/or commercial





Ireland	Intercepting any protected service, possessing, importing or installing any equipment for the purpose of enabling such interception  (“Intercepting” means receiving, viewing, listening to, recording by any means of a broadcasting service without the agreement of the service provider)	Imprisonment and / or fine (up to 3 months or £1000 on summary conviction up to 2 years & £20,000 on conviction on indictment)	Forfeiture of such equipment, injunction, damages and / or an account of profits	S.9, 10, 11, 12, 15 Broadcasting Act 1990	Private and/or commercial
Iceland	Using decoder to receive an encoded broadcast without payment of subscription fee	Imprisonment and / or fine	Confiscation of any objects and equipment that were used to commit the infringements and profits derived from such infringements	Article 28, 29, 33 Broadcasting Act	Private and/or commercial
New Zealand	Receiving a TV / radio programme with intent to avoid payment	Fine	Order for delivery up	S.227, 228 Copyright Act 1994	Private and/or commercial
Fiji	Receiving a TV / radio programme with intent to avoid payment	Fine	Order for delivery up	S.224, 225 Copyright Act 1999	Private and/or commercial
*France	Private possession or acquisition (with intent to use) of equipment, appliances or instruments designed wholly or partly to fraudulently receive protected broadcast programmes	Imprisonment (up to 2 years) and / or fine (up to Euro 30490)	Confiscation of such equipment, appliances, instruments and relating advertising material	Article 79, French Audiovisual Law (Loi No. 86-1067)	Private



*Belgium	Unauthorized reception of pay-TV service	Fine (up to Euro 248)	Confiscation of any devices that were used to commit the offence	Article 19, 43 Decret of 27 July 1987 on broadcasting	Private and/or commercial
	Receiving a decrypted programme from a third party without authorization			Decret of 25 January 1995 on broadcasting	
	Importing, possessing, installing, purchasing or renting unauthorised decoding device				
*Netherlands	Making use, by illicit decoding devices or otherwise, of a service which is offered to the public by way of telecommunications (including TV service), with intent not to pay the full price	Imprisonment (up to 3 years) and / or fine (up to Euro 45378)  (More severe penalty if the offence was performed professionally)	Seizure of goods and profits, publication of the sentence and expulsion from the occupational field	Article 48, 326C Wetboek van Strafrecht (Penal Code)	Private and/or commercial
**Italy	Personal Possession of pirate equipment	Imprisonment (up to 3 years) and/or fine	Seizure etc.	Italian Law 248/2000	Private

\* Source: “Study on the use of conditional access systems for reasons other than the protection of remuneration, to examine the legal and the economic implications within the Internal Market and the need of introducing specific legal protection” – Report presented to the European Commission by N.Helberger, N.A.N.M. van Eijk and P.B. Hugenholtz, University of Amsterdam, April 2000.

\*\* Source: Press Release dated 26 June 2001 of AEPOC (Association Européenne pour la Protection des Oeuvres et Services Cryptés).

## **Appendix II**

### **ADVICE**

#### **Re: Hong Kong Cable Television Limited on Review of Certain Provisions of the Copyright Ordinance and The Legality of a Proposed Law Enforcement Mechanism for Private and Domestic End User Criminal Liability**

#### **Summary**

1. I have been asked by Hong Kong Cable Television Limited (“Cable TV”) to advise on whether their suggested law enforcement mechanism against those who buy decoders and use them in their homes to access paid-TV channels, but without any payment, if made a criminal offence, would contravene the rights of privacy granted under the Bill of Rights Ordinance.
2. I have no doubt whatsoever that, for the reasons given below, if enacted by legislation, the law enforcement mechanism suggested by Cable TV would be lawful and not in breach of Article 14 of the Bill of Rights Ordinance which protects “*privacy*”.
3. I would add that, in terms of the international perception of Hong Kong as a city where there ought to be a proper balance between individual rights and the protection of society, a very bad message is sent to the international business community if, in effect, by failing to legislate, the Government allows “*piracy*” of T.V. programmes to take place. The situation is in some ways not dissimilar from the outcry that arose internationally about the failure of some Asian nations to prevent the “*piracy*” of copyrights goods and materials.

#### **Background**

4. Following a consultation and review of certain provisions of the Copyright Ordinance (Cap. 528), by policy proposals dated 28th January 2002, the Commerce and Industry Bureau issued a paper to the Commerce and Industry Panel of the Legislative Council outlining Government proposals to combat the ever-increasing and rampant use of unauthorized reception of subscription television services through illegal and/or unauthorized decoders, often bought in Shenzhen.

5. The Government originally proposed to introduce criminal and civil liability for fraudulent reception of subscription television services for commercial purposes (such as in bars or hotels) (para 28 of the Review of Certain Provisions of the Copyright Ordinance dated 28th January 2002 ("RCO")), but have now proposed restricting liability for private and domestic unlawful use to a civil sanction only (para 27 of the RCO). This proposal relates to amendments to the Copyright Ordinance only.
6. The Government in their proposal considers it necessary to enhance legislative measures to deter fraudulent reception of subscription television services. They do not, they say, condone such acts (para 25 of the RCO). They propose to introduce a civil remedy against fraudulent reception of subscription television but further add that if following digitalisation - which should make such pirated viewing more difficult - fraudulent reception still remains prevalent, the Government would then take "*prompt*" action to introduce a criminal sanction against end-users (para 27 of the RCO). At this stage, having undertaken consultations, they feel that the severity of the wrong may not justify a criminal sanction, digitalization should thwart the problem (para 26 of the RCO) and (in my opinion wrongly as a matter of law) that enforcement by criminal sanctions against fraudulent reception may be an invasion of privacy.
7. Further, I understand that:
  - (1) Cable TV's license requires them through the drop-cable connection to open up their network for use by other telecommunication licensees and television transmission network operators to households in Hong Kong, resulting in Cable TV not being able to disconnect unlawful, or only connect to lawful, subscribers without thereby being in breach of their license (para 6.2 of Cable TV's submission to Review Board ("CTVS")) and clause 13 of the Fixed Telecommunication Network Services Licence dated 18th January 1998. Consequently, and due to this licence requirement, Cable TV cannot simply disconnect fraudulent users without potentially breaching the terms of their license as other operators, whether interconnected under the licence or free television, may be using the drop cable connection into the household for the receipt by the householder of their programmes;

- (2) Unlawful abstractions of electricity and fraudulent use of public telephone are criminal offences under the Theft Ordinance (Cap. 210);
- (3) There are at least 12 jurisdictions worldwide that impose criminal liability for unauthorized and fraudulent reception of subscription television broadcasts at a private and domestic end-user level (for example: section 297 of Copyright, Designs and Patent Act 1988 in the United Kingdom; sections 633 and 705 of Communications Act 1934 (as amended by Telecommunications Act 1996) in the USA; sections 9 and 10 of Radio Communication Act in Canada; and section 9 of Broadcasting Act 1990 in Republic of Ireland). Of these, it is known that in the United Kingdom, the United States of America and New Zealand, despite criminal sanction at private and domestic level for fraudulent reception, no active enforcement policy by officialdom exists, though it is of course open to any citizen or company to undertake private prosecutions.
- (4) I am told that the effect of digitalization will only assist in reducing fraudulent use but is by no means capable of permanently disabling such use;
- (5) The cost of the digitalization and constant improvements thereafter in order to fight fraudulent use will clearly be borne by innocent parties, namely by Cable TV and other pay television operators, the Government Treasury through lost revenue, lawful subscribers whose rentals inevitably will have to cover the costs of the above, and the like, and not by those who illegally arrange to receive such signals free by buying and fitting an unlawful decoder.

### The Suggested Enforcement Procedures

8. The enforcement mechanism proposed by Cable TV consists of detection of non-subscribers through the drop-cable, and is made from *outside* the end-user's premises. If detection is made of illegal reception from the premises then entry to the premises would only be made following the issue of a warrant by a Magistrate granted under oath describing the evidence of the illegal use. I understand this to mean that, having detected from outside the private premises that there is illegal receipt and decoding of the signals, a warrant would be required to be applied for and issued by a Magistrate before entry to the private or domestic premises would be given (para 3.4 of the CTVS).

### Legal Issues: Privacy

9. Human Rights, and in particular the right to privacy, is in Hong Kong protected by the Hong Kong Bill of Rights Ordinance, (Cap 383), Section 8, Article 14 of which provides:

*“Article 14*

*Protection of privacy, family, home,  
correspondence, honour and reputation*

- (1) *No one shall be subjected to **arbitrary or unlawful** interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- (2) *Everyone has the right to the protection of the law against **such** interference or attacks.”*  
(my emphasis)

10. This basic right to privacy as provided in the Ordinance is similar to that previously provided in the International Covenant on Civil and Political Rights (“ICCPR”) Article 17 which came into force on 17th May 1976 and to which Hong Kong is a party as confirmed under the Basic Law Article 39(1). Further, under the Basic Law Article 29:

*“The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited.”*  
(my emphasis)

11. The common feature is that it is “*arbitrary*” or “*unlawful*” invasions of privacy which are banned, not all invasions.
12. Cons VP observed in ***R. v. Lee Kwok Hung*** (1993) 3 HKPLR 38 at 56, that he was “*not aware of any clearly defined or long established right with regard to privacy, which has always been a grey area of our law.*”
13. In his judgment in ***R. v. Yu Ye.m-kin*** (1994) 4 HKPLR 75, the late Jerome Chan, J. stated at page 92: -

*“It is abundantly clear to me that given its proper construction, the right to privacy must necessarily include a right to be secure against intrusion of an individual's rights over his properties such as search and seizure. In the premises, article 14 confers on an individual the right to be free from **arbitrary or unlawful** interference in the form of search and seizure.”*

(emphasis added)
14. This makes clear that the question of privacy rights necessarily relates to whether any intrusion or interference to the home is either arbitrary or unlawful. If it is not, then there is no interference with the right to privacy.
15. The correct approach to construction of the provisions of the Bill of Rights Ordinance was set out in ***AG of H.K. v. Lee Kwong-Kut*** 1993 AC 951, a case covering whether or not the “*presumption of innocence*” granted by the Bill of Rights was infringed by the presumptions in the Dangerous Drugs Ordinance, inter alia, that the burden of proof in some parts of that Ordinance of proving a defence rested on the accused. The Privy Council held that in respect of the particular burdens cast upon the defendants there was no infringement of Article 11 of the Bills of Rights (presumption of innocence) for the reasons set out at pages 965 to 973 of the judgment. Essentially the Privy Council held that some infringements by statute of Article 11 were permissible provided that the burden cast upon the defendant “*was reasonably imposed*”. The consideration turned

upon balancing the rights of the individual under the Bill of Rights against the needs of society in preventing crime.

16. There have been two important cases considering Article 14 (right to privacy). In 1993 in *R v. Lee Kwong-hung*, supra, the Court of Appeal considered whether the rights of the S.F.C. to investigate under section 33(4) of the Securities and Future Commission Ordinance (Cap. 24) infringed Article 14, and in particular whether the interference was “arbitrary”. In 1994 in *R. v. Yu Yem-kin* the late Jerome Chan J. considered whether the power of the police to break into premises under the provisions of section 52 of the Dangerous Drugs Ordinance (Cap 134) was overcome by the right to privacy granted under Article 14, and in particular considered the meaning of “unlawful interference” and the meaning of “arbitrary”.

#### **Arbitrary**

17. An arbitrary act is an act which *“is based upon opinion or preference which is .....capricious, unpredictable, inconsistent; unrestrained in the exercise of will or authority; despotic, tyrannical”* (see The New Shorter Oxford English Dictionary, Oxford Clarendon Press 1993). This meaning is also consistent with the rationale of the ruling of the Court of Appeal in *Lee Kwok-hung*, supra., per Cons VP at page 56:

*“It is well established in our law that no power, other than the sovereign power of Parliament, may be exercised arbitrarily, i.e. at the whim of the holder. The power has to be exercised for the purposes for which it was given and in accordance with the rules of natural justice.”* (emphasis added)

18. It was found in *Lee Kwok-hung* and approved in *Yu Yem-kin*, supra., that there is nothing “arbitrary” about a statutory power which is only permitted to be exercised upon the existence of objective standards laid down by law, and which is designed to prevent some damage to society, the need for protection from which damage outweighs the right to privacy. So for instance, there was nothing arbitrary in *Yu Yem-kin* about the exercise of the statutory power, in that case a power of search without a warrant under the Dangerous Drugs Ordinance (Cap. 134), upon the existence of reasonable suspicion on the part of the person entrusted with such power that there were dangerous drugs in the premises. In effect, the seriousness of the danger to society out-balanced the need to protect



against invasion of privacy.

### **Unlawful**

19. There is an apparent divergence in the cases on the application of the reference of “*unlawful interference*” as referred to in the Bill of Rights. On the one hand, Kempster JA in ***R. v. Sin Yau-ming*** (1991) 1 HKPLR 88 and Litton JA in ***Lee Kwok-hung*** expressed the view that, to the meaning of ‘*unlawful*’ in Articles 11 and 14 respectively, the test of “*universal concepts of justice*” should be applied. Cons VP in ***Lee Kwok-hung*** and Chan J in ***Yu Yem-kin*** respectfully disagreed and found that Article 14 is to be “*construed with reference only to that law which is to be found in the relevant statutes or in the common law*”.
  
20. However, it appears that the distinction is limited for as Jerome Chan, J. in ***Yu Yem-kin***, *supra.*, states at page 95:

*“The concept of human rights has never been foreign to the common law. Nor do I believe there exists any difference of real substance between the concept of justice in common law and the international standard .... The real substantial divergence between common law and the international concept lies in... legislative supremacy... The concept of supremacy apart, common law as augmented by rules of equity is by definition reasonable, fair and just; and undoubtedly lives up to any universal concept of justice.”*
  
21. The test of lawfulness was enunciated by Jerome Chan, J at page 95 when he said:

*“For the purposes of article 14, I am content to accept that such a broad and fundamental principle - as requiring all interference by the state with an individual be justified by reasonable necessity and be kept to the minimal measure of intrusion - should be applied. This test of lawfulness is but one illustration of the "balancing exercise" the spirit of which was approved in ...Lee Kwok-hung. ”*
  
22. The balancing exercise referred to relates to balancing the “*interests of the individual on the one hand against the interests of society on the other, and in doing so remembering the broad purpose of the Bill of Rights, which is the protection of the individual...*” per Litton, JA in ***Lee Kwok-hung***, *supra.*, at page 54.

23. Litton JA cited in *Lee Kwok-hung*, supra., at page 54-55 as applicable to Hong Kong what was said by La Forest J in *Thomson Newspapers* [1990] 1 SCR at 425, 67 DLR (4th) at 220, where the learned judge said:

*“In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the State to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation, must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateurs compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. ”*

(emphasis added)

24. I advise that the Courts in Hong Kong are likely to continue to apply such a test for lawfulness and to adopt the words of La Forest J as stated above.

#### **Application of the law to Cable TV's proposed enforcement mechanism**

25. The enforcement mechanism proposed by Cable TV does appear to me to have reasonable safeguards, and which mechanism would not, if conferred by legislation, be in my opinion adverse to any rights of privacy granted under Article 14. The detection of the fraudulent reception of subscription television is made from **outside** the domestic or private premises, by means of the drop-cable, and the subsequent entry and inspection of those premises only applies to the identified non-subscribers.
26. Moreover, those who are receiving the signals are doing so knowingly avoiding payment, for they deliberately have installed an illicit decoder, and are not subscribers. They are acting fraudulently. Under the proposed system once the premises are identified, a warrant must be applied for upon oath to a Magistrate, and only after it is granted (if it is) can inspection of the premises take place. There is nothing in my opinion which can be categorized as “arbitrary” about

such a mechanism if laid down in legislation.

27. Similarly, in my opinion there is nothing “*unlawful*” about any interference which the warrant and search would cause. I would observe that applying the balancing test for unlawfulness, one should note that those domestic and private premises that do fraudulently receive subscription television without payment are doing so knowingly; and that only those subscribers using a suitable decoder obtained from Cable TV are entitled to view Cable TV.

Further, that such fraudulent reception can be said to be:

- (a) analogous to the thefts by abstraction of electricity, or the using of a public phone with intent of avoiding payment, especially because of the mandatory interconnection requirement under the license; and
  - (b) the receipt of subscription television through the use of non-authorized decoders with a view to non-payment of subscription is analogous to theft or dishonest appropriation of property; it is only not an existing offence because the definition of property in the Ordinance (probably) does not extend yet to T.V. pictures. Property is defined in the Ordinance as “*including money and all other property, real and personal, including things in action [i.e. legal proceedings etc.] and other intangible property*”.
28. There is nothing in my opinion unlawful or harsh in legislating against what appears already to be quasi-criminal. There is no logic in the argument that existing lawful civil proceedings for investigation and entry (such as an Anton Pillar order under which a Court sanctions the plaintiff's lawyer to enter and seize, for instance, unlawful copies of copyright goods), would be less intrusive into privacy than criminal investigation and entry into domestic premises, where, following grant of a warrant by a Magistrate enforcement officers of the Government, such as the police, or indeed Cable TV employees, acted. In light of the necessary balancing exercise between individual and society, the Government's proposal, by making the inspection subject only to a civil remedy, the balancing becomes one of protection of subscription television operators as opposed to a deterrence of a crime for the greater good of Hong Kong.
29. I am told that there does not appear to be at present any active enforcement criminal sanction in the various jurisdictions which have criminalized fraudulent

reception. The suggestion in RCO of the need for prompt action if the problem persists after digitalisation suggests to me that the matter ought to be remedied **now** with a view to deterrence, and only to commence enforcement action at a later date if digitalization is unsuccessful in solving the problem. To tell the public that under analogue or non-digital means fraudulent reception and decoding is fine, but under digital means it is criminal, is not a good message to give to the public, or indeed to the international community. This distinction should be against policy.

30. I am of the view however that considering the Government stance of not imposing end-user criminal liability in many copyright breaches, as can be seen from the suspension in bringing in the new end-user criminality in that field, that an amendment to the Copyright Ordinance may not be the most appropriate legislative way of dealing with fraudulent reception of subscription television. It may be more appropriate to amend the Theft Ordinance or the Broadcasting Ordinance (Cap.562) instead.

#### **Summary**

31. I have been asked to give my opinion as to whether the enforcement mechanism proposed in making criminal private and domestic fraudulent reception of subscription television would be contrary to rights of privacy enacted under Article 14 of the Bill of Rights. I am firmly of the opinion that such a mechanism, if introduced with proper safeguards such as are considered above, would not infringe or breach the right to privacy as, in the balancing exercise and when legislated, it would neither be “*arbitrary*” nor “*unlawful*”.

Dated this 22nd day of March 2002

Sd.

**John Griffiths S.C., C.M.G., Q.C.**

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