

Broadcasting (Amendment) Bill 2003
Administration's response to issues raised by Members
at the Bills Committee meeting on 10 September 2003

- (a) **The question of legal inconsistency if abstraction of electricity and dishonest use of public phones are criminal offences while using an unauthorized decoder for domestic viewing of subscription television services without payment of a subscription is not.**

Whether or not to criminalize abstraction of electricity, dishonest use of public pay telephone or pirated viewing of pay TV is a policy rather than a legal matter.

2. The Government does not condone pirated viewing which hurts the pay TV industry. The existing section 6 of the Broadcasting Ordinance (Cap. 562) already provides for criminal sanction against commercial manufacturing, distribution and marketing of unauthorized decoders. We consulted the public in late 2001 on whether we should extend the criminal sanction to cover end-users. The views of the public are diverse. Even some respondents who support criminalization in principle consider that the Government should take a cautious approach as enforcement will be intrusive.

Policy Consideration

3. When formulating our legislative proposal, we have taken into account the interests of the industry, the outcome of the public consultation and the adequacy of digitization and conditional access technology to prevent pirated viewing. On balance, we decided to tighten the control of pirated viewing by proposing the extension of the scope of criminal sanction to cover pirated viewing for commercial purposes. We also suggest providing for civil remedy against both domestic pirated viewing and pirated viewing for commercial purposes.

4. At the same time, we encourage and assist pay TV operators, in particular, Hong Kong Cable Television Limited, to digitize their service. If digitization fails to contain the problem, the Government will

consider providing for criminal sanction against domestic pirated viewing.

International Practice

5. Our approach is in line with the practice in many advanced economies. We note that HKCTV has cited examples of criminalization of domestic and commercial pirated viewing in other jurisdictions. In this connection, we wish to draw Members' attention to the Report on the Implementation of the EC Directive on Conditional Access 98/84/EC published on 24 April 2003. The Report states clearly that the Directive "imposes sanctions only on commercial activities favouring unauthorized reception, not on unauthorized reception as such". It also explains that the Directive and Recommendation R(91)14 of the Council of Europe consider that "the most effective way of thwarting piracy is to concentrate on commercial activities enabling illegal access". The Recommendation notes that providers of encrypted TV services have the responsibility to use the best available encryption technology. Moreover, the Report mentions that only "a minority of Member States prohibits personal use and/or private possession of illicit devices" (emphasis added) (pp. 8, 10, 13 and 26 of the Report).

6. In Australia, the Copyright Amendment (Digital Agenda) Act 2000 "introduces remedies and offences in relation to the manufacture, sale and other dealings with broadcast decoding devices that facilitate unauthorized access to encoded broadcasts". The provisions do not prevent the personal use of such devices, but a civil remedy is provided for the use of a decoding device for a commercial purpose (for example the unauthorized reception of an encoded sporting event in a hotel or pub) (page 6 of the *Fact Sheet on Copyright Amendment (Digital Agenda) Act 2000* - Attorney-General's Department of Australia).

7. To the best of our knowledge, even in jurisdictions where pirated viewing is criminalized, there has been no active enforcement against domestic pirated viewing. In most cases, enforcement action focuses on the upstream dealer level. For example, in Canada, both the Royal Canadian Mounted Police and the industry suggested that enforcement action should focus on dealer activity in their representations

to the Parliament's Standing Committee on Canadian Heritage (pp. 515 - 516 of Committee's Report *Our Cultural Sovereignty – The Second Century of Canadian Broadcasting*, June 2003).

Conclusion

8. We consider that our gradual, balanced approach is more acceptable to the public and is in line with international practice. If the Bill is passed, there will be enhanced deterrent effect and proportionate protection of the rights of the industry. We also expect that Hong Kong Cable Television Limited will digitize its service as soon as possible and the industry will deploy effective encryption and conditional access measures to contain the problem. We believe this public-private partnership approach is the most effective way to tackle the problem.

9. There are therefore special policy considerations applying to sanctions for pirated viewing of pay TV which cannot be compared on the same basis to other wrongdoings. In any case, we have not ruled out the possibility of criminalization. We only consider that criminalization is the last resort if technological measures fail to contain the problem.

(b) The Bar Association's concern about presumption in the Bill.

10. We have addressed the concern in both our responses to Assistant Legal Advisor's comments and to the deputations' views.

(c) Estimated number of unauthorized decoders currently in use in Hong Kong.

11. Before starting the digitization of transmission, Hong Kong Cable Television Limited (HKCTV) had claimed that 100,000 unauthorized decoders were in use in Hong Kong. These devices are able to facilitate viewing of HKCTV's service in the analogue format only. They are useless in areas where HKCTV's service has been digitized.

12. Unless we conduct a massive on-site inspection and survey we will not be able to come up with a guesstimate of the number of unauthorized decoders in use. However, since HKCTV has digitized about half of its service coverage and is required to complete digitization by May 2005, we believe that the number of unauthorized decoders in use for viewing HKCTV's analogue service is very limited and will keep declining in time. Unauthorized decoders, including smart cards, which facilitate viewing of HKCTV's digitized service, even if available in the black market, may not be appealing to buyers because they will be rendered useless once the operators have changed the digital key of the encryption.

(d) Concerns about difficulty in ascertaining the person(s) in domestic premises who should be liable for civil action.

13. Proposed section 7B(3) allows a licensee to bring civil action against any person who possesses or uses, or authorizes another person to possess or use an unauthorized decoder to view any licensed television programme service without payment of a subscription. The standard of proof in a civil action is "balance of probabilities". Given the wide scope of the proposed provision, a licensee may bring an action against any person in the premises for possession or use of the unauthorized decoder. Our policy intent is to facilitate a licensee to take civil action and achieve maximum deterrent effect. We believe that the present wording is adequate for the purposes.

Communications and Technology Branch
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