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Secretary for Commerce, Industry and Technology  
(Attention: Mr Eddie Cheung, Prin AS(ITB)A)  
Information Technology and Broadcasting Branch  
Commerce, Industry and Technology Bureau  
1-2/F Murray Building,  
Garden Road  
Central  
Hong Kong

16 August 2003

**BY FAX**

Fax No. : 2511 1458  
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Dear Mr Cheung,

### **Broadcasting (Amendment) Bill 2003**

I am scrutinizing the above Bill with a view to advising Members and should be grateful if you would clarify the following matters:

#### Proposed definition of "unauthorized decoder"

Is it more appropriate to use "receive" instead of "view" to describe "television programme services"? If so, please consider adding "or received" after "viewed". You may wish to note that in section 7(1) of the Broadcasting Ordinance (Cap. 562), "receive" is used in respect of "a broadcasting service" while the existing definition of "unauthorized decoder" in section 6(9) refers to viewing encrypted television programmes.

#### Proposed section 6

- (a) While proposed section 6(1)(a) refers to "in the course of trade or business", section 6(1)(b) makes reference to "in connection with trade or business". Please explain the difference, if any, in the ambit of these two references. As you are aware, it is proposed in the Copyright (Amendment) Bill 2003 that the reference to "for the purpose of, in the course of, or in connection with any trade or business" in the existing offence in relation to possession of infringing copies of certain copyright works will be replaced by "for the purpose of or in the course of any trade or business" (please refer to new section 118A in the Copyright (Amendment) Bill 2003). Should the same reference be used in proposed section 6(1)(b) in this Bill to make it consistent with other copyright-related offences?

- (b) It is noted from the LegCo Brief that the legislative intent for proposed section 6(1)(a) and (b) is to impose criminal sanction against the supply and use of unauthorized decoders for commercial purposes. This intent is reflected more clearly in proposed section 6(1)(a) as the reference to "in the course of trade or business" is used in the context of importing, exporting, selling, offering for sale or letting for hire an authorized decoder which can all be described as commercial activities. Such legislative intent, however, appears to be less clear in proposed section 6(1)(b) which does not contain a similar context as section 6(1)(a). To avoid any possible ambiguity in what is to be covered by the term "business" as used in proposed section 6(1)(b), should the term be defined in the Bill? You may wish to note that a definition of "business" is proposed in the Copyright (Amendment) Bill 2003. Please consider the need to do the same in this Bill.
- (c) Since the primary object of the Bill is to strengthen control against unauthorized reception of subscription television programmes, would it be more appropriate to make dishonest or unauthorized reception an offence instead of possession or use of unauthorized decoders as proposed in section 6(1)(b)? It seems that the scope of the proposed offence is wider than that of the offence of dishonest or unauthorized reception of subscription television programmes as it is possible that the proposed offence may be committed even though an unauthorized decoder is not possessed or used for the purpose of receiving subscription television programmes. You may also note that the relevant offence in the UK Copyright, Designs and Patents Act 1988 is the dishonest reception of a programme included in a broadcasting or cable programme service provided in a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme. Is there any reason for not adopting a similar provision in this Bill?
- (d) It would appear that the presumption provided in proposed section 6(5) is similar to that in the repealed section 47(1)(c) of the Dangerous Drugs Ordinance (Cap. 134), which was held to be inconsistent with Article 11(1) of the Hong Kong Bills of Rights (*R v Sin Yau-ming* [1992] HKCLR 127, CA). It appears that the presumption provided in proposed section 6(5), as drafted, could catch innocent tenant or landlord of a premises. Based on the authority of *R v Sin Yau-ming*, please explain how proposed section 6(5) can satisfy the rationality and proportionality tests in order to make the provision consistent with Article 11(1) of the Hong Kong Bill of Rights.
- (e) It is noted that the presumption provided in proposed section 6(5) will apply to the offence under proposed section 6(1)(a) as well. As proposed section 6(1)(a) does not relate to possession of unauthorized decoders, is it appropriate to apply the presumption to proceedings under that section?

- (f) Please consider whether it is possible that proposed section 6(1)(b), together with proposed section 6(3)(b) and (5), could catch innocent trade or business operators. For example, is a pub or restaurant operator liable to be charged if an authorized decoder is found in his pub or restaurant but the decoder is in fact left behind by his customer?
- (g) Proposed section 6(6), (7) and (8) suggest that the offences under proposed section 6(1)(a) and (b) can be committed by an employee. However, as drafted, section 6(1)(a) and (b) appear to target at the person who does the prohibited act while carrying on a trade or business. Accordingly, please explain how and why an employee should be held criminally liable when the trade or business is in fact carried on by his employer. If it is intended that the offences can be committed by an employee, should this be stipulated expressly in the Bill? As you are aware, in the Copyright (Amendment) Bill 2003, there is a provision (i.e. new section 196A) on the meaning of "for the purpose of or in the course of trade or business", which expressly provides that a reference to a person doing an act for the purpose of or in the course of trade or business includes a reference to an employee of a person who is engaged in a trade or business, who does the act for the purpose of or in the course of that employment. Should a similar provision be included in this Bill?
- (h) In proposed section 6(8), should "or on behalf of" be added before "his employer" to cover the situation that the instructions may be given by other people authorized by the employer? Please refer to a similar provision (i.e. new section 118A(3)) proposed in the Copyright (Amendment) Bill 2003 in which "on behalf of his employer" is included.

#### Proposed section 7

- (a) Why is it necessary to provide for a presumption of possession in proposed section 7(3C) when the offence under section 7(1) relates to acts other than possession? Please also consider the human rights implications of proposed section 7(3C) based on the authority of *R v Sin Yau-ming*.
- (b) Proposed section 7(3D), (3E) and (3F) suggest that the offence under section 7(1) can be committed by an employee. However, section 7(1), as drafted, appears to target at the person who does the prohibited act while carrying on a trade or business. Can an employee be said to carry on a trade or business? In this regard, please refer to my comments on proposed section 6(6), (7) and (8) above.
- (c) In proposed section 7(3F), please consider adding "or on behalf of" before "his employer" to cover the situation where the instructions were given under the authority of the employer.

### New section 7A

- (a) What is the rationale for conferring a new power of arrest on the Telecommunications Authority (TA) or any public officer authorized by him? Would it be more appropriate for the police to exercise such power? If it is considered appropriate that TA or his authorized officer should have the power of arrest, should provisions be made to require TA or the officer concerned to give the person so arrested forthwith into the custody of a police officer?
- (b) It would appear that the English text of proposed 7A(3), as drafted, is open to two possible interpretations in that the reference to "possessed or used" can be interpreted to describe "any domestic premises" or "an unauthorized decoder or a decoder". If it is intended that "possessed or used" relates to "any domestic premises", should the drafting of the provision be improved to make this intention clearer?
- (c) In proposed section 7A(3), is it intended that the warrant issued would authorize TA or any other public officer to seize or remove any unauthorized decoder or decoder found on or in the premises. If so, should such power be stipulated expressly in the provision?
- (d) In proposed section 7A(4)(b), is it necessary to add "or authorized" after "empowered" to make the provision consistent with subsections (4)(a) and (c)?

### New section 7B

- (a) What is the intended time limit for bringing an action under proposed section 7B(1) and (3)? Please consider whether it is necessary to make express provision to cover this.
- (b) In proposed section 7B(3), should "view any television programme service" be replaced by "receive any television programme service"? It would appear more appropriate to use "view" to describe "television programme" and "receive" to describe "television programme service".

### Chinese text

- (a) In proposed section 6(1)(b) and (3)(b) and section 7A(1)(a)(ii), should the two references to "任何" in "任何營商或業務的目的，或在與任何營商或業務有關連的情況下" (*my underline*) be deleted to reflect the meaning of "for the purpose of, or in connection with, trade or business" in the English text which does not contain the reference to "any"? You may wish to note that "任何" does not appear in the Chinese text for "in the course of trade or business" in proposed section 6(1)(a) and (3)(a) and section 7A(1)(a)(i).

- (b) In proposed sections 6(5) and 7(3C), is it appropriate to use "持牌人" as the Chinese rendition for "licensee" given that "licensee" as used in those provisions refers to a person who has been granted a licence or permission to use or occupy the premises? Please also consider whether the use of "licensee" in those provisions will cause confusion given that "licensee" is a defined term under the Broadcasting Ordinance (Cap. 562).

I would appreciate it if you could let us have your reply in both languages on or before *1 September 2003*.

Yours sincerely,

(Connie Fung)  
Assistant Legal Adviser

cc: DoJ (Attention: Mr Vidy Cheung, SGC)  
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